Organisation for Economic Co-operation and Development

DAF/COMP/M(2020)2/ANN1/FINAL

Unclassified

English - Or. English

11 October 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Summary of Discussion of the Hearing on Sustainability and Competition

Annex to the Summary Record of the 134th Meeting of Competition Committee held on 1-3 December 2020

1 December 2020

This document prepared by the OECD Secretariat is a detailed summary of the discussion of the hearing on Sustainability and Competition held virtually during the 134th meeting of the Competition Committee on 1-3 December 2020.

More documents related to this discussion can be found at https://www.oecd.org/daf/competition/sustainability-and-competition.htm

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JT03504677

Summary of discussion of the hearing on Sustainability and Competition

On 1 December 2020, the OECD Competition Committee held a hearing on sustainability and competition. It was a scoping discussion to explore the role for competition law and competition authorities to contribute to sustainability objectives. The discussion was chaired by OECD Competition Chairman Professor Frédéric Jenny and featured eight speakers:

- **Julian Nowag**, Associate Professor at Lund University
- **Maarten Pieter Schinkel**, Professor at the University of Amsterdam
- **Suzanne Kingston**, Professor at the Sutherland School of Law, University College Dublin
- **Maurits Dolmans**, Partner at Cleary Gottlieb
- **Simon Holmes**, Judge, Member of the UK Competition Appeal Tribunal
- **Gianni De Stefano**, Director Global Competition Law at AkzoNobel
- **Martijn Snoep**, Chairman of the Netherlands Authority for Consumers and Markets
- **Ioannis Lianos**, President of the Hellenic Competition Commission and Professor at University College London

The **Chairman** introduced the topic of the hearing on sustainability and competition. For this discussion, it was agreed that sustainability could be defined as meeting the needs of the present without compromising the ability of future generations to meet their own needs. The Chairman outlined two overarching topics for the debate. Firstly, whether competition authorities should consider sustainability. Secondly, if so, how competition authorities can recognise sustainability objectives, for example as efficiencies, quality dimensions or public interest goals.

The **Chairman** recalled that the United Nations adopted the Agenda 2030 and defined 17 Sustainable Development Goals. This commits the governments of the OECD member states to further economic, environmental and social sustainability. Some competition authorities have started exploratory projects to assess how competition law can support these objectives. He mentioned the initiatives of the British, Dutch, Greek and German competition authorities as well as the work of the European Commission to publish guidelines, working papers and engage in a structured debate. The recovery packages to counter the negative impact of Covid-19 crisis would also direct investment towards sustainability and green innovation.

The **Chairman** provided an overview about the relationship between competition and sustainability.

He noted that, on the one hand, there are many instances in which competition and sustainability are consistent and mutually reinforcing. Competition can incentivise firms to innovate and become more sustainable. A research paper prepared by Philippe Aghion et al. evaluated that firms with a greater exposure to environmental attitudes had a greater probability to pursue clean innovation, especially in competitive product markets.

On the other hand, sustainability and competition objectives could in some circumstances be inconsistent with one another and require trade-off decisions. First, this is the case where a pro-competitive outcome could have negative effects on sustainability. This would be, for example, the case of an anti-competitive merger that would result in the closure of a polluting plant if it were not blocked. Second, this is the case of an anticompetitive practice which might be necessary or helpful to promote sustainability. For example, the recycling of waste product may require a restriction of the competition among the collectors of the waste, in order to avoid them driving up the price of the waste through their competition and making it more difficult to recycle successfully the waste.

The **Chairman** then provided a short overview of some of the challenges competition authorities might face in these situations. Firstly, whether the consumer welfare standard is well-suited to an analysis that integrate sustainability considerations. Secondly, whether specific types of agreements could be exempt on a case-by-case basis when sustainability efficiencies outweigh anti-competitive effects. Furthermore, whether those benefits need to be quantified and on which market and over which time horizon would they need to materialise. Thirdly, how could or should competition authorities adapt their analysis when dealing with a situation where consumers' demand may not reflect their preferences well.

In his view, the relationship between competition law and public policy also presents a challenge. A question for the discussion was, if competition agencies have a role in correcting market failures or if this is a role for other regulatory activities. Finally, the **Chairman** underlined that international convergence might be necessary if sustainability initiatives have an impact in various jurisdictions.

