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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**Summary of the Discussion of the Roundtable on Out-of-Market Efficiencies in
Competition Enforcement**

Annex to the Summary Record of the 141st Meeting of the Competition Committee

5-6 December 2023

This document prepared by the OECD Secretariat is a detailed summary of discussion of the roundtable on Out-of-Market Efficiencies in Competition Enforcement, held by the Competition Committee on 6 December 2023.

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Summary of the Discussion of the Roundtable on Out-of-Market Efficiencies in Competition Enforcement

On 6 December 2023, the Competition Committee held a roundtable discussion on Out of Market Efficiencies in Competition Enforcement, chaired by Professor Frédéric Jenny.

The Chair introduced two contexts in which out-of-market efficiencies would be discussed. The first context is digital markets and multi-sided markets, where anti-competitive practices have differing effects on various sides of the market. The other context is that of sustainability, where the interests of those directly affected by anti-competitive practises are balanced against the interests of the general public outside the market, and how they are affected by climate change. The Chair noted that a third context for out-of-market efficiencies may arise out of these discussions: airline cases.

The Chair proposed that the discussion be organised in two segments: The first segment would deal with the pros and cons of taking those out-of-market efficiencies into consideration in competition analyses. The second segment would deal with sustainability agreements, sustainability-related measures taken by different countries, and whether there is a specific case for incorporating out-of-market efficiencies in the discussion of sustainability.

The Chair stated that there would be four external expert speakers taking part in the discussion. The Chair explained that the speakers would introduce themselves and disclose any cases they may be involved in that are relevant to the discussion.

John Davies introduced himself as a member of the UK Competition Appeal Tribunal, and declared that his views were strictly his own, and did not represent the Tribunal. Mr Davies stated that he was not currently involved in any related casework, but that in his previous role as a consulting economist he had advised companies involved in various cases, including interchange fee cases for credit cards, before some of the authorities present at the roundtable.

Nicole Rosenboom introduced herself as a principal at Oxera. Dr Rosenboom stated that she had been involved in several cartel investigations and litigations. She mentioned that she had worked in particular on the Shell/TotalEnergies self-assessment submitted to the Netherlands Authority for Consumers & Markets (ACM), relating to the capturing and storing of CO₂, and which is one of the first green self-assessments.

Nancy Rose introduced herself as a professor of economics at MIT and a visiting scholar at the Harvard Kennedy School. She mentioned that she had been involved in teaching and researching competition and competition policy for her entire career, and acted as Deputy Assistant Attorney General for economic analysis in the antitrust division of the United States Department of Justice from 2014 to 2016. She disclosed that she had advised the US Department of Justice on two recent airline matters, one of which involved some out-of-market efficiency arguments.

Daniel Crane introduced himself as a professor of law at the University of Michigan and of counsel to the Paul Weiss law firm. He disclosed that his law firm was counsel to Spirit Airlines in the ongoing Spirit-JetBlue matter, which raised issues relevant to the roundtable's discussion. He stated that he would not speak directly about that case.

The Chair mentioned that the Competition Committee received eleven contributions for the roundtable. Some of these contributions take a strong stance against considering out-

of-market efficiencies, while others state that they should be considered. The Chair mentioned that John Davies is the author of the background note on this subject, and asked John Davies to summarise the findings and issues outlined in the paper.

1. Overview of the background note

John Davies presented a summary of the paper for this session. The background paper focuses on difficult cases in which there is an efficiency claim relating to a market that differs from the market in which the relevant harm takes place, effectively resulting in the trade off of benefits to consumers in one market, against harm caused to consumers in another market.

The background paper argues that many abuse of dominance cases and vertical mergers involve market comparisons. While competition authorities in those cases have taken an overall view on the effect of the conduct, they do not necessarily apply an out-of-market analysis. One example is that of a merger between two airlines that results in some fairly clearly demonstrated efficiencies that could be expected to reduce prices and therefore bring value to consumers. There is however a more significant per-route detriment to consumers affected by an overlap who have suffered anti-competitive harm. This raises the question of whether that merger should be approved because the resulting reduction in fuel costs, which benefits all entities involved, would outweigh the competitive harm inflicted on a much smaller group of people or entities. Most of the time it is possible to craft remedies or suggest that the parties present remedies that would avoid the situation altogether. The background paper however focuses more on difficult cases where the efficiencies are inextricable between these different markets and no equitable remedies are available.

