Competition Policy supporting the Green Deal – Contribution of the Austrian Federal Ministry of Justice

I. Introduction

With regard to the call for contribution of the European Commission, DG Competition, dated 13 October 2020, the Austrian Federal Ministry of Justice would like to comment on the second part of the consultation, namely the part concerning **Antitrust Rules**. This is without prejudice to the question about how the other mentioned areas of the Consultation paper, namely State aid control or Merger control could contribute to the Green Deal. But as far as the responsibility of the Ministry of Justice is concerned, we have already reflected further on the relationship between Antitrust Rules and the goals of the Green Deal.

We are - together with the Austrian Federal Ministry for Digital and Economic Affairs - currently transposing the ECN+ Directive into Austrian law and are discussing whether this could be the opportunity for further additional amendments in the Austrian Cartel Act. One point that we proposed for discussion with our stakeholders in June 2020 was the question **if it could be useful and, as appropriate, how it could be accomplished to stipulate ecological sustainability as an exception from the prohibition of restrictive agreements.** This also in view of the fact that according to the current Austrian government program, Austria targets to be climate-neutral until 2040.

We are aware of the fact that sustainability is a broad notion. Having in mind that Antitrust Rules require a self-assessment of undertakings whether a certain behaviour is allowed or not, we think that the legislator is challenged to be as clear as possible for the sake of legal certainty. Our discussion proposal therefore encompasses what we called „ecological sustainability".

The challenge is to find a balanced solution that fits in the existing framework and reconciles the need for an effective competition system on the one hand and a more sustainable environment on the other hand.

II. The context of the issue and the main questions

The starting point of our considerations was **whether a cooperation of undertakings for the purpose of an ecological sustainability may already fit into the exception of Art. 101 para 3 TFEU**, which is insofar identical with § 2 para 1 of the Austrian Cartel Act (KartG)[1]. Therefore, on national level, the courts also refer in their jurisdiction to the Guidelines on the Application of Art. 101 para 3 TFEU (hereafter: „Guidelines").

We debated how the following facts - by way of example - would be assessed according to Union and Austrian law in force:

An undertaking invents a new CO2-emmison-saving production method for the products it sells. To avoid the „first mover disadvantage" it seeks to make an agreement with its competitors to use this new sustainable but more expensive production method only. The agreement leads to a higher price of the product for the consumers while the product itself is not of higher quality. The advantage for the whole society would be that the invention of a new CO2-emission-saving production and the

[1] Kartellgesetz 2005.

commitment of the undertakings to use only this production method leads to significant lower CO2-emissions in the concerned industry.

In our examination of Art. 101 para 3 TFEU, respectively § 2 para 1 KartG, we determined several points to be crucial for the assessment of the question whether the restrictive agreement in a case like the mentioned could be qualified as an exception of Art. 101 para 3 TFEU:

1.) Is it possible to **qualify a production method that meets the goals of ecological sustainability as an efficiency gain** in the sense of Art. 101 para 3 TFEU (§ 2 para 1 KartG), although the product itself is not of higher quality?

2.) Is it **necessary that the fair share of the benefit of the consumers takes place in the same market**, namely the market where the competitive restriction proceeded or can a benefit to the general public lead to a justification of the restriction?

3.) Is it necessary that the benefits occur at the same time or shortly after the disadvantages of the restrictive agreement took place or **is it enough that future generations benefit from the positive effects of the restriction of competition**?

In general, we think that the wording of Art. 101 para 3 TFEU, respectively § 2 Abs. 1 KartG, could be broad enough to be interpreted in a way that allows to cover benefits for the general public that are not reflected in the product or service itself, but bring an advantage to the environment, even if it may only be in the future.

But at the same time we note that in the jurisdiction of the European Courts and in the assessment of the Commission there exist only very limited signs as regards the acknowledgment of benefits in terms of positive effects on the environment in general, although it was e.g. recognized that a lower energy consumption contributes to the Union policy on environment which is a collective benefit. Also the Guidelines seem to interpret the mentioned questions in a more restrictive manner:

The Guidelines recognize qualitative efficiencies, but it seems that they **must be reflected in the product itself** (para 69 – 72 of the Guidelines). Agreements concerning a more sustainable production may often also lead to a higher product quality, but – as in our case example – this is not necessarily the case. Against this background, our conclusion to the **first question** would be that, if the sustainable production of a product that does not improve the quality of the product, **it is very doubtful whether efficiency gains** also encompass a more sustainable production.

As regards the **second question**, we assume that the consumers of the relevant geographic or product market must, in general, benefit from the improvements. It seems that a restriction of competition cannot be justified if consumers of another geographic or product market gain advantages (para 43 of the Guidelines). The advantage for the consumers therefore needs to be a direct economic advantage on the concerned market.

As regards the **third question**, paragraph 88 of the Guidelines gives some explanation: the Guidelines state that the advantage of the restrictive agreement may materialize only after a certain period of time. The greater the time lag, the greater must be the efficiencies (para 87 of the Guidelines). The Guidelines **obviously do not encompass advantages that occur only in a longer period or advantages for the next generation**.

III. Reflections concerning a possible development of the law

Our starting point concerning a possible amendment to our national law was that we wanted to diverge as less as possible from Art. 101 para 3 TFEU.

The proposal we brought up for discussion would be along the lines of stipulating explicitly that **consumers have a fair share of the resulting benefit of a restriction, if the efficiency gain contributes to an ecologically sustainable or climate-neutral economy**.

Our primary leverage point would thus be the fair share of the consumers which would be extended by our proposal. Changing this criterion would also have effects on the question of what could be qualified as an efficiency gain (beyond cost efficiencies and qualitative efficiencies in the sense of the Guidelines). If the restrictive agreement of undertakings leads to a more sustainable production method, already this production method could be qualified as a contribution concerning the improvement of the production or distribution of goods in the sense of Art. 101 para 3 TFEU, respectively § 2 Abs. 1 KartG.

We are aware of the fact that such an amendment in the Austrian Cartel Act could have only limited effects because of the primacy of Union law. We present our reflections in this consultation not only to inform the Commission of the ongoing discussion in Austria as regards this topic, but also because we think that a cautious extension forward a broader consumer benefit in terms of a more sustainable environment for the society as a whole could also be a good way forward at Union level.