The **Chairman** introduced the invited speakers at the hearing. He started the debate by asking **Julian Nowag** to introduce the note he had prepared to set out the discussion. Dr. Nowag provided a short high-level overview of the paper. Its first part explores the environmental, economic and social dimensions of the sustainability concept. Its second part analyses the normative question on the role of competition law to promote sustainability and stresses the importance of the individual legal framework to answer it. The third part explores the business and economics of sustainability and concludes that usually competition is better at achieving sustainability. The fourth part presents instruments for competition agencies to recognise sustainability efficiencies in their enforcement activities against restrictive practices. The fifth part claims that some forms of cooperation for sustainability purposes do not fall within the prohibition to form cartels, when certain conditions are met. The sixth part complements the previous points by discussing the procedural ways in which sustainability can be taken into account by competition authorities. Dr. Nowag closed its remarks by noting that, while the balancing of anticompetitive harm and benefits to sustainability is an important area of the debate, there are many situations where no balancing is required. Since the discussions are often focused on the most contentious issues, less contentious areas might be overlooked.

The **Chairman** invited **Professor Suzanne Kingston** to speak about her arguments about reconciling competition and environmental policies. Professor Kingston said that competition regulators and scholars have in the past advocated to keep competition law focused on consumer welfare and economic efficiencies. This narrative placed non-economic public policy goals, including sustainability, outside of the scope of competition law and into the realm of legislators. In the EU, the 2004 Guidelines on Article 101(3) and the 2011 Horizontal Cooperation Guidelines would exemplify this view.

Professor Kingston argued that an urgent change is required and the constitutional foundation of the EU does not support this strict separation. She claimed that the existential threat posed by climate change has changed the preferences of consumers and businesses. Additionally, private environmental initiatives are in her view central elements in the policy

mix to react effectively. Examples are the Forest Stewardship Council, the Marine Stewardship Council, supermarkets banning single-use plastic and the carbon divestiture movement.

Professor Kingston argued that private sector cooperation is able to overcome certain problems that regulatory actions face. Economic actors can work together across jurisdictional boundaries, have expertise in their industries and react more speedily.

She observed that within Europe economic actors have power and responsibilities in the context of the European Green Deal. Additionally, climate litigation, for example in the US, Germany and Poland increasingly recognises the responsibilities of corporations as environmental actors. She further noted that environmental protection is of special legal importance and needs to be integrated into all other policy areas. Article 11 TFEU and Article 37 of the EU Charter of Fundamental Rights codify this in EU law. Professor Kingston argued that a cohesive legal system is capable of balancing competing interests and does not a priori exclude environmental considerations from competition analysis.

Finally, she suggested that environmental benefits could be recognised under the consumer welfare standard. Environmental economics has developed instruments to quantify environmental benefits, for example with willingness to pay for environmental quality assessments. She expressed favour for a case-by-case approach to ensure that environmental arguments are not used as a pretext for collusion. She finished her contribution with a plea for innovative thinking on the part of competition authorities to signal to industries that competition policy will not stand in the way of genuine and proportionate pro-environmental initiatives.

The **Chairman** thanked Professor Kingston and added that one option to recognise environmental considerations is to use a longer time horizon of analysis to capture future benefits. Uncertainty about the future makes it difficult to predict the impact of cumulative environmental degradation. However, competition authorities could potentially explore this avenue. He then gave the floor to **Professor Maarten Pieter Schinkel**.

Professor Schinkel concurred with the argument that the consumer welfare standard is apt to integrate future welfare on the basis of the preference structures of individuals. He stressed, however, that restricting competition would not ultimately be beneficial for sustainability purposes. He advocated for competitive market behaviour to stimulate innovation and sustainable behaviour.

Professor Schinkel noted that there could well be conflicts between sustainability and competition due to externality problems in particular, but that allowing market power is not a remedy. Problems arise when trying to serve sustainability goals by allowing competition restrictions. He explained that for example allowing a horizontal agreement amongst competitors would not at all ensure that they would start internalizing these externalities. The key question is whether a restriction or an artificial creation of market power would ever work to achieve a specific sustainability goal. He also pointed to the risk that sustainability arguments could be used not only to justify anticompetitive agreements, but also mergers or abuse of dominance by pointing to sustainability efficiencies.