The background paper provides examples from jurisdictions where these kinds of out-of-market efficiencies are ruled out or at least very severely restricted, as well as examples from jurisdictions where some claims are allowed under certain conditions. These approaches include a United States Supreme Court ruling that anti-competitive conduct cannot be excused or permitted because there may be benefits to some other consumers. It also discusses the European Commission's approach, according to which out-of-market efficiency claims cannot be used to justify an otherwise anti-competitive agreement. The only case when this may be possible is when the consumers affected by the harm and those who benefit are substantially the same. Australia does not rule out such claims, in the context of the application of a total welfare standard. The United Kingdom allows claims relating to customer benefits, affecting any market in the United Kingdom. Switzerland, similarly to Germany, distinguishes compensating benefits from out-of-market efficiencies, but will consider pro-competitive increases in other markets and potentially balance those effects out against one another.

The background paper also discusses the payment card market, which is a two-sided market involving merchants, on the one side, and consumers, on the other side. The way in which competition authorities treat such cases could depend crucially on whether they regard those two sides of the market as being separate markets or one single market. If there is a strong prohibition against out-of-market efficiencies, and this market is considered as two separate markets, then in principle one could not trade off the benefits that cardholders receive against the harm that merchants experience from an interchange fee system.

With regard to the pros and cons of whether out-of-market efficiencies should be considered, the advantage is that taking account of people who are not in the harmed market would serve the principle that everybody's welfare should matter. An argument against

considering out-of-market efficiencies is that the goal of competition authorities is to protect competition, in any market, so one should not balance harms in one market with efficiencies in another. Another argument is that if efficiency claims are allowed, there is a risk of a so-called slippery slope, that is the risk that efficiency claims in other markets could be used to justify mergers to exploit economies of scale and scope until the economy becomes a single duopoly or monopoly. An additional argument against considering efficiency claims is that it could be impractical to deal with claims about out-of-market efficiencies, as this would likely increase the burden and add to the resource claims on agencies.

With regard to sustainability, out-of-market efficiency has been considered in climate change agreements, due to the urgency of the climate situation, and not necessarily for analytical reasons. The arguments detailed in the background paper against accepting out-of-market efficiencies also apply to environmental efficiencies. The approval of an anti-competitive agreement that is aimed to improve environmental standards must involve approving an agreement that goes beyond the legal requirement for those standards set by central government. This raises the question of whether it is right that competition authorities are empowered to take that kind of decision.

John Davies provided his personal observation that the debate in the literature suggests that the choice of whether to accept out-of-market efficiencies has a significant impact on the competition enforcement system. In fact, these are a few exceptions which are put forward by the parties and have to be proven by the parties just like any other efficiency claim, so the cases where out-of-market efficiencies really matter are going to be rare.

The Chair thanked John Davies for his presentation of the background paper and invited Daniel Crane to discuss the pros and cons of taking out-of-market efficiencies into consideration.

2. Pros and cons of taking out-of-market efficiencies into consideration

Professor Crane began by discussing the perception that under United States law it is impermissible to take into consideration efficiencies in one market as offsetting anti-competitive effects in another market, based on a Supreme Court decision on Philadelphia National Bank in 1963. There are however relatively few legal decisions that have actually implemented this, except for those that have generally established a prohibition on balancing effects across markets. He pointed to uncertainty as to whether that remains the law. In the most recent Supreme Court decision on the subject, *NCAA vs Alston* which was not a merger case, the Court noted that the defendant would have been free to justify anti-competitive effects in the labour market with reference to pro-competitive effects in the separate consumer market.

Professor Crane described the discrete question of whether or not efficiencies in the market does not usually arise, rather parties and agencies may come to an understanding on a series of remedies, without there ever being a strict discussion as to whether the relevant efficiencies are in-market or out-of-market. He mentioned some of the challenges in having a strict rule prohibiting the consideration of out-of-market efficiencies. First, a determination of whether efficiency is in-market or out-of-market requires defining a relevant market, and agencies have been veering away requiring a formal definition of a relevant market. This is because market definition is often artificial and arbitrary.

Second, it is difficult to allocate efficiencies to a particular market. One example is the Sprint/T-Mobile merger in the cellular service industry, whereby a United States Court first defined the relevant geographic markets as a group of small local markets, but then found

that the network level efficiencies taken together were quite significant, and never specifically allocated those efficiencies on a market-by-market basis. Even under an initial premise that out-of-market efficiencies cannot be accepted, a question will inevitably arise as to which efficiencies reside in which markets when conducting a merger analysis.

