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Competition Policy: A Powerful Sword and Shield to Fight Climate Change

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Is the EU’s renewed emphasis on industry and competitiveness a deviation from the green transition path? While economic competition can at times be detrimental to sustainability, there are effective law and policy tools to ensure it serves the common good.

Climate change is an existential crisis for humanity and we must use *all* the tools and policies at our disposal to combat it. Can competition law and policy help in this fight? And how can they serve the transition to a more sustainable economy?

The competition process itself is both positive and negative for this transition. However, there are ways to use competition policy both as a “sword” to attack unsustainable practices and as a “shield” to facilitate action towards a sustainable economy.

Competition and sustainability: friends or foes?

Consumers often want (and are willing to pay for) more sustainable products, so the process of competition often drives firms to produce more sustainable products and services. Thus far, competition is *a friend.*

However, competition can also drive companies – often against their own best intentions – to use less sustainable inputs and production processes, as they are pushed to minimise costs to remain competitive and survive. Furthermore, conventional accounting principles do not take account of many of the true costs of production. For example, pollution generated, or toxic waste dumped into the sea are treated as so-called “externalities,” i.e. as costs for society that never appear in the profit and loss statement of corporations.

In other words, the process of competition can also be a *foe* in the transition to a sustainable economy. Competition authorities, businesses, academics, NGOs, and everyone in the competition policy establishment must do everything they can to mitigate this risk.

Competition as a sword

Anti-competitive agreements

Companies don’t always compete just on price. They often compete on a range of environmental and other sustainability issues like food miles, eliminating harmful ingredients, and using clean fuels and recyclable materials. When companies collude to restrict competition in these areas, it should not be viewed any more favourably than collusion on other parameters of competition such as price or quality. Indeed, given the fundamental importance of doing everything we can to facilitate the transition to a more sustainable economy, there is a strong case to view collusion of this sort as particularly bad.

Competition authorities have recognised this and have condemned several agreements on this basis.

The most famous example is the European Commission's decision in July 2021 to fine five German car manufacturers some 875 million euros. Known as the AdBlue case, the landmark decision punished the car manufacturers for colluding to restrict competition on emission cleaning for new diesel passenger cars.

Similarly, in July 2016, the Commission fined five major truck producers 2.93 billion euros for (among other things) colluding on the timing of the introduction of new emission technologies to meet environmental standards, and on passing on the costs of these technologies to customers. This case has also led to the biggest spate of private damages actions Europe has ever seen. Fines and lawsuits of this scale should make all businesses think twice before colluding on environmental issues in the future.

Abuse of dominance

Secondly, competition law can be used to attack abusive and unsustainable practices by dominant companies, be it burning toxic waste, dumping pollutants in rivers, using child labour, paying starvation wages, or cutting down the Amazon jungle.

This area of the law and practice is still underdeveloped. However, the courts have long recognised that dominant companies have a "special responsibility" to behave well and that the categories of abuse are not fixed. Recent practice has shown the legal tools in this area to be very flexible. Therefore, there is no reason why the sort of practices described above, which the average person would see as inherently abusive and unfair, should not be recognised as such by the law.

There are ways to use competition policy both as a "sword" to attack unsustainable practices and as a "shield" to facilitate action towards a sustainable economy.

This is particularly the case where the practice in question is inconsistent with legally binding commitments in relation to climate change or with internationally recognised norms and reports (such as those of the International Energy Authority or the IPCC) setting out what needs to be done to transition to a sustainability economy. One example might be the distortion of competition that arises when a dominant company avoids the costs of disposing responsibly of waste products (e.g. by dumping them on land or in rivers) while its smaller rivals incur those costs, thus suffering a competitive disadvantage. (In technical terms this could be both an "exclusionary" and "exploitative" abuse of the former's dominant position.)

Using the competition "sword" would complement environmental (and social sustainability) regulations – either because regulation is absent, or because it is not being properly enforced.

Harmful mergers

Thirdly, the EU merger control regime could be used to tackle unsustainable business practices before they arise (as a result of a merger) and to prevent such unsustainable practices being exacerbated by a merger. This could be done either by blocking a merger or by requiring remedies. An obvious example of a harmful merger might be a big company gobbling up a smaller, greener rival and killing off its more

sustainable technology.

Again, this is a little-developed area of law and practice, but this need not be the case. It is widely recognised that sustainability is an aspect of both quality and innovation, which are well-established criteria when assessing a merger. Furthermore, the European Commission's criteria for assessing a merger include the "development of technical and economic progress". In the context of the current ecological crisis, such progress must surely include factors relevant to the transition to a sustainable economy.

Finally, if sustainability factors do not lead to a merger being blocked on competition grounds, there is also the potential to turn to EU or national law relating to the protection of legitimate or public interests.[1]

The competition shield

The analysis above outlines how competition policy can be used to *attack* practices which hinder the transition to a sustainable economy (i.e., the "sword"). However, in many instances, all competition policy needs to do is to ensure that it does not unnecessarily impede actions by private companies to facilitate that transition (i.e., the "shield"). There are broadly three aspects to this.

Sustainability agreements

First, there are many instances where the best and quickest way to put a sector of the economy on a more sustainable footing is through agreements between the companies operating within it. Examples include agreements to phase out polluting inputs or production processes.

Of course, in some cases, regulation is the obvious answer. Minimum environmental standards such as bans on dirty fuels or harmful chemicals, limits on the use of plastic, and recycling obligations, among other things, illustrate this. Unfortunately, however, regulation is often lacking, too slow in coming, and limited to particular jurisdictions, as well as insufficient in scope and ambition. If the world could agree on a realistic carbon price, carbon tax, or a proper phase-out of fossil fuels, this discussion of competition policy would probably not arise. In the real world, such a consensus will not materialise any time soon (you only need to look at the recent COPs).

