



Bundeskartellamt



Offene Märkte | Fairer Wettbewerb

# **Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice**

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Background paper



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## A. Introduction

Social and ecological aspects are gaining more and more attention in the public and political debate. Sustainable management of available resources has been playing an increasingly important role for consumers, policy makers and businesses. Already in 2018, the German government acknowledged the *United Nations' 2030 Agenda for Sustainable Development* as a reference framework for German policies and endorsed the agenda's 17 sustainable development goals.<sup>1</sup> The German government has called on businesses to safeguard the protection of human rights and social standards in value and supply chains.<sup>2</sup> In late 2019, the European Commission presented the *European Green Deal* as a roadmap for a sustainable EU economy, planning to reduce EU-wide greenhouse gas emissions to net zero by 2050.<sup>3</sup> For large businesses, in particular, specific sustainability issues are important in view of the capital market: The majority of large German investors base their investment decisions not only on economic criteria, but also on sustainability criteria.<sup>4</sup> Some international key investors, e.g. the Norwegian Government Pension Fund Global, also take into account specific sustainability criteria.<sup>5</sup> Against this background some stock market indices have been established, such as the Dow Jones Sustainability Indices (DJSI) or FTSE4Good, which place specific sustainability requirements on the listed companies.<sup>6</sup> In early March 2020, Deutsche Börse Group

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<sup>1</sup> Cf. coalition agreement between the CDU, CSU and SPD parties – 19th legislative period, p. 18. The 2030 Agenda for Sustainable Development was adopted by all member states during a UN Special Summit in 2015. 17 sustainable development goals form the core of the agenda which aims to achieve a socially, ecologically and economically sustainable global development. The 2030 Agenda can be downloaded from [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E).

<sup>2</sup> Cf. *Federal Government*, National Action Plan- Implementation of the UN Guiding Principles on Business and Human Rights, 2016-2020, p. 19 f., available at <https://www.bundesregierung.de/breg-en/service/information-material-issued-by-the-federal-government/national-action-plan-implementation-of-the-un-united-nations-guiding-principles-on-business-and-human-rights-1524198>.

<sup>3</sup> Cf. *European Commission*, A European Green Deal, available at [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en).

<sup>4</sup> According to a survey published in 2019 by Union Investment, 92 percent of the capital management companies surveyed and 86 percent of all church investors in Germany consider sustainability criteria in their capital investment decisions. Cf. *Union Investment*, Ergebnisbericht zur Nachhaltigkeitsstudie 2019, available (in German) at <https://unternehmen.union-investment.de/startseite-unternehmen/presseservice/pressemitteilungen/alle-pressemitteilungen/2019/Zahl-nachhaltig-anlegender-Investoren-erreicht-Rekordstand.html>.

<sup>5</sup> Apart from other criteria, the Norwegian Government Pension Fund Global also takes into account sustainability aspects in its investment decisions. Each year the fund assesses the environmental performance of its company portfolio based on the Global Real Estate Sustainability Benchmark. Cf. *Central Bank of Norway*, Government Pension Fund Global Annual Report 2019, pp. 73 ff., available at <https://www.nbim.no/en/the-fund/how-we-invest/>.

<sup>6</sup> The DJSI are among the best-known stock indices that take into account not only economic but also ecological and social criteria. Cf. *Hoffknecht*, Messlatten für Anlagen mit Moral, Handelsblatt.com, 11 November 2006, available (in German) at <https://www.handelsblatt.com/finanzen/maerkte/anlegerakademie/nachhaltigkeitsindizes-messlatten-fuer-anlagen-mit-moral/2731684.html>. The FTSE4GOOD indices include companies with a particular focus on

introduced its DAX 50 ESG Index which only lists companies that fulfil specific requirements.<sup>7</sup> The data required are provided by rating agencies specialising in the analysis of sustainability efforts undertaken by companies.<sup>8</sup> In June 2020, the European Central Bank announced its support for the European Commission’s work to develop a sustainable finance strategy.<sup>9</sup> There are also indications of an increased awareness about sustainability issues among German consumers.<sup>10</sup>

Many businesses thus have an incentive to go beyond the applicable legal provisions and steer their entrepreneurial activities towards sustainable development or public interest objectives. The increased public interest in social and ecological standards thus has an effect on established economic structures; sustainability is developing into a competition parameter. Where businesses adjust their production and procurement policies to also accommodate specific public interest aspects, this will inevitably have an effect on, e.g., their procurement policy (input products that have not been produced sustainably are not to be purchased) and pricing policy (higher procurement and production costs are priced in).<sup>11</sup>

It should be noted first of all that there is no general contradiction between public interest objectives and the objective to protect competition. Safeguarding competition will usually also lead to public interest goals being achieved, especially where customers expect this achievement. There is therefore a certain complementarity between the objectives of protecting competition and achieving public interest objectives. In some scenarios, however, there can be a conflict between the objectives of protecting competition and pursuing public

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corporate social responsibility. Income from licences and other FTSE4GOOD-related income is donated to UNICEF. Cf. Nachhaltiges Investment database: FTSE4GOOD, available (in German) at <https://www.nachhaltiges-investment.org/Indizes/Datenbank/Indexbildung.aspx?idIndex=6#:~:text=FTSE4GOOD%20ist%20eine%20Familie%20von,FTSE4GOOD%20werden%20an%20UNICEF%20gespendet.>

<sup>7</sup> ESG stands for Environmental, Social, Governance. Cf. *Deutsche Börse*, press release of 4 March 2020, available at <https://www.deutsche-boerse.com/dbg-en/media/press-releases/New-DAX-index-focuses-on-sustainability-1786626>

<sup>8</sup> The data for the DAX 50 ESG Index are provided by the rating agency Sustainalytics which specialises in such assessments. Cf. *Willmroth*, Ein grüner Dax für den Aktienmarkt, *Sueddeutsche.de*, 5 March 2020, available (in German) at <https://www.sueddeutsche.de/wirtschaft/dax-50-esg-geldanlage-1.4832576>.

<sup>9</sup> Cf. *EZB*, Eurosystems reply to the European Commission’s public consultations on the Renewed Sustainable Finance Strategy and the revision of the Non-Financial Reporting Directive, 6 August 2020, available at [https://www.ecb.europa.eu/pub/pdf/other/ecb.eurosystemreplyeuropeancommissionpublicconsultations\\_20200608~cf01a984aa.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/ecb.eurosystemreplyeuropeancommissionpublicconsultations_20200608~cf01a984aa.en.pdf). The President of the ECB, Christine Lagarde, also recently emphasized in an interview that climate change had an impact on price stability and should therefore be taken into account by the ECB. Cf. the transcript of the video interview with the *Financial Times* of 7 July 2020, downloadable from <https://www.ecb.europa.eu/press/inter/date/2020/html/ecb.in200708~8418847210.en.html>.

<sup>10</sup> Cf. for example: *GroupM research unit M Science*, survey “Spotlight: Nachhaltiger Konsum”, carried out between 25 April and 6 May 2019, available (in German) at <https://campus.groupm.de/artikel/spotlight-nachhaltiger-konsum-wirkt-der-greta-effekt-2/>.

<sup>11</sup> Cf. *Lübbig*, Nachhaltigkeit als Kartellthematik, *WuW* 2012, p. 1146.



interests, generally caused by market failure or distribution problems.<sup>12</sup> Apart from state-regulation approaches which pursue public interest objectives by setting binding rules or providing relevant incentives, the public debate has also increasingly considered that types of cooperation based on private self-regulation which, beyond price and quality, place an emphasis on public interest objectives, can represent a problem-solving mechanism.

Whereas the unilateral pursuit of public interest objectives by businesses is generally unproblematic under competition law, types of cooperation based on private self-regulation between companies for the purpose of achieving public interest objectives (as e.g. so-called sustainability initiatives) must be examined under competition law.<sup>13</sup> Mere compliance with state-imposed rules will generally not lead to a conflict with competition law: Merely acknowledging legal conformity does not represent a restriction of competition, not even if several companies jointly acknowledge this in a code of conduct which only includes this specific promise. Only agreements which include voluntary additional obligations with regard to public interests can lead to scrutiny under competition law.<sup>14</sup> Many aspects of how to assess such forms of cooperation which go beyond compliance with legal requirements in terms of competition law are, however, still largely unclear and the subject of an ongoing debate.

This is reason enough to shed some light on the questions and challenges for competition law practice, in particular those posed by so-called sustainability initiatives and other types of cooperation based on private self-regulation.

These issues are becoming particularly relevant in view of the urgent problem of global warming. Compared with other sources of structural change, global warming is different in terms of its dimension, irreversibility, non-linearity and its significant (social) effects. An additional aspect is the fact that the further development of climate change in the long term depends on policy measures that must be taken in the short term.

It is primarily the task of democratically elected policy makers to mitigate climate change. However, the structure and dimension of this problem make it necessary for a broader spectrum of players, consumers and, in particular, globally active companies, to change their behaviour.

Can competition law be opposed to cooperations which, for example, aim to achieve a reduction of greenhouse gas emissions if this aim necessarily involves a restriction of competition? What is the basis for a competition authority's decision on which public interest

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<sup>12</sup> Cf. *Schwalbe*, in: *Politischer Einfluss auf Wettbewerbsentscheidungen: Fusionskontrolle und Industriepolitik*, Baden-Baden 2015, pp. 48 – 56.

<sup>13</sup> *Engelsing*, in: *Der Betrieb* 2020 (No. 10), M4.

<sup>14</sup> *Zimmer*, in: *Immenga/Mestmäcker*, Art. 101 AEUV, para. 115; *Ackermann*, in: *CSR und Fairness im Wettbewerb: Corporate Social Responsibility und Kartellrecht*, 2014, pp. 147 – 157.



objectives should legitimately be pursued even by using anti-competitive measures? How can we ensure that an agreement really serves to reach climate goals and that, for example, it is not mainly used to push through uniform price increases? This paper will discuss these questions as well as issues involving other public interest objectives.

From an economic perspective, Part B first of all identifies causes for conflicting goals pursued by the protection of competition and public interest objectives and examines the question as to the circumstances under which an intervention into market development could make sense. Part C deals with the assessment under competition law of types of cooperation based on private self-regulation within the framework of the prohibition of anti-competitive agreements. Part D provides an overview of how the Bundeskartellamt has so far handled sustainability initiatives and compares this to the approach taken by other European competition authorities. Part E deals with the issue of whether and to what extent public interest objectives can be taken into account within the framework of merger control decisions.

## **B. Public interest objectives and the protection of competition**

First of all, it must be noted that the objectives promoted by the protection of competition, e.g. optimisation of resource allocation, technical progress and welfare in general, per se represent public interest objectives. Furthermore, competition law enforcement generally has a (direct or indirect) positive effect on other public interest objectives. The public interest objective of achieving a high level of employment can probably best be achieved if companies can successfully compete against competitors, even from abroad, by offering products and services of higher quality.<sup>15</sup> It is probably also evident that the industrial policy objective of achieving competitiveness of the industry (cf. e.g. Article 173(1) TFEU) can best be realised in a system of open markets and undistorted competition.<sup>16</sup> Cartels can lower the incentive for innovations or prevent innovations from being used, which could also affect other public interest objectives, such as climate protection.<sup>17</sup>

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<sup>15</sup> *Schwalbe*, in: Politischer Einfluss auf Wettbewerbsentscheidungen: Fusionskontrolle und Industriepolitik, Baden-Baden 2015, pp. 50 f.

<sup>16</sup> *Breuer*, Das EU- Kartellrecht im Kraftfeld der Unionsziele, Baden- Baden 2013, pp. 121 ff. with further references.

<sup>17</sup> One example is the proceeding conducted by the European Commission on account of restrictions of competition in the area of emission cleaning technology for new diesel and petrol passenger cars, see press release of 5 April 2019 on the Commission's concerns, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_2008](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008).





Conflicts between the objectives of protecting competition and pursuing public interest objectives can, however, exist in other scenarios.<sup>18</sup> This can be the case where, in their decision-making processes, market participants do not or only partly take into account public interest aspects which have an impact on third parties, as e.g. environmental protection. Where such conflicts arise, they are usually related to market failures.<sup>19</sup> Market failure occurs where the market mechanism of supply and demand does not produce the results that would be desirable from an economic perspective and where the production factors are not used to produce the highest possible rates of return for the economy as a whole.<sup>20</sup> Externalities are one of the crucial causes for market failure. Also information asymmetries as well as cognitive biases, as described by behavioural economics, can have an impact on the market result and lead to market failure (see I.).<sup>21</sup>

From an economic perspective, intervention in the market process must always be based on a specific justification. Intervention is advisable only where an increase in welfare can actually be achieved. For this purpose it is necessary to determine which remedy and which actor would best be suited to eliminate potential inefficiencies. Also from a political and constitutional law perspective the question must be addressed as to which actor would be entitled or best placed to weigh up conflicting competition and public interest objectives (see II.).

