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Austria and the Netherlands are two examples where since 2021 the goal of (ecological) sustainability has been enshrined in competition law or respective guidelines. On the topic of sustainability the European Commission and various competition agencies have formed taskforces, commissioned expert reports (e.g., "Technical Report") and engaged in an exchange with the academia (including the authors of this article). More specifically, the aim of these various engagements is to learn more about possibly applicable tools from environmental and resource economics and about the conceptual challenges and limitations of a greater consideration of sustainability benefits in competition law enforcement. This area has also been a focus of international organisations like the OECD, which analysed how competition authorities can recognise environmental considerations and which recently hosted a discussion on green innovation and competition in its 2022 Open Day.

It is not by chance that this interest and these developments coincide with the increasing responsibility that society and politics place on corporations, including to ascertain that certain standards are kept along the whole supply chain. When firms must face these expectations or even explicit legal requirements on their own, high costs and legal uncertainty may lead to undesired actions, such as firms' outright withdrawal from particular countries or activities. Sharing costs and coordinating on these standards may then be conducive or even necessary to satisfy the objectives of society or the respective laws. Also, firms may refrain from unilaterally implementing sustainability measures beyond legal requirements unless they can coordinate on the necessary steps ("first-mover disadvantage"). This shows that traditional antitrust enforcement paradigms can limit the ability of firms to fulfil the transformative role that politics and society increasingly attribute to them.

Notably many economists still seem hostile to any change in enforcement standards. They question the motives of corporations to coordinate on sustainability. We think, however, that a more nuanced approach is necessary. One must be careful not to allow "green-washing" attempts or a spill-over of sustainability agreements turning them into harmful cartels. However, the aforementioned social and political pressure, besides that of other stakeholders such as investors and employees, can provide legitimate reasons for corporations to engage in sustainable activities that are not directly monetized by higher prices. As we argue next, greater incorporation of sustainability concerns does not necessarily hinge on accepting a "multi-goals approach" that conceives of sustainability as an antitrust goal in its own right. Such concept would indeed impose new, possibly unwanted challenges to enforcement agencies when balancing economic welfare against environmental externalities. Moreover, such criticism often ignores the possibility of a complementary interaction of policy making and enforcement, which we also describe below.

Sustainability within a narrow consumer welfare paradigm

We have shown in various contributions (see for a short exposition "Integrating Sustainability Benefits") how there could be and should be a greater consideration of sustainability concerns

[1] The present article expresses the authors' personal views. It does not reflect the position of the Organisation for Economic Co-operation and Development, or any of its Member Countries.

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even under a (narrow) consumer welfare standard. A consumer welfare standard restricts efficiencies from, for instance, co-operations only to consumers within the relevant market. For one, consumer welfare is not by definition constrained to that of a current cohort of consumers, and preferences of consumers may change over time (see also for practical details "Prospective Welfare Analysis"). The necessary incorporation of the time dimension is arguably a blind spot in antitrust, e.g., as it necessitates the definition and use of a social discount rate. As consumers experience sustainability not through its immediate "use value", its appreciation and with it the measured willingness-to-pay can be highly dependent on the respective context, including consumers' information, awareness, and which social norms are activated (see also for practical details "Reflective Willingness to Pay"). If it is not about the calculation of mere demand elasticities, the measurement of consumer preferences should not be limited to current purchasing behaviour when assessing potential efficiencies resulting from a sustainability agreement. We advocate for the careful use of appropriate tools when eliciting consumers' willingness-to-pay for sustainability, such as contingent valuation and conjoint analysis. These methods are widely used in marketing science and for cost-benefit analyses. The legal endorsement of sustainability as a goal of great societal importance can then legitimize the agency's decision to rely on the greatest willingness-to-pay measurable for sustainability in a given case when undertaking a counterfactual analysis.

When the assessed measure, such as a sustainability cooperation, will considerably change consumption patterns, the construction of the right counterfactual may also entail a change in social norms relating to the particular good (see "Social Norms"). Empirical research indeed confirms that consumers' willingness-to-pay depends on the observed or expected behaviour of others, e.g., as this morally justifies own consumption of less sustainable products, or as it affects one's own willingness to contribute to a greater good. We propose ways how to put this into practice for antitrust enforcement.

Externalities within a consumer welfare standard

Restricting consumers still to the relevant market, some goods may be purchased by a sufficiently large fraction of society so that externalities in their production or consumption have a non-negligible effect on the same set of consumers. Such externalities, however, escape a standard analysis of willingness-to-pay as this leaves other consumers' choices unchanged. We have discussed a wider "Collective Willingness-to-Pay" approach. This could be put into practice in a way that is similar to the standard approach used in cost-benefit analysis in environmental and resource economics. But we also expressed considerable caution. As this essentially amounts to aggregating preferences over the consumption of others (who exert such an externality), the recognition of such effects would deviate considerably from a standard willingness-to-pay analysis in competition enforcement. The application of such an approach thus needs to go hand-in-hand with a careful deliberation about which externalities, and with it which preferences over the consumption of others, might be sufficiently legitimate to bear on antitrust assessment.

Beyond a consumer welfare standard

Our work discussed so far focuses on consumer welfare, as in most jurisdictions efficiency considerations are mainly or fully restricted by this. This leaves enforcers with a single metric in order to balance such efficiencies with competitive harm (such as an increase in price). Notably the consideration of (out-of-market) externalities shows, however, also the limitations of such an approach.

While policy and regulation have at their disposal various instruments, such as minimum standards or environmental taxes, to reign in such externalities, we believe that there are good reasons, in terms of both economic

principles and practice, for why under certain circumstances a cooperation among firms can complement such policies. When a societal sustainability goal is made sufficiently concrete and when such scope has been explicitly recognized in the law, a cooperation could be assessed on its necessity to achieve these goals and therefore be privileged as “ancillary”. Such ancillary sustainability agreements would then be exempt from the cartel prohibition irrespective of the net contribution to consumer welfare in the aforementioned sense. The EU-judicature has recognized the ancillary doctrine in various contexts, and we think it might gain relevance in certain sustainability contexts besides the aforementioned, more in-depth consumer welfare analysis.

Such a sustainability ancillary doctrine, however, must not be confused with a free balancing of sustainability against economic efficiency, as it would be the case in the multi-goals approach. Rather it requires that the legal order defines clear sustainability goals for which coordinative measures can become relevant (we refer to them as “sustainability corridors”; see for further elaborations and examples “Legal Design”). Such a clearly defined goal then allows to evaluate the necessity of a horizontal or vertical restraint to achieve it. For such an assessment it seems also conducive, if not necessary, to a priori provide a specific metric, notably to assess the proportionality of the implied restrictions to competition. For environmental goals such a metric could consist of or comprise marginal costs of avoidance. Such a complementary path resting on the ancillary restraints doctrine is certainly a challenge, but it would reflect the necessity to engage society and policy in reconciling efficiency, freedom to compete and sustainability.