Furthermore, as discussed, companies can – and should, where they can – compete to produce more sustainable products. However, more sustainable inputs or production processes may be more expensive (at least in the short term), giving rise to a competitive disadvantage (a "first mover disadvantage"). Even if some goods can be produced profitably and sustainably, this is often limited to niche sectors of the market, and we need to transition whole sectors of our economy onto a more sustainable basis – and as quickly as possible.

Companies therefore need to work together to transform their industries at the necessary scale and pace. This is where competition law comes in.

Businesses have (quite rightly) learnt that, in order to avoid infringing competition law, they should generally compete rather than collaborate with their competitors. Unfortunately, this instinct is inhibiting the sort of cooperation between businesses that is needed to enable the transition to a sustainable economy at the necessary scale and pace. I have experience of this in industries ranging from fishing to fast fashion, in efforts to halt deforestation in the Amazon, and in the push to reduce plastic use and increase recycling in UK supply chains.[2]

For example, in the fishing sector, major suppliers and retailers agreed to only source mackerel caught on a sustainable basis (as stocks in the North Atlantic were being depleted). One company declined to sign the agreement, (wrongly) fearing competition authorities would see this as an illegal boycott of unsustainably caught mackerel.

Competition policy need not inhibit such vital cooperation, and, in most cases, competition laws around the world are capable of incorporating sustainability considerations and positive action to facilitate the transition to a sustainable economy.

Sustainability is widely recognised as an essential aspect of quality and innovation, which are key components of competition. Deals that improve quality or innovation are, prima facie, pro-competitive, not anti-competitive.

Moreover, even if a sustainability agreement is, on the face of it, caught by a prohibition on anti-competitive agreements, it is often capable of being exempted. For example, EU competition law (and that of most European states, including the UK) exempts agreements which meet certain conditions and which "contribute to improving the production or distribution of goods, or promoting technical or economic progress".[3] Many sustainability agreements will fall within one or more of the four limbs of this condition – for example, an agreement to use less polluting inputs or technology, or to share logistics.

Recognising how important it is not to inhibit the agreements which facilitate the transition to a sustainable economy (and the Green Deal), the European Commission and other competition authorities have produced guidance on sustainability agreements. They also have an open-door policy for companies seeking help in relation to specific agreements.[4]

Thus far the EU has not published specific opinions on such agreements, but several national competition authorities have done so, including those in Germany, Belgium, the UK, France and, above all, the Netherlands. These opinions cover a wide range of cooperation agreements, including the use of pesticides in garden centres, the sustainable procurement of Cocoa and bananas, stimulating recycling, scientific methods for assessing the environmental impact of products, and arrangements for the storage of CO2 in empty North Sea gas fields.

Action by dominant companies

As we have seen, competition law can be a sword to attack unsustainable practices by companies that abuse their dominant position. However, when a dominant company engages in proportionate behaviour to promote the transition to a sustainable economy, we need to be careful not to wrongly classify such behaviour as abusive. For example, if a dominant company charges different prices based on the use its customers make of its products (for example, one customer disposing of by-products in an environmentally friendly way, and the other putting them into landfill), we should not see this as unlawful discrimination or a constructive refusal to supply the latter.

Just as dominant companies often have the potential to do the most harm (if only because they tend to be amongst the biggest companies), they also have the potential to do the greatest good. We should not discourage such companies from "doing the right thing" when they have the economic clout to make a substantial contribution to resolving the ecological crisis.

Helpful mergers

While some mergers can hinder the transition to a sustainable economy, others may accelerate and

assist it. This can be a factor in their approval by competition authorities.

First, sustainability is a factor in the “development of technical and economic progress” criteria that the EU’s merger regulation emphasises. Second, the European Commission looks at “efficiencies”, which may, in certain circumstances, counteract a merger’s potential effects on competition.

The way ahead

Europe has made significant progress in the last four or five years in using competition policy to serve the transition to a sustainable economy, particularly on sustainability cooperation agreements. However, much remains to be done.

First, the guidelines on sustainability agreements are work in progress, and they can – and should – be updated in the light of experience. This requires making greater use of the authorities’ open-door policies. In order to do that, businesses need to come forward with practical examples of projects which they would like to carry out in areas where existing guidelines do not yet provide sufficient general guidance.

Secondly, the focus so far has (understandably) been on climate change, and less on the other existential threat to humanity: biodiversity loss. Future guidelines should place a higher emphasis on this crucial area.

Thirdly, the greatest progress has been made in Europe. However, many of the agreements, which would have the greatest impact on the transition to a sustainable economy have implications around the world and, unfortunately, less progress has been made elsewhere in the world. Still, some countries like Australia, Japan, and Singapore are catching up. Progress in China and the US is a priority. Some of us are working on this, but it will take time, and much depends on external factors like the outcome of the US presidential election.

Finally, the focus so far has (again, understandably) been on ensuring that competition policy does not unduly inhibit private sector agreements to transition their industries onto a more sustainable basis. However, more thought needs to be given to the other areas of the law on abuse of dominance and mergers. This provides an opportunity to challenge both mergers which have negative implications for the transition to a sustainable economy and the unsustainable actions of dominant companies in cases where their actions constitute an illegal abuse of dominant position. In other words, we must be prepared to use the sword more.

Overall, competition policy has a significant role to play in facilitating the transition to a sustainable economy alongside other tools and policies such as regulation. Fantastic progress has been made in the last few years but more remains to be done. To this end, we need to move the debate beyond sustainability agreements and beyond Europe.

However, the business community itself must do more to take advantage of the opportunities presented by the various guidelines on sustainability agreements. This involves taking specific projects to competition authorities to make the most of their open-door policy.

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