### I. Causes of market failure

Externalities can result in market failure. It is an essential feature of externalities that they have no impact on those who caused them as no relationship based on the price or market mechanism exists between those causing the effects and those affected by them, nor is there

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<sup>18</sup>In this context it should be emphasized that there can even be conflicts between individual public interest objectives. Environmental and social objectives, for example, can often be in conflict with each other: It is not very likely that a higher degree of animal welfare could be achieved without higher prices for meat, which in turn could be problematic for poorer parts of the population.

<sup>19</sup> Allocation issues can also be the cause of conflicting objectives. As economic theory generally assesses the efficiency of allocations based on the Pareto criterion, which is deliberately designed to leave aside allocation issues, public interest objectives and the objectives of the protection of competition can be in conflict with each other in this area as well. Cf. *Schwalbe*, in: *Politischer Einfluss auf Wettbewerbsentscheidungen: Fusionskontrolle und Industriepolitik*, Baden-Baden 2015, pp. 51 f.

<sup>20</sup> Cf. *Bundeszentrale für politische Bildung*, *Marktversagen*, available (in German) at <https://www.bpb.de/nachschlagen/lexika/lexikon-der-wirtschaft/20088/marktversagen>. For a detailed analysis of the possible causes of malfunctioning markets, see *Fritsch et al.*, *Marktversagen und Wirtschaftspolitik*, 7th edition, 2007.

<sup>21</sup>Rising economies of scale (natural monopolies) are seen as a further cause of market failure. In this context market failure due to indivisibility is also discussed. Cf. *Fritsch et al.*, *Marktversagen und Wirtschaftspolitik*, 7th edition, 2007, pp. 185 ff.



any other contractual relationship.<sup>22</sup> As those who cause externalities do not take into account the consequences of their behaviour for others, this leads to a misallocation of resources in the market. In theory, this misallocation can be completely eliminated by internalising the loss or gain of utility caused by the externalities. Internalisation can be achieved in different ways: private approaches to internalisation (contractual provisions) can be considered as well as approaches to internalisation adopted by the state (taxes, certificates, rules). Internalising externalities always requires a monetisation of the externalities or the general welfare aspects associated with this. However, the monetisation of externalities involves numerous practical as well as normative problems, which will be discussed in more detail in Section C II.1.

Information asymmetries also often lead to misallocation and thus to market failure. In particular, this also applies to the conditions in place during the production processes with regard to, e.g., environmental, labour or animal welfare standards. Such aspects often cannot be determined by analysing the end product itself, but are likely to be relevant for the purchasing decisions made by many consumers. The features of a product that are relevant to consumers can be classified in three categories.<sup>23</sup> First of all, there are search qualities that consumers can evaluate prior to making a purchase (e.g. surface properties). There are also experience qualities which consumers can only evaluate after the product has been purchased and experienced (e.g. wear characteristics). And finally there are credence qualities<sup>24</sup> which can neither be determined before nor after the purchasing decision and which therefore cannot be evaluated by the consumer (for example compliance with relevant standards in the production of so-called organic products). To some extent guarantees and quality labels can avoid misallocation caused by information asymmetries and, with regard to the experience qualities of goods, result in an improved market result because while consumers can only check whether a promised experience feature exists after the product has been purchased, they can do so while using it. In the case of credence qualities, however, guarantees are of no use, and the benefit of private quality labels is very limited: Whereas it is simply impossible to determine a guarantee case for credence qualities, private quality labels merely shift the information asymmetry problem to a different level. Consumers would have to be in a position enabling them to determine the reliability of a private quality label. As they have no comprehensive insight into how private quality labels are awarded and implemented, they have no or only limited means to ascertain whether the label is reliable or not. In this respect

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<sup>22</sup>Cf. Springer Gabler Verlag (ed.), Gabler Wirtschaftslexikon, entry: Externe Effekte, available (in German) at <https://wirtschaftslexikon.gabler.de/definition/externer-effekt-34801/version-372602> (last accessed on 2 December 2019).

<sup>23</sup> Cf. Kirchgeorg, in: Gabler Wirtschaftslexikon: Gütertypologie, available (in German) at <https://wirtschaftslexikon.gabler.de/definition/guetertypologie-34393/version-257896>.

<sup>24</sup> Concept formed by: *Darbi and Karni* (1973), Free competition and the optimal amount of fraud. *Journal of Law and Economics*, vol. 16, pp. 67 – 88.

the design and transparency of the quality label as well as the degree to which its implementation can be checked (by third parties) is crucial in each individual case. The best way to completely overcome market failure in the case of credence qualities is probably to establish legal provisions on how to mark and monitor them.

Market failure can also be caused by consumer behaviour that is not fully rational.<sup>25</sup> In behavioural economics, a number of errors of judgement that people typically make have meanwhile been identified. In economic literature, the reasons for the bounded rationality of consumers<sup>26</sup> are described in various ways. Among the deviations from the standard assumption of a *homo oeconomicus*, which are particularly relevant in the assessment of sustainability and public interest aspects, are e.g. hyperbolic discounting and heuristics.<sup>27</sup>

The concept of hyperbolic discounting describes temporary aspects of bounded rationality.<sup>28</sup> The most important consequence of hyperbolic discounting is that it creates preferences for smaller rewards that occur sooner over larger, more delayed rewards.<sup>29</sup> Many people thus strongly tend to make decisions that are inconsistent over time – they make decisions today

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<sup>25</sup> See also *Volpin (2020)*, Sustainability as a Quality Dimension of Competition: Protecting our Future (Selves), CPI Antitrust Chronicle, vol. 1 (2), pp. 9 – 19.

<sup>26</sup> It is generally conceivable that bounded rationality exists not only at consumer level but also on the part of undertakings, which is argued e.g. by *Armstrong and Huck (2015)*, Behavioral Economics and Antitrust, in: The Oxford Handbook of International Antitrust Economics, vol. 1, chapter 9, Oxford University Press. *Haucap (2014)*, Implikationen der Verhaltensökonomik für die Wettbewerbspolitik, DICE Ordnungspolitische Perspektiven Nr. 65, applies the theory of bounded rationality also to regulatory authorities. However, in most model approaches in behavioural economics it is assumed that only customers deviate from the assumptions on which the economic standard models are based and the undertakings depicted in the models are usually rational players that maximise their expected (long-term) overall profit. The background to this is, among other aspects, the fact that undertakings are usually in a position to use a sufficient amount of resources to act rationally in the relevant market, whereas consumers will dedicate only some of their attention to a certain market, cf. *Spiegler (2011)*, Bounded Rationality and Industrial Organization, Oxford University Press.

<sup>27</sup> Cf. e.g. *Spiegler (2011)*, Bounded Rationality and Industrial Organization, Oxford University Press; and *Grubb (2015)*, Behavioral Consumers in Industrial Organization: An Overview, Review of Industrial Organization, 47(3), pp. 247-258. In addition to the aspects of bounded rationality mentioned here, other deviations from the standard assumption of the consumer as *homo oeconomicus* are also addressed in literature and research. Examples include altruism, reciprocity and the idea of fairness. In these cases, the benefits enjoyed by various consumers are interdependent. In this regard, cf.: *Fehr and Schmidt (2006)*, The Economics of Fairness, Reciprocity and Altruism – Experimental Evidence and New Theories, Handbook of the Economics of Giving, Altruism and Reciprocity, volume 1, pp. 615– 691.

<sup>28</sup> Cf. *Laibson (1997)*. Golden eggs and hyperbolic discounting. The Quarterly Journal of Economics, 112(2), pp. 443 – 478.

<sup>29</sup> This dynamic inconsistency occurs because in the case of hyperbolic discounting the decrease in utility during short delay periods is rapid, whereas it decreases more slowly during longer delay periods. In other words, hyperbolic discounting leads to people being more impatient during shorter delays than during longer delays. For example, they prefer to receive two apples in 101 days rather than one apple in 100 days, but they are not prepared to go without an apple today in return for receiving two apples tomorrow.



(e.g. refusing a global CO<sub>2</sub> tax) which their future selves would rather not have made, although in both cases they are aware of the same facts (future consequences for the climate).

A further deviation from the standard assumption of a *homo oeconomicus*, which is particularly relevant in the assessment of sustainability and public interest aspects, is heuristics. Whereas the notion of *homo oeconomicus* assumes that consumers know and consider the available information relevant for their decisions, real consumers whose rationality is bounded sometimes make their decisions without taking into account all the information that is known to them or at least easily accessible. Instead of systematically analysing the options available, they decide more or less intuitively (“rule of thumb”). Heuristics can be a useful shortcut for fast decisions, and can often be rational under the existing circumstances, but can also lead to sub-optimal results. Consumers can make mistakes in the assessment of prices and product properties, which suppliers can exploit in the design and content of the information they provide. The problem becomes even more acute in the context of sustainability and environmental protection aspects as consumers must gather information about a large number of aspects at the same time. There can be substantial heterogeneity between the environmental friendliness of a product and its packaging, distribution and transport processes (e.g. wooden cutlery wrapped in plastic foil). Furthermore, an individual consumer can hardly gain an overview of the complex effect mechanisms of a global production chain and its natural-scientific interdependencies.

## II. Legislative measures and private self-regulation

### 1. Economic perspective

From an economic perspective, interventions into market processes can be justified where the proper functioning of markets is impeded. According to economic theory, an intervention into market processes should only take place where this could actually achieve increased welfare. Interventions into market processes will not always bring about better market results. Sometimes decision makers lack relevant information that is required to improve a market result.<sup>30</sup>

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<sup>30</sup> Cf. *Fritsch et al.*, *Marktversagen und Wirtschaftspolitik*, 7th ed., 2007, pp. 83 f.

If intervention can improve the market result, the next step is to ask which tool would be suitable for this purpose. Depending on the type of market failure, several solution approaches are generally available. Apart from a number of different state-imposed measures, such as prohibition, subsidies and taxes, types of cooperation based on private self-regulation and other measures taken by private players can contribute to reducing externalities.

The question of which types of intervention used by which type of player could be most suitable to improve the market result can hardly be answered in general terms based on economic literature and must be analysed in each individual case. In specific cases it can be preferable to choose market self-correction rather than state-imposed measures: *Ronald H. Coase* has pointed out that in the case of externalities the state need not necessarily intervene in the market processes as those that caused externalities and those that were affected could possibly bring about internalisation themselves by way of negotiation.<sup>31</sup> On the other hand, the market's options for self-correction are limited. Negotiations within the meaning of *Coase* reach their limits where transaction costs are high or where information asymmetries exist between the negotiating parties. A private negotiation approach is also excluded if e.g. those affected by externalities have not yet been born.

## 2. Distribution of competences between different players

From a political point of view there is a clear answer to the question of which players – the lawmaker, businesses or competition authorities – are best suited to enforce, define and balance public interests and competition interests. As a matter of principle, the lawmaker should be in charge of this as it has the strongest degree of democratic legitimacy for striking a balance between conflicting social interests. The lawmaker can implement individual public interest objectives quickly and effectively (e.g. minimum requirements for livestock production, prohibition of production techniques that are damaging to the environment). In recent years, however, there has been a growing trend in politics to increasingly rely on corporate initiatives for specific sectors. Examples are animal welfare in meat production or extraterritorial compliance with human rights standards in certain supply chains, e.g. in the textile sector. However, it has to be pointed out that in certain sectors a trend reversal can be observed with a return to more state-imposed rules. For example the Federal Ministry of Food and Agriculture (BMEL) has proposed the introduction of a state animal welfare label.<sup>32</sup> Apart

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<sup>31</sup> Cf. *Coase* (1960), *The Problem of Social Cost*, *Journal of Law and Economics*, vol. 3, pp. 1 – 44.

<sup>32</sup> Cf. *BMEL*, *Tierschutzlabel*, available (in German) at

[https://www.bmel.de/DE/themen/tiere/tierschutz/tierwohl-kennzeichen/tierwohl-kennzeichen\\_node.html](https://www.bmel.de/DE/themen/tiere/tierschutz/tierwohl-kennzeichen/tierwohl-kennzeichen_node.html).

Furthermore, key elements of a supply chain law have been developed. Cf. *Federal Ministry for Economic Cooperation and Development (Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung*,



from state initiatives, more and more sectors have seen private business cooperations setting sustainability standards or other standards that pursue public interest objectives.

