

Newsletter, 23 March 2022

Green Antitrust

How antitrust law is evolving in light of sustainability issues

Green economy: The world needs to become more sustainable. The influence of ESG (Environmental, Social, Governance) and CSR (Corporate Social Responsibility) criteria is steadily increasing in all industries and sustainability initiatives are on the rise, having already been under scrutiny by the German Federal Cartel Office (“FCO”). As a result, sustainability aspects have become significant competition parameters. While unilateral sustainability efforts by companies will generally be classified as unproblematic, coordinated behavior (between competitors) must be compliant with antitrust law. Does antitrust law thus stand in the way of economic evolution towards more public welfare?

Background: The Green Deal

In addition to increased attention to social and ecological aspects, policymakers have made sustainability their guiding principle. While the German government has been committed to the United Nations' [2030 Agenda](#) for Sustainable Development since 2018, the [European Green Deal](#), which aims climate neutrality by 2050, got introduced by the European Commission in 2019. Even so, the social, political and economic significance of the issue does not provide for an exemption with regard to behavior breaching antitrust law.

Companies therefore find themselves confronted between the expectation of more sustainable economic activity and the associated necessary investments, which in turn lead to higher prices and thus give rise to fears of a competitive disadvantage (“[first mover disadvantage](#)”). Nevertheless, it is important at the same time to counteract attempts of “[greenwashing](#)”, i.e. the agreement on a minimum of “green” and a maximum of price increases.

Antitrust considerations

Section 1 of the German Act against Restraints of Competition (“ARC”) and Article 101(1) TFEU

prohibit agreements that restrict competition. In this context, the underlying intention to achieve desirable public welfare objectives is initially irrelevant for the antitrust assessment. The extent to which sustainability-related agreements between competitors are compatible with antitrust law is rather to be assessed on a case-by-case basis. For instance, there may already be no restriction of competition. This is particularly conceivable in cases where the supply of sustainable products is originally created or increased as a direct result of sustainability initiatives. Additionally, if there are no agreements on customers, prices or costs, it is possible that there is no restriction of competition.

If, on the other hand, a restriction of competition is assumed, the possibility of an individual exemption under Article 101(3) TFEU or Section 2 ARC is to be examined. In order to obtain an exemption, the sustainability agreement has to meet various requirements, in particular competition must not be significantly eliminated and it must lead to an increase in efficiency with appropriate consumer participation.

As announced, the European Commission has now included a separate section 9 on sustainability agreements in the revised [draft of the Horizontal Guidelines](#) published on 1 March 2022. It thus offers concrete guidance for the examination of sustainability agreements under Article 101 TFEU as well as a possible exemption of such a cooperation under Article 101 (3) TFEU. The examples of permissible sustainability agreements listed in the guidelines are helpful for such examinations. Stakeholders can [submit their comments](#) on the draft by 26 April 2022. The FCO, on the other hand, does not appear to be working on abstract guidelines regarding the assessment of sustainability initiatives. In a [background paper dated 1 October 2020](#), the FCO points out the practical and normative difficulties in providing the necessary proof of quantifiable consumer benefits and emphasizes the case-by-case nature of the assessment.

Examination of cooperations

The FCO recently assessed three sustainability initiatives, as reported in the [press releases dated 18 January 2022](#) and [25 January 2022](#).

The subject matter of the procedure was a voluntary commitment of the German retail trade and the German Corporation for International Cooperation to establish common standards for wages in the banana sector, aiming to promote [living wages](#) along the supply chain of private label bananas. The initiative focuses on the joint introduction of responsible sourcing practices and the development of processes to monitor transparent wages, with the aim of gradually increasing the sales volume of these bananas.

The FCO had no antitrust concerns in relation to this case. As there had been no information exchange on purchase prices, costs, production quantities and margins, and no mandatory minimum resale prices or price mark-ups had been introduced, the FCO did not seem to consider the requirements of the cartel prohibition to be met.

The FCO also dealt with the [Animal Welfare Initiative](#). This is an industry alliance of agriculture, the meat industry and food retailers whose aim is to reward livestock farmers for improving husbandry conditions. The initiative's key plan is the payment of a uniform surcharge to participating livestock farmers (animal welfare fee) via participating recipients.

Taking into account the initiative's pioneering character, the FCO has tolerated the uniform mark-ups for a transitional phase, while working towards ensuring the implementation of competitive elements (such as a recommendation for the remuneration of animal welfare costs instead of fixed surcharges).

Lastly, the FCO examined a third cooperation, which concerned an initiative of the representatives of German milk producers in the so-called [Agrardialog Milch](#). A coordinated financing concept in favor of raw milk producers was presented, which provided for a subsequent price stabilization of the contractual "milk money" for agricultural producers. This was to be achieved by means of a uniform, continuously adjusted surcharge on the basic milk price.

Differently from the other initiatives, the FCO deemed the financing model of the Agrardialog Milch to be anticompetitive. In the FCO's view, the financing model constitutes a price agreement to the detriment of consumers, with no specific sustainability aspects. According to the FCO's President Andreas Mundt, it aims to

agree on price surcharges that are passed through the supply chain to the milk shelf.

Comment and outlook

The FCO upholds its position of considering public welfare objectives a question of each individual case. Any further specification of the role of sustainability aspects in antitrust law lies with the legislator – an evaluation of the ARC in this respect has been announced in the [present German coalition agreement](#). Yet, the FCO has shown in recent case practice certain flexibility in relation to sustainability initiatives. The FCO clarifies – similarly to the [EU Commission](#) – that functioning competition that allows sustainable initiatives within its limits is part of the solution, whereby greenwashing with the actual goal of increasing margins is to be prevented.

It is advisable to carefully examine the compatibility of public welfare cooperations with antitrust law on a case-by-case basis and, if necessary, to enter into a dialogue with the FCO already at an early stage.



Constanze Ely



Isabel Oest, LL.M.

COMMEO Rechtsanwälte PartGmbH
Rechtsanwälte und Notar
Speicherstraße 55
D-60327 Frankfurt am Main
www.commeo-law.com

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