When determining which principle should be applied in this situation, at a formal level, the principle may be that each distinct product or geography must be judged independently to protect the interests of consumers. Professor Crane expressed doubts as to whether this actually protects the interests of consumers since they often buy products in multiple categories participating in multiple relevant markets, and thus would want the overall cost to be minimised or overall benefits of competition to be maximised across markets.

He suggested considering a functional understanding of the principle, in which the concern is about trading off the interests of different consumers or different groups of people in an antitrust analysis. The notion is that one group should not be exploited to the benefit of another group. He however described this view as too broad, since it is virtually impossible to conduct an antitrust analysis in any context without considering trade-offs between different populations of consumers.

Lastly, Professor Crane offered an alternative way of thinking about this principle: that anti-competitive effects and efficiencies should not be traded off either across markets or even within markets, when that would lead to exploitation of economically vulnerable groups or result in unjust reallocations of wealth. He proposed that this principle be implemented as a more functional approach as opposed to a formal one, considering the different economic positions of various markets. He mentioned a hypothetical example of a supermarket merger where the merging entities plan to move more upscale in the market, closing a store in a poor neighbourhood and opening a new store in a richer neighbourhood. One could either say that the two stores are in the same relevant geographic market or that the two stores are in different relevant geographic markets. The question would be whether formal market definition should determine whether or not one should trade off the interests of poorer consumers versus those of richer consumers. He concluded that the discussion on out-of-market efficiencies should not be about a formal principle about the boundaries of a market, but instead a more functional principle about the kinds of effects we are and are not willing to trade off.

The Chair turned to the Japanese delegation, asking them to expand on their contribution regarding public interest considerations and a particular case in which consumer safety was considered to be a possible efficiency to be weighed against the anti-competitive effect of the merger.

Japan set out its view that consumer safety can be considered as an out-of-market efficiency because certain business conducts may harm competition in the market, while at the same time broadly securing consumers safety, including for those outside the market. The delegation referred to two cases in Japan dealing with consumer safety and competition law. In both cases the respondent alleged that their business conduct was necessary for securing consumer safety and thus justified under the Japanese Anti-Monopoly Act.

The first case dealt with Toshiba elevators, in which Toshiba refused to provide an independent elevator maintenance company with the component parts necessary to fix elevators, arguing that Toshiba itself had to supervise the repairs to ensure the safety of the repaired elevators. Toshiba had argued this was an issue of public interest and that public safety should be considered in determining whether its trade practices were just. The court in this case however found that there was no evidence that the elevators would be any less safe if the repairs were made by the independent company.

The second case concerned the Japan Toy Gun Cooperative Association. The plaintiff, a new manufacturer of air guns, alleged that the association's request to retailers not to carry the manufacturer's products violated the Anti Monopoly Act. The association argued that it made such a request to exclude these products because they did not comply with the association's safety standards and thus risked harming the public. The court held that if the purpose of setting the safety standard is acceptable from the perspective of competition policy, implementation of these standards was reasonably tailored to that purpose, then the conduct could potentially be justified under the Anti-Monopoly Act. The court however rejected the Japan Toy Gun Cooperative Association's argument, finding that their conduct was not a reasonable form of implementation to ensure consumer safety.

The Chair then turned to Mexico, asking the delegation to discuss a case in which the bundling of telecommunications services may be anti-competitive in one market, but provide benefits to another market.

Mexico discussed a study by the Mexico's Federal Telecommunications Institute (IFT) on bundling in the telecommunications sector, particularly with regard to services. The delegation explained that the main telecommunications operator in the country only provides two out of three services analysed: telephone and internet services.

Mexico expressed its view that bundling actions can have both positive and negative effects on markets. The positive effects include supporting economies of scale and scope, investment in the quality of goods, reduction in the public having to seek out options, reduction of advertising costs. Some of the negative effects include problems of comparability, high surge costs, and a lack of transparency. Mexico explained that the study provides insight into how final users experience these services.

The Chair asked Argentina to discuss its view that out-of-market efficiencies may be considered as contributions to the general economic interest.

