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## **Legal challenges of integrating sustainability into antitrust enforcement – a case for interdisciplinary research**

*abstract*

The consideration of sustainability goals in antitrust enforcement is at the center of a fierce debate among practitioners and scholars worldwide. Unlike most epochal discourses in antitrust, the subject did not emerge from the USA. Rather, it was pushed by European scholars and agencies. Even though it is easy to find endorsement for the goal of increasing sustainability, it is much more challenging to reconcile such postulates with the paradigms underlying antitrust. In economic terms, the problem lies in the internalization of negative environmental (or social) externalities and the fact that the interdependencies between sustainability and consumer rent are more complex than, say, the relation between a price reduction and consumer rent. The reasons lie in the multifaceted interdependencies between information, the dimension of time, the definition of the consumer cohort and social norms in shaping the consumers' appreciation for sustainability. Traditional antitrust enforcement paradigms are prone to neglect those interdependencies and thereby create a much too restrictive stance towards sustainability agreements among rivaling firms.

Roman Inderst and I have investigated into these challenges in a series of articles and working papers. Several key issues can be identified. The consumer welfare approach can be rendered more powerful in a sustainability context by applying more elaborate elicitation methods for willingness-to-pay (Reflective Willingness to Pay)<sup>1</sup>. Also, welfare effects require a more extensive consideration of the dimension of time, i.e. an integration of welfare effects on future consumer cohorts if faced with potentially irreversible environmental harm (Prospective Welfare Analysis<sup>2</sup>). Moreover, antitrust assessment needs to pay heed to the interrelations between sustainability agreements among firms and social norms that shape consumers' willingness to pay (Social Norms<sup>3</sup>). A sustainability agreement may increase consumers' awareness of a sustainability issue and thereby raise their appreciation for industry efforts to mitigate them. Yet where is the borderline between such social norm impacts and the mechanism of a political choice in which consumers act as voters? Should

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<sup>1</sup> Inderst & Thomas, Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis, *Journal of Competition Law & Economics*, nhab016, <https://doi.org/10.1093/joclec/nhab016>; Inderst & Thomas, Integrating Benefits from Sustainability into the Competitive Assessment—How Can We Measure Them?, *Journal of European Competition Law & Practice*, 2021, S. 705-709, <https://doi.org/10.1093/jeclap/lpab077>

<sup>2</sup> Inderst & Thomas, Prospective Welfare Analysis—Extending Willingness-To-Pay Assessment to Embrace Sustainability, *Journal of Competition Law & Economics*, nhab021, <https://doi.org/10.1093/joclec/nhab021>

<sup>3</sup> Inderst/Rhiel/Thomas, Sustainability Agreements and Social Norms [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3887314](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887314)

antitrust account for people's willingness to pay for a change in the behavior of others (Externality)?<sup>4</sup>

In conclusion, we see plenty of reason to be more optimistic about the ability of antitrust enforcement to actually integrate sustainability effects into its assessment of concrete cases. Our policy proposals, however, go beyond mere sustainability postulates in that they describe ways of operationalizing the sustainability program in a transparent and effects base economic appraisal that is embedded in the existing laws.

Ultimately, our research leads to the question in what ways the legislator can proactively foster sustainable competition whilst avoiding mere "greenwashing" of harmful hardcore restraints. This is the most recent project which will be presented at Frankfurt. To find an answer, it is necessary to consider that Article 101 TFEU – the European cartel prohibition – has the rank of primary legislation. This makes it quasi-immune to national attempts to alter the underlying legal rationale. Can the EU or its member states still contribute to a legal antitrust landscape that is more accommodation of sustainability considerations?

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<sup>4</sup> Inderst & Thomas, The Scope and Limitations of Incorporating Externalities in Competition Analysis within a Consumer Welfare Approach [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3896243](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3896243)