

## PANEL DISCUSSION ON SUSTAINABLE DEVELOPMENT AND COMPETITION LAW

ICN ANNUAL CONFERENCE, HOST'S SPECIAL PLENARY SESSION (ONLINE EVENT)

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TRANSCRIPT<sup>1</sup>

### **Renáta Sipka (GVH) (event moderator)**

To move on with our next agenda point it will be a plenary discussion about the special project of the host, on the topic of Sustainable Development and Competition Law. One of the current challenges of mankind is also reflected in the evolution of competition law just like Mr Mundt said. The assessment of sustainability agreements opens up a number of theoretical and practical questions for both competition authorities and stakeholders. How to deal with sustainability matters, and what competition agencies can do to foster sustainability?

Well, these questions will be discussed with an excellent panel composed of enforcers and professionals, moderated by Mr Martijn Snoep, the Chairman of the Dutch Authority for Consumers and Markets. Mr Snoep has an extensive experience in the application of competition law, and before appointed as the Chairman of the ACM, he worked as an excellent adviser, but also operated as a managing partner of a very recognized law firm.

Please, welcome Mr Snoep on the stage and the panel as well.

### **Martijn Snoep (ACM) (moderator)**

Thank you very much for this kind introduction and welcome everyone to our panel on sustainable development and competition law. Before we kick off and I introduce the rest of the panel to you, I will kind of briefly set out what we had in mind to discuss and how we are going to structure this discussion. Because it's a wide topic and sustainability can include a wide variety of topics and we decided in preparation for this panel to focus this discussion on environmental protection and climate change.

Because it is clear that the world is preparing for a massive transition to a net zero economy, and this transition will require a drastic change in production processes, in consumption patterns, and will require an enormous adaptation of the world economy. And of course, it is the legislator who needs to set the goalposts who need to set clear targets, introduce product restrictions, introduce price incentives. This is first and foremost the task of the legislator.

But second, we cannot deny that industries will need to change dramatically, like I said, consumption patterns need to change. And most of the change indeed will need to come from these companies and consumers. Legislators will not be able to micromanage this change and we need therefore Adam Smith's invisible hand to help us.

But that invisible hand will probably also need some help from us, competition authorities. We need and are probably already enforcing the competition laws against agreements and mergers that have a negative effect on this transition that have a negative effect on carbon neutrality. We may also need to allow

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<sup>1</sup> Edited. Text approved by each participant. (Prepared by the Hungarian Competition Authority.)

agreements or mergers that can have a positive effect on this transition under certain conditions. But the key question for us this afternoon is: should competition authorities take into account the effects on sustainability and if so, how should they do that? And can the laws that we currently have allow us to do our task?

And fortunately, we have a fantastic panel to discuss these topics with you. And let me introduce them to you right away. The first person on the panel needs no introduction because he is our host. He is the chair of the Hungarian Competition Authority, Csaba Rigó who allowed and organised everything in this fantastic conference for us to join forces to exchange ideas. And we are extremely grateful as a global competition community for the opportunity and all the work that the Hungarian Competition Authority did in organising this conference.

Second, I will say the man who needs no introduction as he is one of the most famous presidents of any competition authority in the world, Andreas Mundt, the chair of our ICN, who welcomed us earlier today in his fantastic and ever warming welcome speech.

The third person on our panel is Delia Rickard. And we are extremely grateful that we have Delia on our panel, being mindful of the time-difference with Australia. She is the deputy chair of the Australian Competition and Consumer Commission.

The fourth person on the panel – and it shows the diversity of this panel and also the diversity in the global reach of this topic – is the Commissioner of the South African Competition Commission, Tembinkosi Bonakele.

And last but not least, we are extremely grateful to have Nicole Kar amongst us. She is a partner at Linklaters in London, and well known for her thought leadership in the area of competition and sustainability.

So, all in all, a stellar panel to discuss this important topic as part of this conference. And we thought the structure the discussion as follows. First, Csaba will give a short summary of the ICN survey the Hungarian Competition Authority conducted and that will give us some insight in the existing thoughts across the global competition community. Then each of the panellists will share some views from their own jurisdiction, some personal views on how to address this topic. Then we will check to see whether there are any questions from the audience and there is room for all the panellists to respond to what the other panellists have said and will take a bit of a free-flow discussion.