Argentina stated that reflecting on out-of-market efficiencies necessarily implies a consideration of the general welfare, particularly with regard to the goals of competition policy. Argentina posed the question of whether restricting competition alone makes a practice inherently anti-competitive, or whether the focus should rather be on the damage inflicted on the general economic interest by a practice, agreement or merger through the restriction of competition. Argentina explained that the Comisión Nacional de Defensa de la Competencia (CNDC) has recently made progress in embracing an evaluation of these effects, which may be overlooked in a more traditional analysis.

Argentina described a new regulation it put in place for merger notification, which provides for an exceptional form requested only when the CNDC considers that the merger under review is highly likely to lead to the strengthening of market power of the merging firms. This requires notifying companies, not only to indicate the efficiency gains arising from the merger and how they will be passed on to consumers, but to identify the benefits that the transaction could have on aggregate variables such as employment generation, income, import substitution, level of investment, environmental care, and gender policies.

One of the challenges of this measure is the ability to prove these types of benefits. Argentina mentioned a merger between the companies Avon and Natura, who had claimed the existence of out-of-market efficiencies, but to which the CNDC objected in 2022 and was still analysing at the time of the roundtable. Argentina reiterated that its broader approach to the effects of acts that harm competition, in an effort to incorporate out-of-market efficiencies into its assessment matrix, has the ultimate goal of preserving the general economic interest.

The Chair turned to the Singaporean delegation to discuss its contribution stating that the Competition and Consumer Commission of Singapore (CCCS) has adopted a total welfare approach, allowing the consideration of efficiencies in markets that are closely related to each other. The Chair asked the delegation to explain how Singapore defines the closeness of markets, and whether you define the market broader if you want to look at some efficiencies.

Singapore began by providing background on its economy more generally. The delegation explained that its exports and imports are much larger than its GDP, which implies that Singapore is frequently dealing with out-of-market efficiencies. Singapore explained that in the Changi Airport, 25% of traffic is transit, so that ignoring transit efficiencies would mean ignoring 25% of the economic reality. Similarly, 17% of Singapore's public register of cases comprises airline cases, including foreign airlines.

Singapore agreed with the Chair that the country has recognised out-of-market efficiencies, particularly in its guidelines accepting efficiencies from closely related markets. Singapore explained that for airlines, competition is usually route-specific, particularly for overlapping routes where airlines cooperate, while the efficiencies are almost always in transit connections. Singapore argued that they always resolved this potential conflict is through accepting commitments to address the competition concerns, such that Singapore can allow the alliances to happen, to reap the out-of-market efficiencies. They do not need to retrofit the market definition since they accept out-of-market efficiencies.

Lastly, Singapore expressed that it permits efficiencies that are out-of-market, but not out of Singapore. A major consideration is thus whether Singapore outbound passengers can benefit from the connections. For example, if not for the transit traffic, it may not be economically feasible to sustain the size of the plane or the frequency of flights by serving Singapore passengers alone. This underlies why Singapore tends to accept such efficiencies.

The Chair asked Kazakhstan to discuss its law and policy around out-of-market efficiencies.

Kazakhstan explained that it was in the process of reviewing legislation with regard to accepting certain out-of-market efficiencies. The delegation referred to a 2018 case discussed in its contribution, in which it cleared a government-backed deal with pending conditions for a state-owned telecommunications company to acquire a major stake from a Swedish company in the same market, which led to an increase in its market share to 70%. Some of the out-of-market efficiencies included 4G coverage and the launch of some 5G coverage, key performance indicators, and providing rural areas with optic fibre infrastructure to reduce digital inequality. One of the conditions was about providing transparent access to independent private operators to share available and existing radio frequency waves for potential investment projects. Following a complaint by an independent operator, the competition authority considered that the condition imposed in 2018 was violated and was litigating the matter.

The Chair asked Professor Nancy Rose to discuss her view that it is unwise to accept out-of-market efficiencies, from an economic and legal perspective.

Professor Rose introduced three questions related to out-of-market efficiencies. The first question deals with what is needed to consider out-of-market benefits and to weigh those against competitive harm. The second question is how costly it would be to add out-of-market benefits to the decision making of both enforcement agencies and courts, where applicable. The third question is whether there is over-enforcement, which necessitates further investigation into what are considered out-of-market benefits.

For the first question, Professor Rose explained that balancing across markets requires determinations that enforcement entities and courts are not well positioned to make. The implication of such balancing is that if the sum of all of costs and benefits towards total welfare are taken into account, it would in theory be possible to achieve redistribution so that every group would either be in as well or better off. She points out however that neither enforcers nor courts generally can dictate this redistribution.

