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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Sustainability and Competition – Summaries of contributions

1 December 2020

This document reproduces summaries of contribution submitted for Item 1 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

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

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Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on the role of sustainability and competition (134th Meeting of the Competition Committee on 1-3 December 2020). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia & New Zealand

This paper is a written contribution to the Competition Committee’s call for country contributions to the roundtable on 23 July 2020, to be discussed at the Hearing on “Sustainability and Competition” on 1 December 2020.

For much of its history, competition law has largely focused on promoting consumer welfare as its primary objective.¹ Recently though, there has been a growing school of thought that competition law’s objectives should be broadened to incorporate other public policy considerations, including sustainability.²

Without discrediting the merit of these additional public policy objectives, and subject to some qualifications discussed below, Australia and New Zealand’s competition authorities hold the position that competition legislation should remain focused on protecting the competitive process by applying a consumer welfare standard. Specific policy measures and regulatory measures (for example, environmental protection frameworks, workplace relations regimes, and prudential regulation) are better equipped to achieve these supplementary goals without undermining the efficacy of competition law.

Both New Zealand’s and Australia’s competition laws have authorisation regimes that can allow each agency to authorise mergers or restrictive trade practices which may reduce competition, but only if it is in the public interest, that is, there is a net public benefit. This paper explains how those regimes work, their benefits and how each agency can account for sustainability factors in certain circumstances to allow anti-competitive mergers or restrictive arrangements that may have sustainability benefits to proceed. In those situations, the New Zealand and Australian competition law regimes have sufficient flexibility to look beyond a consumer welfare standard to consider broader wider economic and social impacts.

¹ For example, the purpose of New Zealand’s Commerce Act is to “promote competition in markets for the long-term benefit of consumers within New Zealand”.

² Daniel A. Crane, 'Antitrust's Unconventional Politics' (2018). *Law & Economics Working Papers*. 153. repository.law.umich.edu/law_econ_current/153/

BEUC

Competition policy cannot be the primary tool to promote sustainability. Nevertheless, within the boundaries of the existing EU legal framework there is scope to clarify that EU competition law and its enforcement should not stand in the way of sustainability initiatives and, where possible, can actively support climate change and environmental protection.

Clarification of the application of EU competition law to sustainability initiatives should not, and does not need to, be stretched so far as to undermine basic principles such as consumer welfare. On the contrary, it is through the consumer welfare standard lens that environmental benefits could be internalised, as consumers play a key role in the green transition. However, consumers should not bear the cost of businesses' sustainability agreements, either directly in the form of unjustifiably increased prices or indirectly through inefficient market outcomes.

Many agreements promoting sustainability goals can/will fall completely outside the scope of Article 101(1) TFEU. The large scope for agreements that do not have anticompetitive effects is often underestimated. On the other hand, it would be inadvisable to apply the *Wouters/Meca Medina* public interest approach to sustainability. This is a far broader subject than the issues at stake in that line of cases and would not allow for a proper and demonstrably objective balancing of different interests, including those of consumers.

Article 101(3) provides considerable scope to enable sustainability related agreements between businesses to be exempted, in many cases under traditional interpretations of this Article. One could also consider expanding the current approach in a limited number of circumstances. From the consumer perspective, a distinction must be drawn here between the first and second conditions of Article 101(3), where sustainability considerations can be reflected, and the third and fourth conditions which must be rigorously maintained to protect consumers.

The first condition of Article 101(3) can be fulfilled by sustainability features being considered as quality improvements or innovation insofar as consumers place a value on such features. For the second requirement, that consumers receive a "fair share of the benefit", the basic principle that users of the products that are the object of an agreement should be compensated for the harm caused to them by the restriction of competition is sound and should remain the rule. A broader standard could however conceivably be envisaged in limited circumstances to take into account indirect benefits such as (1) benefits in other markets, for example, where the benefit accrues to future consumers; or (2) societal benefits such as collective environmental benefits, to factor in negative externalities.

As regards societal benefits, the Netherlands ACM suggests that if an agreement: (i) prevents or limits any obvious environmental damage, and (ii) helps, in an efficient manner, to comply with a binding international or national standard to prevent environmental damage, users will, as a rule, benefit in the same way as the rest of society. According to the ACM, as long as the price increase to users is lower than expected benefits for society as a whole, this type of agreement can be exempted.