According to Professor Schinkel, economic research indicates strongly that companies would not adhere to higher corporate social responsibility standards in co-operation than in competition. Companies incentives to invest in CSR in collaboration are not stronger than in competition. He gave a concrete example of an investigation by the Dutch competition authority of an agreement about the closure of coal burning electricity plants. The closure would reduce electricity capacity production in the Netherlands by 10% and lead to price rises in electricity and extra costs of EUR 75 million per year for Dutch consumers. The Dutch competition authority calculated that the value of the emissions reduction in that

case would amount to EUR 30 million a year. The electricity plants would sell the carbon emission rights that they would not have to use, so that those would remain on the market. Therefore, there would not be a reduction of overall European CO_2 emissions and no greater benefit to society. The producers refused to take a compensatory amount of CO2 emissions rights out of the market. The competition authority rejected the agreement because the environmental benefits would not compensate the financial harm to consumers. Professor Schinkel agreed with the decision.

Professor Schinkel then proceeded to explain a model to assess how competition affects sustainability. If people care about sustainable products and have at least some willingness to pay more for them, and corporations are primarily profit-maximizing entities, sustainability becomes a dimension of product differentiation. It also imposes additional costs, however, which incentivises firms to engage in greenwashing if they are allowed to make sustainability agreements. In that case, firms have an incentive to invest as little as possible in sustainability, against a high price increase. In competition, firms will make an effort to offer a greener product than their rivals. Professor Schinkel said that there is less corporate social responsibility in co-operation than in competition and that, with few exceptions, research has shown how firms tend to do more for sustainability or the environment if they are in a more competitive setting. He explained that it can be demonstrated that, if there is some willingness to pay, companies will invest more in sustainability in a competitive setting than if they are allowed to make agreements on sustainability levels. If firms increase co-operation this is likely to increase collusion for other anti-competitive aspects. He also noted that if consumers have no or negative willingness to pay, sustainability agreements also do not create incentives to invest more in sustainability.

On the contrary, he reported to have found that allowing production cartels would result in more sustainable investments, because firms can recoup the investment costs under the cartel prices and still compete on the sustainability level. However, he noted, it would be absolutely crucial in that case to ensure that consumers are adequately compensated for the much higher prices they would then face. This would be complex to do in practice, as competition authorities would require a lot of information to assess, decide and permanently supervise such an arrangement.

Finally, Professor Schinkel argued that a focus on sustainability efficiencies and self-regulation for sustainability might also present governments with an excuse not to regulate, whereas proper regulation is first and foremost a government responsibility. He pointed to the Dutch Chicken of Tomorrow case as an example of the lack of governmental initiatives, for which then approving the proposed private collaboration initiative was hoped to be an alternative solution.

The **Chairman** agreed with Professor Schinkel that no general relationship between lack of competition and sustainability exists, but argued that in some cases there may be a reason to take into account the presence of market failures in these markets. One example is that people tend to underestimate the costs of climate change in their willingness to pay and that it is often not sufficient to achieve a more sustainable market equilibrium. He raised the question whether it is correct to start from the assumption that people are willing to reward the firms that are more respectful of the environment. On this question, the Chairman introduced the next speaker, **Mr. Maurits Dolmans**.

Mr. Dolmans said that environmental economics is rife with market failures, especially due to negative price externalities. Producers may decide not to switch to a more sustainable production because they fear that polluting rivals will undercut them. Thus, coordination could be a way to solve those market failures. The best tools for coordination would be regulation, carbon taxation and emissions trading schemes.

However, he noted that regulatory and government failures have failed to advance these measures enough, especially as carbon prices remain too low to capture full abatement costs. He referred to calculations by Stern and Stiglitz that the price of carbon should be between USD 40 and USD 80 per ton and that the price should be even higher to get to net zero commitments by 2050. Additionally, the compounding effects of climate change would make it important to act quickly.

