

Evonik Industries AG

World Commerce & Contracting Association - Sustainable Contracting event

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Consider Antitrust Law – Why?

- **Severe consequences for antitrust violations:**

- Substantial **fin**es, imposed on company and acting personnel;
- Large **damage claims** of (direct or indirect) customers;
- **Criminal liability (jail!) of cartel infringements** in many countries;
- **Negative publicity**; adverse effect on share price, financial rating, sustainability ranking; ban on public biddings, blacklisting in company register, etc.;
- Agreements are **void** or unenforceable;
- In many companies in case of infringement, employer will take measures under **employment law**.

⇒ **Every employee has to familiarize himself with the essential principles of antitrust law.**

Discussions and agreements with competitors concerning the following topics are prohibited:

All competition parameters, but especially:

- Prices (e.g. intended future prices, actual prices, discounts, increases, reductions or rebates);
- Output (e.g., intended future sales, market shares, territories, sales to particular consumer groups);
- Non-public information on profits, margins or costs;
- Strategic sourcing-related information (e.g., purchase prices and conditions, purchased quantities, quality, planned sourcing behavior or certain claims voiced by suppliers);
- Information regarding present suppliers or customers (names, costs, prices, profitability, etc.);
- Business opportunities or **business strategies** more generally;
- Specifics of planned new products;
- Non-public information on technologies and R&D programs; or
- Any information from which such information could be derived.

Attention:

- Even a **one-time exchange** of market sensitive data can cause a fine.
- Even general discussions about these topics are illegal!
- In case your customer / supplier is your competitor the general principles for dealings with competitors are applicable (→ restrictive information change).

What are „sustainable agreements“?

- Better living conditions for animals (e.g. “more space for chicken”)
- Better living conditions for people/farmers (e.g. “minimum purchase prices”)
- Projects for Green House Gas Reductions (CO2 footprint) (e.g. “termination of products”)

Challenge: often there is a “first-mover-disadvantage” – the one paving the way and introducing the more sustainable product will bear all costs and suffer from the traditionally produced and cheaper alternatives.

Practical questions you need to consider for cooperation

Issues

- Collaboration amongst competitors have the inherent risk of antitrust related infringements, see before.
- Typically prices for consumers raise!

Questions

- Why do you need to work together? Why can't you undertake your project alone?
- How can you achieve your goals with the minimum impact on competition (least restrictive way)?
- Have you quantified the size and scope of the environmental and other benefits produced by the cooperation?
- In which way will customers share these benefits?
- What is the precise scope of the collaboration and how are you going to ensure everyone sticks to it?

Specific questions on efficiencies

1. Efficiencies **within** the relevant market

- **Direct** benefits to consumers buying the more sustainable product (higher quality product)
- **Indirect** benefits (environmental benefits, to consumers who buy the more sustainable product)

2. Efficiencies **outside** the relevant market

- **Indirect** benefits / Externalities (environmental benefits, employment benefits etc.)
- **Other** benefits (other raw materials required, and hence more sales from that raw material companies who act more sustainable)

Practical examples - 1

1. Transparency in the supply chain

- Several platforms used by customers require the disclosure of individual information about suppliers in different levels of detail; the degree of disclosure or visibility for other users of the platform can influence the rating as a more or less sustainable supplier;
- ➔ Lack of "safe harbour" rules for the exchange of information

2. Joint discontinuation/replacement of certain products

- Agreements to only supply products that meet certain sustainability requirements;
- Mandatory purchasing from certain suppliers (possibly also at certain negotiated prices) – and not to buy from others (boycott);
- Agreements on the abandonment of production of certain products (within a certain time) in order to introduce more sustainable and expensive alternatives;
- Refusal to supply certain (discontinued, unsustainable) products

Practical examples - 2

3. **Voluntary** agreements between companies to achieve certain sustainability goals, **standards**, quality **labels** (beyond minimum legal standards)
 - ➔ Non-binding private self-regulation or labels usually do not restrict competition or can be justified based on efficiency gains
4. **Binding** agreements between companies to meet certain **standards** (e.g. on more environmentally friendly packaging materials)
 - Role of the legislator?
 - Legal uncertainty regarding the introduction or implementation of the standards through private-sector cooperation
5. **Joint research**
 - Introduction of new products with research objectives that can only be achieved jointly, usually not restrictive of competition, but possibly restrictions on innovation competition
 - Uncertainties in antitrust assessment
6. Sustainability as a possible efficiency in **merger control**?
 - Uncertainty as to how to substantiate sustainability efficiencies

EU Law – Art. 101 EU Treaty

Art. 101 Para 1 EU Treaty forbids agreements or concerted practices which have as object or effect prevention, restriction or distortion of competition

Art. 101 Para 3 EU Treaty provides justification if the **cumulative** criteria below are met:

- (1) objective **efficiencies** (improvement in production, distribution, product variety, quality, innovation), and
- (2) while allowing **consumers a fair share** of the benefit, and
- (3) indispensable** to attain the objective, and
- (4) not **eliminating** competition **entirely**.

Challenges:

- (2) requires a benefit for the direct or indirect consumers of the products/services; sustainability benefits might be **unrelated** to the consumers
- (2) requires that benefits **fully outweigh the harm** caused by the restriction in the relevant market; sustainability benefits might not be significant enough to compensate
- (2) requires a **quantitative** assessment
- (3) requires an argumentation why alternative solutions **are not as effective**

EU Commission Draft Horizontal Guidelines published March 1

EU Commission included new chapter on agreements between competitors that pursue one or more sustainability objectives (sustainability agreements)

- https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en
- Sustainability objectives are not limited to climate goals, but encompass economic, environmental and social (labour, human rights) dimension

Commission provides illustrative but not exhaustive list of agreements not raising concerns (9.2):

- agreements that do not concern economic activity but **internal corporate conduct** (e.g. measures to eliminate single-plastics use on business premises, not exceed certain temperature in buildings, number of printed materials per day)
- creation of **databases with sustainability information on suppliers, distributors**, etc. without obligation to buy or sell

No "fake" sustainability objective covering up price fixing or market/customer allocation, limiting output or innovation (9.3)

EU Commission Draft Horizontal Guidelines

“**Soft**” **safe harbour rules** for some sustainability **standards** (to phase out, withdraw, replace non sustainable products, or processes, harmonize packaging, purchase sustainable input etc.): unlikely to produce appreciable negative effects on competition if the below cumulative conditions are met (9.3):

- transparent procedure where all interested competitors can participate and contribute to selection of standard
- no obligation to participate
- freedom to adopt higher standards for those who apply the standard
- no exchange of commercially sensitive information beyond what is necessary to develop, adopt or modify the standard
- effective and non-discriminatory access to standard
- standard will **not lead to significant increase in price or reduction in choice** and
- monitoring system to track compliance of those who adopted the standard

EU Commission Draft Horizontal Guidelines

Guidance on application of **Art. 101 Para 3** (9.4)

(1) sustainability **efficiencies** can be objective efficiencies (cleaner production, less pollution, more resilient infrastructure or supply chain, less disruption, better quality, reduced time to market, improve consumer choice by facilitating product comparison) but need to be substantiated, objective, concrete and verifiable

(3) **indispensability** to attain benefit: in principle every market participant shall compete in offering sustainable products

(2) **pass on** to consumers (fair share of benefit for consumers) could be

- individual use value (improved product quality or variety)
- individual non-use value (consumers value impact of their sustainable consumption on environment and others, measured by willingness to pay, demonstrated by customer)
- collective benefits can only be taken into account if the larger group of consumers outside the relevant market overlaps essentially with a significant group of consumers in the relevant market, e.g. drivers who buy less pollutive fuel benefit as citizens from cleaner air

EU Commission Draft Horizontal Guidelines

(4) **elimination** of competition

- Is not given as long as parties compete on **one aspect**, e.g. even if competition on variety or quality is eliminated, price competition can remain; if particular non sustainable ingredients or technologies are eliminated, price and quality competition can remain
- Even if competition is eliminated for a certain **time** (to introduce a sustainable product), competition can remain after that period