The panellists will raise their hands if they have anything to say, and I will try to moderate the discussion as good as possible. And with that, we are ready to go for the next fifty-three minutes of what is going to be, I think, a very interesting discussion. Csaba, can I give you the floor first?

### **Csaba Rigó (GVH)**

Thank you Martijn for your kind words.

Dear Panel Members, dear Colleagues, on behalf of the GVH community, thank you very much for your kind words. We are ready to show our survey – here it is [waving a copy of the survey report and its appendices in front of the camera].<sup>2</sup> And I try to show you the main findings, the big questions of the survey.

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<sup>2</sup> Sustainable Development and Competition Law – Survey Report (Special Project for the 2021 ICN Annual Conference) Hungarian Competition Authority, 30.09.2021.

First, I have to highlight that while the survey collected the experience and views of ICN members and NGAs, my presentation should not be taken as representing the official views of the ICN or any of its members or NGAs, of course.

Let me start by saying that this topic attracts different views, proposals and debates. We thought that it would be useful to complement these theoretical debates with a survey of actual practice. To keep our project less complicated, we limited our survey to environmental sustainability, as opposed to, for example, social sustainability. We focused on restrictive agreements, because this area seemed to be more promising in terms of case experience. Nevertheless, we also covered market studies and research, institutional issues and international co-operation.

52 competition agencies and 41 non-governmental advisors responded to our questionnaires. It is important to mention here that we asked NGAs to answer only if they have experience in the subject. In other words, NGAs were filtered. All in all, we believe that we cover most of the relevant experience. For the sake of time, I will simplify and talk about each point very shortly and look at the big questions.

There is almost a consensus among the respondent NGAs that competition law enforcement can play a reasonable role in achieving sustainability objectives. At the same time, comments suggest that this role should be limited in scope, as in most cases regulations are a superior means. Respondents may or may not be right, but their views certainly show the relevance of the topic.

Sustainability related cases do not seem to be much influenced by the legal framework. For example, efficiency and welfare objectives do not seem to impede sustainability related cases. Other goals, such as public interest and special provisions in competition law do not seem to facilitate those cases. At the same time, several NGAs call for soft laws and guidance. They are very vocal when they do that. Clearly, they want to be heard, [saying] for example: more guidance, please!

There is only a modest number of cases involving sustainability considerations and those cases are dealt by only a handful of competition agencies, as this chart shows.<sup>3</sup> Furthermore, there are only a few competition agencies with guidance materials. Also, the number of responding NGAs, 41, as I mentioned, of more than 600, shows that there are only a few NGAs with experience in the subject.

At the same time, there has been a recent surge in the number of cases involving sustainability defence, as this chart shows.<sup>4</sup> Also, there seems to be a recent surge in NGA experience. In addition, a much larger share of competition agencies expect to have sustainability related cases in the near future – almost three times [the number of agencies that had cases in the recent past] as you see – and many competition agencies have the topic on their strategic agenda.

Sustainability and competition is a hot topic in Europe nowadays. So, it was no surprise to see that a high number of respondents were European. Our survey also showed that case-experience is limited to Europe as well. At the same time, interest and expectation seem to build up in other continents as well. For example, several non-European competition agencies expect to encounter sustainability related cases in the near future. Time will tell if European agencies will be followed by others or not. Obviously, convergence would bring many advantages, as Andreas Mundt mentioned in his opening speech.

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<https://www.gvh.hu/en/gvh/Conference/icn-2021-annual-conference/special-project-for-the-2021-icn-annual-conference-sustainable-development-and-competition-law>

<sup>3</sup> Chart CA.III.B.1.i of the survey report.

<sup>4</sup> Chart CA.III.E.2.i.a of the survey report.

It appears that to assess sustainability considerations in competition law enforcement is challenging and requires special skills. Those competition agencies that actually had to deal with sustainability considerations in competition analysis tended to be faced with the need of new skills. This chart shows that several agencies that have not had such experience, and have not started preparations, are planning to do so.<sup>5</sup>

Also, about half of NGAs found the topic either fairly or extremely challenging, and most NGAs are planning preparations. In addition, as this chart shows, they tend to believe that the existing competition law framework has greater potential than what is currently being utilised.<sup>6</sup> We don't need to modify, of course, the legal framework.

International cooperation is much supported. Cooperation with their foreign partners seems to be crucial for competition agencies to overcome missing skills. This chart shows that the share of competition agencies preferring the involvement of international organisations, such as ICN, is much higher than the share of agencies with any actual experience in the topic, or the share of agencies having sustainability on their strategic agenda.<sup>7</sup> This implies that several competition agencies might be able to rely on the work of international organisations.