In Mr. Dolmans' view, if consumers are willing to pay higher prices for more sustainable products, competition should be encouraged. It would remain necessary to monitor activities and set standards to avoid misleading claims and greenwashing. However, if consumers are unable or unwilling to pay the higher prices, for example because of behavioural biases and heuristics in their decision-making, co-operation could help to overcome market failures. He provided the examples of voluntary environmental standards that are higher than the legally mandated level or agreements to stop using high carbon emissions raw materials or production methods.

He objected to the model of Professor Schinkel as limited by a number of assumptions which do not necessarily reflect reality, because, for instance, it presented firms only as short-term profit maximizing, whereas there is an ongoing shift towards more long-term stakeholder capitalism, ESG investments and shareholder activism. Importantly, firms increasingly realize that they benefit if their rivals eliminate greenhouse gas emissions ("spillover benefits"), and these private benefits align with public benefits. If so, firms have a genuine incentive to pursue efficient sustainability goals, and competition authorities do not need to assume that they are just out to raise short-term profits at the expense of consumers. The model would also imply compensation could only occur in the same market and ignore that consumers could be compensated through other societal and non-market benefits. He concluded by stressing that in-market full compensation is required by EU guidelines, but not by the underlying legislation.

The **Chairman** then gave the floor to **Mr. Gianni De Stefano** and asked him to comment under what circumstances he thought co-operation is necessary to promote sustainability objectives.

Mr. De Stefano reminded the participants that the UN has recognised that private companies have an important role in the achievement of sustainability objectives. He pointed to the paradox that firms declare they are interested in co-operation, but there is limited co-operation in practice. He noted that one of the reasons could be an over-deterrence effect of competition law.

Mr. De Stefano discussed the risks of cartel greenwashing, mentioning the example of the laundry detergent powder case, truck maker cartel and the investigation into the automotive sector by the European Commission. He noted that participants talked about environmental issues, before beginning to fix prices and stressed the risk that firms might collude to collectively lower their environmental compliance and delay innovation.

A more complex example of co-operation is when competitors might decide to jointly adopt stricter environmental standards. To do so, they would need to co-ordinate on other aspects like which process they could choose, for which the red line would be unclear. Therefore, Mr. De Stefano said that businesses need guidance.

He proposed that competition authorities and lawyers should engage with trade associations and provide advice on how businesses can legitimately cooperate. He added that the guidelines published by the Dutch and the Greek competition authorities and the European Commission are useful tools. He also mentioned that comfort letters, along the lines of the European Commission's guidance in the pharma and automotive industries, could be used.

The **Chairman** proposed a further example on co-operation in the grey area. He reminded the participants about the investigation of the US Department of Justice of an agreement of automobile manufacturers with the State of California. This agreement mandated lower emissions than required by federal law, which was feared to raise car prices for Californian buyers. The **Chairman** explained that while prices might increase, the cost of transportation would likely be lowered. He said that this future benefit could maybe be included in the analysis under the consumer welfare standard. He noted that the discussion should be focused on how the consumer welfare standard must be interpreted rather than on questioning the suitability of the consumer welfare standard itself.

The **Chairman** then gave the floor to **Mr. Simon Holmes**, who first outlined that he planned to focus his contribution on climate change and environmental damage. Regulation is generally in his view the best way forward, but he regretted that it is often too slow, limited in jurisdiction and lacking in ambition. This would explain why the private sector has to go further. He voiced his support for competition to achieve sustainability, but if market failures, like a first-mover disadvantage, exist, co-operation could be both beneficial and necessary.

He expressed the view that competition law is suitable to address the issue, but it is currently perceived as a problem by business players. He mentioned a study by Linklaters that over 60% of businesses said they did not participate in sustainability initiatives for a fear of competition law.

He then proceeded to set out arguments why sustainability co-operation is in his view generally not forbidden under competition law. Some non-contentious agreements might not fall under Article 101 TFEU at all. In addition, the ancillary restraints doctrine and rules for standardization agreements could be used as a justification in some cases to allow some forms of co-operation.

For the exemption provision in 101(3) TFEU, he focused on the 1st condition that agreements must contribute to "improving the production or distribution of goods, or to promoting technical or economic progress" (emphasis added). He highlighted that all four limbs of this provision can be used to justify co-operation and the focus should not just be on the economic progress limb. For example, using fewer resources during production processes, sharing distribution systems or developing new green technologies could be presented as relevant benefits under the other limbs.

