

Sustainability in (Swiss) antitrust law

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I. Starting point

Sustainability issues are on everyone's lips, which has led to an increased awareness of the need for sustainable use of available resources – not only in politics but among consumers too. Hence, the importance of sustainable management for companies is growing. Corporate social responsibility, meanwhile, prevails in business practice¹, and sustainability criteria are gaining popularity alongside economic factors. The containment of waste of resources is primarily a political decision. It requires a change in behaviour of many actors and results in agreements between companies. However, agreements between companies can restrict competition.

In Swiss antitrust law agreements on competition can be justified by reasons of economic efficiency if they are necessary for using *resources more rationally* (Article 5 paragraph 2 litera a CartA²). While part of the doctrine only allows economic efficiency reasons, i.e., no other public interests such as environmental policy reasons, as a legitimate legal justification,³ the Federal Supreme Court states in a decision that *public goods and natural resources* are also covered by the rational use of resources.⁴ Thus, there is disagreement as to whether, in the case of restrictions of competition, the achievement of environmental protection constitutes a legitimate ground for justification or whether environmental protection is «merely» regarded as a generally desirable objective. In this case, the environmental protection objective is thus «only» amenable to exceptional approval by the Federal Council on the grounds of overriding public interests pursuant to Article 8 and 11 CartA.

Against this background, I examine how the framework conditions for companies are designed to realize sustainable competition and whether there is a possible need for action that enables companies to contribute to a more sustainable development of our society. The term *sustainability* covers not only ecological but also economic and social aspects.⁵ In my work, I primarily refer to the ecological meaning of sustainability.

¹ See CSR Action Plan 2020-2023 of the Federal Council and implementation status 2017-2019; overall, *economiesuisse, Corporate Social Responsibility from a Business Perspective*, June 2015; updated September 2015.

² Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA) of 6 October 1995 (SR 251).

³ BEAT ZIRLICK/SIMON BANGERTER, Article 5 CartA Rz. 261, with references, in: *Kommentar Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen*, Roger Zäch/Ruth Arnet/Marino Baldi/Regina Kiener/Olivier Schaller/Felix Schraner/Adrian Spühler (eds.), Zurich/St. Gallen 2018.

⁴ BGE 129 II 18 p. 47 E. 10.3.3, with evidence; critically ZIRLICK/BANGERTER, Article 5 CartA Rz. 306, loc. cit.

⁵ See *Our Common Future* (Brundtland Report) (dated 20.03.1987), Report of the World Commission on Environment and Development and Rio-Declaration on Environment and Development (3-14 June 1992), Report of the United Nations conference on Environment and Development.

II. Research questions and structure

1. Overview: groups of cases

The first part of the paper covers the legal framework in Switzerland in consideration of the historical development. The focus is on the prohibition of restraints of competition.⁶ In the context of a stocktaking, I will give an overview of the practice of the COMCO⁷ and the jurisprudence. Specifically, I will work out groups of cases that have been decided by the COMCO and by the Federal Administrative Court and the Federal Supreme Court based on sustainability considerations (for example, the climate cent project⁸).

2. Cumulation of norms

In a further step, core areas of environmental law are elaborated, and possible conflicts of objectives explained. Emphasis will be placed on the relationship between competition objectives and public welfare objectives (e.g., environmental protection). Environmental law pursues different objectives than competition law. In this context, the question will be addressed as to how these goals can be brought to the best possible balance.

3. Comparative legal discourse

Within the framework of a comparative legal discourse – whereby the law of the EU will be paramount – I would like to show the international environment by which Swiss antitrust law is surrounded and to what extent Swiss antitrust law deviates from more «sustainable» legal systems. In this context, a comparison is drawn with Article 101 paragraph 1 TFEU on the prohibition of agreements that restrict competition. Paragraph 3 provides for grounds for justification. The European Commission has specified the extent of this provision in more detail in the Horizontal Guidelines (2001). A separate chapter was written about environmental protection agreements⁹, but has been deleted without replacement.

4. Legislative proposals

The legal comparison intends to show whether concrete legislative proposals can be made. Furthermore, I would like to explore what could replace a missing adaptation of the legal foundations. E.g., is the application of the principle of proportionality sufficient in case of a conflict between sustainability and economic goals? Ultimately, it is also a question of responsibility to internalize sustainability considerations in the operation of companies. Essentially, it is likely to be a matter of showing how to deal with uncertain components in practice as well in legislation. How can the rational use of resources become predictable, and thus verifiable, in terms of a positive environmental impact? In my paper I follow a purely jurisprudential approach leaving economic and managerial considerations of sustainability out of consideration. However, the different sustainability goals can serve as a selective illustration. The focus will be on the ecologically responsible actions of companies taking also political science considerations into account.

⁶ The focus is on agreements between companies; market powerful companies are not considered in a first step.

⁷ Swiss Competition Commission.

⁸ Cf. COMCO expert opinion of 20 December 2004, on the admissibility of the «Klimarappen» under competition law (Article 5 CartA).

⁹ European Commission, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ of 6 January 2001, No. C 3, 2, p. 26, Chapter 7 (*no longer in force*).

The thesis concludes with a summary and an assessment of the findings. With my dissertation, I set the goal of writing a treatise on the status of sustainability in (Swiss) antitrust law, of subjecting it to an assessment and of pointing out possible legal policy options for action.