I did not have enough time to cover everything, of course, and to go into details. But you can always read the report. Also, all tables are available as annexes of the report, as you saw probably. We share everything that we can without violating privacy or confidentiality.

Last but not least, I am grateful to the respondents for their cooperation. I am also grateful to our special project team, Aranka Nagy, Csaba Kovács and Miranda Molnár, who conducted the survey and prepared the report, for their devotion and work.

That's all, Martijn, and I would like to come back later to talk about greenwashing if we have enough time.

#### **Martijn Snoep (ACM) (moderator)**

Thank you very much Csaba, and I can only repeat your enthusiasm for the report because I think it is very valuable work for the international competition community. It shows the divergence across the globe, but there is also what seems to be kind of a common understanding – if I may call it that – that the current laws give competition authorities plenty of room to incorporate sustainability arguments, defences, offences in their work and that that room can be further explored. And that such exploration would be best done in cooperation with other authorities around the world because, in fact, we are dealing here with a global problem, a global dilemma. So, it is very interesting to hear the results of the survey and it will also be very interesting to hear from different corners of the world how they look at this issue? Andreas, can I give the floor to you first?

#### **Andreas Mundt (Bundeskartellamt)**

Yes, Martijn, many thanks. I think sustainability is proof that we do not live on an island as competition agencies, but we're kind of embedded in what is important for society, for the business community. That's why sustainability is so important at all levels in Europe. Think of the European Commission's Green Deal, the prospect of a climate neutral Europe by 2050, and I must say it was also a central topic in the recent

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<sup>5</sup> Chart CA.IV.B.4.a.v of the survey report.

<sup>6</sup> Chart NGA.II.B.3.iii of the survey report.

<sup>7</sup> Chart CA.IV.D.2.v of the survey report.

elections that we had here, and I imagine that it is going to be very important for the next government as well.

So let me mention three points on how we deal with the question of climate change and sustainability with regard to competition law. I think, first of all – and that is the most important message that we should convey – sustainability and competition go hand in hand. Sustainability already is a very important competition parameter. For example, if you think of the ESG standards, the environmental, social, governance standards for corporate social responsibility, these ESG standards have already become an important competition parameter.

So, I firmly believe that neither competition nor competition law hamper sustainability goals. On the contrary, it is up to competition and free market mechanisms to fulfil environmental standards. You have mentioned it, Martijn, sustainability is costly and for that we need to get on board the private sector, we need businesses, we need consumers who in the very end will have to pay for it. And the necessary changes in innovation will come from private initiatives, they will come from private investment, they are not going to come from the start. So, I think what matters most is that we organise sustainability in a market economy structure, the best example are our CO2 certificates, which might work as a driver towards more sustainability.

Secondly, I think we should not let competition law be instrumentalised by others. I firmly believe that it is primarily the task of the legislator to set an appropriate legal framework to achieve the desired sustainability goals. If animal welfare, climate protection, and agricultural standards are desirable and if they are political goals, it is up to the policymakers to step up and set the standards. And they should not leave that to companies to organise themselves in kind of self-help groups to figure out how to cooperate in all this and leave any emerging problems with the competition agencies afterwards. I think that should also be a clear message from us that this is a task for the legislator to set these standards and to take care that they are pursued in a market economy manner.

And thirdly, if companies strive for higher sustainability standards than implemented by the legislator, I think we all acknowledge, and this is also part of the report, that cooperation can be necessary. Sustainable investments for one company alone might be too risky, there is the risk of the first mover disadvantage, there are lots of risks in this. And I think what the businesses request in this respect is legal certainty for their cooperation. It is an imminent role also of competition agencies to provide this legal certainty through guidance, which we offer to the business community.

Having said that, it's important to know that many initiatives we have looked at in the past don't even lead to a restriction of competition, there is no inherent tension in all these cooperations. But if they lead to competition restraints, they might nevertheless be allowed if the consumer benefits and if the cooperation is indispensable.

So, it is our approach here at the Bundeskartellamt to advise and enable rather than to prohibit and prevent. We have some expertise in this area and some practical experience with some cases. We have dealt with cases, for example, in the area of animal welfare. In these cases, we have achieved more transparency for consumers so that consumers really know which products were produced in line with higher animal welfare standards and which were not. We have seen efficiencies, we have tolerated moderately higher prices, we have tolerated cooperations in this respect. And I think this is the way forward to deal with these kinds of issues.