Mr. Holmes concluded by saying that he thinks the EU has a suitable competition law framework to take into account climate change and reduce environmental damage. He additionally referred to the constitutional provision in Article 11 TFEU, which mandates that environmental protection and sustainability must be integrated into all policy areas. He added that the principles that are discussed in the EU could be relevant for other jurisdictions and he mentioned as an example that the Australian system has shown flexibility in order to approve sustainability initiatives.

The **Chairman** commented that one area of focus might be placed on a possible communication failure by competition authorities in conveying the message that competition does not hinder sustainability initiatives. He compared this to the reaction during the Covid-19 crisis where horizontal co-operation had been encouraged in specific circumstances. He then invited **Mr. Martijn Snoep** from the Dutch Competition Authority (ACM) to speak about the draft sustainability guidelines.

Mr. Snoep explained that the ACM is a multi-functional authority with a mission to make markets work well for people and businesses now and in the future. The guidelines were meant as an instrument to reflect on the Dutch competition law and understand where

sustainability agreements could be assessed more favourably. He also expressed his hope that the guidelines would accelerate and foster an international debate on this issue.

He noted that the draft guidelines provide numerous examples on the types of agreements that do not restrict competition. They also highlight that the ACM would be willing to support parties in their self-assessment to support the development of sustainability agreements and provide individual guidance. Moreover, Mr. Snoep highlighted that the guidelines grant immunity or commit not to impose fines if an agreement on sustainability concluded in good faith would turn out to have anti-competitive effects.

The draft guidelines would also include a new approach for a subset of sustainability agreements: the so-called environmental damage agreements. For this subset, the ACM proposed to balance the negative effects of a restriction of competition against the benefits for society as a whole. This balancing would also take into account the impact over the long term. He stressed that the approach would be in line with both Dutch law and the EU treaties.

Mr. Snoep further said that most of the reactions to the draft guidelines during the consultation period were positive. Nonetheless, there were few critics on both sides. On the one hand, some argued that the ACM should keep to a strict interpretation and exclude out-of-market efficiencies. On the other hand, others regretted that the environmental agreements subset should be wider and that more agreements should benefit from this exception. A further version would be published in January to elaborate more on the definition of environmental damage agreements.

He also mentioned that the guidelines would give more guidance on how to quantify the benefits to society and that this initiative would be followed by a joint report with the Hellenic Competition Commission to provide further details on methods to quantify environmental benefits.

Mr. Snoep concluded by recalling that the Netherlands is too small to make a significant impact at the global level by itself and said he hoped that national authorities, international communities and companies would work together on the issue.

The **Chairman** then introduced **Professor Ioannis Lianos** from the Hellenic Competition Commission (HCC), asking him to illustrate the approach of Greece to this issue and to compare it with the Dutch one.

Professor Lianos began his intervention by pointing out that while small changes can make significant differences, the role of competition authorities on sustainability is necessarily limited. He noted, however, that not all countries have the same expertise and funding to address the challenge through regulation. He mentioned that EU competition law also applies to self-regulation initiatives, so the guidance of competition agencies would not only be relevant for businesses, but also for governments.

Then Professor Lianos said that the HCC is very much aligned with the ACM but that there are a few differences in their approach. He reiterated that according to the mainstream view the efficiency generated by the restrictive agreement must be sufficient to outweigh the anti-competitive effects. Additionally, the group of consumers benefiting from the efficiency should at least overlap with the negatively affected consumer group.

Professor Lianos said that the concept of user is generally wrongly linked to the concept of consumer and should be broadened. The preferences of users might be revealed in other contexts that a mere purchase, for instance, in their role as citizens, especially when they are expressing their support for environmental policies. In this context, the fact that the protection of environment is provided for in legislations and constitutions is a sign that there is a stated preference by citizens for it. He thus said the government is trying to

transform the preferences of users to a certain extent though a normative intervention by putting forward environmental objectives and principles. To him, this approach should include competition law. Two of the conditions under 101(3) TFEU would ensure that an overly broad interpretation is not adopted. He referred to the conditions that the agreement should not be more restrictive than necessary and that there should be no elimination of competition.