With regard to the second question, Professor Rose asserted that neither economists, nor enforcement agencies, nor courts, are equipped to assign particular weights to the respective wellbeing of specific groups that are economically or politically disadvantaged, or for one group of consumers in one market versus another group of consumers in another market. She referred to Professor Crane's proposal as effectively weighing very heavily the welfare of groups that are economically disadvantaged. Professor Rose agreed that some form of balancing may be taking place when examining harm within a market, because not all consumers are homogeneous within a market. As for out-of-market efficiencies, the US courts have resisted that balancing.

Professor Rose moved to her third question and asserted that considering out-of-market efficiencies would likely be quite costly. Current practice strives to minimise costs associated with both enforcement and error. The United States' system for investigating, challenging, and blocking mergers is very costly, but this cost would increase further if the system incorporated out-of-market benefits.

Professor Rose pointed out a deficit in empirical evidence of widespread realised efficiencies that are sufficient to offset harm within markets. As an example, she mentioned the case of a 2008 merger between beer companies Coors and Miller, which had been cleared by the Antitrust Division of the Department of Justice on the grounds that there were cognizable efficiencies sufficient to offset competitive harm. While there were ex post efficiencies that were created by allowing Coors to brew its beer across the country at Miller's various breweries, there was also a massive increase in the price of Miller, Coors and their leading competitor Budweiser. Economists concluded that this occurred due to increased co-ordination between the leading companies. She highlighted the risk of an increase in tacit co-ordination between competitors that would be enabled once a merger is approved, even if the merging party claimed that it would provide broad national benefits.

Professor Rose emphasised that very complex scenarios involving out-of-market efficiencies are relatively rare, and thus it is not logical to totally alter competition policies to accommodate that possibility. She also mentioned that enforcement agencies have a degree of effective prosecutorial discretion for instances of de minimis harm and substantial out-of-market benefits, since none of the enforcement agencies have the resources to go after all potentially anti-competitive conduct.

Finally, with respect to climate benefits, she mentioned that legislators could modify the law to address the possibility of considering out-of-market benefits in very specific situations where the legislature identifies potential climate benefits. She however pointed out that allowing companies to co-operate under the auspices of a climate-related initiative could still lead to co-operation that is harmful for consumers and could counteract the climate-related benefits of the initiative.

The Chair asked the United States to discuss the risks, issues of administrability and policy benefits of not accepting out-of-market efficiencies.

The **United States** began by emphasising that it is not against considering the impacts discussed, but that it limits such considerations when the legislature so specifies. One example is that during the Covid-19 pandemic, when there was a shortage of masks and

respirators, it became necessary to geographically allocate markets for distribution, and Congress enabled the development of an antitrust immunity framework for this purpose.

The United States distinguished this type of scenario from situations where a competition enforcer or judge decides themselves that it is worth weighing other factors against competitive harm. The delegation explained that the law in the United States does not permit a merger resulting in a lessening of competition that will cause harm to one group just because another group of people may experience some benefits.

The United States considered that weighing two different groups of people is fundamentally a political judgement, which requires valuing one group of people against another. For example, a judge tasked with determining which group is more important and how much each deserves at the expense of one another would be based on “nothing more objective than his own sympathies or political views”. This should be the task of legislators, not judges.

In situations where it is clear that one group will be harmed significantly more than another group, a question arises as to whether the less-harmed group deserves the protection of the law. In the United States it is well established that harm inflicted on people by the government is much more serious of an issue than providing a group with benefits. The United States would thus be very cautious to knowingly harm one identifiable group of people for the benefit of another group.

The Chair asked France to discuss its view on the spectrum between caution and extreme caution in considering out-of-market efficiencies.

France began by recalling that in French competition law, consideration of such efficiencies is permitted as under French law, there is a very broad definition of economic progress that can be factored in the competitive assessment. French law however does not address whether this economic progress should be limited to a given market, or if it can be looked at from a perspective beyond that market, and thus out-of-market gains can be factored into the analysis.

While consideration of efficiencies is allowed in France, some key questions remain: when they should be considered, what the standard of proof is for the party claiming these efficiencies, and how such efficiencies can be quantified for purposes of a trade off with anti-competitive practises. This also necessitates an analysis of the conditions whereby the transaction is good for the economy and to what extent that can offset the loss in competition.