This always raises the question of whether cooperations between private businesses, which generally also have their own interests in mind, are an adequate substitute for the democratically elected lawmaker and the procedural requirements of the legislative process.<sup>33</sup> Businesses are generally free to set unilateral social or environmental standards for themselves that go beyond the statutory requirements. However, private businesses have no democratic legitimacy for jointly enforcing the over-fulfilment of statutory requirements to the disadvantage of consumers. Neither can decisions made by competition authorities and cartel courts replace a lawmaker's decision that strikes a balance between opposing public and competition interests.

If a decision balancing opposing social interests is taken by the lawmaker, i.e. in line with the desirable division of roles from a dogmatic point of view, conflicts between competition law and public interests can be almost excluded. In such a case the competition authorities simply accept the non-competition related statutory provisions and only deal with possible excessive restraints of competition that would not be required for the fulfilment of these provisions or the achievement of the respective public interest objectives.

Examples of how ecological objectives can be achieved and weighed up against competition goals, while at the same time maintaining the division of roles between businesses, the lawmaker and the competition authority, are several proceedings conducted by the Bundeskartellamt with regard to different take-back systems for packaging (Duales System Deutschland – DSD), electrical and electronic waste, batteries or the bottle deposit scheme. In these proceedings, statutory provisions led to the creation of new market relations or new markets in the form of take-back systems. To the extent that these take-back systems involved the necessity of cooperation between competitors, the Bundeskartellamt was able to take steps to ensure that this cooperation was limited to necessary measures and that the newly emerging market relationships were based as much as possible on competition. For example, the Bundeskartellamt comprehensively monitored the development of the DSD system to ensure that the cooperation between the parties would not restrain competition to an extent that was not essentially necessary for implementing the take-back system.

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BMZ), Faire globale Liefer- und Wertschöpfungsketten, available (in German) at <https://www.bmz.de/de/themen/lieferketten/index.html>.

<sup>33</sup> Cf. *Schweitzer*, in: Politischer Einfluss auf Wettbewerbsentscheidungen: Die Bedeutung nicht-wettbewerblicher Aspekte für die Auslegung von Art. 101 AEUV im Licht der Querschnittsklauseln, Baden-Baden 2015, p. 22.



Only in exceptional cases, i.e. only where a type of cooperation based on private self-regulation is in fact the most suitable approach to achieve the respective public interest objective, should the lawmaker refrain from stipulating its own provisions and allow the parties to use types of cooperation based on private self-regulation.<sup>34</sup> Where businesses engage in such types of cooperation based on private self-regulation in order to achieve public interest objectives, these types of cooperation must be examined under competition law. The ensuing questions as to whether and to what extent public interest objectives can be taken into account within the framework of the prohibition of anti-competitive agreements will be dealt with in the next section.

### **C. Public interest aspects in decisions under Article 101 TFEU**

When discussing the role of public interest objectives within the context of Article 101 TFEU, the question is whether businesses are entitled to (jointly) define and enforce public interest objectives and to weigh them up against other objectives if the democratically elected lawmaker has refrained from stipulating relevant provisions. It must therefore be asked whether, based on public interest considerations, businesses should be able to enter into agreements which restrict or even eliminate competition.<sup>35</sup>

It should be noted first of all that cooperations or types of private self-regulation which pursue public interest objectives often do not restrict competition at all and thus do not come under the scope of application of the prohibition of anti-competitive agreements. For example, cooperations creating labels which are not binding or exclusive and which thus enable the parallel production and distribution of “conventional” products generally provide consumers with more choice and do not restrict competition. If, however, types of cooperation based on private self-regulation involve restraints of competition because they exclude the parallel distribution of “conventional”, possibly cheaper products or include agreements on, for example, price components, the question arises as to the extent to which public interest objectives can be taken into account within the scope of Article 101 TFEU.

Irrespective of the individual case under review, this question can be divided into two sub-questions: First of all, the question of whether a restraint of competition can be shown to exist within the meaning of Article 101(1) TFEU and how the pursuit of public interest objectives could be taken into account (see I.). Furthermore, the question arises as to the extent to which public interest objectives can justify an exemption from the prohibition of anti-competitive

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<sup>34</sup>This could be the case for example where types of cooperation based on private self-regulation can be implemented faster than state-imposed measures. A similar approach could apply in situations which concern global problems but where no supranational legislative competences exist.

<sup>35</sup> Cf. *Schweitzer*, in: *Politischer Einfluss auf Wettbewerbsentscheidungen: Die Bedeutung nicht-wettbewerblicher Aspekte für die Auslegung von Art. 101 AEUV im Licht der Querschnittsklauseln*, Baden-Baden 2015, p. 21.





agreements pursuant to Article 101(3) TFEU, which would mean that such an exemption could be considered for types of cooperation based on private self-regulation (see II.).

## I. Article 101(1) TFEU

The first possible starting point for a consideration of public interest objectives is the decision on the scope of application of the prohibition of anti-competitive agreements. The literature includes various considerations on how to take into account public interest objectives within the scope of Article 101(1) TFEU. The basis and content of these considerations will be discussed in more detail in the following section.

### 1. Public interest criteria as technical standards

Cooperations which define requirements relating to public interest objectives can be seen as technical standards or quality marks which can be exempted from the scope of application of the prohibition of anti-competitive agreements if they fulfil specific conditions.<sup>36</sup>

Technical standards define technical or quality requirements that have to be met by products and production processes. In accordance with the European Commission's guidelines on horizontal co-operation ("Horizontal Guidelines") the essential purpose of standardisation agreements is the definition by recognised standardisation bodies, consortia, fora or agreements between independent companies of technical or quality requirements that have to be met by current or future products, production processes, services and methods. The Horizontal Guidelines also cover agreements setting out standards on the environmental performance of products or production processes. The terms of access to a particular quality mark can also represent a standard.<sup>37</sup>

The European Commission's Horizontal Guidelines include principles for the assessment of standardisation agreements and quality mark associations under competition law. The guidelines also include a statement pointing out that standards can potentially give rise to restrictive effects on competition.<sup>38</sup> Under specific circumstances, however, standards will not normally be considered to restrict competition within the meaning of Article 101(1).<sup>39</sup>

The question as to the extent to which the considerations on jointly developed technical specifications and quality marks can also apply to standards relating to public interest aspects

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<sup>36</sup> Cf. *Engelsing and Jakobs* (2019), *Nachhaltigkeit und Wettbewerb*, WuW, No. 1, pp. 16, 18 f. The considerations made in this paper directly relate to sustainability criteria.

<sup>37</sup> Cf. *European Commission*, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ (EU) C11/1 of 14 January 2011, para. 257.

<sup>38</sup> Cf. *ibid.*, para. 264.

<sup>39</sup> Cf. *ibid.*, para. 280.





will depend on the type of cooperation and the public interest aspect actually concerned. This could probably be applicable in particular to non-binding standards relating to environmental protection aspects as the provisions on standardisation agreements also explicitly apply to agreements setting out standards for the environmental performance of products or production processes.<sup>40</sup>

From a technical point of view, public interest aspects, as e.g. working conditions in developing countries, are not directly connected with the quality of the product concerned since better working conditions will not necessarily result in higher product quality. The question of what can be considered the quality characteristic of a product must, however, be answered from the consumer's point of view. The case law on selective distribution systems has acknowledged that what is seen by consumers as a product's "aura of luxury" can be a quality characteristic even if, in terms of its substance or technical quality, the product does not differ from other products that are not described as having such an aura.<sup>41</sup> It is therefore conceivable that certain requirements relating to public interest aspects which result in improving the quality of a product "only" from the consumer's point of view can also be classified as a quality characteristic.

The Horizontal Guidelines also deem that standardisation agreements will generally raise no concerns only in cases where they do not include the obligation to comply with a specific standard. The scenarios which are in fact problematic from a competition law perspective, e.g. in the case of minimum standards and labels, are those in which the participating companies undertake to produce or supply only products that comply with a specific standard.<sup>42</sup>

## 2. Case law on self-regulation by professional associations

Furthermore, in accordance with the reasoning of the Court of Justice of the European Union (CJEU) in its *Wouters* judgment<sup>43</sup>, anti-competitive types of cooperation based on private self-regulation might not fall under the prohibition of restrictive agreements if the (main) agreements restricting competition are necessary for the fulfilment of a regulating or supervisory task. In its *Wouters* judgment the CJEU decided on the compatibility of a regulation adopted by the Netherlands Bar Association with Article 101(1) TFEU. The regulation prohibited lawyers practising in the Netherlands from entering into multi-disciplinary partnerships with members of the professional category of accountants in order to safeguard the independence of legal advice and to avoid conflicts of interest. The CJEU

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<sup>40</sup> Cf. *ibid.*, para. 257.

<sup>41</sup> Cf. *Krauβ*, in: Langen/Bunte, *GWB*, 13th ed., Section 1 *GWB*, para. 262.

<sup>42</sup> The Horizontal Guidelines take a critical view on these cases, see paras. 280,293.

<sup>43</sup> CJEU, judgment of 19 February 2002, case no. C-309/99 – *Wouters*.



reached the conclusion that the regulation did not violate Article 101(1) TFEU since the Bar Association could reasonably have considered that the regulation, despite the effects restrictive of competition that were inherent in it, was necessary for the proper practice of the legal profession.<sup>44</sup> The CJEU held that not every agreement between undertakings which restricts the freedom of action of the parties necessarily falls within the prohibition laid down in Article 101(1) TFEU:

“For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience [...]. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.”

In accordance with the judgment of the CJEU, deontological objectives could thus narrow the scope of application of Article 101(1) TFEU. The dogmatic foundation on which the Court’s opinion is based is hard to determine and subject to ongoing debate.<sup>45</sup> It is unclear in particular whether the reasoning of the *Wouters* decision is only applicable if either law enforcement powers are delegated by the state to companies or their associations or if these have autonomy rights. It is also unclear on which basis such autonomy rights can be established.

In several follow-on decisions the CJEU has taken into account non-competition related objectives within the scope of Article 101(1) TFEU and referred to the *Wouters* decision. For example, the CJEU held that Article 101(1) TFEU was not applicable inter alia to anti-competitive practices that safeguard the integrity of competitive sport (anti-doping rules in *Meca-Medina*<sup>46</sup>), ensure the quality of the services offered by chartered accountants (restriction of access to the market of compulsory training in *OTO*<sup>47</sup>) or provide guarantees

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<sup>44</sup> CJEU, judgment of 19 February 2002, case no. C-309/99, para. 110 – *Wouters*.

<sup>45</sup> For details on this, see *Breuer*, *Das EU-Kartellrecht im Kraftfeld der Unionsziele*, Baden-Baden 2013, pp. 548 ff.

<sup>46</sup> CJEU, judgment of 18 July 2006, case no. C-519/04P – *Meca-Medina*.

<sup>47</sup> CJEU, judgment of 28 February 2013, case no. C-1/12 – *OTO*. In this case, however, the CJEU reached the conclusion that the restrictions of competition involved in the agreement appear to go beyond what is necessary to safeguard the quality of the services offered by chartered accountants. Cf. CJEU, judgment of 28 February 2013, case no. C-1/12, para. 93-100.



for users of a service (price control applied by an association of geologists in *Consiglio nazionale di geologi*<sup>48</sup>).<sup>49</sup>

### 3. Exception for necessary anti-competitive practices?

The question also arises as to whether a full exception from the prohibition of anti-competitive agreements can be made for sustainability initiatives. Such a line of argumentation could be based on the *Albany* decision of the CJEU.<sup>50</sup> The CJEU had to make a decision on whether a compulsory collective agreement for the Netherlands textile sector based on which a pension fund was set up was permissible under competition law.<sup>51</sup> The CJEU reached the conclusion that the underlying collective agreement was excluded from the scope of the prohibition of anti-competitive agreements because, according to the insights gained by the Court, the agreement contributed to improving one of the employees' working conditions, namely their remuneration.<sup>52</sup> The CJEU did not include any assessment of proportionality in its statement of reasons and thus did not weigh up the social policy objectives (improvement of working conditions) and the welfare losses to be expected, which is why it appears likely that an exception from the prohibition was found to exist.

The "*Albany*" exception was developed by the CJEU for a fundamental conflict between the principle of pay scale uniformity as recognised by primary law, and competition law. Collective agreements, by their very nature, necessarily restrict competition, i.e. price competition between employees. If a certain private practice, by its nature, results in restricting competition but is expressly recognised by European primary law, the prohibition of restraints of competition does not apply.<sup>53</sup>

It is questionable whether and to what extent types of cooperation based on private self-regulation which pursue public interest objectives can fulfil these preconditions. The horizontal clauses of the European primary law relating specifically to environmental protection (Article 11 and Article 191 TFEU), just as all other horizontal clauses, primarily address the institutions of the European Union, i.e. the lawmaker, not private persons or

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<sup>48</sup> CJEU, judgment of 18 July 2013, case no. C-136/12 - *Consiglio nazionale di geologi*.

