



# Antitrust and Sustainability

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## Matching Topic



- Antitrust and Sustainability
  - Almost 50 years of sleepy awareness when it comes to climate change & Co.
  - **Stand-alone solutions** proven to be unlikely
  - Unimpeded competition **not necessarily results in enhanced social welfare or careful use of natural resources**

# Overview



I. Introduction

II. Antitrust – Impact on SDGs

III. The concept of Art 101 TFEU and Sustainability

IV. Prevailing of Economic Considerations

V. Conclusion

# I. Introduction



## 2015: Adoption of the 2030 UN Agenda for Sustainable Development

- Implementation in national sustainability policies as well as in international cooperation
- Governmental action to be taken to reach the 17 global sustainability goals – by example Hungary: <https://sustainabledevelopment.un.org/memberstates/hungary>

### Guiding principle:

- The prime and overarching objective is to preserve the **natural foundations of life**
- For all decisions **economic efficiency**, the **protection of the natural basis of life** as well as **social justice, equal participation** and **technological and social innovations** are to be brought together
- **Order and obligation for competition authorities and competition policy?**

# I. Introduction



## SUSTAINABLE DEVELOPMENT GOALS



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## II. Antitrust – Impact on SDGs

**“Antitrust law helps secure economic justice for consumers and workers.”**  
(FTC Commissioner Rebecca Kelly Slaughter)

A monopoly leads to loss of welfare for the entire society



**So antitrust law should have positive effects on sustainability**

- Facilitating economic growth and innovation while helping to **eradicate poverty and create better products, for example in the medical field**
- Problem: Merely indirect and untaxed and thus uncertain effects! Growth and innovation may be misallocated!



## II. Antitrust – Impact on SDG's

Antitrust → may help to a certain extend

- **Mergers (EUMR), abusive practices (Art. 102 TFEU) and cooperations** of companies (Art. 101 TFEU) or **State Aid** can be blocked if specific SDGs were under threat as a result of the project, while sustainable projects may be supported by antitrust/competition law
- **But only within established goals of antitrust law**
  - the integration of the **Internal Market**,
  - the protection of **consumers**,
  - protection of the **competitors**,
  - freedom of **competition** and
  - economic efficiency
- Antitrust law is **not primarily regulatory law – indirect effects** via efficient competition
- Precondition: **Customer demand for sustainable products and behavior**
- Otherwise **competition may lead to non-sustainable effects**: e.g. “SUV-boom”



### III. The concept of Art 101 TFEU and Sustainability

- Art. 101 (1) TFEU prohibits agreements between companies that prevent, restrict or distort competition
- Political opportunity or order by political executives not exculpatory even if SDGs are effected, no general intervention right for government/politicians (but see Sec. 42 ARC in merger control)
- But **Article 101 (1) and (3) TFEU** could possibly support that market activity actually leads to SDG-compliance



**Cases where non-economic issues were taken into account via exemption rules**





### III. The concept of Art 101 TFEU and Sustainability

#### Art. 101 (3) TFEU

The **provisions of paragraph 1** may be **declared inapplicable** in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to **promoting technical or economic progress**, while **allowing consumers a fair share of the resulting benefit**, and which does not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

### III. The concept of Art 101 TFEU and Sustainability



#### Washing machines Case (2000/475/EC)

- The Commission considered ...  
not only the individual economic benefits to customers from lower energy costs, but also the "**collective environmental benefits**" that would result from the agreement, referring in the decision specifically to EU environmental policy, Case IV.F.1/36.718. CECED.
- The “biodegradability” or “energy balance” of products or the features “ecologically sustainable” and “rain forest friendly” can be considered a direct **economic advantage** if these characteristics were to be given a **certain value**.



### III. The concept of Art 101 TFEU and Sustainability

- **Metro vs. Commission (Case 26/76)**: the ECJ stated that employment is a relevant factor under 101(3) TFEU, the agreement was a  
“stabilising factor with regard to the provision of employment”
- **Philips/Osram (94/986/EC)**: the Commission stated that the use of cleaner facilities may  
“result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities”
- **Exxon/Shell (94/322/EC)**: the Commission stated (“advantages for consumers”) that  
“the avoidance of environmental risks will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are increasing”

### III. The concept of Art 101 TFEU and Sustainability



**Negative decisions in terms of sustainability** – by example competition authority in the Netherlands (ACM)

- Case of sustainable chicken “**Chicken of Tomorrow**”, Netherlands, 2015
  - Parties agreed to ban chicken meat produced under certain conditions and only offer chickens produced in a better way of sustainable production
  - ACM: *“the benefits in terms of animal welfare did not outweigh the adverse effects on competition leading to price increases”*
- Coordinated closure of five **Dutch coal plants**
  - According to the ACM, the respective agreements harmed consumers, while offering too few benefits
  - The possible reduction of carbon dioxide (CO<sub>2</sub>) emissions was balanced out by the fact that the emission rights could be used elsewhere on the European market for CO<sub>2</sub> emission rights – no overall reduction of CO<sub>2</sub>



### III. The concept of Art 101 TFEU and Sustainability

**“The Goals of Antitrust: Other than Competition and Efficiency, what else counts?”**

(Kenneth G. Elzinga, 1977)



Focus of antitrust laws remains on economic aspects

SDGs play currently only a subordinate role in terms of antitrust goals



## IV. Prevailing of Economic Considerations (Germany)

### Draft on the 10th amendment of the German Act Against Restraints of Competition:

- *“The provisions of the draft serve the objectives of the **German Sustainable Development Strategy** adopted at the beginning of 2017 in the relevant policy field*
- *“In particular, the draft should contribute to steady and **adequate economic growth** (Sustainability Strategy, version 2018, Indicator 8.4),*
- *by creating the conditions for **effective growth strengthen competition***
- *the strengthening of the preconditions for effective competition, especially in the digital sector, should also **boost the innovative capacity of the markets** (sustainability strategy, version 2018, indicator 9.1)”*

German Sustainable Development Strategy:

<https://www.bundesregierung.de/resource/blob/975274/1588964/1b24aced2b731744c2ffa4ca9f3a6fc/2019-03-13-dns-aktualisierung-2018-englisch-data.pdf?download=1>



## V. Conclusion

- Antitrust law's aim is to **protect competition**
- It is **no regulatory law** that primarily supports SDGs
- Thus, all eyes are on enforcers and how **they evaluate sustainability improvements and weigh this against the possible reduction in competition in specific cases**
- Authorities should consider – **besides short term consumer interests – long-term environmental and social sustainability** when reviewing how well markets are **functioning**



## V. Conclusion

- There is a need for
  - **clarifications in future Horizontal Guidelines on cooperations that support SDGs**
  - **suitable methods to value the benefits of SDG-compliance** for consumers and society (both, in the short term and long term)
  - Empiric evidence, predictive analysis
- *At last it should not be forgotten*
  - *it may also be possible for individual companies to move towards more sustainable production modes without co-operative sustainability agreements*
  - *It's also on the consumers – they need to do a better choice!*



## V. Conclusion



- And an important overall question is whether (in the good or the bad)
  - *antitrust law is the right tool to enforce political goals?*

# A SUSTAINABLE BLUE ECONOMY:

Restores, protects and maintains the diversity, productivity, resilience, core functions, and intrinsic value of marine ecosystems — the natural capital upon which its prosperity depends.

Is based on clean technologies, renewable energy, and circular material flows to secure economic and social stability over time, while keeping within the limits of one planet.

Provides social and economic benefits for current and future generations by contributing to food security, poverty eradication, livelihoods, income, employment, health, safety, equity, and political stability.



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