

## Competition and sustainability – new guidance from FCO

While generally, sustainability initiatives and Environmental Social Governance (*ESG*) become increasingly important for both consumers and investors, the line between strengthening cooperation to achieve sustainability goals and compliance with competition law remains a fine one (see also our [briefing of 7 February 2021](#)). The German Federal Cartel Office (*FCO*) has recently examined three sector initiatives aimed at sustainability gains. While the agency did not publish detailed decisions or case reports, some guidance can still be concluded from its findings.

### Sustainability initiatives and competition law

When assessing joint sustainability initiatives of several companies under competition law, the question is whether they can have detrimental effects on competition under Article 101 (1) TFEU. The answer may be “no” if the companies involved are not competitors or the cooperation has no direct effect on product prices but instead merely enhances sustainable production and handling of resources.

Even if a cooperation does restrict competition, it may still be permitted under Article 101 (3) TFEU provided its pro-competitive effects eventually prevail. Agreements on production standards, for example, may lead to economies of scale and the launch of innovative, more sustainable products, which eventually increase consumer choice. The principle test is whether cooperation agreements eventually promote technical or economic progress, and whether consumers get a fair share of the benefit.

### Case by case approach by the FCO

Other than the Dutch competition authority and the British Competition and Markets Authority who have been the frontrunners in Europe to issue detailed guidance on sustainability agreements and opportunities within competition law, the FCO seems to wait for the European Commission with regards to actual sustainability reforms. At European level, the horizontal guidelines dealing with competitor collaboration are currently being reviewed. In the agricultural sector, the legal framework for assessing initiatives to implement sustainability standards has already changed in December 2021 with Article 210a of the Regulation establishing a common organisation of the markets in agricultural products entering into force. For now, the FCO seems to prefer approaching the topic on a case-by-case analysis.

## **Living wages in the banana sector**

With regard to a voluntary commitment by the food retail sector to promote living wages in the banana sector, the FCO had no competition concerns. The essence of this cooperation is to agree on voluntary common standards and strategic goals along the private-label banana supply chain in order to jointly introduce responsible procurement practices and develop processes to monitor transparent wages. The FCO found that there was no information exchange regarding procurement prices, other costs, production volumes or margins.

## **Animal welfare initiative**

Another sustainability initiative that was recently re-examined by the FCO is the animal welfare initiative ("Initiative Tierwohl"), a multi-sided cooperation between the agricultural, meat production and food retail sectors aimed at rewarding livestock owners for improving living conditions of animals, in particular space in stalls. The initiative is mainly sponsored by the four largest German food retailer groups and has already been on the FCO's radar since 2014. Previously, the agency had called for the introduction of a clear labelling for meat products, namely an identification system in the pig meat sector for the benefit of transparency to consumers, and announced that it would tolerate the agreement only for a transitional period until 2020. As *Initiative Tierwohl* is now planning to include cattle fattening, the FCO requests from it to further develop the financing model. Under the existing model, a standard premium for animal welfare is required for poultry and pork, which the agency considers critical and said it merely tolerated for the initial phase due to the project's "pioneering nature". The competition authority remained vague how this could be done exactly but hinted at the fact that a recommendation to pay a compensation for animal welfare costs might be more appropriate. In any event, competition elements must gradually be introduced, animal welfare criteria will have to be reflected in the structure of the financing model and the concept of the initiative needs to be further developed until 2024 when its next project phase starts.

## **Milk sector**

In the most recent case, the FCO showed the boundaries of cooperation under anti-trust law. The agricultural policy project "Agrardialog Milch" approached the FCO and proposed an agreed financing concept in favour of the raw milk producers. According to the project, raw milk prices are not cost covering. *Agrardialog's* model proposes to retroactively stabilise the contractually agreed "raw milk price" by paying surcharges. The FCO found that this model would have resulted in an industry-wide milk price increase. It criticised that the real rationale behind this project was higher income which cannot per se justify its exemption from competition rules. In contrast, the initiative had not presented any sustainability-related criteria for the

production of raw milk. Therefore, the FCO made clear that “Cooperation is possible – illegal price-fixing agreements are not.” – and rejected the project, at least until *Agrardialog* presents a sustainability concept.

## **Further developments?**

These three examples show that the FCO considers current competition law to be an effective and sufficient tool to address sustainability objectives. This is in line with its previous assessments regarding the sustainability labels *Fairtrade* and *Grüner Knopf*, regarding a cooperation to reduce salt/sugar/fat and regarding a plastic waste reduction initiative. According to FCO president Mundt, “*competition law does not stand in the way of cooperations for achieving sustainability objectives – on the contrary. Effective competition is part of the solution since sustainability requires innovation, which in turn only emerges in a competitive environment. [...] However, such cooperations are only allowed if they genuinely improve sustainability. They must not aim to solely increase the margins of a few companies*”.

The cases also show that it is critical to seek guidance from the FCO instead of implementing initiatives without knowing the regulator’s view. It also remains to be seen what new regulations the new German government will introduce – according to their coalition agreement, sustainability goals are fairly prominent on the agenda.

BLOMSTEIN will continue to monitor developments regarding sustainability initiatives and competition law. If you have any questions on the topic, [Anna Blume Huttenlauch](#) and [Marie-Luise Heuer](#) will be happy to advise you.