<sup>49</sup> Cf. also *Monti and Mulder*, Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives, *European Law Review*, 2017 (5), pp. 646 f.

<sup>50</sup> CJEU, judgment of 21 September 1999, case no. C-67/96 – *Albany*.

<sup>51</sup> Apart from a statutory basic pension guaranteed by the state the pension scheme in the Netherlands provides for a "second pillar", a supplementary pension provided in the context of employment or self-employed activity. Although employers are generally free to decide whether they intend to grant their staff a supplementary pension, collective agreements in practice generally set up sectoral pension funds. Affiliation in these funds is compulsory for all workers in the sector under a regulation issued by the Minister for Social Affairs and Employment.

<sup>52</sup> Cf. CJEU, judgment of 21 September 1999, case no. C-67/96, para. 59-64 – *Albany*.

<sup>53</sup> Cf. *Breuer*, Das EU- Kartellrecht im Kraftfeld der Unionsziele, Baden- Baden 2013, pp. 616 ff.



companies.<sup>54</sup> The clauses do not automatically include anti-competitive practices by private persons or companies, nor do they explicitly endorse such practices. Against this background it seems rather unlikely that the horizontal clauses relating specifically to environmental protection could be used to justify a full exception from the prohibition of anti-competitive agreements to be made for types of cooperation based on private self-regulation on the basis of the *Albany* doctrine. Also with regard to other public interest objectives, the idea of granting an exception without having to weigh up conflicting interests has so far not been met with any relevant support.<sup>55</sup>

#### 4. Further considerations

It should also be considered whether the anti-competitive effects of private self-regulation could represent a case in which the concept of ancillary restraint or rule of reason could be applied. These doctrines are based on the following assumption: Where the parties' agreement pursues a main purpose that does not raise any concerns under competition law, a restriction of the commercial autonomy of one or more participants in that activity is not covered by the prohibition of anti-competitive agreements if the restriction is objectively necessary and proportionate with regard to the achievement of this main purpose.<sup>56</sup> The most important examples in this respect are articles of association, partnership agreements and acquisition agreements which serve a purpose that is neutral in terms of competition law, and share purchase agreements including a non-competition clause.<sup>57</sup> The application of the concept of ancillary restraint or rule of reason to agreements specifically relating to environmental protection has so far not been subject to judicial review, which in some cases, however, has been considered an opportunity.<sup>58</sup> It should, however, be at least critically discussed whether this restriction of competition can actually be seen as an ancillary restraint included in a main agreement that is neutral in terms of competition law.

It would also be conceivable that types of cooperation based on private self-regulation might profit from the concept of syndicates. If several companies join forces in order to fulfil a usually

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<sup>54</sup> Cf. *Grabitz/Hilf/Nettesheim/Simon*, Das Recht der EU, 69th update February 2020, TFEU Art. 147, para. 6 – 10.

<sup>55</sup> The sectors for which an exception in line with the *Albany* doctrine was considered include sports (*Meca-Medina*) and the rules adopted by the professional associations of liberal professions (*Wouters*). Sports associations and professional associations invoked their autonomy of association or self-administration. This aspect directly builds on the first of the two fundamental preconditions of the *Albany* doctrine. However, none of the two areas of autonomy fulfil the precondition of resulting, by purpose or nature, in restraints of competition.

<sup>56</sup> Cf. CJEU, judgment of 11 September 2014, case no. C-382/12 P, juris para. 89 – MasterCard et al./Commission with further references.

<sup>57</sup> Cf. *Krauβ* in: Langen/Bunte, *GWB*, 13th ed., Section 1 *GWB*, para. 151.

<sup>58</sup> Cf. *Holmes*, Climate Change, sustainability, and competition law, *Journal of Antitrust Enforcement*, 2020 (8), pp. 370 f.



large contract (establishing a syndicate) and agree not to submit any independent bids and not to cooperate with other companies, competition could be impeded, especially if the participating companies are active in the same sector. This generally represents a restraint of competition within the meaning of Article 101(1) TFEU, Section 1 GWB. An exception can apply, however, if the cooperation only covers products or services which none of the participants can produce or provide on their own.<sup>59</sup> In general, the companies participating in sustainability initiatives still continue to operate independently in the market.

## II. Article 101(3) TFEU

The second starting point for a consideration of public interest objectives in competition law practice is their assessment within the framework of Article 101(3) TFEU. In this respect, four conditions must be satisfied: An agreement must (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii) consumers must be allowed a fair share of the resulting efficiency gains, (iii) it must not include any restrictions which are not indispensable to the attainment of the first two objectives, and (iv) it must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products (or services) in question. Before an exemption from the prohibition of anti-competitive agreements can be made it must therefore first be examined whether the sustainability agreement under review results in substantial efficiency gains (see 1.). Apart from this, the issue of a fair share for consumers is particularly important (see 2.).<sup>60</sup>

### 1. Sustainability improvements as efficiency gains

The first requirement for exemption pursuant to Article 101(3) TFEU is the agreement's contribution to "improving the production or distribution of goods or to promoting technical or economic progress". It is still unclear to what extent public interest objectives achieved through types of cooperation based on self-regulation (such as environmental protection, animal welfare or the improvement of living conditions in developing countries) can be classified as efficiency gains within the meaning of the first condition under Article 101(3) TFEU.

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<sup>59</sup> Cf. *Braun* in: Langen/Bunte, Europäisches Kartellrecht, 13th ed., Article 101 TFEU, para. 76.

<sup>60</sup> The issues of whether a restriction is indispensable and whether competition could possibly be eliminated can both be relevant in the context of cooperations relating specifically to sustainability or public interest aspects. The questions which arise in this context are less specifically related to sustainability aspects and are thus not dealt with separately. However, these conditions can still create a considerable barrier to types of cooperation based on private self-regulation. As to the condition of indispensability e.g., this has been shown in two proceedings conducted by the Bundeskartellamt regarding take-back systems (see section D.I.1.). Also, in particular in the case of sector-wide types of cooperation based on private self-regulation, the condition that an agreement may not result in the elimination of competition can be a relevant barrier.

Prior to the entry into force of Council Regulation (EC) No. 1/2003<sup>61</sup>, the European Commission held a broader view of the type of factors that can be considered efficiency gains. For instance, in its CECD decision handed down in 2000, the European Commission exempted an agreement regarding the gradual phase-out of energy inefficient washing machines on the grounds that this contributed, among other things, to reducing energy consumption and thus to reducing the products' environmental impact.<sup>62</sup> In this context, the European Commission took particular account of the collective environmental benefits which would result from the agreement in the form of less energy consumption. However, the 'Guidelines on the application of Article 81(3) of the Treaty' published in 2004 ("2004 Guidelines") narrow the scope of the previously pursued approach. According to these guidelines, non-competition related objectives pursued by other provisions of European treaties can be taken into account only to the extent that they can be subsumed under the four conditions of Article 101(3).<sup>63</sup> The European Commission's new guiding principle was also reflected in the legal assessment of the CECD decision: Citing a case example based on the facts of the CECD decision, the current version of the Horizontal Guidelines published in 2011 refer only to the technical innovation brought about in the market and the cost savings for each individual as efficiency gains resulting from the agreement; the effects on the environment as such are not mentioned.<sup>64</sup>

According to the 2004 Guidelines which continue to apply, efficiencies within the meaning of the first condition under Article 101(3) TFEU can particularly include such public interest objectives that are pursued by other provisions of European treaties.<sup>65</sup> This covers a broad range of issues, including the environment (Article 11 TFEU, Article 37 of the Charter of Fundamental Rights), culture (Article 167(1) and (4) TFEU) as well as public health and social policy issues (Article 168(1), Article 9, Article 10 TFEU).

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<sup>61</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>62</sup> *European Commission*, decision of 24 January 1999, case no. IV. F. 1/36.178, para. 55-57 – *CECED*. Further examples in *Nistor*, *Public Services and the European Union*, Springer Science & Business Media, 2011, p. 206.

<sup>63</sup> *European Commission*, Guidelines on the application of Article 81(3) of the Treaty, OJ (EU) C101/97 of 27 April 2004, para. 42. This clarification was possibly also due to the then ongoing shift towards a decentralised application of EU competition law and towards a system of legal exemptions, cf. *Lugard and Hancher (2004)*, *Honey, I Shrunk the Article!*, *European Competition Law Review*, 7, pp. 410 – 420.

<sup>64</sup> Cf. *European Commission*, Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ (EU) C 11/01 of 14 January 2011, para 329. In the version of the Guidelines published in 2001, it was still stated with regard to this example that the net contribution to protecting the environment was altogether perceived as outweighing the cost increase; cf. *European Commission*, Communication regarding Guidelines on the applicability of Article 81 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ (EG) C 3/02 of 6 January 2001, para. 198.

<sup>65</sup> Cf. *European Commission*, Guidelines on the application of Article 81(3) of the Treaty, OJ (EU) C101/97 of 27 April 2004, para. 42.



In addition to cost savings, the 2004 Guidelines also acknowledge so-called “qualitative efficiencies”<sup>66</sup> which provide added value in the form of a new or improved product or a larger variety of products. This opens up opportunities to include public interest objectives.<sup>67</sup> In the Commission’s view, it is, however, always necessary to determine the value of such efficiencies.<sup>68</sup>

Restrictive agreements that have a positive effect on certain public interest aspects may also trigger conventional efficiency gains (in the form of price reductions or quality improvements). This includes production processes that use environmentally harmful substances in a more efficient way while at the same time reducing production costs. Other examples where the agreement has a positive effect only on public interest aspects are also conceivable. Whereas the evaluation of conventional efficiency gains (reduction of production costs) usually poses no particular problems, it may be challenging for legal practitioners to assess the value of improvements relating to public interests.

Quantifying improvements relating to public interests is particularly difficult in practice. The reasons for this include practical as well as normative aspects. For instance, there is no specific “market price” for many improvements that can be achieved by types of cooperation based on self-regulation. By way of example, this includes efforts to protect the environment, improvements in livestock farming or improvements in working conditions in developing countries.

A theoretical basis for monetisation is provided by the Hicksian compensating variation (CV).<sup>69</sup> It describes the amount of money which would have to be given to or taken from a person for that person to reach his or her initial utility level after a change in relative prices (that is the prices for various goods). The compensating variation in income is either the (minimum) amount that would have to be given to a person for that person to willingly accept a negative utility change (e.g. traffic noise and air pollution) or the (maximum) amount the person would be willing to pay for a positive utility change (e.g. animal welfare). The former amount reflects a person’s willingness to accept (WTA) and the latter amount a person’s willingness to pay (WTP) for a utility change. There are various economic evaluation methods available to

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<sup>66</sup> Cf. *ibid.*, para. 69 ff.

<sup>67</sup> Cf. *Schweitzer*, in: *Politischer Einfluss auf Wettbewerbsentscheidungen: Die Bedeutung nicht-wettbewerblicher Aspekte für die Auslegung von Art. 101 AEUV im Licht der Querschnittsklauseln*, Baden-Baden 2015, p. 27.

<sup>68</sup> Cf. *European Commission*, Guidelines on the application of Article 81(3) of the Treaty, OJ (EU) C101/97 of 27 April 2004, para. 55.

<sup>69</sup> Cf. *Kloosterhuis und Mulder* (2015), *Competition Law Environmental Protection: The Dutch Agreement on Coal-fired Powerplants*, *Journal of Competition Law & Economics*, 11 (4), pp. 855 – 880.





determine a person's WTP and WTA; these methods can be divided into direct and indirect evaluation methods.

Indirect evaluation methods derive the value of a good that has not been priced from the value of another good for which a market price exists. The results reached in this way are thus based on real decision-making situations even though they are not directly related to the good that has not been priced. One example of this is the travel expenses method (also referred to as the Clawson method<sup>70</sup>) which determines the value of a good that has not been priced, such as a national park, based on the travel costs consumers are willing to accept in order to visit the park. This method is most commonly used to determine the value of public goods for leisure and recreational use.

While the fact that indirect evaluation methods are based on real decision-making situations is an advantage, it is a disadvantage that such methods can be applied only if the demand for the good that has not been priced is directly connected to the demand for a good for which a price exists.