The French delegation pointed out the difficulty in taking efficiencies into account and that competition authorities rarely do it in merger cases, since what is reported by the companies often does not meet the expected standards of proof.

With regard to sustainability, France emphasised that most co-operation between companies that aim for sustainability development generally will not be prohibited by competition law. Moreover, in a lot of cases there will be in-market efficiencies and out-of-market efficiencies, and competition authorities could take decisions based on in-market efficiencies. This could be the case for an agreement to optimise the collection of waste between competing companies, which would reduce CO2 emissions and transportation costs, and will in turn benefit the consumers in the market.

Lastly, France mentioned how externalities can be internalised through taxes, regulation and market mechanisms. In most cases, these instruments are more efficient in changing the behaviour of companies than using competition law. The institutions that implement this will be in a better position to control the redistributive effects under their political mandate.

The Chair asked BIAC to present its view that out-of-market efficiencies should be taken into consideration in general.

BIAC agreed that in specific situations out-of-market efficiencies should be considered, however clarified that this is not always the case. In reference to the aforementioned spectrum between caution and extreme caution, BIAC stated its view was more on the side of caution than extreme caution. Some fundamental issues to consider are what should be protected and who can make that decision. The reason BIAC believes that out-of-market efficiencies are valuable and should be taken on board is because these efficiencies benefit consumers. While from a strictly formalistic perspective these benefits may go to consumers that are not in the same market as the one where potential harm takes place, the fact remains that there are benefits from which society benefits.

BIAC posed the question of how to treat cases in which consumers are active or purchasing products in different markets. The same consumer may be, on one hand, harmed because it purchased a product in a particular market, but may on the other hand, benefit from these out-of-market efficiencies in markets where they purchased other products.

BIAC pointed out that before entering into a discussion on how to approach out-of-market efficiencies, it is logical to discuss how to treat in-market efficiencies. This is important because out-of-market efficiencies and in-market efficiencies, to a large extent, are subject to the same rules, including that they must be established, quantifiable, and cognizable.

BIAC also mentioned that consumers in a particular market may not have to be compensated fully, which raises a question of whether agencies and political entities are content with the notion that in some cases there is less than full compensation for specific consumers. BIAC recalled points made earlier that while this discussion is largely centred around mergers and horizontal collaboration, it could be helpful to engage in a comprehensive analytical framework that also covers exclusionary conduct and vertical restrictions. BIAC also mentioned the reluctance among some jurisdictions that if out-of-market efficiencies are allowed, then this might open the floodgates and cause uncertainty in how enforcement can be done. In BIAC's view, as long as the rules are clear, agencies know what they need to do, and businesses are aware of the precise criteria in place, then such a risk would hopefully be mitigated.

3. Out-of-market efficiencies and sustainability

The Chair noted that one of the main points in the first part of the discussion was that it was very difficult to measure efficiencies in general, and even more efficiencies that related to public good. He therefore asked Nicole Rosenboom to discuss methodological approaches on how one can measure out-of-market efficiencies.

Dr Rosenboom began by discussing ways to approach quantifying public interests and how to weigh them against potential negative effects on competition. There are various methods for companies seeking to enter agreements for the sake of sustainability and these mostly derive from cost-benefit analyses. Dr Rosenboom explained that it can be difficult to balance environment effects, since they are non-monetary effects, while the effect of price increases is in monetary terms.

To quantify environmental benefits, there are two types of methods: revealed preferences and stated preferences. Economists generally prefer revealed preferences since they are based on actual market data, whilst stated preferences, which are based on survey data, may be biased. Another key distinction is the one between social cost and willingness to pay on the right-hand side of the slide. Within the social cost, there are damaged cost methods and

abatement cost methods that quantify efficiencies impacting society as a whole or a large group of consumers. I think the most common known example is a reduction in CO₂, which, regardless of how it is accomplished, benefits people living in that geographic area, or even globally. Whilst at the bottom side of the slide, there is the willingness to pay, which is more an individual measure of individual consumers' willingness to pay, which is by definition more targeted towards in-market efficiencies.

