Comments by the German Federal Government

on the contribution of competition policy in support of the Green Deal

In presenting the European Green Deal, the European Commission has set out a growth and transformation strategy that is to pave the way for European business to reach climate neutrality. The German Federal Government supports the approach served by and the targets set out in the European Green Deal, and is playing a constructive role in the implementation processes for the various measures. In light of this, the Federal Government welcomes the dialogue launched by the European Commission on potential ways in which the Green Deal could be supported by competition policy.

Sustainability objectives and antitrust law

Mitigating climate change is one of the key challenges of this century, and therefore of utmost importance. For climate policy to be fully effective, the existing legal framework needs to be reviewed for potential obstacles. This also includes a review of antitrust law. At present, the Federal Government has no information that would suggest that the current antitrust framework within the EU acts as an obstacle to mitigating climate change or any other sustainability objectives.

The opposite is true. Well-functioning competition will foster an efficient use of resources, strengthen innovation, and ensure that production is guided by the preferences of the demand-side. In these ways, competition creates a framework that helps achieve sustainability targets. However, this does not rule out the possibility that there may be some isolated conflicts of interest between the enforcement of competition law and corporate conduct that has a positive effect on sustainability.

Against this background, the Federal Government welcomes the debate opened up by the European Commission on whether the competition policy framework and the work of the competition authorities are in need of adjustment to rectify this type of conflict of interest. It is the Federal Government's view that the European Commission ought to take into account as it conducts its review that an opening up of competition policy to incorporate sustainability interests should not result in a situation whereby competition policy would be opened up to considerations of all kinds of other non-competitive objectives.

Prohibition of anticompetitive agreements

There are numerous types of inter-company cooperation that serve sustainability objectives (hereinafter: 'sustainability cooperation') and do not result in restraints of competition, which also means that the prohibition of anticompetitive agreements does not apply. Examples of this include the many cases of cooperation on private-sector self-regulation, e.g. voluntary product certifications and quality labels. It is required, however, that such initiatives be open to all interested companies, in principle, and that products not subject to the self-regulation can continue to be also

sold on the market. As a general rule, this will give consumers greater choice and enable competition between different standards / certifications.

European and national antitrust law leaves only restricted scope for types of sustainability cooperation that have a negative impact on competition, but the Federal Government holds that this scope is sufficient. The Federal Government is not aware of any indications suggesting a need for adjusting the way in which the law is currently being applied. The cases decided by the Bundeskartellamt so far have shown that the law can be applied flexibly enough to ensure that adequate consideration can be given to sustainability interests.

The case law handed down by the ECJ (in particular ECJ, Judgement of 19 February 2002, C-309/99 – Wouters) shows that the scope of application of Art. 101(1) TFEU can be restricted if this is warranted by certain circumstances. To what extent this applies in the case of sustainability cooperation must be ascertained for each individual case. By contrast, for the vast bulk of types of cooperation that result in restraints of competition, the only legal basis that might allow for positive sustainability effects to be factored in is likely to be Art. 101(3) TFEU.

Whether or not an exemption pursuant to Art. 101(3) can be granted for cooperation depends on whether the (positive) sustainability effects balance out or outweigh the negative effect of the restraint of competition on consumers. This means that where *regional* markets are concerned, only a small proportion of the positive effects can be factored in in cases such as climate mitigation cooperation focused on preventing emissions that have a *global* effect. Nevertheless, it is the Federal Government's view that this principle should be upheld and that the list of criteria in Art. 101(3) should remain in place.

By no means is this meant to say that benefits accruing outside the market relevant for the purposes of competition law are irrelevant. But the process of considering all aspects on the various stakeholders requires normative rule-setting and political decision. The Federal Government holds that, wherever possible, this rule-setting and these political decisions ought to take place outside the competition authorities applying the law.

Furthermore, if, for instance, global effects on the climate had to be factored in by the competition authorities, these would be confronted with the challenge of ascertaining and quantifying these for purposes of comparison. This in turn would mean that the relevant authority would have to consult current climate models, consider global carbon leakage effects and the monetisation of improvements for the common good – and thus would be confronted with a large number of highly complex decisions, including normative ones. The Federal Government considers this type of balancing of interests to be a task that must primarily fall to the legislator.

