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Executive Summary 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

3 December 2020

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held 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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Executive Summary of the Hearing on Sustainability and Competition

By the Secretariat*

On 1 December 2020, the OECD Competition Committee held a hearing on Sustainability and Competition.

Based on the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. Sustainability is a broad concept, which encompasses environmental, social and economic dimensions. Some competition authorities have been recently taking initiatives to discuss and clarify the compatibility of different sustainability objectives with competition policy and enforcement.

A broad notion of sustainability recognises the environmental, social and economic dimensions. Fighting climate change and environmental degradation present especially urgent challenges, but other aspects of sustainability may be equally important for consumers. The 17 Sustainable Development Goals ("SDGs") adopted by the United Nations Member States include, for example, the promotion of sustainable agriculture, responsible consumption and production, labour rights, and affordable and clean energy.

Some competition authorities have recently undertaken initiatives to explore to what extent competition policy and enforcement may risk hindering sustainability activities by private companies and ensure that such a "chilling" effect does not affect pro-competitive initiatives. Such initiatives, which include the preparation or publication of staff papers and guidelines (for instance, in the Netherlands, Greece, Germany, UK and at the European level), but also legislative amendments (for instance, in Austria), aim at providing increased legal certainty for businesses on the type of agreements between competitors that may be allowed by competition authorities or considered compatible with competition law.

2. While regulatory interventions tend to be the preferable instrument to reach sustainability objectives, competition policy and enforcement may contribute to advancing sustainability objectives in specific ways.

The main ways to achieve sustainability objectives are typically targeted legislative and regulatory measures. One important way in which regulation can help is to support the internalisation of negative externalities. For example, by adopting an adequate system of carbon taxation or developing an effective cap-and-trade system, governments may ensure that private actors take into account the fuller environmental impact of products and services emitting greenhouse gas emissions. However, particularly when consumers value sustainability, competition policy and enforcement can ensure the effectiveness of sustainability policy initiatives, as well as significantly support compliance with corporate social responsibility requirements and investments in greener products and processes.

In addition to driving companies to compete by offering greener features of their products and services, competition enforcement can also prevent anticompetitive agreements and

* This executive summary was prepared by Cristina Volpin and Robert Horney. It does not necessarily represent the consensus view of the Competition Committee. It does however identify key points from the hearing on Competition Economics of Digital Ecosystems, including the views of the expert panellist, the delegates' oral and written contributions.

transactions that negatively impact sustainability. For example, it prohibits and provides fines for “sustainability cartels”, whereby companies may use sustainability as an excuse to raise prices collectively or refrain from competing with one another. Competition authorities can also block mergers, whereby firms try to acquire companies to alleviate the competitive pressure posed by more sustainable rivals.

3. Sustainability outcomes are normally best achieved if firms compete. However, if market failures exist, co-operative initiatives might, under specific circumstances, be useful or even necessary to overcome them. When this is the case, competition authorities may consider whether certain agreements between competitors may be allowed, whilst remaining vigilant so as to prevent sustainability initiatives from spilling over into anticompetitive infringements.

A competitive market environment will typically lead to more sustainable outcomes. Sustainability may be a dimension of product differentiation on which businesses compete, when consumers have a willingness to pay for more sustainable products.

When consumers are unwilling or unable to pay more for sustainable products, co-operation might be, in some cases, a way to achieve a more sustainable outcome. Behavioural economics has identified numerous behavioural biases to explain why consumers might not be willing to pay more for more sustainable products, even in those cases where they might have a general preference for them. Further, companies may collectively address coordination problems.

Competition authorities may consider whether a specific agreement between competitors may be allowed to overcome a specific market failure that is not addressed by public policy measures. They would need to assess carefully the indispensability and proportionality of such types of co-operation to reach the sustainable goals, as well as the existence of economic incentives on the part of businesses to provide more sustainable outcomes. As mentioned above, they also need to be wary of the possibility that co-operation for sustainability objectives may be used as a pretext to engage in anti-competitive practices, such as price fixing.

4. Many forms of private co-operation between competitors aimed at sustainability objectives will not negatively affect competition and will thus be outside of the scope of competition law.

Agreements aimed at combining complementary skills or assets of private actors may yield significant efficiencies. For instance, a research and development (R&D) co-operation agreement may allow bringing products to the market in a swifter and cheaper way. A production agreement may allow companies to achieve economies of scale that it would be otherwise impossible to attain. A standardization agreement may enhance product choice and quality, as well as allow interoperability and technological development.

Many forms of co-operation agreements, such as those listed above, may be unproblematic under competition law or exempted under a traditional framework analysis.

In some jurisdictions, such as Australia and New Zealand, competition authorities can also allow restrictive agreements and mergers potentially reducing competition if the likely net public benefit outweighs the likely public harm of the conduct or transaction.

Even if many forms of private co-operation between competitors aimed at sustainability objectives may not negatively affect competition, businesses can benefit from additional guidance and legal clarity on what kind of co-operation initiatives may be excluded or exempted from the application of competition law. This is also to ensure that competition law does not have an over-deterrence effect hampering legitimate sustainability initiatives.

Many competition authorities have undertaken this effort, including, among others, at the European level, in the Netherlands, in Greece, and in the UK.

5. Sustainability harm and efficiencies can be generally recognised under the consumer welfare standard. If sustainability efficiencies are to be taken into account, appropriate quantification techniques may need to be adjusted or further developed, also drawing insights from environmental economics.

The consumer welfare analysis is considered a sufficiently flexible framework to recognise sustainability-related harm and efficiencies on a case-by-case basis. There are divergent views on whether societal benefits can or should be, to some extent, recognised in the assessment in specific circumstances. This typically concerns the situation where sustainability benefits accrue to a group of people, which is different from or wider than the consumers negatively affected by the anticompetitive effects of an agreement. A separate, but related, debate concerns also whether sustainability benefits, when present, could be taken into account only when they outweigh fully the anticompetitive harm of the conduct or transaction, or whether partial compensation could be accepted.

If sustainability efficiencies are to be taken into account, quantification techniques may need to be adjusted or further developed to capture adequately the effects of sustainability agreements or transactions, also drawing from the experience and insights gained by environmental economics. Different techniques, such as those based on 'willingness to pay'-analyses, could be used in the assessment of potential efficiencies, if relevant.