

Antitrust and Climate Change

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The sustainability agenda has caught the attention of antitrust authorities around the world, and Brazil is no different. Discussions are underway on how to incorporate environmental, economic and social objectives into competition law, without compromising its essential mission.

Of the various topics, climate change is perhaps the most critical, as Simon Holmes alerts in a paper submitted to the OECD: we are facing a climate emergency that represents a true existential threat. Urgent action is needed; joint effort is required by all those involved – governments, the private sector and individuals, and antitrust should have a supporting, not detracting, role in the actions that must be taken ("Climate Change and Competition Law – Note by Simon Holmes", DAF/COMP/WD(2020)94, 01.12.2020, §§ 2-4, 11-12 and 42).

The main way to contain climate deterioration is certainly regulation, as the direct means of establishing measures to reverse the current status, including sources of financing. But there is no reason why antitrust should lose the opportunity to contribute to the climate agenda, beyond advocacy designed to ensure that regulation is neutral from a competition perspective. Adjustments will be needed – some more controversial than others – but leaving aside innovations in enforcement for the moment, certain measures can be expected even within the current framework.

Adverse effects on more carbon-neutral products and technologies can be treated as aggravating factors in fixing penalties for antitrust offences. This would be a practical application of the aggravating factors provided for under Law 12.529/2011: the seriousness of the infraction (article 46-I), the danger of injury to the national economy or to third parties (article 46-V), and economic effects produced in the market (article 46-VI). Given the urgency and potential irreversibility of climate damage, more frequent use could be made of interim measures (article 84, law 12.529/2011) to safeguard the final outcome of an investigation whenever the conduct that negatively affects competition also threatens measures to contain climate change.

If competition usually generates more efficient results, there are also situations in which cooperation between companies can also produce benefits. To avoid redundant activities, to carry out projects where the minimum scale required is greater than the size of the individual players, or to adopt more efficient standards even if they generate disadvantages for pioneer businesses, coordination between companies has a legitimate aim. As long as safeguards are in place to ensure that they are ancillary, limited to what is strictly necessary, and do not harm vigorous competition in the market, coordinated activities can be carried out without violating antitrust laws. This reasoning can be immediately extended to the adoption of clean technologies, to the spread of production standards with a smaller carbon footprint, and even to more sustainable production and consumption practices, and should be incorporated in the application of competition law without major disruptions.

Mergers and acquisitions that result in higher market shares can also be allowed under Law 12.529/2011, if efficiency gains outweigh anticompetitive effects, when necessary to achieve greater productivity (article 88, §6-I(a)), better quality (article 88, §6-I(b)), or efficiency, technological or economic development (article 88, §6-I(c)), as long as a significant share of the benefits are passed on to consumers (article 88, §6-II). The practical application of this reasoning offers some challenges, such as quantifying the economic benefits flowing from a less carbon-intensive economy, which consumer groups should be considered in the calculation, and what time horizon and discount rate would be appropriate. But none of these difficulties is foreign to the mechanics that are traditionally faced in estimating efficiencies.

Given the nature of climate problems, discussions will have a dimension that crosses national borders and will require cooperation with antitrust authorities of other countries. In light of the peculiarities of the question, closer cooperation between antitrust, environmental and scientific authorities will also be highly beneficial, contributing to solid antitrust decisions based on scientific evidence.

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