Dr Rosenboom presented a case study dealing with how to weigh the environmental benefits of a proposed agreement against potential negative impacts. She provided a hypothetical example of a group of online grocery delivery companies, each with its own fleet of vehicles to deliver products. In this scenario the companies agree to phase out their diesel and petrol vehicles, and to replace them with electric vehicles which would lead to reduction in CO₂. She applied this scenario to the recent measures in the UK providing for out-of-market efficiencies under climate change agreements, and the European Commission guidelines which do not allow out-of-market efficiencies. The exercise involved transforming carbon values into monetary amounts. Many governments have declared which method they consider should be used for this kind of analysis. This would represent an abatement cost valuation in the UK context, and the government has also published the abatement cost valuation of carbon per year, which are used in the hypothetical example and reported in the table on the slide. If we know the rate at which those vehicles are phased out and replaced by electric vehicles, it is possible to calculate the amount of emissions that are reduced and the resulting monetary benefits, which would be significant at GBP 193.2 million. This is a major positive impact to weigh against the potential negative in the balancing of effects. It is known that 15% of UK households use online grocery delivery. When applying this rate of use in the UK to the total benefit of saved emissions, the benefit of the agreement decrease significantly to GBP 29 million. If a 1% price increase for online groceries is assumed, this would lead to a totally different result depending on whether out-of-market benefits are included or not. Under the UK framework, where, for climate change agreements that reduce CO₂, one can incorporate out-of-market efficiencies, the balance is positive, whilst in a framework without out-of-market efficiencies, for instance, like that of the European Commission, that balance indicates far less benefits.

The **Chair** turned to Australia, referring to its long-standing practice of recognising out-of-market efficiencies in agreements and the recent clearing of a merger in recognition of environmental benefits. The Chair asked Australia to discuss how it conducts the balancing of competition and notion of public benefit.

Australia referred its legal system's policy of granting exemptions from competition laws it believes the public benefit resulting from the proposed conduct would outweigh the likely public detriment. One set of criteria is that Australia must be confident that the effects will be significantly enduring, probable, causally related to the relevant conduct, and supported by sufficient evidence. Australia referred to the ease of taking measures during the Covid-19 pandemic since legislative approval was not needed. The balancing exercise was done by the ACCC, which has been granted jurisdiction Parliament in relation to social benefits. With regard to environmental applications, the ACCC granted authorisations to groups of generally small to medium sized businesses to enable them to establish a buying group to pool their electricity demand, enable joint procurement at better prices for renewable energy. Australia also passed a series of authorisations looking at circular economies, developing a voluntary scheme to provide for the alternate safe disposal and reuse of end-of-life batteries, in Australia through the restricting the use of landfills for batteries, and in other countries by prohibiting the export of these batteries to countries that engage in unsafe disposal methods.

Australia discussed the authorisation of a proposed acquisition which, related to vertical integration and common ownership issues. In this case a proposed private equity fund stipulated that it would bring foreign investment to the amount of 20 to 30 billion Australian dollars in accelerating the decarbonising of a very large emitter of greenhouse gases in Australia by means of accelerated renewable generation and storage. While aware of the competition risks of the vertical integration, Australia scrutinised internal documents of the plans for renewable investments, commitments investors, and financial impacts, and was satisfied that there was a sufficient benefit that outweighed the anti-competitive detriment.

The Chair asked Australia if the method proposed by Dr Rosenboom for weighing out-of-market efficiencies against anti-competitive practises would be useful, or if Australia had already been applying that approach, or a more qualitative approach.

Australia responded that it had been applying a more qualitative approach, though it does seek evidence, including in internal documents, that can help lead to a conclusion that the stated benefits are likely to be effected. Australia mentioned that it requires reporting in order to grant authorisations and renewals.

The Chair turned to the European Union, mentioning that anti-competitive agreements can be exempted on the basis of efficiencies, including out-of-market efficiencies, provided that the consumers receive a fair portion of those efficiencies. The Chair asked the European Union how it conducts this assessment in application of the revised horizontal guidelines.

The **European Union** responded that the new horizontal guidelines contain a chapter on sustainability agreements describing the type of efficiencies that it is willing to consider, covering the classic costs and qualitative efficiencies, as well as sustainability benefits, such as reduction in pollution or waste, elimination of pesticides, lower energy consumption, reduction of greenhouse gas emissions, and the Green Deal. The EU emphasised that companies must make it clear that such efficiencies are objective, concrete and verifiable.

The delegation discussed individual use value benefits and individual non-use value benefits, explaining that while they are both individual benefits for the consumers of the product, but they are experienced in different ways. In this sense, use value benefits for consumers are effected based on their own use of the products and the reduction in costs in terms of sustainability benefits, derived largely from reductions in energy consumption, and the transition from plastics to more durable materials in certain products. Non-use value benefits are more based on feelings of consumers with regard to the sustainability quality of the product, and positive benefits to others.

