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The German Competition Authority rejects the national milk producers' proposed uniform mark-up system for ensuring minimum guaranteed income level for all raw milk producers due to it being price-fixing

ANTICOMPETITIVE PRACTICES, GERMANY, AGREEMENT (NOTION), PROFESSIONAL ASSOCIATION, PRICES, AGRICULTURE / FOOD PRODUCTS , PRICE FIXING, COOPERATION AGREEMENT, ENVIRONMENTAL PROTECTION, EXEMPTION (INDIVIDUAL), ANTICOMPETITIVE OBJECT / EFFECT, CONSUMER PROTECTION

German Competition Authority, *Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law*, Press release, 25 January 2022

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e-Competitions News Issue Preview

1. Introduction

1.1 Competitor cooperations in pursuit of sustainability and human rights, or to reach broader ESG (Environment – Social – Governance) goals, have become a key element for companies' global business strategies. In this context, "green competition law", i.e. the intersection between competition law on the one hand and sustainability or environmental protection topics (ESG objectives) on the other, is hotly debated, especially in Europe. At the latest since the announcement of the *European Green Deal* and *"Fit for 55"* package, it is clearly one of the key topics on the agenda for companies, enforcers, and practitioners in Brussels and various EU member states – including in Germany.

1.2 On 18 and 25 January 2022, respectively, the German Federal Cartel Office (FCO) joined the fray again and published short press releases on its review of three different projects – all of which concerned food production and were (supposedly) related to ESG. While it found two of these essentially unobjectionable, one was not allowed to be implemented. This article looks at the legal lessons that can be gleaned from the FCO's releases, how the authority's actions should be viewed in the overall context and what the road ahead may look like.

2. The Problem with "Green Competition Law"

2.1 Large scale problems require large scale solutions. It is no wonder then that ESG objectives, most notably the fight against climate change, are being addressed across all economic sectors and by all companies active within the respective value chains. This may extend to all sorts of activities, from investing in sustainable products or processes, industry-wide agreements to phase out unsustainable products and/or unethical modes of production, joint procurement of sustainable input products, and joint R&D, innovation and production agreements, to the setting of industry standards for the use of sustainable products and green technologies.

2.2 To avoid being disadvantaged by the costs that come with being a "green first mover" and to jump-start the transition towards greener or generally more ESG-oriented supply chains, technologies and production methods, companies – including competitors – have a strong interest to work closely together and align their conduct. Alas, the line between legitimate cooperation to meet ESG objectives and falling foul of antitrust law is a fine one. Is there a restriction of competition to begin with? If so, can it be exempted from antitrust laws? And under what conditions?

3. The FCO's latest Case Law

3.1 The FCO has now added to its (still rather scant) case law on the topic. In its *press release of 18 January 2022*, the FCO outlined its review of (1) an initiative by German grocery retailers and the German Corporation for International Cooperation (GIZ) on living wages in the banana sector, and (2) plans to extend the Initiative Tierwohl (the German Animal Welfare Initiative – AWI) to cattle fattening. Most recently, as described in its *press release of 25 January 2022*, the FCO dealt with (3) an initiative in the dairy sector, concerning the price of raw milk.

(1) Against the backdrop of a corresponding mandate from the German Federal Ministry for Economic Cooperation and Development to the GIZ, the first initiative concerned a voluntary commitment of German grocery retailers to adhering to common standards for wages paid in relation to the retailers' private label bananas. Participating companies plan to jointly implement "responsible sourcing practices", i.e. to develop processes to monitor transparent wages, and, as part of this, to gradually increase the volume of sales of bananas produced and purchased in line with these criteria. The FCO had no concerns as compliance with these plans would remain voluntary and there was no information exchange regarding procurement prices, other costs, production volumes or margins.