This restriction in use does not exist with regard to direct evaluation methods, but these methods have other shortcomings. Direct evaluation methods include techniques to directly ask consumers which value they ascribe to a certain good. One of these methods is the contingent valuation method (CVM) which determines the value of a good that has not been priced by way of surveys; another example are choice experiments (choice-based conjoint method, CBC). Choice experiments determine the value of a good that has not been priced by presenting the participants in the experiment with various options which differ with regard to various environmental characteristics and in terms of price (i.e. the price that has to be paid).

The advantage of these direct survey techniques is that they allow goods to be assessed which could otherwise not be evaluated (such as immaterial goods). A major disadvantage of these direct survey techniques is that in these surveys different interests are not actually balanced and the results may be strongly influenced by the survey's structure. For instance, the wording of the questions (so-called "framing effect")<sup>71</sup> and the approach chosen (willingness to pay or willingness to accept) may have an influence on the respondents' answers. In addition, studies have shown that the stated willingness to pay often differs from the actual willingness to pay.<sup>72</sup>

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<sup>70</sup> Cf., for example, *Smith (1971)*, The evaluation of recreation benefits: the Clawson method in practice. *Urban Studies*, 8 (2), pp. 89 – 102.

<sup>71</sup> Cf., for example, *Malenka et al. (1993)*, The framing effect of relative and absolute risk, *Journal of General Internal Medicine*, 8, pp. 543 – 548.

<sup>72</sup> This is demonstrated, for example, by the fact that consumers' willingness to pay for sustainability standards as stated in surveys tends to be greater than their actual buying behaviour suggests. This phenomenon is also described as the "sustainability paradox". Cf. *White, Hardisty and Habib (2019)*, The Elusive Green Consumer,





Another valuation method, which is particularly suitable for the evaluation of environmental degradation, is the avoidance cost method which determines the value of a good that has not been priced, such as the value of environmental damage, based on the costs of avoiding such damage.<sup>73</sup> This approach provides the advantage that the avoidance costs are usually significantly easier to determine than the costs linked to the damage. The disadvantage of the avoidance cost method is, however, that the relation between the avoidance costs and the utility loss caused by externalities is relatively weak. The actual damage can greatly differ from the avoidance costs. In addition, avoidance costs are dependent on technology, which is why it is difficult to forecast their development under different framework conditions and for longer periods of time.<sup>74</sup>

This plurality of evaluation methods alone is a practical problem for the economic evaluation of non-competitive goals since the results often differ depending on the method used.<sup>75</sup> This is due to, among other things, the shortcomings of the respective evaluation methods mentioned above. In addition, different evaluation methods can be used for various improvements relating to public interests, which may also lead to fluctuations in the evaluation. Monetising improvements relating to public interests is thus always associated with great uncertainties since the applicable prices depend to a large extent on the method chosen.

In addition to practicable problems, there are also normative problems when it comes to monetising or quantifying non-competition related goals. For instance, not all sustainability aspects can be evaluated within an economic system based on monetary values. Aims such as the prevention of child labour in developing countries or the avoidance of health risks by way

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Harvard Business Review, Issue July-August, available at <https://hbr.org/2019/07/the-elusive-green-consumer>.

<sup>73</sup> One example of a method to determine avoidance costs is the European emission allowance trading scheme. The price for allowances corresponds to the marginal avoidance costs incurred by the businesses participating in the trading scheme if a certain maximum emission level is to be achieved.

<sup>74</sup> Cf. *Puls* (2009), Externe Kosten am Beispiel des deutschen Straßenverkehrs, Forschungsbericht aus dem Institut der deutschen Wirtschaft Köln, No. 53, pp. 27 f.

<sup>75</sup> The analysis carried out by the Netherlands competition authority ACM in the “Chicken of Tomorrow” case showed that the results differed between the various valuation methods. The economic valuation methods used by ACM to evaluate consumers’ willingness to pay (CBC and CVM) ultimately all resulted in the overall negative outcome with regard to the initiative, but the absolute figures significantly differed. For details, cf. ACM, Economische effecten van „Kip van Morgen“, table 17, available (in Dutch) at: <https://www.acm.nl/nl/publicaties/publicatie/13759/Onderzoek-ACM-naar-de-economische-effecten-van-de-Kip-van-Morgen>.

of environmental measures are examples of this. Desirable improvements in these areas can in principle not be evaluated in monetary terms for ethical and constitutional reasons.<sup>76</sup>

The practical and normative problems outlined above show that quantifying improvements relating to public interests ultimately always also remains a policy decision due to the uncertainties mentioned above.<sup>77</sup>

## 2. Fair share of the benefit for consumers

The second condition for an individual exemption under Article 101(3) TFEU sets out that consumers must receive a fair share of the efficiencies generated by the restrictive agreement.<sup>78</sup> According to the 2004 Guidelines, this requires that the net effect of the agreement has to be at least neutral for consumers that are directly or likely to be affected.<sup>79</sup> In this context, the concept of ‘consumers’ encompasses all direct and indirect users of the services or products covered by the agreement.<sup>80</sup> Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in other unrelated markets. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the groups of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.<sup>81</sup> Also future positive effects for consumers can be taken into account but have to be discounted based on the time lag.<sup>82</sup>

Sets of problems are particularly associated with the evaluation of efficiencies which show their positive effect in other areas and not on the relevant markets or not in favour of the consumers within the meaning of Article 101(3) TFEU. Examples of this may include the introduction of minimum wages in developing countries or the prohibition to use harmful chemicals during production. These examples may well be recognised as public interest objectives but their positive effect is not or not fully reflected in the relevant product – at least not in a material form. This positive effect is therefore an externality.

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<sup>76</sup> On the incommensurability of human life and the handling of this issue by governments and state institutions in decision-making situations relating to this good cf. *Chang*, *Incommensurability, Incomparability, and Practical Reason*, Cambridge 1997, pp. 191 ff.

<sup>77</sup> Similarly, on determining external costs: *Puls* (2009), *Externe Kosten am Beispiel des deutschen Straßenverkehrs*, Forschungsbericht aus dem Institut der deutschen Wirtschaft Köln, No. 53, pp. 7 f.

<sup>78</sup> In this regard, only such efficiency gains are to be taken into account which meet the requirement of indispensability pursuant to Article 101(3) TFEU. Cf. *European Commission*, *Guidelines on the application of Article 81(3) of the Treaty*, OJ (EU) C101/97 of 27 April 2004, para. 39.

<sup>79</sup> Cf. *European Commission*, *Guidelines on the application of Article 81(3) of the Treaty*, OJ (EU) C101/97 of 27 April 2004, para. 85.

<sup>80</sup> Cf. *ibid.*, para. 84.

<sup>81</sup> Cf. *ibid.*, para. 43.

<sup>82</sup> Cf. *ibid.*, para. 88.



The extent to which externalities can even be taken into account within the scope of Article 101(3) TFEU is questionable. The wording of Article 101(3) TFEU and especially the Commission's Horizontal Guidelines applicable in this case support a restrictive interpretation. In addition, quantifying these externalities causes the problems for competition authorities mentioned above. Objectifiable quantification will hardly be possible with regard to externalities. However, the Horizontal Guidelines are binding only on the European Commission itself<sup>83</sup>; they are not binding on the CJEU or on national courts. In the *Expedia* case, the CJEU also clarified that this binding effect does not extend to national competition authorities.<sup>84</sup> National competition authorities could therefore interpret the requirements under Article 101(3) TFEU in a more flexible manner.<sup>85</sup>

### III. Interim conclusion

Types of cooperation based on private self-regulation which pursue climate protection and other public interest objectives and do not restrict competition do not fall within the scope of application of the prohibition of anti-competitive agreements. This includes, in particular, non-binding agreements that in an open and transparent process define standards relating to certain public interest objectives, or also commitments based on which the businesses involved jointly and exclusively undertake within the framework of a code of conduct to comply with statutory rules that are already mandatory. If, however, types of cooperation based on private self-regulation involve restraints of competition because they exclude the parallel distribution of "conventional", possibly cheaper products, the question arises as to the extent to which public interest objectives can be taken into account within the scope of Article 101 TFEU.

Especially public interest objectives that are pursued by other provisions of European primary law can be taken into account within the scope of the prohibition of anti-competitive agreements; there are, however, limits to the extent to which they can be taken into account: Narrowing the scope of application of Article 101(1) TFEU may be possible for types of cooperation based on private self-regulation in exceptional cases only. This may primarily be the case if the cooperating businesses have been granted state-imposed law enforcement powers or autonomy rights. Otherwise, public interest objectives could be taken into account within the scope of Article 101(3) TFEU. However, cooperating businesses cannot simply claim the protection of abstract public interest goals in this regard. They have to prove that the adversely affected consumers on the relevant market also benefit from the advantages of the

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<sup>83</sup> Cf. *Bunte* in Langen/Bunte, *Europäisches Kartellrecht*, 13th ed., Einleitung zum EU-Kartellrecht, para. 23-24.

<sup>84</sup> Cf. CJEU, judgment of 13 December 2012, case no. C-226/11, para. 30-31.

<sup>85</sup> In this regard, particularly see the draft guidelines published by ACM on how to deal with sustainability agreements (D.II.3.).

agreement and are overall not placed in a less favourable position by the agreement.<sup>86</sup> The condition of allowing consumers a fair share of the benefit is likely to greatly limit the extent to which general welfare advantages can be taken into account since they often benefit not only the consumers on the relevant market but mainly society as a whole. This issue prompted the Netherlands competition authority to suggest improving the flexibility of the condition of allowing consumers a fair share of the benefit for certain sustainability initiatives (see D.).

#### D. Case practice of European competition authorities

The question of whether public interest objectives can be taken into account has been increasingly raised in the Bundeskartellamt's recent practice; however, this question is not entirely new: Since the turn of the millennium, the Bundeskartellamt has already dealt with the question of whether environmental concerns can be taken into account with regard to the prohibition of anti-competitive agreements. This was brought about by legislative measures which have led to the creation of various take-back systems, such as "Der Grüne Punkt – Duales System Deutschland AG" (DSD).<sup>87</sup>

In addition, as part of the 6th amendment to the German Competition Act (GWB) in 1999, the lawmaker introduced a new exemption rule in Section 7 GWB which expressly related to cooperations implementing take-back and recovery obligations under environmental law.<sup>88</sup> Exemptions from the prohibition of anti-competitive agreements had already been discussed with regard to the environmental sector prior to the 6th amendment to the GWB. The draft Environmental Code (Umweltgesetzbuch, UGB) from 1997 provided for a rule excluding agreements restricting competition from the prohibition of anti-competitive agreements under Section 1 GWB for the purpose of protecting the environment, and afforded the competition authority merely the possibility to object to this in consultation with the environmental authority if the requirements for exemption were not shown to exist in the

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<sup>86</sup> Cf. *Schweitzer*, in: *Politischer Einfluss auf Wettbewerbsentscheidungen: Die Bedeutung nicht-wettbewerblicher Aspekte für die Auslegung von Art. 101 AEUV im Licht der Querschnittsklauseln*, Baden-Baden 2015, p. 38.

<sup>87</sup> Cf. *Bundeskartellamt*, press release of 23 August 2002, Bundeskartellamt examines whether DSD is compatible with competition law, available at [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2002/23\\_08\\_2002\\_DSD\\_eng.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2002/23_08_2002_DSD_eng.html).

<sup>88</sup> Section 7 was repealed in the 7th amendment to the GWB on 30 June 2005. Agreements and decisions which contributed to improving the taking back or disposal of goods while allowing consumers a fair share of the resulting benefit could be exempted from the prohibition under Section 1 GWB provided that the improvement cannot be achieved otherwise by the participating undertakings and is of sufficient importance when compared with the restraint of competition connected with it and the restraint of competition does not result in the creation or strengthening of a dominant position.



individual case.<sup>89</sup> However, specific criteria for exempting the environmental sector under competition law were ultimately not introduced either in German or in European competition law.

In the following, two proceedings conducted by the Bundeskartellamt in connection with take-back systems and the Bundeskartellamt's recent practice in handling cooperations based on private self-regulation that pursue public interest objectives will be discussed (see I.). Following this, the previous case practice of the Netherlands competition authority (see II.) as well as other European competition authorities, including the European Commission, will be addressed (see III.).