The European Union also discussed collective benefits, which mirror the more classic category of out-of-market efficiencies, where the sustainability benefits are accrued to a larger group of society rather than just groups of consumers in the relevant markets, irrespective of the appreciation by the individual consumers in the relevant markets. These occur outside of the relevant market or at least partially, for example, because there's a reduction in soil pollution or reduction in the emission of toxic particles in the air, which takes place outside the relevant market. The EU provided several examples, including one in which consumers purchase clothing made of sustainable cotton, which uses less fertiliser and thus less pollutants in the soil, or where the people who harvest cotton are better paid because they earn a decent living wage. Here, the benefits accrued from improvements in sustainability are not really benefits which accrue to the consumers of the more sustainable cotton clothing. In this example, collective benefits are very difficult to measure.

Finally, the European Union pointed out a connection between this example and individual non-value benefits, as consumers consider it valuable and are willing to pay for the benefits

experienced by the people in this example who harvest the cotton. The European Union emphasised that these three categories do not operate separately, and that each category can be put forward as a defence against a finding of an anti-competitive agreement.

The Chair asked Austria to discuss recent changes to its Cartel Act introducing a sustainability exemption applicable to agreements that do not affect trade between the EU Member States.

Austria discussed the intersection between competition law enforcement and the government's goals for a more sustainable economy. Austria explained that its approach is always to act within the law, so that to enact fundamental changes with regard to out-of-market efficiencies there must be a clear legal basis to do so. In that regard, Austrian legislators amended the criteria for cartel exemptions under the Austrian Cartel Act, including out-of-market efficiencies, which could be sufficient to fulfil the criteria for the national sustainability exemption. This exemption is however limited to aspects of ecological sustainability and climate neutral economy.

Austria described four criteria that should be assessed in determining whether the sustainability exemption should apply. The first is whether cooperation produces efficiencies. The second is whether those efficiencies contribute to ecologically sustainable or climate neutral economy. The third is whether the contribution to an ecologically sustainable or climate neutral economy is essential, and the fourth is whether the restrictions are indispensable for reaching goals that are referred to in the law.

4. Conclusion

The Chair offered some concluding remarks, and referred to the question of whether competition reform should be the responsibility of a given country's competition authority or of that country's legislators.

The **United States** recalled that the various speakers at the roundtable largely discussed competition and out-of-market efficiencies from an institutional design perspective, while the United States focused on how such changes are effected through judicial channels, commenting that administrative tribunals can be generally more democratic than other ways to make regulatory decisions.

The Chair mentioned prior situations in which various countries' political leaders have delegated non-competition-related economic issues to their respective competition authorities, and asked the roundtable participants for final comments.

John Davies observed that much of the discussion was theoretical, and pointed out that the United Kingdom had not been heard from, despite the fact that the United Kingdom's Competition and Markets Authority (CMA) had a different position on sustainability agreements compared to the European Union, creating an opportunity for a natural experiment in the coming years which could highlight whether there are anti-competitive agreements that might come before a competition authority or agreements that would not be authorised by the European Commission but might be authorised under the UK's exception.

The Chair mentioned that Australia had previously exempted agreements on the basis of out-of-market efficiencies, particularly related to sustainability. He asked Australia if there was any evaluation of whether those agreements have actually delivered the expected benefits that would justify their allowance.

Australia responded that for non-merger conduct agreements, audits and independent monitors have provided evidence that expected benefits had been delivered. However, in one case where the expected benefits were not generated, Australia refused to reauthorise the agreement.

Dr Rosenboom commented on John Davies's observation that it would be interesting to be able to see potential discrepancies between the UK and EU competition regimes. She also raised the importance of a pan-European or global programme, given that multinational corporations are not likely to adapt their respective policies to different countries.

Professor Rose expressed scepticism about some of the efficiency claims regarding potential anti-competitive agreements being considered a primary means of achieving certain benefits. At the same time she found it exciting to hear about the initiatives in various jurisdictions and the important lessons to be learned by other jurisdictions such as the US.

Professor Crane noted that for him the point is whether efficiencies-based defences in general should be allowed, particularly with regard to mergers.

The Chair mentioned that the question of efficiencies has been a very difficult one, resulting in the need for more roundtables on this issue in the future. The Chair thanked the experts and all who contributed to the roundtable.