

Sustainable Cocoa – no Competition Concerns

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Sustainability and competition law has been one of the hottest topics among competition authorities and regulators in recent years. The German Federal Cartel Office (*FCO*) has always stressed that it is open to give informal guidance on sustainability initiatives. Yesterday, it has proven that it takes this approach seriously and does not stand in the way of sustainability initiatives. It has published a [press release](#) that it currently sees no reason for a more detailed examination of the German Initiative on Sustainable Cocoa “Forum Nachhaltiger Kakao e.V.” (*Kakaoforum*). According to the FCO, there have been no indications that the initiative would incur a clear risk of a restraint of competition. The Kakaoforum is a joint initiative made up of representatives of the public sector, companies in the cocoa and chocolate industry, a large part of the German food retail trade and international NGOs.

One of the main objectives of the initiative is to help cocoa farmers in Ghana and Côte d’Ivoire earn a living income. The initiative does not provide for uniform price premiums but encourages its members to voluntarily commit themselves to individualised minimum prices, quotas and premium systems to achieve better farm gate prices for producers.

The FCO currently sees no reason for a detailed examination of the Kakaoforum. The members of the initiative make their commitments on a voluntary basis and there is no sanctioning mechanism if the members fall short of their commitments. While the FCO expressed that the case did not require a detailed examination, it still pointed out that it sees strong indications that the exemption under Article 210a CMO is not applicable for the Kakaoforum case. Living income is not a sustainability objective explicitly laid down in Article 210a (3) CMO (for more information on the sector-specific exemption of Art. 210a CMO Regulation, see our briefing [here](#)).

Overview of case-by-case approach by the FCO

The FCO is continuing its case-by-case approach. In the past two years, the FCO has dealt with five cases:

- **Living wages in the banana sector (January 2022):** the FCO had [no competition concerns](#) regarding the voluntary commitment by the food retail sector to promote living wages in the banana sector;

- **Animal Welfare Initiative - "Initiative Tierwohl" (January 2022/May 2023):** The FCO has dealt with this initiative several times since 2014 and raised competition concerns regarding its compulsory price premium. In May 2023, the FCO announced that the so-called „animal welfare surcharge“, a compulsory premium payable by buyers to participating farmers will be abolished. Instead, the initiative wants to introduce a recommendation-based system (see our latest briefing here).
- **Agricultural policy project – “Agrardialog Milch” (January 2022):** Agrardialog Milks’s model proposed to retroactively stabilize 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 made clear that “cooperation is possible – illegal price-fixing agreements are not.” – and rejected the project, at least until Agrardialog presents a sustainability concept.
- **Industry agreement milk by QM+ e.V. (March 2022):** QM+ introduced an industry-wide agreement on a binding animal welfare surcharge in the milk sector, which, however, is voluntary for farmers dairies and food retailers. The FCO decided to tolerate the initiative in the first program phase until 2024,. After the first phase, it will have to be reassessed to what extent additional competition elements can be introduced.
- **Initiative on Sustainable Cocoa – “Kakaoforum” (June 2023):** See above.

Takeaways

The FCO’s announcement published yesterday is comparable to the decision on living wages in the banana sector. It contains few surprises and is also in line with the European Commission’s recently published draft of the Horizontal Guidelines (see our latest briefing here). The Guidelines explicitly find that those sustainability initiatives, where the parameters of competition, i.e. price, quality, quantity, choice or innovation are not affected, are not caught by the cartel prohibition laid down in Article 101(1) TFEU. It is noticeable that in its press releases, the FCO constantly refers to the sector specific exemption of Art. 210a GMO. It remains to be seen if and to what extent the FCO will also refer to the Horizontal Guidelines once they have entered into force.

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.