Fair Trade
ADVOCACY OFFICE

Briefing Note

EU Competition Law and Sustainability in Food Systems

Addressing the Broken Links

February 2019, Brussels

A History of Competition Law: how it has been shaped by ideologies and its relevance for the sustainability of food systems

Competition law has played a key role in the shaping of modern-day global food supply chains that are characterised by massive imbalances of power; an unfair sharing of value, and the continuous struggle to produce cheap food. This puts a huge burden on the environment, and on people's livelihoods through suppressed incomes due to concentrated bargaining power in the food processing and retailing industries.

ARE THE INTERESTS OF CONSUMERS THE ONLY ONES THAT MATTER?

The currently dominant competition law interpretation considers lower prices, more innovation and a wider availability of products as the three main goals of competition law. Thereby excluding that ever larger numbers of citizens are increasingly concert about the impact of supply chains on human rights and the environment. In addition, seeing the world only through the lens of consumers narrows the vision and thereby the ability to see the ways in which the production of cheap and available products may affect the environment and the social foundations of our society.

Reviewing the history of competition law on both sides of the Atlantic makes it abundantly clear that the aims and objectives of competition law have been neither consistent nor immutable. On the contrary, they have been changed in the past according to dominant political contexts and ideologies and they need to change now to adjust to the demands of an economy for the 21st century that respects planetary boundaries and upholds social foundations, e.g. through living incomes and wages.

Born as a policy tool to fight private 'trusts' of power, antitrust law has more recently become an overly complex, and often inaccessible, legal instrument. However, it is still an expression of specific ideologies, mainly neoliberalism, although this is often disguised by technical, economic and legal jargon.

Fostered by the financial crisis and the intervention of financial players, the food system has witnessed increasing levels of concentration in market power, in particular, in sectors such as seeds, pesticides, food processing and retailing.

These mergers and acquisitions have been cleared within the context of an EU regulation that has mainly only taken into consideration consumer welfare and the sale of cheap and — to a certain extent — innovative products. In the meantime, farmers' revenues are being squeezed by the imbalance in bargaining power, while the environmental impacts of competition are often dismissed.

However, this is not inevitable. On the contrary, a step in the right direction could be to realise that EU competition law does not exist in a socio-environmental vacuum and is not an end in itself. Looking at the EU treaties in their entirety, it becomes clear that it is not the core framework for competition law in the EU Treaties that is restrictive, rather its current interpretation.

EU competition law therefore needs to be applied in conjunction with other EU laws, principles, and objectives.

A renewed interpretation where competition law moves towards a more holistic vision can contribute to — or at least avoid impeding — progress towards political commitments made by the EU such as the Sustainable Development Goals (SDGs), the Paris Agreement or human rights such as the right to food.

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Broken Links between Sustainability and Competition Law

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At the heart of the problem is the current anti-trust mantra by the EU and the National Competition Authorities across Europe (and most of the world) that is based on the paradigm of consumer welfare and on the idea that 'cheap is good'.

Competition laws have generally allowed and contributed to the creation of markets based on cheap products, thereby disregarding the welfare of the producers, society at large, future generations and the environment.

One of the areas that is receiving the most attention is that of horizontal agreements as defined by Article 101 of the Treaty on the Functioning of the European Union (TFEU). It is our view that there is a discontinuity in the way it is interpreted with regards to socio-environmental sustainability:

1 A too strict interpretation of what is allowable through horizontal cooperation is having a chilling effect on industry actors wishing to join sustainability initiatives and collaborate.[1]

2 Competition law fails to explicitly acknowledge sustainability initiatives as a means towards efficiency that could outweigh, and possibly overcome, the anticompetitive aspects of collaboration, thereby preventing any such initiatives.

3 The calculation methods applied in current assessments consider the environment and the social implications of a commercial practice only when they can be monetised (only valuable when they are assigned a price tag) and when the cost of considering them does not affect consumer welfare by being excessively expensive. Although this does mean that it opens up the possibility to consider elements such as animal welfare and an improvement in smallholders' living conditions.