It is true that the cooperations we have seen so far were quite small. Maybe the big cases are yet to come. Maybe a cooperation for green hydrogen? Or a cooperation, for example, amongst steel producers for

green steel? We have not seen that, but it might come. I think we're well equipped with the toolkit that we have. And we might still come to this topic, we might look at sustainability gains from a perspective of efficiency gains that we can include in our assessment, at least as far as Article 101(3) is concerned. So, I think we have the tools and if we handle them wisely, I think, we can get by.

**Martijn Snoep (ACM) (moderator)**

Thank you very much Andreas, it has been very helpful and informative as always. Now may be a good time to move to almost the other side of the globe. And Delia, can you give us your perspective from the ACCC?

**Delia Rickard (ACCC)**

It's undeniable that the world is facing an environmental crisis and that we need every lever at our disposal to try and turn things around. First, I want to thank the Hungarian Competition Authority for their contribution to the sustainability quest and their really excellent report. As the report makes clear the EU is out ahead in its thinking and action on sustainability, I really welcome this opportunity for us all to learn from each other and think deeply about whether our laws are up to the job and what, if any, changes are required.

I would though say that laws such as environmental, trade and tax laws are likely to be more central to dealing with sustainability and climate change than competition laws. That said, competition laws can and do complement these other laws. Competition law assists sustainability goals by ensuring firms can innovate, develop products and services that deliver sustainability improvements unhindered by anticompetitive conduct.

A really clear example of this complementarity is the EC law dealing with taxes on vehicle manufacturers for their emissions in the EU. Here a policy lever was used that has driven competition amongst manufacturers to innovate electric vehicles at a range of price points and car sizes, with the clear initial focus on the European market, because the incentives were taxes. Competition law ensures businesses can't stifle this strong rivalry through anticompetitive agreements or unilateral action. Those of us without such complementary public policy measures now have a more limited choice in electrical vehicles and they are available at much more expensive prices. I know this from my own very frustrating experience of buying an electric car.

The ACCC's focus is on protecting the process of competition across the economy and enforcing laws in the interest of the broader public. Now, this is opposed to the idea of promoting competition in line with specific public interest considerations such as sustainability or dealing with inequality.

That's not to say that such objectives are not important. Of course they are, they are hugely important, but they require their own policy instruments. That said, considerations such as sustainability can influence our priority settings and enforcement case selection.

The momentum in Australia to develop environmentally sustainable initiatives can involve collaboration between competitors. We think it's important that competition laws don't obstruct these positive initiatives that may technically contravene competition laws but are in a broader public interest. And this is where our exemptions regime provides us with a transparent and effective lever.

The ACCC can grant authorisation for conduct that might otherwise breach our competition laws, including the cartel provisions. We can provide an exemption where the public benefit resulting from the conduct outweighs the likely public detriment. And fortunately, our courts have defined public benefit very broadly allowing us to have regard to matters such as sustainability as a benefit to the public. It has

become increasingly common for environmental benefits, sustainability, climate change, whatever you want to call them, to be amongst the public benefits recognised for exemptions.

Just some examples of approved authorizations include:

- The Tyre Stewardship scheme which is a levy scheme designed to increase the recycling of tyres and to reduce the volume of tyres entering into the domestic waste stream or worse still, exported overseas to be burned for fuel in environmentally unsound manner, reducing the environmental and health and safety hazards associated with such disposal methods.
- Another example is the battery stewardship industries scheme, another levy scheme, which is designed to enable responsible disposal of used batteries.
- We've also allowed companies to join together to jointly tender for green energy, thus ensuring that more clean energy projects that built and come online.
- And we have multiple authorizations for local government areas jointly tendering for waste disposal services, including building new, more effective and innovative recycling schemes.

All of these authorizations likely conflict with competition laws as they involve agreements between competitors and impact supplier pricing. However, under our framework, if we assess the benefits to be greater than the detriments, they can go ahead with immunity from action under competition laws. So that's getting that certainty point that business want as Andreas was talking about.

The concept of net public benefit is also present in our merger authorisation framework. We can authorise an application for a merger or acquisition if we're satisfied either that:

- the proposed acquisitions would not be likely to substantially lessening competition or, more importantly for today's purpose,
- the likely public benefits from the proposed acquisition outweigh the likely public detriments, including lessening competition.

