Competition Law and Sustainable Innovation

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Andreas Heinemann
University of Zurich | Swiss Competition Commission
Competition Law \(\rightarrow\) Innovation

Intellectual Property \(\rightarrow\) Innovation

Sustainability \(\rightarrow\) Innovation
1. The Relationship between Competition Law and IP

- In former times, a **conflict between patent protection and competition law** was supposed:
  - patents grant monopolies
  - competition law fights against monopolies

- Since the 1970ies, both fields are perceived not as conflicting, but as **complementary**:
  - patent law promotes innovation by granting exclusive rights
  - competition law protects the competitive process which should also generate innovation
  
  ➔ Hence, both fields share the same goal (i.e. innovation)
2. The Relationship between Competition Law and Sustainability

- Agreements on complying with current environmental law are no restriction of competition.

- No restriction of competition when setting up environmental labels
  - Condition: No exclusivity, no price elements etc.

- If there is a restriction of competition, an efficiency justification is possible.
  - For Switzerland Art. 5 para. 2 Swiss Cartel Act: Agreements are justified if:
    "a. they are necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; " [since 1995]
Legislative Materials (1994)

"For example, candy manufacturers could claim an efficiency improvement if they agreed to **stop packaging their products in aluminum foil** for environmental reasons (energy consumption, waste disposal problems) and instead use another more environmentally friendly material."

A sufficient connection to the production process or the **products** of the parties is required.
Counterexample

Klimarap penn ("Climate Centime"):

2004: The Swiss Petroleum Association planned to bring about a voluntary agreement between petroleum importers to add one to two centimes to the sales prices of gasoline and diesel. The additional revenue was to go to a foundation that would use the money for CO2-reducing measures.

- Art. 5 para. 3 Cartel Act: Two centimes is too small an amount in relation to the final price, to have a price harmonizing effect. It is no price cartel (important for sanctions under Swiss law).

- But it is a general restriction of competition that needs justification, Art. 5 para. 2 Cartel Act.

- According to the practice of the Competition Commission, "a sufficiently close connection with the product or the production process" is necessary.
This condition could not be affirmed, because the contours of the project were not yet sufficiently clear and therefore there was no certainty as to what the collected money would be used for.

In general, it seems questionable whether a CO2 reduction that is obtained merely by an increase in price due to a restrictive agreement can be recognized as a sufficiently specific efficiency advantage.

Such an incentive tax should rather be imposed by the legislature (or authorized by the government on the basis of Article 8 Cartel Act).

In sum, it is not clear at all, how such a system would contribute to sustainable innovation
3. The Relationship between Competition Law, IP and Sustainability

- What about joint research and joint solutions with the goal of promoting sustainability?
- In the EU there is the Block Exemption Regulation on R&D (BER R&D) currently under revision
- BER R&D grants a large amount of leeway for joint R&D including access to arising IPRs
- Art. 3 (1) BER R&D:

  "The research and development agreement must stipulate that all the parties have full access to the final results of the joint research and development [...] including any resulting intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as they become available."
Conclusions

- Environmental policy by the state is key, on a national and international basis.
- Business cooperation can only supplement the right framework, not replace it.
- Competition law offers large flexibilities for cooperative solutions.
- However, mere greenwashing is not conducive to sustainability.
- Only in a competitive system, firms will have incentives to innovate and to improve their ecological footprint.