

Go green go

13 May 2024

Sustainability and competition law has been a hotly debated topic. While some competition authorities have dedicated specific guidelines for cooperations among competitors in the name of sustainability, the German Federal Cartel Office (FCO) has been adamant that it will adopt a case-by-case approach and that guidance can only be derived from specific precedents. It has continuously invited companies to bring forward specific cases - and sometimes the president of the FCO, Andreas Mundt, jokingly even questioned whether there was really such a big need for guidance given the low numbers of precedents on which the FCO's position was actively requested. Last week, the FCO finally had another chance to provide its assessment and expressed its support for a project introducing a reusable system in the plant trade sector to reduce plastic waste (see [press release](#)).

The sustainability initiative assessed by the FCO

At present, plants are typically sold in disposable plastic trays throughout the various stages of the value chain. Euro Plant Tray eG aims to replace these disposable trays with a reusable system for the B2B transport of potted plants, thus reducing plastic waste.

The FCO found that it currently has no major objections to the introduction of a reusable system in the plant trade. Once more, it stressed that while sustainability initiatives are important, they have to comply with competition law. Sustainability requires functioning competition, which ensures innovation and prevents inappropriate price increases and quality reductions.

The decisive factor for the FCO to support the project was the fact that the coordination and exchange of information between the (market) participants was reduced to the extent necessary for the introduction and operation of the reusable system. Company-specific, strategic data is collected by neutral third parties and is only available to the project participants in an accumulated and aggregated form. What was particularly important for the FCO is that participation in the Euro Plant Tray eG reusable tray system is voluntary and open to all market participants at the various stages of the value chain, including non-members of Euro Plant Tray eG. Members can also continue to use trays from other suppliers.

The FCO has announced that it will shortly publish a detailed case report on this matter.

Approach by the FCO – case-by-case analysis

With this initiative, the FCO continues its case-by-case approach regarding sustainability initiatives. In the past two years, it has dealt with the following 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):** Kakaoforum is a joint initiative of representatives from the public sector, stakeholders from the industry international NGOs with the goal to help cocoa farmers in Ghana and Côte d'Ivoire generate a sustainable income. The FCO saw no reason to investigate the Kakaoforum in detail. Members of the initiative are free to make voluntary commitments, and there are no sanctions if they fail to meet their commitments.
- **Reusable System in Plant Trade - Euro Plant Tray eG (May 2023) – see above**

Approach by the European Commission - Soft Safe Harbor for Sustainability Standardization Agreements

In contrast to the FCO, the European Commission (EC) issued guidance on sustainability agreements in its Horizontal Guidelines which entered into force in June 2023. The initiative by Euro Plant Tray eG can be seen as a “sustainability standardization agreement” under the Horizontal Guidelines. Such agreements aim at the adoption and adherence to certain sustainability standards and specify the requirements to be met by stakeholders along the supply chain in terms of sustainability metrics.

The EC provides for a soft safe harbor for such sustainability standardization agreements. They are unlikely to restrict competition if seven criteria are cumulatively met:

- (i) they are transparent;
- (ii) they do not impose obligations on companies that do not wish to participate;
- (iii) companies remain free to adopt a higher standard;
- (iv) there is no unnecessary exchange of commercially sensitive information;
- (v) their outcome is effective and non-discriminatory;
- (vi) they do not lead to a significant price increase or to a significant reduction in the choice of products available on the market;
- (vii) there is a monitoring system in place to ensure compliance with the requirements of the standard

While the FCO did not explicitly stress that it took into account the criteria of the Horizontal Guidelines, it at least names a few of these criteria in its press release.

Takeaways

Once more, the FCO has dealt with a sustainability initiative, and once more, it has stressed that it does not stand in its way. It remains to be seen for how long the FCO will keep up with its case-by-case approach. As part of the competition policy agenda, the Federal Ministry of Economics and Climate Protection intends to publish a draft bill for the 12th amendment to the German Act against Restraints of Competition this quarter. It has already announced that the bill will deal with sustainability initiatives. This could provide some legal certainty for companies seeking to improve their sustainability impact.

We continue to follow developments on sustainability agreements closely. BLOMSTEIN is at your disposal at any time to answer questions on the practical implementation as

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well as on the scope of application of these measures. Please do not hesitate to contact Anna Blume Huttenlauch and Marie-Luise Heuer.