It is clear that our merger and non-merger authorisations allow us to account for positive sustainability considerations to offset competitive detriment.

Where our ability to deal with sustainability concerns is less clear, is where mergers or acquisitions for example, of sustainable startups are unlikely to SLC but there are concerns that the acquisition will have negative sustainability outcomes, including potential killer acquisitions. This is something I think we all need to think about in terms of competition law, but also from a broader public policy perspective. The risks from a merger, that has potential negative sustainability effects can, for instance, be offset by regulation such as environmental protection laws that set boundaries around the types of harmful conduct that business can engage in, in line with sustainability goals.

Now, the ACCC is an agency responsible both for competition and consumer protection. I would note that taking strong action against misleading greenwashing is also central to fair competition and the sustainability battle. And we have produced guidance and taken a number of cases and won't hesitate to take more. So, I'm interested to hear what Csaba has to say – and learn more.

Finally, I would strongly support international cooperation on sustainability. International corporation can only improve our efforts to get to net zero emissions sooner rather than later and create the more sustainable world we all hoped for and desperately need, so thank you or köszönöm [thank you in Hungarian]. Thanks.

**Martijn Snoep (ACM) (moderator)**

Thank you very much Delia, that's a very insightful and very rich contribution to the discussion, so thank you, thank you for that. We move now to again another part of the world. Tembi, what is the South African perspective? [pause] There seems to be a small technical hiccup.

[music]

**Martijn Snoep (ACM) (moderator)**

Apologies for that technical interruption, the connection with South Africa was suddenly interrupted, so we need to change the order of this panel. And therefore, we now have the privilege to listen to Nicole. And also, because, you know, the first contributions were all from the enforcers perspective, the public perspective, I think now is also interesting for us, enforcers, to hear the private sector perspective and therefore we are extremely grateful that Nicole is willing to share with us her perspective.

**Nicole Kar (Linklaters)**

Thank you very much Martijn and thank you very much to the Hungarian Competition authority for hosting the conference and for asking me to speak, I'm absolutely delighted. And, you know, I think this is a very important topic not only from the agency point of view, but obviously from the private sector point of view.

I thought maybe I would start with maybe a few, I think, common elements from the agencies that Andreas and Delia commented already. And that is that the private sector is necessary and the investment, the scale of the investment that is necessary to achieve many of governments, particularly in Europe but also elsewhere, binding commitments to net zero by 2050, it would be impossible to achieve those without very significant state aid programmes which we are seeing, but also very significant private sector contribution.

So, what is the private sector view? I think that the view of companies and practitioners at the moment is probably that we need to act globally but the solutions that are suggested may well be local. So, I think, as Andreas said, in some countries you may well have to see legislation that supports sustainability initiatives. Because companies are in some markets responding to consumer demand, and in other markets they are leading consumer preferences trying to change and shape these. And I think one thing that I was naïve about when I first came into this debate was the need for democratic legitimacy for agencies to be acting on behalf of and implementing and being complementary to government policy.

So, government policy must go first, but I think that as we're all agreeing competition agencies and competition policy needs to enable the achievement of that government policy. And I think that the private sector perspective is, rightly or wrongly, that competition law does prevent them pursuing ambitious collaborative agreements. And I think it's hard to say just anecdotally from my practice that competition law actually stops initiatives going forward in most cases, but I think what the kind of experience I have is that competition law concerns can make initiatives smaller scale or less effective than may otherwise would have been.

And I would command to you amongst the reading material, certainly the Hungarian survey is very important in this regard, also there's a paper in there from the Competition and Markets Authority in the UK that they issued in September this year which calls for inputs.<sup>8</sup> And it goes through some of the

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<sup>8</sup> <https://www.gov.uk/government/consultations/environmental-sustainability-advice-to-government-call-for-inputs>



examples that we're seeing, I think, as practitioners very commonly in terms of companies pursuing sustainability objectives.

And some of the examples given are the desire to impose binding standards, so moving an industry from polluting technologies and production methods to less polluting production methods, less polluting inputs, greater use of recycled material, for example, moving away from non-sustainable packaging, all those kinds of initiatives. And some groups would like to have companies sign up to a binding commitment, but there is a real concern that particularly where that increases cost that could give rise to competition concerns.