## I. Bundeskartellamt

### 1. Take-back systems

The two proceedings by the Bundeskartellamt described below related to the Ordinance on the Avoidance and Recovery of Packaging Wastes (Packaging Ordinance), which has now been superseded by the Packaging Act (VerpackG).<sup>90</sup> The purpose of the Packaging Ordinance initially was the reduction of packaging waste as well as a shift towards a less waste-producing society.<sup>91</sup> In order to ensure an efficient recovery system, the Packaging Ordinance stipulated that every business producing packaging in Germany or bringing packaged products into circulation had to ensure that it fulfilled the take-back and recovery obligations for all kinds of packaging. In order to ensure the take-back of sales packaging, such businesses could conclude an agreement with a collection and disposal system (also referred to as “dual system”) licenced in Germany.

#### a. Duales System Deutschland – DSD<sup>92</sup>

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<sup>89</sup> Cf. *Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU)* (ed.), *Umweltgesetzbuch (UGB-KomE)*, 1998, p. 122. In 2009, the Federal Minister of the Environment at the time, Sigmar Gabriel, declared the Environmental Code to have failed. Cf. *BMU*, press release of 1 February 2009, *Umweltgesetzbuch ist am Widerstand Bayerns und der Union gescheitert*, available (in German) at <https://www.bmu.de/pressemitteilung/umweltgesetzbuch-ist-am-widerstand-bayerns-und-der-union-gescheitert/>.

<sup>90</sup> Cf. *BMU*, Act on the Putting into Circulation, Return and High-quality Recovery of Packaging, available (in German) at <https://www.bmu.de/gesetz/gesetz-ueber-das-inverkehrbringen-die-ruecknahme-und-die-hochwertige-verwertung-von-verpackungen/>.

<sup>91</sup> Cf. *BMU*, Packaging Ordinance, available (in German) at <https://www.bmu.de/gesetz/verordnung-ueber-die-vermeidung-und-verwertung-von-verpackungsabfaellen/>.

<sup>92</sup> Cf. also *Bundeskartellamt*, sector inquiry into dual systems, available (in German) at <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Duale%20Systeme%20-%20Abschlussbericht.html>.



The aim of DSD was to implement the requirements set out in the Packaging Ordinance. In the discussion on how to deal with packaging waste, the participating businesses held the view that the goals set by the ordinance could be reached only if the take-back system was run by one single service provider. The sectors affected initially feared that organising the take-back system in a competitive way would adversely affect the aim of protecting the environment and that the take-back system would even collapse. However, this view has changed, partly owing to competition law proceedings conducted by the European Commission<sup>93</sup> and the Bundeskartellamt<sup>94</sup>. In a decision that became final in 2007, the European Commission ordered DSD not to prevent (potentially) competing “dual systems” from concluding contracts relating to packaging waste with waste management companies. In 2002, the Bundeskartellamt announced that in 2006 it would end its policy of tolerating agreements that restricted competition within the DSD system. As a consequence, DSD decided to change the company’s cartel-like structure. In 2003, companies from the waste management sector left the circle of silent shareholders. In 2005, DSD was sold to a financial investor. Ultimately, the proceeding resulted in the opening of the waste management markets to competition.

Further developments have shown that the fear that the collection and recovery system for packaging waste would collapse was unfounded. In contrast, competition on the markets for the collection and recovery of sales packaging increased to the advantage of consumers, which was in turn reflected in lower costs for the collection and recovery of sales packaging. It was also possible to meet the environmental requirements by structuring the take-back system in a competitive manner.<sup>95</sup>

#### **b. Gesellschaft für Glasrecycling und Abfallvermeidung – GGA**

Another case regarded the collecting and recycling of glass. The Bundeskartellamt assessed this cooperation in detail in 2007.<sup>96</sup>

German container glass manufacturers established the association “Gesellschaft für Glasrecycling und Abfallvermeidung” (GGA) in 1993 in order to jointly buy up the entire waste glass recovered from near-household collection facilities. GGA centrally purchased the entire

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<sup>93</sup> Cf. *European Commission*, decision of 20 April 2004, COMP D3/34493 – *DSD*.

<sup>94</sup> Cf. *Bundeskartellamt*, press release of 12 October 2004, available (in German) at [https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2004/12\\_10\\_2004\\_DSD.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2004/12_10_2004_DSD.html).

<sup>95</sup> Cf. *Bundeskartellamt*, Final report published in December 2012 on the sector inquiry into dual systems – interim results of the opening of the sector to competition, available (in German) at <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Duale%20Systeme%20-%20Abschlussbericht.html?nn=3591074>.

<sup>96</sup> *Bundeskartellamt*, decision of 31 May 2007, B 4-1006/06, available (in German) at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2007/B4-1006-06.html>.



waste glass from waste disposal companies and organised the delivery to special recycling facilities. The container glass manufacturers collected the glass according to demand and settled the recovery costs with the operators of the recovery facilities. GGA passed on its purchasing costs for the waste glass and the transportation costs to the member companies, i.e. container glass manufacturers with production sites in Germany, in the form of tonnage standard prices.

This purchasing cartel restricted the container glass manufacturers' individual need for secondary glass materials and violated both German and European law.<sup>97</sup>

This assessment was above all based on the fact that the use of waste glass led to a considerable reduction of costs incurred by glass manufacturers. In the Bundeskartellamt's view, there was therefore an economic incentive to largely replace primary raw materials with waste glass in the production of container glass. Moreover, the Bundeskartellamt ascertained that contrary to the statements made by the participating companies the cartel was not necessary in order to ensure the recovery rates of more than 80 percent for waste glass in the long term.<sup>98</sup> The Düsseldorf Higher Regional Court confirmed the immediate enforceability of the prohibition in summary proceedings; as a consequence, the container glass manufacturers withdrew their further-reaching appeal.<sup>99</sup>

## 2. Recent practice

In recent years, the Bundeskartellamt has primarily dealt with sustainability initiatives in the consumer goods sector, such as Fairtrade Labelling Organisations International e.V., the animal welfare initiative "Initiative Tierwohl", the label "Grüner Knopf – Bündnis für nachhaltige Textilien" and the initiative to reduce fat, sugar and salt in ready-made meals and beverages.<sup>100</sup> The first two sustainability initiatives in particular were examined in more detail by the Bundeskartellamt.

### a. Fairtrade

Fairtrade Labelling Organizations International e.V. ("Fairtrade") is a globally active umbrella organisation working to secure fair trade terms. It was established in 1997 and is domiciled in Bonn. The Fairtrade system, which focuses on fair trade terms for agricultural products from

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<sup>97</sup> Cf. *ibid.*, pp. 43 ff.

<sup>98</sup> Cf. *ibid.* pp. 73 ff.

<sup>99</sup> Cf. *Bundeskartellamt*, 2007/2008 Activity Report, German Bundestag – 16th legislative period, printed paper 16/13500, pp. 152 f, available (in German) at [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202008.pdf;jsessionid=AF9D2597BCDF2A69779596FC951C2637.2\\_cid387?\\_bl\\_ob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202008.pdf;jsessionid=AF9D2597BCDF2A69779596FC951C2637.2_cid387?_bl_ob=publicationFile&v=3).

<sup>100</sup> Cf. *Engelsing and Jakobs* (2019), *Nachhaltigkeit und Wettbewerb*, WuW, no. 1, pp. 17 ff. All initiatives mentioned above were tolerated within the scope of discretion.





third countries, sets standards that a product has to meet in order to become certified and bear the Fairtrade label. The standards include both organisational and product-related criteria. Participation in the Fairtrade system is voluntary and non-exclusive. Participants may still choose to sell their products on conventional terms but are then not allowed to use the label for these specific products. It is also possible to take part in competing label initiatives.

The price elements of the certification system prohibiting businesses to undercut an agreed minimum price for certain product groups set by Fairtrade (such as for the procurement of mangos from South Asia<sup>101</sup>) and the payment of a so-called Fairtrade premium that always has to be paid are of particular interest in terms of competition law. The premium is paid to producers or producer organisations in addition to the minimum price; the producers then decide together on the use of this premium.<sup>102</sup> The Fairtrade premium is not based on the actual production costs. Commercial customers are free to decide whether and if so how they want to pass on these price elements in the distribution chain.

In the exercise of its discretionary powers, the Bundeskartellamt decided not to initiate investigation proceedings against the Fairtrade system.<sup>103</sup> In this context, the Bundeskartellamt addressed the following aspects, among other things: Participation in the Fairtrade system is voluntary, non-exclusive and open to businesses from every stage of production. During the period under review, the market coverage of the Fairtrade label was relatively poor within the European Union and competed with numerous other sustainability labels in Germany. In addition, transparency regarding the price elements and the social standards of the Fairtrade label was decisive for the Bundeskartellamt.<sup>104</sup> The in principle problematic aspect of standardising price elements in procurement, which may constitute a restriction of competition by object, was ultimately secondary to these aspects within the scope of discretion.

## **b. The animal welfare initiative “Initiative Tierwohl”**

Another sustainability initiative which the Bundeskartellamt has dealt with is the animal welfare initiative “Initiative Tierwohl” (ITW). Within the framework of ITW, a project based on an agreement between the agricultural, meat production and food retail sectors, livestock

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<sup>101</sup> Cf. *Fairtrade*, Fairtrade Minimum Price and Premium Information, available at <https://www.fairtrade.net/standard/minimum-price-info> (last accessed on 10 August 2020).

<sup>102</sup> Cf. *Fairtrade Deutschland*, Fairtrade-Mindestpreis und -Prämie, available (in German) at <https://www.fairtrade-deutschland.de/was-ist-fairtrade/fairtrade-standards/mindestpreis-und-praemie.html>.

<sup>103</sup> *Engelsing and Jakobs* (2019), *Nachhaltigkeit und Wettbewerb*, WuW, no. 1, p. 20.

<sup>104</sup> Cf. *Bundeskartellamt*, 2017/2018 Activity Report, German Bundestag – 16th legislative period, printed paper 19/10900, p. 52 available (in German) at [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202017\\_2018.pdf?\\_\\_blob=publicationFile&v=6](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202017_2018.pdf?__blob=publicationFile&v=6).





farmers are rewarded for implementing animal welfare measures. The key element of ITW is that a premium (referred to as “animal welfare fee”) has to be paid on each kilogram of pork or poultry sold by the participating food retail businesses and the income is then used as financial subsidies for participating livestock farmers who implement certain animal welfare criteria from a set catalogue. The specificities of ITW’s financing model have changed over the years.

The Bundeskartellamt was first informed of ITW in 2012. At that time, one of the central differences between ITW and, for example, the Fairtrade system was that ITW did not label the meat produced in accordance with animal welfare criteria. Since no product-related label existed, consumers did not have the option to specifically choose such products. ITW was more a funds-based model in which funds from food retail businesses were used to pay farmers for improving the conditions of livestock farming.

In 2014, the Bundeskartellamt decided within the scope of its discretion not to initiate investigation proceedings against ITW. The authority informed the participating businesses of the essential key aspects necessary for structuring and implementing the initiative in line with competition law. The key aspects included, for one thing, ensuring non-discriminatory and voluntary access for relevant businesses. For another, each agricultural farm had to be free to choose its own certifier to inspect the implementation of the measures. It also had to be ensured that no competition-related information was exchanged between the market levels involved and the businesses active on one market level.<sup>105</sup>

In the following years, ITW adjusted its model several times: The financing model in the poultry sector was adjusted and an obligation to identify ITW poultry meat was introduced.<sup>106</sup> In 2018, the Bundeskartellamt then decided within the scope of its discretionary powers to still tolerate ITW’s poultry business (ITW poultry) until 2020. The authority suggested, however, that ITW present a concept how to also introduce the ITW identification for pork and how the financing of this ITW pork could be decoupled from a standard amount that is to be paid equally by all retailers and that is based on the overall amount of meat sold.<sup>107</sup>

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<sup>105</sup> Cf. *Bundeskartellamt*, 2013/2014 Activity Report, German Bundestag – 18th legislative period, printed paper 18/5210, pp. 53-54, available (in German) at [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202014.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202014.pdf?__blob=publicationFile&v=2).

<sup>106</sup> Identification means that those products that are produced in line with ITW criteria are labelled accordingly when sold in shops and can therefore be clearly identified by consumers. The obligation to identify ITW pork is to be introduced in 2021.

<sup>107</sup> Cf. *Bundeskartellamt*, press release of 28 September 2017 as well as *Engelsing and Jakobs* (2019), *Nachhaltigkeit und Wettbewerb*, WuW, no. 1, pp. 16 – 22.



## II. ACM

Over the last years, the Netherlands competition authority ACM has dealt intensively with two sustainability initiatives, the so-called ‘Chicken of Tomorrow’ initiative and the Dutch Energy Agreement for Sustainable Growth. According to ACM’s assessment, both initiatives resulted in the restriction of competition. In addition, ACM was the first European competition authority to publish guidelines on how to deal with sustainability initiatives as early as in 2014.<sup>108</sup> Since 9 July 2020, a revised version of these guidelines has been available for public consultation.<sup>109</sup> Both initiatives and the revised version of ACM’s guidelines will be discussed in the following.