He then said that in the joint economic report with the AMC they looked at the different quantification approaches to support the evaluation of the trade-offs. They explored willingness to pay methods. They thus used environmental economics with a focus on revealed or stated preferences. They also looked into the problem of free riding. For instance, they observed that consumers have a high willingness to pay for sustainable products, but prefer others to pay for the emission reductions. Besides, future generations of consumers may have a higher willingness to pay than present generations. In addition, consumers may have higher willingness to pay if they have an assurance than others contribute as well.

They also looked into the benefits for citizens as an overall group. For instance, the positive effects of reduced CO_2 emissions might go to consumers as well as non-consumers, together forming the overall group of citizens. The benefits going to the citizens might be measured in monetary terms by using shadow pricing through damage cost and abatement cost assessments. Therefore, the idea would be to determine how to use shadow prices to quantify sustainability benefits in a way that they can be compared to the price increase. This would enable competition authorities to recognise benefits for the broader group of citizens compared to consumers.

Professor Lianos concluded that the Greek and Dutch authorities tried to adopt a more realistic approach to the interests of users and to focus on the significance of the broader constitutional context to find evidence of the interests and not necessarily only of willingness to pay of the users. He referred in this context to the social welfare approach used in studies by Bergson and Samuelson and the Rawlsian maximin criterion of analysing users with the lowest expectations in terms of benefiting from environmental sustainability.

The **Chairman** invited the experts to comment on each other's views.

Professor Schinkel stressed that, in his analysis, if consumers have even limited, no or negative willingness to pay, firms would do more on green under competition than co-operation. Co-operation accordingly would be an option if other firms could somehow free ride on the sustainability efforts of others, which would induce firms in competition to wait for the other firmst to differentiate on sustainability characteristics.

He stated that some rare exceptions might exist, for example a green experience goods setting, or maybe a level playing field type of argument. That will however be extremely rare. He agreed with Professor Lianos and Mr. Snoep that environmental economics can provide beneficial insights to measure benefits, willingness to pay and intergenerational altruism. But he stressed that that is a different discussion than the one on the lack of incentives that firms have to collaborative make CSR efforts. Therefore, he remained opposed to stretching the compensation criteria, so that cartel exemptions are at least only given to firms that are forced to make a sufficiently high and compensatory amount of sustainability effort.

Professor Schinkel further noted that joint green investments agreements would need to be treated differently from agreements on R&D co-operation.

The **Chairman** then asked about whether the focus should be extended from climate change to the broader sustainability debate. **Mr. Holmes** replied that issues around climate

change and environmental damage are extremely pressing and progress must be achieved quickly. He suggested that nevertheless some insights could be applied to other areas as well on a case-by-case basis.

Mr. De Stefano argued that in the EU there is a legal objective to incorporate environmental issues in policy-making as demonstrated by the EU Green Deal objective.

Mr. Snoep said that the examples in the guidelines are applicable to a broad range of sustainability initiatives. Climate change agreements however may require a different approach, which would be justified by the extent of the negative externalities for the society. He disagreed on the point that firms do not have incentives to reduce negative externalities and he concluded that firms have such incentives even if the willingness to pay by consumers is too low to justify this.

Professor Nowag added that sustainability has essentially an environmental core, which explains the focus on climate change. He argued that the descriptive and the normative levels should not be confused. He then endorsed the work of the ACM, which distinguishes between non-contentious issues, where competition law already recognises environmental production efficiencies, which reduces the input of raw materials or increases the quality of a product, and more exceptional cases, where there is more disagreement. He said that it is important to provide legal certainty in the areas where everybody agrees such as innovation, standards and R&D.

The **Chairman** argued that businesses also need reliable information through guidelines to understand how competition agencies consider different type of efficiencies.

Professor Kingston returned to the question if climate change should be a special area of focus. She highlighted the strength of scientific evidence on the risks of climate change and the immediate threat of environmental degradation. She mentioned the Urgenda case of the Dutch Supreme Court, which required the Dutch government to commit to reducing emission more than it was obliged to under EU law.