Similarly, I think, in relation to deforestation, certain input products like palm oil *et cetera*, companies would like to sign up to industry-wide commitments that they will not source from non-sustainable sources. But collective boycott concerns raise a real concern that they might breach the law and be subject to penalties. And finally, information exchange, as always is an issue, there is perhaps a lack of clarity in some areas around publication of whether or not companies are meeting their sustainability requirements by reference to individual named data. All these kinds of issues, I think, manifest in practice as a real concern that competition law could be invoked, and the consequences of getting it wrong are extremely serious, as you know, up to 10% of global turnover, at least in Europe.

So, you know, I think there is genuine concern in some cases and I think competition lawyers have done a fantastic job of making companies very afraid of competition law and there is probably a slight overreaction to where competition law applies and how it might apply to them. But whether right or wrong we are now in a situation where, I think, it is perceived to be a hinderance. And I think any of us on initiatives calls that we join across sectors, will hear competition law several times mentioned in the course of those calls. And you don't tend to hear other areas of law mentioned in the same way. There's of course a concern about consumer protection law, and whether or not claims are actually legitimate. But competition law, I would say, gets the most airtime in these kinds of discussions. So, whether it's a perception problem, whether it's a real problem, it depends on the facts, but it exists.

And I think the other issue too then reflect is how companies view agency attitudes here. And I think you know if you see the European Commission's recent policy paper about the Green Deal and competition policy, the Commission says a number of very useful things and also says that stakeholders have had real difficulty providing real life examples of sustainability initiatives that are actually hampered by the potential risk of application of competition rules. And I have some sympathy with that. I've been on calls where the Commission has really been trying to get sector groups and industry associations to participate and have a dialogue with them and come forward and be a case study.

And I think there's a number of reasons why there is hesitancy. Firstly, some initiatives really represent no commercial gain to companies. And where there's no economic gain and there's risk, you will see much more willingness for companies to abandon projects, or at least to become publicly known to agencies about it. I think it is challenging when an agency is both an enforcer and is trying to set policy. So, companies think if I get into this discussion, then maybe I'm the next pet project for an agency who wants to really make an example of initiatives gone wrong.

And I think finally, when I read some of the policy papers, you might be forgiven for thinking there's actually a sustainability offence. The direction of travel in some papers, which I think are trying to engender debate over-index on concerns about killer acquisitions in the sustainability sector and are much lighter, because we're still having this discussion about the right framework for analysing competition benefits versus competition detriments, on sustainability efficiencies.

So, I will, I can see we have South Africa back, which is fantastic, and I will wrap up.

I think what everyone is calling out for, and this came through very clearly from the Hungarian survey, is a framework for analysing sustainability benefits. The idea that there is a sustainability defence, I see very clearly in the Hungarian results. I mean how do you measure some of those qualitative perhaps less quantitative benefits against harm. And I think the Dutch authority under Martijn's leadership has done a fantastic job of proposing a framework for thinking about that. I think everyone has to take that in their own domestic circumstances, but that is for me an excellent framework for thinking about the issue, and also thinking about qualitative efficiencies not just quantitative efficiencies.

And finally, I would say just a small anecdotal example. I do hear very clearly the agencies saying: come forward, give us examples, we will give you guidance, we will give you informal advice. I have one recently where we had an R&D cooperation between two multinationals very well known in their sectors trying to phase out to a low carbon no carbon solution.

We approached 14 global agencies. We received one confirmation in response to a detailed briefing paper with market share information and analysis from us on whether there were competition concerns. Japan said *"thank you very much, we think this is compatible with Japanese competition law"*. 13 agencies said a mix of *"this is a self-assessment issue, we cannot give you an answer"*, *"we will not give advance guidance, you have to commence your collaboration before we will give you guidance"*, and others said *"thank you, but we would need to market test this and deal with this publicly"*.

So, a range of responses, but what I would say: companies do need to come forward, they need to give agencies case studies so we can make the frameworks as efficient and as across the board as they can be. There are some brilliant examples of agencies trying to push discussion and the framework solutions forward, I think that is hugely commendable.

For those agencies who are at the beginning of the journey do take a look at the CMA paper, the issues there are spelt out at least for Europe very clearly, some of the debate that we're having around what is a fair share to consumers is it spelled out very clearly, the challenges for agencies is spelt out very clearly.

But companies absolutely need to do their part too by giving you case studies to work on.

That's all I was going to say Martijn and I'm very pleased to see Tembi back, hi.