### 1. Energy agreement for sustainable growth

Between 2012 and 2013, the Netherlands government arranged for the drafting of an energy agreement for sustainable growth (Energieakkoord voor duurzame groei) between more than 40 interest groups under the auspices of the Social and Economic Council (Sociaal-Economische Raad, SER) – a national policy advisory institute. The results of these negotiations related to energy savings in industry and agriculture and the expansion of renewable power generation, among other things.

Parts of the agreement which provided for the coordinated shutdown of five coal-fired power plants polluting the environment to a greater extent than newer coal-fired power plants due to their age were deemed problematic under competition law. At the request of the industry association of the Netherlands energy sector, Energie Nederland (EN), ACM assessed whether the planned agreement regarding the closure of the coal-fired power plants could be brought in line with Article 101 TFEU.

ACM reached the conclusion that the closure of the coal-fired power plants constituted a restraint of competition within the meaning of Article 101 TFEU.<sup>110</sup> In ACM’s assessment, it was not possible either to exempt the closure of the coal-fired power plants from the prohibition of anti-competitive agreements based on Article 101(3) TFEU. ACM carried out an

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<sup>108</sup> Cf. ACM, Vision Document on Competition and Sustainability, 9 May 2014, available at <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability>.

<sup>109</sup> Cf. ACM, Draft Guidelines Sustainability Agreements, available at <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements>.

<sup>110</sup> Due to the closure of the coal-fired power plants the businesses involved had fewer production capacities than they would have had without the agreement. The production capacity of the coal-fired power plants that were to be shut down amounted to approx. 2500 megawatts, which totalled roughly 10 percent of the overall electricity production in the Netherlands at that time.

extensive cost-benefit analysis.<sup>111</sup> The value of the agreement's benefits was determined based on the costs of other (efficiency) measures which would not have to be taken as a result of the agreement (i.e. avoided costs or shadow prices). ACM reached the conclusion that the expected disadvantages for consumers relating to electricity prices caused by the agreement would be significantly greater than the estimated value of the positive effects on the environment.<sup>112</sup>

## 2. The 'Chicken of Tomorrow' initiative

In 2013, a large number of organisations and businesses from the Netherlands poultry industry as well as Netherlands supermarket chains held round table discussions to talk about more sustainably produced chicken meat. The purpose of these discussions was to introduce a sector-wide minimum standard exceeding the statutory requirements for the production of chicken meat. A declaration of intent was signed according to which only more sustainably produced poultry should be sold as of 2020.<sup>113</sup>

ACM reached the conclusion that this initiative also constituted a restraint of competition within the meaning of Article 101(1) TFEU.<sup>114</sup> In ACM's view, it could be regarded as restricting competition on the chicken meat retail market since "regularly" produced chicken meat would no longer be sold in Netherlands supermarkets after the implementation of the initiative. This would reduce the choices available to consumers.

In ACM's view, it was not possible either to exempt the Chicken-of-Tomorrow initiative based on Article 101(3) TFEU. In this regard, ACM analysed the consumers' willingness to pay.<sup>115</sup> In

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<sup>111</sup> Cf. *Kloosterhuis and Mulder* (2015), *Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants*, *Journal of Competition Law & Economics*, vol. 11. (4), pp. 855 – 880.

<sup>112</sup> One reason for this conclusion was the fact that the most important positive effect of the energy agreement was related to the reduction of greenhouse gas emissions caused by energy providers. Since this meant that the businesses would then not make use of all the emission allowances granted within the context of the emissions trading system, ACM assumed that they would probably use these allowances for other purposes or for trading. In ACM's view, the closure of the coal-fired power plants would therefore not have any net effect on the emission of carbon dioxide but merely affect the costs of emissions reduction. This meant that the (only) benefit of the emissions reduction brought about by the closure of the coal-fired power plants would be that fewer other measures for the reduction of emissions would have to be taken in the context of the emissions trading system. Cf. *ibid.* pp. 871 ff.

<sup>113</sup> For a detailed summary of the initiative and ACM's assessment see *Monti and Mulder* (2017), *Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives*, *European Law Review*, (5), pp. 639 f.

<sup>114</sup> Cf. ACM, ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', 26 January 2015, available at <https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition>.

<sup>115</sup> ACM's economic analysis is available (in Dutch) at <https://www.acm.nl/nl/publicaties/publicatie/13759/Onderzoek-ACM-naar-de-economische-effecten-van-de-Kip-van-Morgen>.

ACM's opinion, the initiative could be exempted from the prohibition of anti-competitive agreements pursuant to Article 101(3) TFEU only if the initiative as a whole were to lead to a higher consumer surplus, which in turn was to be determined based on an analysis of the consumers' willingness to pay. In order to determine the consumers' willingness to pay, ACM conducted both choice experiments (choice based conjoint method, CBC)<sup>116</sup> and surveys (contingent valuation method, CVM)<sup>117</sup>. In its analysis, ACM reached the conclusion that the consumers' willingness to pay for the 'Chicken of Tomorrow' was not enough to justify the expected increase in consumer prices.<sup>118</sup>

### 3. Draft guidelines on sustainability agreements (2020)

On 9 July 2020, ACM published a draft of its revised guidelines on how to deal with sustainability agreements.<sup>119</sup> According to ACM, the guidelines aim to explain which sustainability agreements are permitted in ACM's view and how ACM deals with questions regarding sustainability agreements in practice. In addition to examples and practical advice for undertakings enabling them to conduct self-assessments, the guidelines also include special requirements for 'environmental damage agreements'.

According to ACM, environmental damage agreements are agreements that aim to improve production processes causing harm to humans, the environment and/or nature. Examples mentioned by ACM include agreements aimed at reducing emissions of pollutants and at preventing the use of pollutive raw materials in products. With regard to such environmental damage agreements, ACM intends to deal with the criterion of allowing consumers a fair share of the resulting benefit (second condition of Article 101(3) TFEU) in a more flexible way than before if the following two cumulative conditions are met:

- (i) the agreement is aimed at preventing or limiting obvious environmental damage
- and

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<sup>116</sup> The purpose of the CBC method is to estimate the value of benefit and preference structures based on the individual elements making up the product or service, which allows for the analysis of discrete decisions. In this regard also see C. II.

<sup>117</sup> The contingent valuation method is a method to estimate the economic value of non-tradable goods based on preferences expressed in surveys. In this regard also see C. II.

<sup>118</sup> All in all, the initiative would negatively affect the consumer surplus, resulting in the additional amount of EUR 0.64 per kilogram of chicken breast. Cf. ACM, *Onderzoek ACM naar de economische effecten van de Kip van Morgen*, p.26, available (in Dutch) at <https://www.acm.nl/nl/publicaties/publicatie/13759/Onderzoek-ACM-naar-de-economische-effecten-van-de-Kip-van-Morgen>.

<sup>119</sup> According to ACM and following the UN Resolution 66/288, sustainability agreements are any agreements between undertakings as well as any decisions of associations of undertakings that are aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment or nature.



- (ii) the agreement efficiently contributes to a policy objective for the prevention of environmental damage that has been laid down in an international or national standard to which the (Netherlands) government is bound.<sup>120</sup>

ACM is of the opinion that in the case of such agreements benefits that are useful not only to the consumers on the relevant market (but also to third parties) can be taken into account within the scope of the second condition of Article 101(3) TFEU. In ACM's view, it can be appropriate in such situations not to compensate users fully for the harm caused by the agreement since it is particularly their demand for the products in question that essentially causes the environmental damage for which society has to find solutions. In ACM's view, the condition of allowing consumers a fair share of the benefit is already fulfilled in the case of environmental-damage arrangements if all the initiative's benefits (including the advantages mainly benefitting society as a whole) offset the disadvantages for the consumers on the relevant market. The consumers on the relevant market therefore do not have to be fully compensated for the disadvantages caused by the initiative.<sup>121</sup>

ACM addresses the quantification problem mentioned above by specifying two (alternative) conditions under which it is deemed sufficient to assess the effects of an agreement (advantages and disadvantages) within the scope of Article 101(3) TFEU in a purely qualitative manner without quantifying such effects:

- (i) The undertakings involved in the agreement have a combined market share of no more than 30%

or

- (ii) the expected efficiency benefits more than offset the competitive disadvantages associated with the agreement.<sup>122</sup>

This is to apply to all sustainability agreements, i.e. to environmental damage agreements and others. In all other cases, it is ACM's view that the expected advantages and disadvantages of an agreement have to be quantified within the scope of Article 101(3) TFEU.

### III. Other European competition authorities

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<sup>120</sup> Cf. ACM, Draft Guidelines Sustainability Agreements, para. 38 - 42, available at <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements>.

<sup>121</sup> Cf. ACM, Draft Guidelines Sustainability Agreements, para. 50 - 53.

<sup>122</sup> Cf. ACM, Draft Guidelines Sustainability Agreements, para. 46 - 48.



On a European level, there is, as far as can be seen, no widely applied competition law case practice relating to sustainability initiatives and types of cooperation based on private self-regulation which pursue public interest objectives.

Before introducing the Council Regulation (EC) No 1/2003 and the “more economic approach” associated with this, the **European Commission** exempted a limited number of commitments for environmental reasons: This includes, among others, a commitment between manufacturers of consumer electronics<sup>123</sup> which pursued the goal of reducing the energy consumption of TVs. The commitment was exempted by the European Commission especially on the grounds that the advantages of saving energy and the environmental advantages were passed on to consumers. The European Commission also exempted the commitment between washing machine manufacturers mentioned above on the basis of environmental advantages, among other things.<sup>124</sup> However, no cases have recently become known in which the European Commission assumed that grounds for exemption existed due to environmental concerns.

In mid-September 2020, the **Greek competition authority Hellenic Competition Commission (HCC)** published a staff discussion paper in which it discussed various suggestions on how to take into account sustainability aspects in the context of competition law.<sup>125</sup> The **French competition authority Autorité de la concurrence** has announced to make the topic of sustainability a key issue of its work in 2020 and to jointly discuss the question of whether sustainability aspects could be taken into account with other regulatory authorities in France and in Europe.<sup>126</sup> In the course of preparing the UK’s withdrawal from the European Union, the **British competition authority CMA** has also announced the intention to provide further information on how it deals with sustainability initiatives.<sup>127</sup> The **Nordic competition**

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<sup>123</sup> *European Commission*, decision of 16 January 1998, case no. IV. C-3/36.494 – *EACEM energy saving commitment*.

<sup>124</sup> *European Commission*, decision of 24 January 1999, case no. IV. F. 1/36.178 – *CECED*.

<sup>125</sup> Cf. *HCC*, press release of 17 September 2020, available at [https://www.epant.gr/en/enimerosi/press-releases/item/1089-press-release-initiative-competition-law-and-sustainability.html?idU=3&utm\\_source=newsletter\\_155&utm\\_medium=email&utm\\_campaign=initiative-competition-law-and-sustainability](https://www.epant.gr/en/enimerosi/press-releases/item/1089-press-release-initiative-competition-law-and-sustainability.html?idU=3&utm_source=newsletter_155&utm_medium=email&utm_campaign=initiative-competition-law-and-sustainability). The staff discussion paper can be found at [https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896\\_9b05dc293adbae88a7bb6cce37d1ea60.html](https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html)

<sup>126</sup> Cf. *Adlc*, Priorities 2020, available at <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-announces-its-priorities-2020>.

<sup>127</sup> Cf. *CMA*, Annual Plan 2020 to 2021, p. 17, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/873689/Annual\\_Plan\\_2020-21.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873689/Annual_Plan_2020-21.pdf).



**authorities**<sup>128</sup> already approached the sustainability issue in 2010 and published a joint report on “Competition Policy and Green Growth”.<sup>129</sup>

#### **IV. Interim conclusion**

Despite the less extensive case practice of European competition authorities, it can be seen that the issue of a more sustainable use of the resources available to us is moving to the centre of the debate on competition policy. Due to the singularity of the social challenges associated with climate change, more and more competition authorities see the need to take greater account of environmental concerns in their competition law practice. Conversely, businesses are also demanding legal certainty with regard to corresponding types of cooperation – which is similar to the current demand in the digital sector – and request more competition law guidance for this purpose.<sup>130</sup>

In its previous practice, the Bundeskartellamt has taken this and other public interest objectives into account within the scope of its discretionary powers and has thus primarily provided individual guidance to businesses. The Netherlands competition authority has identified the need for abstract guidance and has developed guidelines on how to deal with sustainability initiatives. In their material assessment, the draft guidelines make a distinction between types of cooperation based on private self-regulation which pursue environmental objectives and other sustainability initiatives. In this way, ACM deliberately takes into account the singularity of the social challenges linked to climate change.