Notwithstanding this, it is important to ensure that the competition authorities do their best to support sustainability cooperation. The Bundeskartellamt is already ensuring this by holding informal deliberations with the companies affected. The Bundeskartellamt has no knowledge of any sustainability cooperation subject to its scrutiny that would not have gone ahead due to objections under competition law. However, as the number cases of sustainability cooperation is likely on the

rise, informal deliberations might cease to be efficient. It is true that giving universally applicable support, e.g. official guidelines, is far more complex as it would require subjecting numerous sustainability objectives and types of cooperation to abstract legal scrutiny. But as this type of case becomes more common in the work of the European Commission and the NCAs, the challenges of ensuring this scrutiny should diminish. Therefore, the Federal Government can see good reason why the competition authorities should, in the medium term, support companies by issuing guidelines.

Merger control

The effects of corporate mergers on sustainability objectives can vary and cannot be generalised. On the one hand, cost advantages and better bargaining power can put established companies in a position to defend market shares against new and more "sustainable" competitors, or to stand in the way of technological advances. On the other hand, there are some markets where a positive correlation has been found between company size and innovation activity. Where global environmental issues such as climate change are concerned, it also necessary to factor in international interdependencies. Where markets are characterised by considerable economies of scale, mergers between innovative companies offering sustainable products have the potential to improve their international competitiveness and help secure market shares. In those cases, in particular, where production conditions in the EU and products made in the EU are considerably more sustainable than in third countries, the competitiveness of European companies is a matter of global ecological relevance. However, incentives for innovation can be reduced if there is too much concentration on individual markets, which is why sufficient competitive pressure needs to be upheld.

The European Commission's scrutiny in the field of merger control is limited to matters directly related to competition. Art. 2(1) Sentence 2b of the Merger Control Regulation (Regulation (EC) No. 139/2004) allows for consumer interests and technical progress to be taken into account, but only if this does not hinder competition. German antitrust law is based on a strict separation of the assessment under competition law and the pursuit of common-interest objectives, with the latter taking the form of the ministerial authorisation (Section 42, Act against Restraints of Competition).

Whilst it is possible to consider allowing a merger that has previously been banned to go ahead if this helps serve sustainability objectives, it should not be possible to stop a merger which is unobjectionable under competition law on the grounds that it has a negative impact on sustainability. A good example of this is the Bayer/Monsanto merger (Case M.8084). The calls made for the merger to go ahead only subject to additional environmental requirements would have resulted in these affecting only the newly merged company, whereas its competitors would not have had to comply with any additional requirements beyond the regular legal framework.

The Federal Government considers that it would be conceivable to give consideration to common-interest objectives (including climate change) after the assessment under competition law has been completed. This, however, would require a prior in-depth analysis to see how merger control (potentially) runs counter to these common-interest objectives. The Federal Government welcomes

the fact that the European Commission has started this analysis by conducting this consultation. Furthermore, the Federal Government would like to point out that there are numerous general issues affecting both the prohibition of anticompetitive agreements and merger control and which also need to be discussed as part of this analysis. The Federal Government is taking this opportunity to comment on these general issues:

How antitrust law can help progress towards sustainability objectives and where its limitations are

The Federal Government holds that an adjustment of antitrust law is not the preferred method for fostering progress on sustainability objectives. First of all, a thorough assessment should take place to see whether a 'first best' solution, i.e. internalisation of external effects (e.g. in the case of climate change) or a reduction of information asymmetries (e.g. via certification of sustainable products) is available to the legislator. Where initiatives by the private sector are necessary ('second best') and where these should unexpectedly turn out to be in conflict with the protection of competition, a political solution is required.

This decision then requires an instituted way in which common-interest objectives must be taken into account and how any conflicting common-interest objectives are to be prioritised. For instance, it would have to be decided to what extent and how certain common-interest objectives (such as climate change mitigation) can or should be assigned a special role vis-à-vis other objectives enshrined in European primary law.

With regard to the institutional framework, care must be taken to ensure than any prioritisation of common-interest objectives would have to take place outside the competition authorities and be bound to strict criteria. After all, not only is the action of weighing conflicting objectives against each other a political action by its very nature. It also requires democratic legitimisation.

Finally, it is important to note that, at this point in time, any decisive adjustment of the European or national competition framework, with the intention of serving sustainability objectives, is not (yet) something the Federal Government would consider. The Federal Government is not aware of any significant ways in which competition law would hinder private-sector companies in their attempts to further the sustainability objectives. The work of the competition authorities should, however, be oriented towards offering advice and support to companies as to how they can implement sustainability cooperation within the existing legal framework.

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