#### **Martijn Snoep (ACM) (moderator)**

Thank you, thank you very much Nicole. Also thanks to give your kind of practical and also a bit sobering perspective on this. I mean it's good to have a real-life perspective from a private practitioner on these issues. And like you said, we are indeed very happy that Tembi is back on and can share with us the South African perspective.

#### **Tembinkosi Bonakele (SA Competition Commission)**

Thanks very much. Let me also join my colleagues in congratulating our Hungarian counterparts for hosting the conference under these difficult circumstances, but also for choosing such a fascinating topic to headline the ICN this year.

Of course, the issue of sustainability reminds us that we are human beings, after all, before we are competition practitioners. So, it has become a survival issue. I want to suggest that it has become a survival issue for humanity, but also it has become a survival issue for agencies. In South Africa we do have a case of this, and this is what we call public interest issues in competition law. And these issues relating to employment, to small and medium enterprises issues, relating to the transformation of the economy, the

ownership patterns and so on. And the legislator so it fit that these should be part of the package of competition laws.

And many people, including our founding chairman of the Competition Tribunal, David Lewis, have commented that South Africa would probably not have competition agencies without these public interest issues. And so I'm suggesting that if competition authorities were seen to be a hinderance to environmental sustainability, and policymakers have a choice to make between having competition and sustainability, I suspect that competition may come second best. And so this is how I think ignoring sustainability, I think is an existential risk for competition authorities. So that's the first point I wanted to make.

The second thing is obviously in putting these together, and I agree with Andreas that this is the matter that legislators and policymakers have to decide on. But even when they have decided to legislate as they have done in South Africa, when it comes to public interest issues, this doesn't take away the difficulties of making these compatible.

So, there is a need to create certainty, because they lead to a lot of uncertainty, so there is a need to create certainty with legal instruments, with the laws themselves, but also the guidelines and opinions by competition agencies. There is also, I think, a scope to be creative with the laws, for an example, making it clear upfront which type of activities would be given green light and whether these need to be given green light upfront or after they have been implemented. I think that's very helpful for example exemptions of sorts and allowing JV's of sort by giving them a green light upfront.

The second issue is that of measurement. So, there is a problem of measurement: if we say that public interest, this public interest issue of sustainability outweighs competition concerns – how do we arrive at that, how do we measure that? And so, I think that competition authorities need to develop a new skill of economic analysis that takes all of these trade-offs into account. We've already had a framework in South Africa trying to balance. For example, if you have a merger that is going to limit competition, but has got such positive public interest issues, how do you balance this. So, there are models, they are not perfect, and I think that this is a challenge for competition agencies.

So, in the transition itself one last issue I want to raise is that we have also seen that in the transition, particularly from the carbon intensive economy, to greener, more sustainable technologies, there is a lot of incentives provided by governments and concessions. And these may tend to favour this or that other technology. And so, what is the role of the competition authority in a transitioning economy? So, in South Africa, for example, we are playing a very big role in making sure that there is competitive neutrality, and that competition is preserved, and innovation actually is encouraged of various technologies.

And I think this is really a major role to be played, because there is a very high chance, there's a very likelihood that you may have certain technology promoters capturing the policy space. And I think the competition agency in those instances should be a trusted advisor, through its advocacy tool to government and really plant competition as the driver of innovation. Because energy transition is largely about innovation and I think competition and innovation go hand in hand, and we know this very well. And we need to get policymakers to understand that the benefits of competition in energy transition is that they encourage innovation, but innovation can only happen if you have competitive neutrality. Thank you.

**Martijn Snoep (ACM) (moderator)**

Thank you very much Tembi. You raise an extremely important point that innovation here is key and that also protecting innovation, you know, is part of the objective of our competition law. And how important innovation is in this transitioning economy where we go to a net zero situation in many years to come. So, it is indeed the innovation that the world is depending on and that therefore competition authorities have to play a role there.

In the final couple of minutes that we have for this panel maybe it's good to pick up on a point that was initially raised by Csaba on which he wanted to comment on and that was the greenwashing. Some of the other panellists also mentioned the greenwashing and first maybe it's good to define what we really mean by greenwashing because they're basically two types of greenwashing I would say. First there is the greenwashing where in mergers and agreements the parties raise a false sustainability defence. They claim that a merger or agreement has benefits to sustainability but actually they don't in reality.

