Position Paper

of the German Insurance Association (GDV)

ID Number 6437280268-55

on the call for contributions of 13 October 2020 –
Competition Policy supporting the Green Deal

Gesamtverband der Deutschen Versicherungswirtschaft e. V.

German Insurance Association

Wilhelmstraße 43 / 43 G, 10117 Berlin
P.O. Box 08 02 64, 10002 Berlin
Phone: +49 30 2020-5000
Fax: +49 30 2020-6000

51, rue Montoyer
B - 1000 Brussels
Phone: +32 2 28247-30
Fax: +49 30 2020-6140
ID Number 6437280268-55

Contact:
Legal Affairs and Compliance

E-mail: **recht@gdv.de**

www.gdv.de

The German Insurance Association (GDV) welcomes the European Green Deal and its goal to make Europe the first climate neutral continent by 2050. The following contribution aims to address the question raised by the Commission as to how EU competition rules can better contribute to the Green Deal objectives and how competition and environmental policies can better work together.

The German insurance industry has been repeatedly confronted with the question of how voluntary commitments with non-competitive objectives, such as promoting sustainability, are to be evaluated in the light of competition law. Providing an answer to this question seems to be all the more important given that is often the public or the legislator who call for respective initiatives.

For instance, in response to respective calls for action, the insurance industry developed a code of responsible investment a few years ago. Insurers were asked to commit to no longer invest in companies involved in the production of certain internationally outlawed weapon systems such as anti-personnel landmines and cluster munitions. Germany's Federal Cartel Office *(Bundeskartellamt)* had serious concerns about this initiative in terms of competition law. It argued that the factual conditions laid out in Article 101 TFEU would only focus on the impacts that agreements might have on competition but would not allow for a balancing with other interests. Efficiencies within the meaning of Article 101(3) TFEU were not apparent according to the antitrust authority. In exercising its discretion, the Federal Cartel Office stated however that for the time beingopen a case. Given the objections raised by the Federal Cartel Office, the insurance industry did not take any further action on this issue. Even though, strictly speaking, it was not about a sustainability agreement then, we believe that the issue is basically the same.

In addition, the insurance industry is currently discussing possible initiatives regarding sustainability standards and objectives in various areas, including the following, amongst others:

- Objectives for carbon neutrality as well as development of sustainability standards and criteria for investments;
- Commitments to adopting a responsible approach to dealing with sustainability risks in consultation with the insured companies and the companies in which investments were made (engagement).

In assessing these and similar issues, it becomes very clear that there is currently a significant lack of legal certainty with respect to the competition law assessment of sustainability agreements. There are hardly any current guidelines on the conditions on which such agreements and initiatives are

permissible under competition law. The adoption of a separate section on environmental agreements in the Commission's Horizontal Guidelines of 2001 provided some helpful guidance.[1] It is probably safe to assume, however, that the information provided there is no longer up to date, and the respective section is no longer included in the current version of the Guidelines.

The authorities' practices do not provide sufficient legal clarity to cooperating companies in many instances either. Within the scope of its discretion in taking up a case, the Federal Cartel Office addresses such cases on a regular basis by committing not to initiate proceedings for the time being. Given the significant potential implications of competition law violations both in terms of penalties and loss of reputation, most companies tend to be very cautious. Consequently, if there are any doubts about the admissibility of sustainability initiatives, voluntary commitments, and similar agreements under competition law, they will usually not be realized.

We believe that, from a legal perspective, clarifications and amendments to the following issues, in particular, would be useful:

- There is probably no doubt about the fact that agreements which merely involve compliance with government guidelines are unproblematic from a competition law perspective. However, it would be helpful to have some guidance on how to evaluate voluntary commitments which aim to promote the objectives of supranational, non-binding agreements and provisions, such as, for example, the UN's Sustainable Development Goals of the 2030 Agenda. The European Green Deal is another example, at least in cases where it does not impose any binding provisions or in cases where business initiatives aim to implement binding provisions prematurely or to over-implement them.

- As already mentioned above, the public and government agencies often explicitly call for industries to encourage companies to enter into agreements to meet sustainability goals. In many cases, private self-regulation indeed has the advantage that it can be implemented more rapidly and that it provides more flexibility to react to changing conditions. From a competition law perspective, however, it is currently irrelevant whether self-regulation is desired or supported by the government. This state of affairs does not appear to be appropriate since the legislator is thus getting in its own way

[1] Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ 2001 C 3/02, para. 179 et seq.

when it comes to choosing the appropriate means to meet sustainability goals most efficiently.

- It is frequently assumed that many sustainability initiatives can be considered as standardisation agreements within the meaning of the Horizontal Guidelines under competition law, and thus do not fall within the scope of the prohibition on concerted practices if the requirements set out in the Horizontal Guidelines have been fulfilled. It would be appreciated if the issue of "sustainability initiatives seen as standards" would be further elaborated.

- The biggest challenge is probably the fact that the assessment of potential efficiency gains and allowing consumers a fair share of these efficiency gains pursuant to Article 101(3) TFEU encounter difficulties: positive effects of an agreement on environmental protection are currently unlikely to be eligible for consideration. In addition, quantifying these kinds of benefits is always difficult. Guidelines as to what kinds of efficiency gains are eligible for consideration and what kind of methodology should be used to calculate such improvements would be very much appreciated in this context. Last but not least, it should also be clarified how the criterion of benefits to consumers is to be interpreted in this context.

We believe that, from a procedural perspective, it would probably be the best solution if the EU Commission included a separate section on environmental and sustainability agreements in the revised version of the Horizontal Guidelines, which is currently being prepared. It would thus build on the respective statements in the Horizontal Guidelines of 2001. In addition, making an amendment to the Guidelines on the application of Article 81(3) of the EC Treaty[2] might be a good idea to allow for environmental and sustainability benefits of agreements to be also recognised as efficiency gains.

It would also be very useful if the Commission – at least with regard to crucial sustainability initiatives with a Community dimension – created the procedural conditions to publish comfort letters, which is already being done in the context of the coordination of competitors in order to respond to the coronavirus pandemic.[3] This would provide a significant increase in legal certainty. It would be particularly useful given the fact that the self-

[2] Commission Notice – Guidelines on the application of Article 81(3) of the EC Treaty, OJ 2004 C 101/97.

[3] Comfort letter "*Coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients"* to Medicines for Europe of 8 April 2020.

assessment within the scope of Article 101(3) TFEU, as described above, is subject to a great deal of uncertainty.

Berlin, 20 November 2020