

SUSTAINABLE DEVELOPMENT AND COMPETITION LAW
(Special project for the 2021 ICN Annual Conference – Survey)

APPENDIX C.4
to the Survey Report

Introduction to the survey



Please read carefully before responding to your online questionnaire
(APPENDIX C.4 to the Survey Report)

This document introduces the survey for prospective respondents by describing its substantive background and its main features. A separate document sets out useful technical remarks.

SUBSTANTIVE BACKGROUND

Sustainability and competition law is an emerging topic for competition agencies and other stakeholders, representing an area where there is great potential for further exploration. In fact, whether sustainability should be considered in competition enforcement, and if so, how, is not only a relatively new topic for competition policy, but also a highly complex one, giving rise to a number of controversies and conceptual and practical challenges.

Our preliminary knowledge on the issue that shaped our ideas about this survey can be summarised as follows:

- The interaction between sustainability and competition law is a hot and evolving topic. It has attracted keen interest from several competition agencies, practitioners and academia.
- At present, there is no consensus as to whether (a) competition law has a meaningful role to play in the achievement of sustainability objectives, or (b) other tools are the only appropriate means for dealing with sustainability related competition policy considerations.

While this is a fundamental question, a survey aimed at collecting experience does not need to address it; and it obviously cannot *per se* rule out that competition law has a meaningful role to play.

- Although it is anticipated that no competition agency will have substantial experience on this issue, the degree and type of agencies' experience may vary widely. The topic may be new for many competition agencies, including the GVH, while some other agencies may have valuable knowledge from recent case work, sector inquiries or market studies, research, competition advocacy and other activities.
- Reasonable ideas have been put forward as to how sustainability could be incorporated into the broad enforcement framework, such as considering sustainability as a non-price factor (i.e. a part of product quality), or considering sustainability improvements as efficiencies. In jurisdictions with a public interest standard, or with broader competition policy objectives, sustainability may (or may not) be regarded as part of the public interest, or part of those broader objectives.

At the same time, there are certainly challenges at the level of detailed analytics and measurement, e.g. when it comes to the quantification of sustainability gains (or losses for that matter) and their comparison with price effects and other standard metrics relied on by competition agencies.

- Analysing sustainability in competition cases may require skills that are outside of the traditional core-competencies of competition agencies, such as environmental economics and behavioural economics. Consequently, it may be necessary to engage in capacity building and co-operation with various domestic and international partners in order to overcome these challenges.
- In the context of competition policy, the term 'sustainability' seems to refer primarily to environmental sustainability, although sometimes it also covers social sustainability, such as agreements about decent farm gate prices, or fair trading arrangements. In any event, a

broader definition of ‘sustainability’ makes its content more diverse and further complicates its relationship with competition and competition enforcement.

- As far as competition enforcement is concerned, sustainability mainly arises in relation to restrictive agreements as a possible justification for the restriction of competition (i.e. as a defence).¹ Nevertheless, it can also arise in cases involving merger control and unilateral conduct, and may appear not only as a defence, but also as an offence (i.e. when less competition leads to less sustainability instead of higher prices).²
- It is often mentioned that beyond state regulation and other interventions, private initiatives are needed to achieve sustainability objectives. These initiatives tend to involve co-operation between competitors and, consequently, also affect competition.

If this is the case, too harsh competition enforcement against such co-operation is likely to discourage these initiatives and unduly compromise sustainability achievements as a result. At the same time, too relaxed enforcement may lead to undue restrictions of competition in the name of (false) sustainability (e.g. so-called green washing).

- As sustainability specific practices and standards are not well established yet, there is significant room and, perhaps, a need for competition agencies to provide informal guidance to parties involved in sustainability related arrangements involving competition. Furthermore, the provision of such guidance documents and soft law – or the elaboration of them – may be important for legal certainty.

SURVEY FEATURES

Against the background described above, we found it adequate to contribute to the ongoing exploration with a basic stock-taking, i.e. to collect information about existing experience concerning the interaction between sustainability and competition law.

We limited our survey to environmental sustainability. While we are aware that social sustainability may also be an important subject, environmental sustainability appears to be the most often discussed ‘genre’ of sustainability. In addition, by focusing on environmental sustainability the topic is less heterogeneous and less complicated.

This is an online survey, and the questionnaires may only be completed online via the URL provided in the email of invitation to participate in the survey.³

It is expected that the collected information will enable us to identify existing patterns and promising practices, while also allowing us to highlight the sobering limits that NCAs face in this field. The results of the survey will be presented at the ICN 2021 Annual Conference. We believe that this survey may serve as a useful basis for further research.

¹ An example may be an agreement between car manufacturers to jointly set ambitious CO2 emission reduction targets.

² An example may be an agreement between car manufacturers to limit their efforts to reduce CO2 emission.

³ In order to provide respondents with a non-fragmented view of the questionnaires and thereby facilitate the giving of proper responses (by making it easier for them to check the context of each-question), the respondents are also provided with the questionnaires in PDF and Word format. These PDF and Word versions of the questionnaires are for information purposes only, and responses must be submitted online.

Survey among competition agencies

The basic ambition of the survey among competition agencies is to identify the place and role that sustainability plays in competition law and its enforcement *in practice*. We do not aim to explore theoretical questions, for example whether competition law *should* have a role to play regarding sustainability.

The questionnaire adopts an open but focused approach. It concentrates on facts and the context behind those facts, including institutional aspects.

Restrictive agreements are placed at the centre of the questionnaire. This type of case seems to be the most affected by the issue of sustainability. Also, we do not want to overwhelm respondents with an excessive number of questions by extending the questionnaire to mergers and unilateral conduct cases.

The term ‘case’ has a broad meaning in the questionnaire: it does not only cover formal proceedings/investigations, but also informal consultations with parties.

The questionnaire is structured in sections, according to subject matter. Respondents are mostly required to give simple answers (Y/N type, number of cases/events, predefined options), but there are also occasions where respondents are given the opportunity to provide comments and explain their answers in more detail. For each major topic, the questionnaire makes use of open-ended questions (which are supported by checklists), which enable respondents to provide relevant examples in their own words.

Please submit your responses to this questionnaire by no later than **30 April 2021**.

Survey among NGAs

Compared to the survey among competition agencies, the survey among NGAs plays a supplementary role – its questionnaire is much simpler and shorter, but other than that the two questionnaires share many attributes.

The basic ambition of the NGA survey is to gather information about the views of NGAs regarding sustainability and competition law. It is important to note, however, that the questionnaire asks questions about *experience-based* views. Only NGAs having experience on the topic should respond to the questionnaire.

The survey also seeks to explore NGAs' views about competition agencies' transparency and preparedness regarding sustainability.

Please submit your responses to this questionnaire by no later than **16 April 2021**.

Confidentiality

The responses you submit to the GVH, as well as the data set generated from these responses, will *not* be made publicly available.

Nevertheless, individual/illustrative examples from your responses will be used in the descriptive report of the project, which will be publicly available.

Therefore, we kindly ask you to phrase your responses accordingly, and preferably not to include confidential data and information in your responses to the questionnaires.