And second there is greenwashing in the sense that those of the enforcers, like we, who also have a consumer protection role, are faced with companies that have a misleading sustainability claim on their products, which is in fact a form of consumer protection. It is obvious that both elements are really important to avoid and to enforce against, to make sure that the process of competition runs properly. Csaba, you would like to comment first on greenwashing?

**Csaba Rigó (GVH)**

Yes, thank you very much for the floor, Martijn. I'm pleased to present the Hungarian case law in relation to greenwashing.

First, let me highlight that relevant cases from the Hungarian case law do not concern cases where sustainability was the main concern or defense, but rather cases with a sustainability element – typically, where the relevant product or conduct related to environment protection.

Out of these cases, I would like to quickly present Energizer and others from 2015 because I think it is a good example of when parties put forward sustainability related reasons with the ulterior motive to avoid being sanctioned.

In Energizer and others, the Competition Council of the GVH found that Energizer, Duracell and Varta participated in an illegal restrictive agreement for 10 years. The theory of harm was a price cartel: battery producers agreed to pass-through waste management fee in a unified way. They collectively refused to compete on how much of the waste management fee is passed on to their customers. This was considered by the GVH as a restriction by object. The Competition Council imposed a fine of around 30 million HUF (approx. 84 thousand EUR). The decision was not challenged in court.

Sustainability elements appeared as part of the parties' defence. They asked the Competition Council to consider the fact that their sole purpose was to reach environmentally friendly solutions. They did not articulate a theory of the sustainability benefit, neither did they quantify or analyse environmental benefits or submitted supporting documentation. Since the parties' claim was not substantiated enough, the Competition Council did not assess it in detail, nor did it exempt the agreement on sustainability grounds. However, it took the parties' claim into consideration when determining the amount of the fine.

More generally, those cases where sustainability as a defence was referred to by the parties followed the same pattern: members of the respective cartel based their claims on environmental benefits but without any serious substantiation, thus resulting in the plain and simple refusal of the GVH, of course.

I would like to emphasize that since there is a direct reference to the protection of the environment in the Competition Act, the GVH is very much open to accept reasoning relating to that. However, the above example shows that these reasoning will only be assessed and accepted by the GVH if they are more than general statements and assumptions. The GVH is of the opinion that unless the claims are more concrete or are substantiated, these “green washing” attempts do not require any sophisticated assessment.

Thank you very much for your attention. Should you have any questions, I’m happy to answer them either now or you can also contact me through my email address.

**Martijn Snoep (ACM) (moderator)**

Thank you very much Csaba, and it is good to have this practical experience. Andreas, you mentioned that at the Bundeskartellamt you also have some practical experience. Can you tell from your practise whether competition authorities need to be more suspicious of sustainability defences than of any other defence that the parties put forward?

**Andreas Mundt (Bundeskartellamt)**

I'm not so sure, Martijn, if this is a special category with regard to sustainability. I mean that happens frequently in mergers or when it comes to the question of whether a cooperation is in line with Article 101(3) or not, the parties then claim certain efficiencies. And I would say that sustainability, or environmental issues, are one of the efficiencies that are brought forward here and that we have to deal with. But, maybe I would go with what Csaba said: they have to demonstrate the efficiencies.

Of course, we must question ourselves, we must make sure that we have the necessary skills to assess the efficiencies that are brought forward. Because we have also seen cases here where it was quite obvious that the alleged efficiencies were not really in place, but the whole cooperation served to raise the income of certain parts of the business. This is what we call greenwashing.

This is exactly what we will have to assess. We need skills in the digital economy, and I think, in the future, we might need skills also here with regard to environmental questions and we will have to deal with that. But again, Martijn, I would not say this is a new or special category. We are all confronted with these kinds of cases where parties claim certain efficiencies and where we finally have to say, well, listen, this is not really substantiated in a way that we can follow you.

**Martijn Snoep (ACM) (moderator)**

Thank you, thank you Andreas, and that's also very helpful and good to know for all of us when we are facing the sustainability defences from the parties.

I'm afraid we're running out of time for our panel. And I think the audience will share with me the idea that we could have talked for quite a long time further on this topic because there are many issues and angles that require further discussion. And therefore, I do hope that future ICN conferences and at other conferences where we, enforcers, meet from around the world, we can continue this discussion and learn from each other’s experience. It is with this that I would thank the panel very much for the time they spend here on the conference, in preparing for this panel on this important topic, and especially thanks to the Hungarian Competition Authority for making all this possible and put this issue right and squarely on the map of competition authorities around the world. Thank you very much.