In the past few years, the question as to whether public interest objectives can be taken into account when applying competition law has also been raised repeatedly in merger control proceedings. This was due to both environmental and industrial policy deliberations, which will be addressed in more detail below.

#### **E. Public interest aspects in merger control decisions**

In recent years, an increasing number of voices have been demanding that non-competition related goals and public interest objectives be considered also in merger control decisions. The need to take account of industrial policy considerations in decisions under competition law is increasingly recognised on a policy level.<sup>131</sup> An intensive debate is currently unfolding on

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<sup>128</sup> Denmark, Finland, Faroe Islands, Greenland, Iceland, Norway and Sweden.

<sup>129</sup> Cf. *Nordic competition authorities*, Competition Policy and Green Growth, available at <https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf>.

<sup>130</sup> Cf. also MLEX of 14 September 2020, “Climate cooperation should get 'comfort' from EU antitrust officials, Guersent says”.

<sup>131</sup> Cf. *German Federal Ministry for Economic Affairs and Energy (BMWi) and French Ministry for the Economy and Finance (MINEFI) (2019)*, A Franco-German Manifesto for a European industrial policy for the 21st



how European businesses can remain competitive and stand their ground in the face of non-European competition in times of globalisation. The European Commission's prohibition of the Siemens/Alstom merger temporarily pushed competition policy into the centre of the debate. In addition to considering unspecified industrial policy deliberations when assessing mergers, specific changes to European merger control law are also discussed.<sup>132</sup> In this regard, France and Germany suggest changing the current merger guidelines "to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets". A "right of appeal of the Council" has also been suggested for industrial policy reasons. Five Nordic competition authorities have, in contrast, called for a strict merger control regime under the exclusive rules of competition law.<sup>133</sup> A similar discussion is also conceivable when it comes to sustainability aspects.

In the context of merger control decisions relating to environmental issues, there are also more and more discussions on whether sustainability aspects and other public interest objectives can justify the clearance or the prohibition of a merger project. The European Commission's clearance decision in the Bayer/Monsanto case was particularly criticised for not taking sufficient account of non-competition related aspects and public interest objectives such as biodiversity, food sovereignty, health protection and supply guarantee.<sup>134</sup> In the critics' view, these aspects would have been an argument against clearing the merger project.

## I. German merger control

It first has to be pointed out that – in deviation from the application of the prohibition of anti-competitive agreements – discretionary considerations are ruled out under Section 36 GWB. The wording of Section 36 GWB is clear in this regard (a concentration "shall be prohibited"). Section 36 GWB thus reduces the scope for the consideration and weighing of public interest objectives due to this difference alone.

When it comes to merger control in Germany, there is a clear separation between the areas of responsibility of the Bundeskartellamt and those of the policy makers: The

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Century, 19 February 2019, available at [https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F\\_\\_blob%3DpublicationFile%26v%3D2](https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2).

<sup>132</sup> Cf. *ibid.*, p. 4. In this manifesto, Germany and France suggest changing the current merger guidelines "to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets."

<sup>133</sup> <https://www.en.kfst.dk/nyheder/kfst/english/news/2019/201906278-the-nordic-competition-authorities-support-a-strict-merger-control-regime/>.

<sup>134</sup> Cf., for example, *MdB Dröge*, Bayer-Monsanto hearing in the Bundestag, available (in German) at <https://katharina-droege.de/artikel/11-07-2018/bayer-monsanto-anhoerung-im-bundestag>; *MdB Dröge*, Baysanto: Schlechte Entscheidung für Wettbewerb und Umwelt, available (in German) at <https://katharina-droege.de/artikel/21-03-2018/baysanto-schlechte-entscheidung-fuer-wettbewerb-und-umwelt>.





Bundeskartellamt's only responsibility is the protection of competition. Overriding public welfare interests, i.e. parameters not relating to an assessment under competition law, are taken into account within the scope of ministerial authorisation proceedings. The two-stage process of having concentrations assessed from the perspective of competition law by the Bundeskartellamt on the one hand and from the perspective of other policy considerations by the Federal Ministry for Economic Affairs and Energy on the other hand also serves the purpose of ensuring the Bundeskartellamt's independence from political influence.

Within the scope of ministerial authorisation proceedings, non-competition related aspects may only result in the clearance of a merger which is to be prohibited based on competition law aspects alone. Ministerial authorisation proceedings are not intended to prohibit a merger due to aspects not related to competition law.

## II. European merger control

The European Commission's task is to assess mergers and acquisitions of businesses whose turnover exceeds certain threshold values (Article 1 of the EC Merger Regulation<sup>135</sup>). The examination standard in terms of substantive law is Article 2 of the Merger Regulation. According to this, concentrations which would significantly impede effective competition in the common market or in a substantial part of it are to be prohibited. The Commission's power to assess concentrations is limited to competition law issues only; the wording of the Merger Regulation generally does not provide for the consideration of non-competition related issues.<sup>136</sup>

The competent EU Competition Commissioner Margrethe Vestager also pointed out in August 2017 that the assessment under competition law in the Bayer/Monsanto merger control proceedings was based on possible negative effects of the concentration on prices, quality, the choice of products or innovation and not on non-competition related issues:

*"Many of you warn about potential negative effects linked to Monsanto's and Bayer's products, including risks for human health, food safety, consumer protection, the environment and the climate. [...] While these concerns are of great importance they do not form the basis for a merger assessment."*<sup>137</sup>

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<sup>135</sup> European Commission, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("EC Merger Regulation"), OJ 2010 L 24/1.

<sup>136</sup> When the EC Merger Regulation was adopted, the inclusion of other non-competition related objectives in the context of merger control had been expressly discussed but dismissed. Cf. *Körber*, in: Immenga/Mestmäcker, EU-Wettbewerbsrecht, 6th ed. 2020, introduction to the EC Merger Regulation, para. 30 ff. with further references.

<sup>137</sup> Cf. letter from Margrethe Vestager to the petitioners of 22 August 2017, available at [https://ec.europa.eu/competition/mergers/cases/additional\\_data/m8084\\_4719\\_6.pdf](https://ec.europa.eu/competition/mergers/cases/additional_data/m8084_4719_6.pdf).



In addition, it can be stated that especially the Bayer/Monsanto case has shown that the merger control regime will generally not be a suitable instrument to systematically take into account environmental issues. If Monsanto's genetically modified products are considered a risk on grounds relating to environmental protection, then these products are to be prohibited on the basis of environmental law or other environmental measures are to be taken. It would hardly help the environment if such risks were addressed only because Monsanto is – by chance – planning to merge with another business. Clearing the merger subject to environmental obligations would not be a suitable solution either if competitors not planning to merge were still allowed to offer similar products.

### III. Interim conclusion

In summary, the following can be noted: The exclusive examination standard applied by the European Commission and the Bundeskartellamt with regard to merger control is whether the concentration is likely to “significantly impede effective competition” (Article 2 of the Merger Regulation, Section 36(1) GWB). By including the principle of ministerial authorisation, German law provides for rules pertaining to individual cases in which legitimate non-competition related interests exist that run counter to the interest of protecting effective competition but may nevertheless justify the clearance of a merger which would have to be prohibited under the exclusive rules of competition law. In a recent ministerial authorisation proceeding, environmental aspects played an important part even though it did not become sufficiently clear in the view of academic experts and the Monopolies Commission, which provided an expert report in this proceeding<sup>138</sup>, whether these aspects were in fact able to justify the decision in the individual case in question.<sup>139</sup> A similar instrument does not exist on a European level, however.

Neither German nor European law provides for suitable means to take into account non-competition related aspects which would have opposed the clearance of the Bayer/Monsanto merger.

Due to the clear separation of the areas of responsibility of the Bundeskartellamt and those of the Federal Ministry for Economic Affairs and Energy within the context of ministerial

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<sup>138</sup>The Monopolies Commission advised not to grant ministerial authorisation requested by Miba and Zollern. Cf. *Monopolies Commission*, press release of 18 April 2019, available (in German) at <https://www.monopolkommission.de/index.php/de/pressemitteilungen/239-zusammenschlussvorhaben-der-miba-ag-und-der-zollern-gmbh-co-kg.html>.

<sup>139</sup> In the merger control proceeding Miba/Zollern, the German Federal Minister for Economic Affairs and Energy, Peter Altmaier, granted ministerial authorisation and justified this by citing environmental policy goals. Cf. *BMW*, press release of 19 August 2019, Altmaier: Ministererlaubnis im Verfahren Miba/Zollern, available (in German) at <https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2019/20190819-altmaier-ministererlaubnis-im-verfahren-miba-zollern.html>.



authorisation proceedings, it could hardly be justified to take into account non-competition related interests opposing the clearance of a merger project in the scope of the competition authority's merger assessment.<sup>140</sup>

## F. Conclusion

In most cases, public interest objectives do not come into conflict with the aims of competition law. Protecting competition and pursuing public interest objectives often goes hand in hand: Jobs are most likely to be protected if businesses prove to be successful in the face of competition by offering products and services of higher quality. Just as competition can stimulate innovation in the form of new products and improved processes, it can also stimulate sustainable economic activity. Investing in production technology that uses scarce resources more efficiently not only offers businesses competitive advantages but is also in the interest of a more sustainable use of the resources available to us.

Where the goals of protecting competition and pursuing public interests come into conflict, it is primarily the task of the democratically elected lawmaker to strike a balance between the opposing interests. For instance, the lawmaker can set mandatory standards regarding environmental protection and in this way – in view of possible deviations falling short of the standards required – simply remove them as competition parameters. In some cases, it can be observed, however, that in certain policy areas types of cooperation based on private self-regulation are regarded as an alternative to legislative measures to achieve public interest objectives. However, the lawmaker should refrain from stipulating its own provisions and allow the parties to use types of cooperation based on private self-regulation only if this is in fact the most effective approach.

Where businesses engage in types of cooperation based on private self-regulation, these types of cooperation must be in line with the standards set by competition law. In this regard, it is to be noted that in many cases these types of cooperation do not restrict competition. They do not fall under the scope of the prohibition of anti-competitive agreements. If, however, types of cooperation based on private self-regulation are linked to restraints of competition, the question arises as to the extent to which public interest objectives can be taken into account within the scope of the prohibition of restrictive agreements.

It may be possible to include such types of cooperation within the scope of the prohibition of restrictive agreements especially with regard to such public interest objectives which are

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<sup>140</sup> In this context, the instrument of ministerial prohibition is also discussed (overriding public interest in prohibiting a merger). Cf., for example, *Budzinski and Stöhr* (2018), Die Ministererlaubnis als Element der deutschen Wettbewerbsordnung: eine theoretische und empirische Analyse, Discussion Paper No. 114 Technische Universität Ilmenau, available (in German) at [https://www.db-thueringen.de/servlets/MCRFileNodeServlet/dbt\\_derivate\\_00041312/Diskussionspapier\\_Nr\\_114.pdf](https://www.db-thueringen.de/servlets/MCRFileNodeServlet/dbt_derivate_00041312/Diskussionspapier_Nr_114.pdf).



pursued by other provisions of European primary law. However, there are limits to this: Restricting the scope of application of Article 101(1) TFEU may be possible in rare exceptional cases only. Public interest objectives may rather be taken into account within the framework of Article 101(3) TFEU. However, cooperating businesses cannot simply claim the protection of abstract public interest goals in this regard. They have to prove that the adversely affected consumers are not placed in a less favourable position by the agreement. This proof and the quantification of the related public interest objectives are associated with a number of practical and normative problems.

Due to the singularity of the social challenges linked to climate change, more and more competition authorities see the need to take greater account of environmental concerns in their competition law practice. In its previous practice, the Bundeskartellamt has taken the aim of protecting the environment and other public interest objectives into account within its scope of discretionary powers.<sup>141</sup> It is, however, to be expected that the debate regarding guidelines on how to deal with sustainability initiatives will not fall silent. Therefore, the Bundeskartellamt will also have to face the question of whether it should adhere to its previous practice of taking account of non-competition related issues primarily within the scope of its discretionary powers.

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<sup>141</sup> Cf., for example, *Bundeskartellamt*, 2015/2016 Activity Report, German Bundestag – 18th legislative period, printed paper 18/12760, p. 54, available (in German) at [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202015\\_2016.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202015_2016.pdf?__blob=publicationFile&v=4).