Such agreements would not necessarily fully compensate the increased price to the users of the product affected but arguably this is not required by the term "fair". Specifically, in relation to recognised globally tangible environmental benefits, such an approach could factor in negative externalities which might be fairer for users and non-users of the affected products. Non-users otherwise necessarily bear the cost of such negative externalities. However, this type of "fair share" reasoning could not be accepted in the same way for all sustainability agreements which restrict competition and harm consumers and do not internalise negative externalities in the same way as environmental protection improvements.

BIAC

The topic concerning the relationship between sustainability and competition has become increasingly important in recent years, with governments seeking to strengthen their commitment to greener and more sustainable policies and private entities being increasingly encouraged to align their conduct and business strategies with sustainable development goals. In this setting, conflicts may arise between sustainability goals and the protection of competition, for instance where companies cooperate to implement green initiatives, but where their collaboration might give rise to higher consumer prices in some markets.

Business at OECD notes that it is hard to overestimate the importance of the global challenge that lies ahead and the urgency required to tackle it. In its contribution, *Business at OECD* focuses on a number of two interrelated topics that are particularly relevant for adequately factoring in sustainability interests and considerations into competition enforcement, i.e. (i) the relationship between government action aimed at stimulating or mandating sustainable business ventures and antitrust enforcement; and (ii) the question how competition agencies can take sustainability interests into account and develop a framework for balancing those interests against potential negative effects on, for example, price competition in affected markets.

Business at OECD notes that there is some overlap between the issues that are relevant for the current Hearing with the topics that were discussed in the context of the 2010 OECD Roundtable on Horizontal Agreements in the Environmental Context. Indeed, while the current debate on sustainable economic development has a broader scope than environmental issues only, many of the analytical questions are similar. In addition to its current submission, *Business at OECD* therefore respectfully refers to its submission for the 2010 Roundtable.

Business at OECD is highly supportive of sustainable economic initiatives and believes that sustainability and economic growth challenges should preferably be addressed in a mutually reinforcing manner. This is because sustainable, long-term economic growth is of fundamental importance for raising the necessary resources for addressing the challenges that may endanger sustainability initiatives. This requires supporting innovation, entrepreneurship and green growth across all sectors, focusing on where improvements that both are economically efficient and contribute to attaining sustainable development goals can best be achieved.

Business at OECD strongly recommends that agencies work towards a transparent and consistent approach to factor sustainability benefits into the analysis of potentially anti-competitive agreements. In addition to the need for a general framework that is more hospitable to environmental and other sustainable benefits, *Business at OECD* encourages national competition agencies to consider the use of safe harbors for business ventures that are most likely to generate sustainability efficiencies. Once it is accepted that horizontal agreements aimed at attaining sustainability goals should not be considered naked restraints, the next step in enforcement is for the agencies to establish better and more tools for guidance on the types of agreements that enhance overall welfare.

Germany

The sustainable use of resources is one of the major issues of our time. Public expectations are high, especially with regard to the business community and companies that want to go beyond the applicable legal provisions and steer their entrepreneurial activities towards sustainable development. Competition law and competition authorities come into play whenever companies seek ways to cooperate in sustainability matters. One question in this respect is how to take greater account of sustainability aspects in assessments under competition law and in this way increase legal certainty for companies.

There is no general contradiction between public interest objectives and the objective to protect competition. Safeguarding competition will usually also lead to public interest goals being achieved. In some scenarios, however, there can be a conflict between the objectives of protecting competition and pursuing public interests, generally caused by market failure or distribution problems. Apart from state-regulation approaches which pursue public interest objectives by setting binding rules or providing relevant incentives, the public debate has also increasingly considered that private self-regulation can represent a problem-solving mechanism.

Where businesses engage in private self-regulation, these types of cooperation must be in line with competition law. In many cases cooperation do not fall under the scope of the prohibition of anti-competitive agreements. If they are linked to restraints of competition, the question arises as to the extent to which public interest objectives can be taken into account. The first possible starting point for a consideration of public interest objectives is the decision on the scope of application of the prohibition of anti-competitive agreements, but restricting the scope may be possible in rare exceptional cases only. Public interest objectives may rather be exempted from the prohibition within the framework of Article 101(3) TFEU. However, cooperating businesses cannot simply claim the protection of abstract public interest goals in this regard. They have to prove that the adversely affected consumers are not placed in a less favourable position by the agreement. This proof and the quantification of the related public interest objectives are associated with a number of practical and normative problems.

