



DESIGNING COMPETITION LAW FOR SUSTAINABILITY: WHAT ARE GLOBAL SOUTH PRIORITIES?

Sustainability, Climate Change and Competition Policy

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Vitor Ido, PhD
South Centre

Main points

- Sustainability and climate change at the core of global discussions – should be integrated in competition policy
- Promotion of (global) cooperation requires binding commitments by developed countries
- Possibility of incorporating such concerns under a renewed consumer welfare standard – but can also go much beyond
- Priorities for developing countries can be and often are distinct from developed countries
- Focus on technology transfer and access to technologies is needed

Importance of a broader view of competition law

- Sustainability concerns are a legitimate goal under competition law (which is not restricted to consumer welfare)
- While developed countries are currently expanding their intervention/analysis with such kind of concerns, developing countries do not need to replicate them in the same way
- Ample policy space under international law
- See, as example: Structural Change and the Environment
By Calixto Salomão Filho, South Views N. 237, available from:
<https://www.southcentre.int/southviews-no-237-31-may-2022/>)

Example: Brazil and biodiversity protection

- “In Brazil, in 2008, biodiversity was considered in a merger review involving the acquisition of a bird breeding business, whereby the transaction was expected to considerably reduce production costs, but also harmed biodiversity by limiting the genetic variety of birds available to humans.¹⁵ Article 170 of the Federal Constitution of 1988 establishes environmental protection and free competition as economic principles, and the Administrative Council for Economic Defense considered whether biodiversity issues should be included in the competition assessment, concluding that the merging parties should not dispose of genetic lines acquired in the short term since it would not be possible to compensate the reduction of genetic variety through efficiencies generated by the new business.” (UNCTAD, 2023)

Developing countries may be skeptical due to misaligned signs from developed countries

- Developed countries ask developing countries for commitments on sustainability and climate change, but:
 - Propose patents on seeds, protection of plant variety protection in free trade agreements;
 - Do not have commitments of technology transfer, despite obligations under TRIPS and other international instruments;
 - Propose cooperation agreements that only or mainly benefit their own companies (e.g. Catena-X);
 - Industrial clusters, energy sources completely different;
 - Environmental measures which can be protectionist measures in disguise;
 - No funding for just transition and little support to LDCs and small island nations.

A key issue: technology transfer

- The focus in developing countries, to a large extent, is and should be on technology transfer
- Competition policies may enable technology transfer
- The long promises of technology transfer from developed countries to the global south have not been met but become even more prominent in climate change and sustainability
- There are legitimate, existing measures to achieve so, and competition policies should explore this further.

(Partial) lessons from other fields

- Ido, Vitor Henrique Pinto (2020), **Designing pro-health competition policies in developing countries**, Research Paper, No. 125, South Centre, Geneva
- Recognition of multiple anti-competitive conducts in the pharmaceutical sector, including IP-related – also in environment?
- Doctrines of abuse can (under international law) be applied per se
- Access and licensing (including compulsory licensing, FRAND and other models can be envisaged)
- Merger control with environmental concerns

Catena-X case in Brazil: merger rejection (2023)

- Global joint venture between Volkswagen, BMW, Mercedes-Benz, Basf, Henkel, SAP, Schaeffler, Siemens, T-Systems and ZF – sharing of information and better integration on inter alia car parts
- Operation had already been approved in Chile, South Korea, Poland, Ukraine, Germany, and the European Commission
- Companies/countries argue that Brazil is impeding sustainability efforts (more traditional approach Applied), but what can be at stake? Who would benefit from sharing of information? Why did this merger not contemplate any tech transfer measures?

Conclusions

- Competition not at the core of sustainability and climate change, but must not be understated
- Needs by developed countries may not reflect what is needed in developing countries
- Global solutions are required – although this doesn't mean a treaty is needed
 - Guidelines are indeed useful and can be source of inspiration
 - But if measures become de facto protectionism, the global south will legitimately oppose
 - Policy alignment under a broader view of competition law is needed, including IP, value chains and industrial policy
- More attention is needed to non-Western jurisdictions, including but not only BRICS

Thank you!

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