Mr. Dolman added that the European Parliament had declared a climate emergency and that Article 191 TFEU also requires environmental policy to be based on the precautionary principle. In his view, the court has interpreted that this means giving precedence to the requirements on environmental protection over economic interests. In addition, the Paris Agreement and Articles 2 and 8 of the European Convention of Human Rights include legal obligations to focus on climate change.

The **Chairman** raised the question whether non-EU country may adopt a different perspective, more focused on other aspects of sustainability. **Mr. Dolman** argued that the European Convention on Human Rights has many similarities to the UN Convention on Human Rights. He also stressed that climate change is a worldwide emergency and pollution affects countries across borders.

The **Chairman** next invited delegations to comment on the debate. He first gave the floor to **Italy**.

Italy welcomed the debate and said it is generally in favour of considering sustainability factors into the assessment. However, the scope of competition law should not be broadened too much. It suggested that the approach competition agencies have taken to horizontal co-operation in the context of the Covid-19 pandemic might be used as a basis for a common approach. It stressed the importance of international cooperation in this area and mentioned in particular how helpful it would be to co-ordinate via the European Competition Network.

The Italian Competition Authority currently would focus on two areas. Firstly, using proportionality assessments to balance between competition and other policy goals. As examples, it mentioned how the authority considered public health issues when assessing competitive effects of the deployment of the 5G network. It also looked into the effects on city traffic when considering some new business models of the sharing economy. Secondly, the agency would also use its enforcement powers to further sustainability goals. It argued that its investigation into a case of exclusionary abuse by a supply chain consortium helped to enhance competition and simultaneously the recovery and recycling services of water for food use.

The **Chairman** again summarised the discussion and mentioned that the contributions had expressed that climate change is a special issue because of the urgency for action and the scientific proof. He also argued that there are probably market failures because of issues with the price mechanism not fully integrating negative externalities. He suggested that the prices of resources does not reflect the opportunity costs of their depletion or the cost of pollution does not reflect the real costs of depletion.

One of the main points of debate was whether co-operation would be able to overcome market failures and lead to more sustainability. Some argued for this position, supporting the view that there is a market failure on the demand side, where consumers are either unaware or unwilling to pay for the real price of their preferences, and that, in some cases, co-operation may help. Sceptics of this position stated that nothing guarantees that co-operating companies would increase their investment in sustainability when co-operating. The Chair concluded that therefore there is no obvious reason to think that co-operation will always lead to a more sustainable solution.

The Chairman identified a challenge for competition authorities to make a distinction between anti-competitive co-operation that might have pro-sustainability benefits and those that are purely anti-competitive. He also wondered whether the interpretation of the consumer welfare standard needs to evolve to fit this analysis. He said that the speakers agreed on the fact that the current standard is flexible and that competition authorities can modify it to include sustainability criteria. The Chairman evoked the question of quantification for which the crucial points would be to develop appropriate analytical tools and fill the communication gap to ensure that the business community understands what is going to be the analysis of the competition authorities. This is the point at which guidelines would come into play.

Germany intervened by highlighting that the Bundeskartellamt has experience assessing a range of co-operation initiatives, for example on fair trade labelling and animal welfare. It stressed the importance of recognising environmental consequences and the discretion of the agency to decide on cases independently.

It then questioned whether insights of the debate should also be applied to mergers. This could result in a merger with environmental benefits being allowed and a merger could be forbidden if it would have a negative environmental impact. He referred to the Bayer-Monsanto case of the European Commission as an example of this discussion.

Germany voiced scepticism if the direction of the current debate would result in a rule of reason test or be applied to the area of preservation of employment as well. This could lead to the politicisation of competition agencies. However, the issue should be further debated at the OECD and the European level. It should also involve legislators, who might need to take decisions about the development of the law.

The **Chairman** considered that that the issue of how environmental issues should be taken into account in a competition law assessment is distinct from a public interest consideration analysis in merger control. The **Chairman** then wondered if it is justified to integrate

climate change into competition law but no other public policy objectives such as the fight against poverty and if there is a need to look at the trade-off between those issues.

Finally, the **Chairman** said he agreed that a discussion among competition authorities should continue and they could exchange experiences about previous cases related to sustainability. The **Chairman** said the OECD would try to organize such a discussion with the national authorities soon. The **Chairman** thanked the experts and all participants and concluded the hearing.