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Executive Summary of the roundtable on Environmental Considerations in Competition Enforcement

Annex to the Summary Record of the 136th Meeting of Competition Committee held on 1-3 December 2021

1 December 2021

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 136th Meeting of the Competition Committee on 1-3 December 2021.

More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm

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Executive Summary of the roundtable on Environmental Considerations in Competition Enforcement

By the Secretariat*

On 1 December 2021, the OECD Competition Committee held a meeting to discuss how competition authorities can take environmental considerations into account in their case analysis. Based on the background note, the written contributions by experts and the roundtable discussion with panellists and delegates, the following key points emerged:

1. Private actors play an important role in reaching internationally set net-zero targets, alongside public policy, public investments and regulation. Competition enforcement and competition policy are thus fundamental to ensure the efficient allocation of capital and contribute to enabling the technological breakthroughs needed to reach environmental goals and their dissemination at scale.

The negative consequences of climate change on the world and its economy are well documented. While government policies and regulatory solutions may be key tools to internalise negative externalities, such as the costs of pollution, well-functioning markets can also play a part as a fundamental driver of green innovation.

The role of private investments and initiatives is therefore necessary to face the climate crisis and reach net-zero goals. As investors, shareholders and consumers increasingly consider environmental sustainability in their market decisions, business models, investments and strategies are increasingly driven by sustainability rationales.

Competition enforcement and policy can support environmental goals in several ways, by relying on their traditional tools and frameworks of analysis. First, competition authorities can prohibit and sanction any undue market distortions negatively affecting sustainability, for instance by prioritising enforcement activity aimed at preventing anti-competitive conduct and mergers that also harm the environment, such as greenwashing cartels and so-called "green killer acquisitions" (companies acquiring more sustainable competitors to alleviate competitive pressure to produce greener or less polluting products, thus stifling innovation). Second, they can allow pro-competitive and sustainable collective initiatives or mergers, duly considering environmental efficiencies, when and if they arise. Third, they can use their advocacy powers to support the maximisation of the use of State resources and private investments in the green transition.

2. Sustainability outcomes will generally be best achieved if firms compete. It is therefore important to prevent sustainability initiatives from being abused to form illegal cartels or for greenwashing purposes. Nevertheless, private co-operation can, under certain circumstances, contribute to advancing sustainability objectives and efficiencies.

In many instances a competitive market environment will lead to sustainable outcomes, as it may provide the incentives for green investments, leading to more economic efficiency, economies of scale and innovation. Further, many forms of co-operation agreements are

* This executive summary 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.

typically unproblematic under competition law or can be exempted under existing provisions, such as certain forms of R&D co-operation.

In some instances, however, the presence of market failures such as coordination problems, first-mover disadvantage, and information asymmetries, as well as the existence of behavioural biases, may have to be taken into account by competition authorities, if they are unaddressed by regulation, as they affect competition dynamics and may justify specific forms of co-operation.

However, co-operation on alleged sustainability parameters can also be used as a pretext to engage in anti-competitive practices, like price-fixing. Competition agencies need therefore to be mindful of the risks and address such attempts at "greenwashing".

3. The traditional analytical framework used by competition authorities is flexible enough to allow for environmental considerations, even if it may be challenging in some cases. Addressing such challenges may require some adjustments to the current analytical tools and to the investigation techniques used by competition authorities, including a more extensive use of environmental economics and closer co-operation with other policymakers.

The current legal and economic frameworks can to a very significant extent include the analysis of environmental considerations within the boundaries of the traditional assessment of harm and efficiencies. The consumer welfare analysis, where used, is a sufficiently flexible framework to recognise anti-competitive harm and efficiencies that also affect sustainability.

When applying their traditional analytical tools, competition authorities will be confronted with four main challenges: i) identifying the type of sustainability effects that are relevant for the analysis; ii) determining the role of "out-of-market" efficiencies (i.e. efficiencies arising to consumers other than those directly affected by the conduct or transaction); iii) establishing the correct timeframe for the analysis; and iv) developing the right tools for the quantification and measurement of sustainability effects that are relevant to the analysis.

Some of these challenges will require further analysis and possibly adjustments of the analytical tools and of the competition investigation design. Importantly, competition authorities may need to move from a focus on price effects to a more holistic analysis of both static and dynamic effects in the longer term. They may need to adapt different quantification techniques such as those used in environmental economics and incorporate them into the competitive analysis. For the assessment of green quality, choice and innovation harm and efficiencies, authorities may need to build expertise in-house or via co-operation with other competition authorities, environmental agencies or environmental economics experts. They also may need to continue to develop investigative techniques and internal document collection practices related to sustainability impacts.

4. Since many forms of sustainability co-operation do not negatively affect competition, guidance by competition authorities may be important to avoid chilling effects on investments and private initiatives. Given the cross-border nature of environmental impacts, increased internal co-operation between competition authorities will be important to reach consistent solutions.

Uncertainty as regards which co-operation agreements may be caught by antitrust rules can lead to chilling effects on sustainability private investments and initiatives. Guidance to businesses via decisional practice, informal advice, and soft law tools on how environmental considerations are expected to enter the competition assessment may be beneficial. At the time of writing, guidelines have been issued or are under discussion at the European level, as well as, for example, in the UK, Austria, the Netherlands, Greece, Germany and Japan.

As many businesses operate across jurisdictions and environmental impacts are not bound by national borders, increased international co-operation and communication between competition authorities will help determine how best to face the common challenges that integrating environmental considerations into the competition assessment presents, as well as to increase consistency in the application of competition rules.