

## **Response National Competition Authorities on the Draft Guidelines on Sustainability Agreements**

*Bundeskartellamt:*

Sustainability has become a central social and political issue in recent years, which is also reflected in the EU Green Deal. Nevertheless, only a few competition authorities have been dealing with the issue of sustainability agreements in recent years. To our knowledge, we are among the few competition authorities that have dealt with actual cases and discussed them in the ECN. Hardly any final decisions have been adopted so far, which is not surprising in view of difficult legal questions that have not yet been conclusively answered. Furthermore, any action by a competition authority regarding sustainability agreements is likely to attract a high level of public attention, which carries the risk that competitive interests are played off against the “good cause” of sustainability in the public debate.

So far, the Bundeskartellamt has dealt with various sustainability agreements, such as a fair trade initiative, an animal welfare initiative, an initiative for sustainable textile production and an initiative for the reduction of sugar, fat and salt in food products. Exercising its discretion within the framework of § 32 GWB, the Bundeskartellamt has tolerated these agreements. Important factors for this in the specific cases were that the restrictions of competition were often minor and in particular had little effect on sales prices, that there was non-discriminatory access to the cooperation and that the criteria of the initiative were developed in an open process. It was also important that there was transparency for the consumer with regard to the sustainability criteria ("labelling") and that there were alternatives for the consumer so that he or she could consciously choose certain "sustainably" produced products. The Bundeskartellamt plans to further develop these criteria in future case practice. Nevertheless, in view of the small number of cases to date, the Bundeskartellamt does not believe it is in a position to develop or publish detailed guidelines going beyond the abovementioned factors.

We would also like to stress that primarily democratically elected parliaments are the institutions who should decide on balancing the different interests and goals and setting the legal framework to pursue these goals. Other supposed solutions, such as self-regulation by industry or government-supported anticompetitive cooperations have the potential to put competition authorities in “trouble waters”. Taking into account that there are around 20 goals mentioned in the EU Treaties (like a sustainable development, a social market economy, full employment, gender equality, the protection of human rights and children rights, animal welfare, free and fair trade) it seems to be quite difficult for competition authorities to assess and quantify all these goals when assessing competitive restraints. Furthermore competition agencies could come under political pressure to prioritise certain goals, depending on the political party that is part of the government.

As already mentioned in the discussion regarding the ECN working paper on sustainability in 2018, writing general guidelines is an even bigger challenge than dealing with individual cases. A large number of possible sustainability goals and various design options for shaping a sustainability agreement must be taken into account and subjected to an abstract legal review. What is more, the publication of guidelines always entails the risk of them being applied to situations which only seemingly fit to the criteria of the guidelines, or to see the guidelines applied to situations which have not been considered in the development of the guidelines and to which therefore the competitive analysis does not really fit.

In order to minimize these risks, the Bundeskartellamt prefers to continue the discussion on sustainability agreements and on individual cases in the ECN WGs before guidelines are developed and published at European level. Once a certain case practice of the NCAs and the European Commission has developed, guidelines could be drafted on a more solid basis in a second step.

With respect to your national proposal, we wonder whether a solution can be found to the problem of assessing the public policy benefits of a sustainability agreement under competition within the framework of Article 101 (3) TFEU. We agree that competition law should not stand in the way of sustainability goals like protecting the environment. However, we do have concerns about incorporating out-of-market efficiencies, including society wide beneficial sustainability effects, in the Article 101 (3) assessment of individual cases. In this context, we are mainly concerned with the questions of which public policy benefits can be qualified as efficiency gains (and if we are the ones to judge about it), how these can be measured and how an appropriate participation of consumers can be determined. Our impression is that the discussion about valid efficiencies and their passing-on to the consumers is still in its infancy. At the same time, this is certainly the place where the competitive assessment is most vulnerable for being played off against (genuine or fake) sustainability goals. Therefore, at the time being, we think that appropriately exercising discretion in individual cases is a valid approach. Indeed, it would be good if the Commission and NCAs could be more open to provide advice and individual guidance to firms to help the self-assessment of new and innovative cooperation agreements. Providing abstract guidance could then be a next step.

Against the background of a large number of open questions, we suggest continuing the discussions on incoming cases in the ECN Working Groups and look forward to the further discussion within the ECN. It may well be that we need to refine and modernize our approach in this regard and we hope the discussion in the ECN WGs will contribute to finding a coherent way to fit these aspects into our competition law system.

*Romanian Competition Authority*

In RCC's view, the NMA's approach outlined in the Dutch Guidelines on sustainability agreements for environmental policy objectives is circumscribed to the assessment under provisions of Art. 101 (3) TFEU. We welcome your initiative, as taken at national level. Member States who take certain measures to particularly exempt certain agreements concerning areas of national interest may have the possibility to make a balanced approach keeping the same lines as currently provided for the EU competition law.

However, we are reticent on the opportunity to introduce a new distinct section on sustainability agreements within the HBER and detailed in the EC Guidelines on the applicability of Art. 101 (1) TFEU, to avoid any extrapolation risks to include a large scale of agreements that could potentially impede competition, beyond the legal framework of evaluation under provisions of Art. 101 (3).

*Spanish Competition Authority:*

As the Netherlands Competition Authority, we understand that sustainability has become a clear priority within the EU and we need to address how it can be considered vis a vis competition policy. Notwithstanding this, we also share the concerns of other NCAs and DGCOMP about how to embed such criteria, not related to antitrust policy, within the assessment of agreements between undertakings.

The evaluation of such agreements would compel competition authorities to carry out an environmental impact assessment of such agreements, which not only is beyond their competence, but would be time and resource-consuming and could greatly delay our decision-making procedures.

Are the NCAs supposed and prepared to assess environmental efficiencies of the agreements? What instruments would be used for it? Who would verify the environmental impact assessments submitted by the companies? All these questions, as well as the main difficulties that implies the economic quantification of environmental efficiencies, lead us to be very cautious when assessing measures such as those proposed by the sustainability guidelines submitted by the Netherlands Competition Authority.

However, we understand that this issue requires and merits the attention and constructive debate in the ECN in order to define the way forward to introduce sustainability considerations within competition policy, being sustainability a cornerstone for the New Commission under the Green Deal.

*Finnish Competition and Consumers Authority:*

The FCCA sees the vital importance of climate policy for the EU and the world, and considers combatting climate change an issue demanding an urgent global response. In its response

concerning the review of the HGL, the FCCA also highlighted the need for guidance and an analytical framework for the assessment of horizontal agreements pursuing more sustainable outcomes, especially concerning agreements aiming to promote climate policy objectives by reducing greenhouse gas emissions.

In this sense, the FCCA supports the aims of the Dutch guidelines. The scope of the issue, however, is such that solutions ought undoubtedly to be sought on an EU level. Appropriate review of the HGL might also respond to the most urgent sustainability-related issues identified in individual Member States.