(2) AWI is a multi-sided cooperation between agricultural, meat production and food retail companies and has been on the FCO's radar since 2014 when the initiative was first rolled out for chicken and pork. It aims to reward livestock farmers for improving the conditions in which animals are kept (e.g., more space in barns). The core element of the initiative is the payment of a uniform surcharge to participating livestock farmers (the so-called "animal welfare fee") via the participating slaughterhouses. The companies sought to introduce this model in the **cattle fattening** sector from this year. Already in 2017, the FCO had *called for the introduction of clear labels* for meat stemming from slaughterhouses taking part in AWI, for the benefit of transparency to consumers. It stated that it would tolerate the agreement only for a transitional period until 2020 due to its "pioneering nature". The authority also considered the uniform surcharge critical and has now requested the AWI to further develop its financing model by 2024. Remaining rather vague as to how the AWI might do so (only mentioning that one solution could be to switch from fixed surcharges to a mere recommendation for the remuneration of animal welfare costs), the FCO stressed that competition elements must now gradually be introduced while reflecting animal welfare criteria.

(3) The dairy-related initiative also concerned a financing concept. It was presented by German milk producers organised in the self-styled "Agricultural Dialogue Milk" (ADM). Their plan aimed to create price surcharges to directly benefit raw milk producers. To that end, participating companies would have first determined the average costs of milk production for farms throughout the sector and then, in a second step, used these costs as a starting point for uniform mark-ups on the base milk price. The respective surcharges would then have been constantly adapted based on a binding clause in contracts between producers, dairies and food retailers. This concept was based on the companies' perception that milk prices in Germany do not cover the costs incurred by milk producers. The FCO found this plan to be *"not acceptable under competition law"* as it would have resulted in fixed price surcharges across the entire supply chain in the entire sector ("from the udder to the shelf"). The authority saw no grounds for an exemption pursuant to Article 101(3) TFEU or its German equivalent, Section 2 ARC [*1*], and did not consider this an ESG case either. Recognizing that "public welfare objectives such as sustainability" play a role in the legal assessment, the FCO found that the companies fell short of demonstrating the pursuit of such goals. In particular, their concept did not include any concrete sustainability-related production criteria for raw milk. Instead, the ADM had merely argued that it *"could be instrumental in financing the transformation of the domestic agricultural sector"*. The FCO concluded that the mere interest in higher income is not enough for an exemption from the ban on cartels.

4. Lessons Learned – The "Green Competition Law" Status Quo in Germany

4.1 The FCO does not currently provide any general guidelines regarding ESG objectives in antitrust. Instead, its "green enforcement" is still anchored in a case-by-case approach, hinging on the specifics of each project and the exertion of the FCO's discretion. Nevertheless, there are a few cornerstones showing in the authorities (published) case law – to which the three most recent decisions add. When dealing with "green competition law" before, the FCO regularly "focused on whether the proportionality of any restrictions on competition is maintained, whether consumers' choice is not restricted and whether consumers are informed transparently" [*2*]. More specifically, the authority has described [*3*] the following determinants for its enforcement:

(a) **How severe** are the restraints on competition entailed by a cooperation, e.g. through an alignment of cost components?

(b) Does this have an **effect on sales prices**?

(c) Is there **non-discriminatory access** to the cooperation?

(d) Were the sustainability **criteria developed in an open process**?

(e) Is there **sufficient transparency** ("labelling") for consumers?

4.2 Looking at the authority's latest case law, we would add the following guardrails:

(a) ESG initiatives should ideally **refrain from coordination of or exchange on parameters traditionally considered sensitive in antitrust law.** This is indicated by the FCO emphasizing that the GIZ's living wages initiative for bananas is not objectionable under antitrust law primarily because it neither involves any exchanges on competitively sensitive information nor introduces mandatory minimum prices or mark-ups anywhere in the supply chain.

(b) To the extent a cooperation affects even remotely competitively sensitive parameters such as product marketing or cost structures, a rather strict standard applies. The actions taken within the specific cooperation must then directly serve concrete ESG objectives. This proved to be the sticking point for ADM which sought higher levels of income for its members. Here, the initiative would have had an indirect effect on animal welfare at best. In other words: A project may have to do with pastures, but that's not enough for it to be "green" from an antitrust point of view.