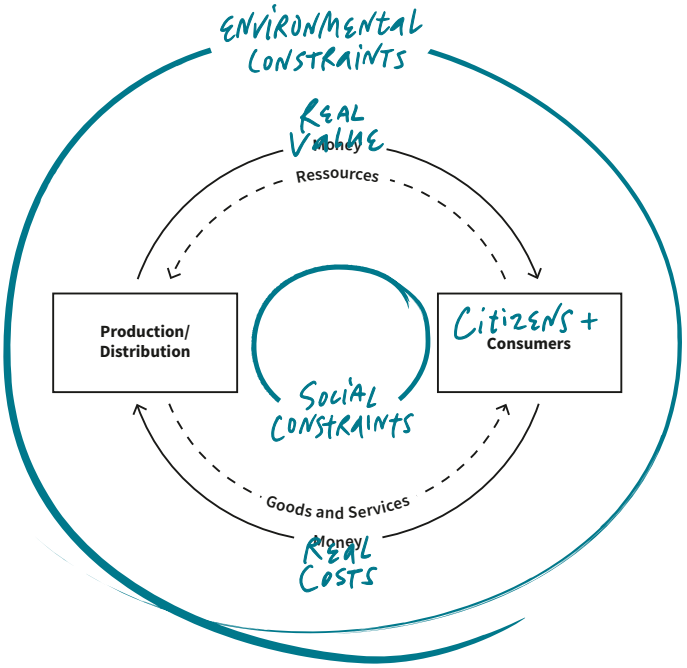
Similar problems haunt the application of Article 102 TFEU on the abuse of dominant position.

When the exercise of vertical power across the food chain is assessed, sustainability-related efficiencies and market failures are not considered per se.

Moreover, the European and national authorities only partially recognise and reprove the imbalance in bargaining power at the different levels of the food chain, a matter that is also touched upon by the recent Directive on Unfair Trading Practices (UTP) in the food system.

1 Fairtrade Foundation, Competition Law and Sustainability. A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector (London: January 2019)

Food for Thought on How to Fix the Broken Links



A comprehensive and systemic reform of EU competition law along the double-bottom line of fulfilling human rights within planetary boundaries, as proposed in Kate Raworth's, *Doughnut Economics* (Penguin Random House, 2017), is not only needed, but also possible.

The FTAO report, written by Dr Tomaso Ferrando (University of Bristol) and Dr Claudio Lombardi (KIMEP), proposes three types of changes to reconcile the broken links between sustainability and EU competition law:

1 Interpretative changes

- → Sustainability concerns need to be taken into account systematically across the board within decision-making, e.g. how is biodiversity affected by the merger of the biggest seed producers? The treaties need to be read more holistically, in particular, Article 11 TFEU.
- → Sector-specific antitrust regulation, such as block exemptions or other exceptions to the application of competition laws, should be advisable only when competition law is found to be the best institution to solve such market failures.
- → Careful assessment and ongoing scrutiny exemptions should be granted under Article 101(3) of the TFEU to allow actors in a sector to work together—if their intentions are honourable—for example to promote sustainability in supply chains by discussing how to raise incomes and wages to living income/wage levels.

2 Institutional changes

- → Competition authorities facing multiple challenges could be supported by special institutional bodies that incorporate public interest concerns into the decision- making process.
- → Global collaboration by institutions such as UNCTAD, the ICN, and the OECD should strongly encourage the sharing of expertise—particularly from countries that take innovative approaches such as South Africa—and explore further possibilities for the reconciliation of sustainability and competition law.

3 Regulatory changes

- → It may be important to shift to direct regulatory intervention, when existing competition laws fail to rise to the challenge of dealing with the socio-environmental impacts caused as a consequence of competitiveness. For example, policy makers may want to facilitate collaboration among market actors pursuing special objectives or deserving protection, when upholding particularly valuable public interest concerns.
- → Competition authorities ought to consider non-economic aspects when prioritising one case over another. Instead of becoming substantive elements of adjudication (therefore left to the participation and pressure of the parties) public interests such as human rights, the environment, and the right to food may thus be taken into consideration in the preliminary phase of the investigation.
- → Special laws on superior bargaining power could be introduced to tackle abuses, especially upstream against farmers.

Read the full report:

Fair Trade Advocacy Office, *EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links,* February 2019, Brussels.

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