This paper sheds some light on the questions and challenges for competition law practice, in particular those posed by so-called sustainability initiatives.

Greece

This paper presents possible approaches to address sustainability concerns under Articles 101(1), 101(3) and 102 of the Treaty of the Functioning of the European Union (TFEU) and the Merger Regulation, with the aim to foster sustainable development goals while also curtailing anticompetitive practices.

Collective agreements related to environmental schemes or to fulfill certain Sustainable Development Goals (SDGs) adopted by the General Assembly of the UN, involving companies and other stakeholders, can produce substantial benefits from an environmental perspective, while at the same time they may have the potential to limit competition, and this is where competition authorities should intervene

The existing case law on art. 101, par. 1 TFEU may allow collective actions by the private sector to implement SDGs under specific circumstances. First, sustainability agreements, mandated by regulation, may be excluded from the scope of the prohibition under art. 101 par. 1. Second, certain sustainability agreements are unlikely to restrict competition. Third, sustainability agreements, either as ancillary regulatory restraints or under the objective necessity doctrine, may fall outside the scope of 101 (1). Finally, standardisation agreements may not be evaluated under 101 (1). Overall, the intuitive balancing test under 101 (1) may be conceived broadly enough to encompass sustainability concerns.

Article 101 par. 3 TFEU imposes more rigid criteria. Sustainability agreements may well fall under the first condition of the pursuit of economic progress and efficiency gains. However, for the accommodation of environmental and sustainability objectives, it is critical to have a toolbox, based among others on environmental economics and contingent valuation, on how to monetize these and what weights should be placed on each of these and to take a broad view of economic benefits that would also include collective economic benefits.

Sustainability considerations may also arise under the examination of an abuse of a dominant position under article 102 TFEU, serving as an efficiency argument and also under the assessment of mergers, generating an important competitive advantage or supporting “public security”.

Competition authorities should have a role in facilitating this transition to a Green economy.

First, they should enforce competition law in “Green cartels”, adopting nevertheless a hospitable approach taken for R&D horizontal agreements and agreements promoting innovation. Competition law should break its insularity and in accordance with the principle of consistency and that of policy coherence become more synchronised with the broader constitutional values and programmatic aims regarding sustainability, at the international, EU and national levels. Under this realm, more efforts should be made in order to provide undertakings with the legal certainty, through the collection of information on the various business strategies and the issues they face, in collaboration with other regulatory authorities and stakeholders, for the issue of e.g. general guidelines.

A novel suggestion is the development of a competition law sustainability ‘sandbox’ in order, for the industry to experiment with new business formats that aim to realize more quickly and efficiently sustainability goals, and which involve cooperation between competing undertakings or even more permanent changes in market structure in order to be accomplished.

Lithuania

Good Health and Well-Being is among 17 Sustainable Development Goals (SDGs). In one of the cases of the Competition Council parties put forward an argument that their anti-competitive agreement contributed to better public health protection and therefore must be exempted from the prohibition. However, analysis of information provided by the parties which was conducted by the Competition Council showed that there was no evidence proving the alleged improvement of health. Hence, the Competition Council concluded that the exemption was not applicable and parties to the agreement committed the infringement of competition law.

Netherlands

Companies sometimes need to collaborate to achieve sustainability goals. Agreements between undertakings can contribute in an effective manner to the realization of public sustainability objectives. However, competition laws sometimes stand in the way or are perceived to stand in the way. According to the Netherlands Authority for Consumers and Markets (ACM), competition authorities could facilitate the transition to a more sustainable economy, by i. explaining in general how competition laws relate to joint sustainability initiatives, ii. giving specific guidance to parties that collaborate with the aim to make their products, services and production processes sustainable, iii. granting immunity from fines to companies that entered into bona fide agreements when guidance is taken into account and by iv. taking into account the benefits of joint initiatives for people and businesses that are not direct or indirect customers, especially if these benefits aim to reduce negative externalities of production and consumption.

Although the transition to a sustainable economy calls for a new approach from competition authorities, and requires them, more than ever, to position themselves as specialist guides rather than enforcers, they should remain critical of whether agreements are necessary to achieve the set goals. They must also ensure that competition is not completely eliminated and they should force parties to substantiate, in principle, the benefits properly and quantitatively.

By giving clarity on how competition rules relate to horizontal sustainability agreements competition authorities could show that competition and sustainability go hand in hand. Guidance on what is allowed and what the boundaries of competition laws are will help undertakings start new sustainability initiatives.