(c) Even if ESG objectives are pursued, the conduct in question must be **consistently geared towards achieving these goals**. That was the reason why, for instance, the AWI had already been reminded in 2017 to implement improvements with regard to the labelling of its products, allowing consumers to more clearly recognize the meat on offer as stemming from farms participating in the initiative. The FCO has now again pointed out the importance of such transparency.

(d) The FCO will **consider the full legal context** of a cooperation. For instance, the ADM project would generally have been able to benefit from special provisions for the agricultural sector recently introduced at European level. Since last December, there are antitrust exemptions for sustainability initiatives for certain agricultural products (including milk and dairy) in Article 210a of the amended CMO Regulation [*4*]. However, this exemption only applies to coordination aimed at implementing environmental, animal health or animal welfare standards that are higher (i.e. stricter) than already required by European or national law [*5*]. As set out above, the ADM was unable to clear this hurdle.

(e) While specific ESG-related provisions in the law will be taken into account, projects "merely" initiated against the backdrop of an **official or political mandate** for achieving certain public welfare objectives (such as the GIZ's) do **not automatically enjoy privileged treatment** under antitrust law.

(f) However, the FCO is prepared to **temporarily apply a more generous standard, at least for "pioneering acts"** such as the AWI. However, this higher tolerance threshold will only apply to the start-up phase of a project and will decrease over time. This will in particular be true where it becomes apparent that the goal pursued – such as animal welfare in case of the AWI – is already (or at least increasingly) a factor that consumers take into account in their purchasing decisions, i.e. if it is (about to become) a standard feature of the supply and demand mechanics in the respective sector.

4.3 In practical terms, the FCO emphasizes in its press releases that it *"offers guidance in these matters and provides advice on how to ensure that agreements conform with competition law"* and "*that competition law is flexible enough to support sustainability initiatives especially in setting common standards while making sure that the conditions are fair and transparent*".

5. Our View

5.1 It is widely expected that the number of cases in which competitors attempt to meet ESG objectives through cooperation will increase worldwide. Germany is likely to be spearheading this development: With its heavily CO2-emitting industries and the government's proclaimed goal of the country becoming a global leader in the conversion of hydrogen into electricity, Germany will be the scene of fundamental economic shifts that will make cooperation between competitors inevitable. The FCO is well aware of this, as its President, Andreas Mundt, already stated: "The most tedious tasks are probably yet to come" [*6*].

5.2 The FCO's constructive advisory approach, encouraging companies to proactively present their ESG projects, is

therefore to be welcomed without qualification. Weighing their interest in independent and rapid implementation of a cooperation against their interest in legal certainty, companies considering ESG initiatives will often find that taking the authority up on its offer is in their best interest. That said, the situation companies are currently facing is not satisfying:

(a) Sustainability cooperation is largely placed in uncharted territory, which in itself is likely to cause uncertainty among market participants.

(b) This is exacerbated by the antitrust context. For many years now, antitrust law has, not least due to its staggering fines, been anchored in the consciousness of management and employees alike as a particularly sensitive compliance issue and (financial) high-risk zone.

(c) The FCO's current practice does little to alleviate this. There is no real body of case law to rely on. Based on available information, it looks like the FCO so far has dealt with eight (remotely) ESG-related projects. However, it has only published information on its analysis for half of these [*7*] and there are no full decisions available anywhere.

(d) Contrary to its counterparts in the *Netherlands* and the *United Kingdom*, the FCO is showing no inclination to publish comprehensive guidelines on the subject. Absent proper cases coming along by chance, this leaves fundamental questions unanswered, in particular:

- Could a price-related agreement such as the one for raw milk proposed by the ADM have been exempted from antitrust law if it pursued not only goals of (company-oriented) financial subsistence, but also (public welfare-oriented) sustainability? And if so: would this only be conceivable within the limits of the above-mentioned "agricultural law" (Article 210a)? Or would it also be possible in other sectors?

- Generally, what are the requirements for an exemption under Article 101(3) TFEU and Section 2 ARC, respectively? In October 2020, a paper published by the FCO pointed out the difficulties of an individual exemption [*8*]. Unfortunately, the authority's case law still does not provide any clues for this issue.

5.3 This leaves room for imponderables that may cause even "green-minded" companies to refrain from progressing their ESG-related plans – all the more so when taking into account the "first-mover disadvantage": Companies distinguishing themselves from their competitors in terms of animal welfare, environmental protection standards or other ESG objectives will immediately incur higher costs but often without any comfort that their initiative will result in a competitive advantage. An antitrust enforcement environment which has no settled fundamentals for "green competition law" and hinges on specific cases (the outcome and duration of which can hardly be predicted) may then further discourage green cooperation and thus green innovation.

6. The Road Ahead

A lot is at stake here and the FCO is not blind to the issues set out above. Already in 2020, it had raised the question "whether it should stick to its practice of primarily taking the goals of climate protection and other public welfare concerns into account within its discretion in taking up cases", noting "the debate on guidelines for dealing with sustainability initiatives will not die down" [*9*]. For the time being, however, it seems completely open whether and how the FCO will address "green competition" law from a more fundamental perspective and complement its

case-by-case approach. One thing is certain though: we can expect the road ahead to be paved with exciting new developments in Germany as well as in Europe – in particular when taking into account the EU Commission's current thinking on the subject [*10*] and legislative developments at national level. [*11*]

[*1*] Act against Restraints of Competition

[*2*] FCO, Activity Report 2019/2020, p. 13 (only available in German).

[*3*] FCO, Annual Report 2020/2021, p. 46 (only available in German).

[*4*] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347 20.12.2013, p. 671).

[*5*] Notably, even if the ADM had successfully demonstrated a pursuit of such objectives, the provision would still require that the resulting benefits for the public interest outweigh the disadvantages for consumers. Furthermore, only restrictions that are indispensable for achieving the objective(s) in question are exempted.

[*6*] Interview with Frankfurter Allgemeine Zeitung, 17 September 2021, p. 26 (only available in Germany).

[*7*] These are the three cases discussed here as well as the Fairtrade initiative on trade in agricultural products (see FCO, Activity Report 2017/2018, p. 52 (only available in German). By contrast, there is virtually no information at all with regards to other known projects, i.e. (1) the Alliance for Sustainable Textiles ("Green Button"), (2) a retail initiative to reduce the use of plastic shopping bags, (3) a beverage manufacturers' initiative to avoid advertising alcopops and sugary drinks in schools, and (4) an initiative to reduce fat, sugar, and salt in convenience food; these are just mentioned in an essay by FCO officials (see Engelsing/Jakobs, WuW 2019, 16 (17)).

[*8*] Background paper for the Working Group on Competition Law, "Open Markets and Sustainable Economic Activity - Public Welfare Objectives as an antitrust challenge", 1 October 2020, p. 45: "Cooperating companies cannot rely on [...] abstract public interest objectives. Instead, they must provide evidence that the consumers adversely affected are not placed in a worse position as a result of the agreement. This proof and the associated quantification of public welfare objectives come with many practical and legal problems" (only available in German).

[*9*] Background paper for the Working Group on Competition Law, "Open Markets and Sustainable Economic Activity - Public Welfare Objectives as an antitrust challenge", 1 October 2020, p. 45 (only available in German).

[*10*] Competition policy brief. 2021-01, September 2021. We have further discussed this here.

[*11*] For instance, effective 10 September 2021, Austria has amended its Federal Cartel Act, which now clearly allows for an individual exemption from the ban on cartels in "green cases". Section 2(1) 2nd sentence now reads: "Consumers shall also be deemed to enjoy a fair share of the

benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy".