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

Environmental Considerations in Competition Enforcement – Note by Belgium

1 December 2021

This document reproduces a written contribution from Belgium submitted for Item 1 of the 136th OECD Competition Committee meeting 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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Belgium

1. General competition legal framework

1.1. Does your legal framework already allow competition authorities to take environmental considerations into account within the competitive assessment of cases?

1. We consider that our legal framework allows us to take environmental considerations into account within the competitive assessment of infringement and merger control cases in order to assess whether there is a restriction of competition in the meaning of article 101(1) TFEU (and its Belgian law equivalent in article IV.1(1) Code of economic law (CEL)), or whether the agreement, concentration or practice can benefit of an exemption by application of article 101(3) TFEU (or article IV.1(3) CEL), or whether the concentration can be authorised in view of the assessment criteria in article IV.9 CEL, provided:

- It can be established that the issues are relevant to the functioning of the relevant market(s) in the short to medium term in order to be taken into account as an objective justification of any negative impact the agreement, concentration or practice may have on competition, or
- The sufficiently likely positive impact on society of out-of-market benefits also benefit to those who may be affected by any negative impact an agreement or practice may have on competition, in order to fulfill the conditions listed in article 101(3) TFEU (or article IV.1(3) CEL), including the requirement that the restrictive aspects must be necessary in order to achieve the relevant benefits.

1.2. If so, is it through public/legitimate interest provisions (enabling authorities to balance contrasting benefits and harms beyond market effects) or is it by means of other notions (e.g., interpretation of total or consumer welfare; polluter pays principle; fair share of consumer benefit) or provisions? Other?

2. In infringement and merger control cases:
- By interpretation taking into account total as well as consumer welfare (i.e. also out-of-market benefits).
 - We do so in light of the fact that the Court of Justice of the EU never endorsed an exclusive focus on consumer welfare as interpreted in economic doctrine¹.

¹ See e.g. case C-501/06P, 6 October 2009, *GlaxoSmithKline*, par. 63: “*First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price*”.

- We also take into account the macro-economic impact of practices in the Belgian environment when assessing the gravity of an infringement. We did so e.g. in the decision of 30 June 2021 in the *Caudalie* case when assessing vertical restrictions.

3. In interim measures cases: Article IV.71 CEL empowers us to take into account not only the need to avoid prejudice to the parties who are affected by the prima facie illegal agreement or practice but also the negative impact of agreements or practices on the general economic interest. We did so e.g. in the decision of 21 January 2019 in the *VRT/Norkring België* case on the availability of transmission masts for radio programmes.

1.3. Have there been any legal changes or proposals in this respect?

4. No.

2. Analytical tools and competitive assessment of environmental considerations

2.1. Do you use any tools to assess consumers' willingness to pay for more environmental-friendly products? If so, what tools do you use?

5. We did not yet have a case which required us to do so.

2.2. Do you use any tools to determine whether a market is affected by potentially relevant supply side factors (e.g. negative cost externality of production and distribution, information asymmetry, first-mover disadvantage) or demand side factors (e.g. behavioural biases or information asymmetry)? Did you ever apply contingent valuation techniques or other stated preference approach to estimate consumers' willingness to pay for greener products?

6. No specific tools.

2.3. What tools have you used, if any, to assess, estimate or quantify environmental impacts of conducts or mergers?

7. We did not yet have a case which required us to do so and will not necessarily require a quantification, as we e.g. do not when assessing the injury aspect in interim measures cases. It must, however be demonstrated that the impact is sufficiently likely.

2.4. For the assessment of cases with potential environmental impact, do you commit or intend to commit more resources on the analysis of potential dynamic effects in the future?

8. Not yet.

2.5. Have you adjusted the time horizon of your competitive assessment to take into account environmental impacts? How do you take into account long term or intergenerational effects?

9. We did not yet have a case which required us to do so.

2.6. Did you weigh price effects against dynamic effects in cases with potential environmental impact? If so, how did you perform the balancing of the effects?

10. We did not yet have a case which required us to do so.

2.7. Did you, in relation to environmental effects in any other markets, ever take into account out of market harm or benefits? Did you ever assess effects on consumers which were not the same as those affected by the investigated agreement, practice or transaction? What about effects that materialise in other jurisdictions? How did you proceed?

11. We did not yet have a case which required us to do so.

3. C. Anticompetitive conducts (agreements and abuses of dominance)

3.1. Did you enforce competition law against a “greenwashing” cartel or an anticompetitive conduct with negative impact on the environment? How did you distinguish between “greenwashing” and credible environmental claims? What elements did you assess and what evidence did your agency require to submit?

12. We did not yet have a case which required us to do so.

3.2. Have you ever brought cases (cartels, abuses of dominance) in which environmental considerations were relevant? Which tools and evidence did you use?

13. We did not yet have a case which required us to do so.

3.3. What were the main theories of harm you adopted? Have you adjusted traditional theories of harm or developed new ones to take environmental impacts into account?

14. We did not yet have a case which required us to do so.

3.4. How did your analysis differ from the traditional analysis of effects on the market and consumer or total welfare? What legal or practical challenges did you encounter?

15. We did not yet have a case which required us to do so but do not expect our analysis to be significantly different.

3.5. What tools did you use to assess, estimate or quantify (economic or non-economic) environmental effects? Did you ever estimate shadow prices for environmental damage? Which method did you use (e.g. damage cost method; abatement cost method; etc.)?

16. N/A

3.6. Does your agency allow or has allowed any co-operation agreements that, while distorting some competitive parameters or restricting competition, also contributed

to environmental protection goals? For example, how does your agency assess horizontal agreements aimed at internalising negative environmental externalities?

17. We did not yet have a case which required us to do so.

3.6.1. If your system requires that, to benefit from an exemption, any competition restriction must be necessary to achieve the objective of the agreement, how did you interpret this ‘necessity’ or ‘indispensability’ condition in relation to environmental considerations?

18. We can be expected to interpret the relevant provision in articles 101(3)TFEU and IV.1(3) CEL in the light of EU case law, but might be willing to welcome in all cases (and not only in respect of environmental issues) an interpretation tending towards a rigorous application of the proportionality principle.

3.6.2. Did you require full consumers’ compensation to allow agreements with positive environmental effects? How did you interpret the notion of “consumers”?

19. We did not yet have a case which required us to do so, but can be expected to interpret the concept of ‘consumers’ as including ‘users’ and out-of-market end-users, provided the agreement also benefits to those who may be affected by any negative impact an agreement on competition.

3.6.3. What kind of environmental agreements may not currently be allowed in your jurisdiction that you consider should be?

20. We are not aware of an example.

3.7. Did you deal with any claim that competition law was an obstacles to a sustainability initiative? In your experience, are firms disincentivised from entering into beneficial green collective initiatives or unilateral activities due to the risk of breaching competition law?

21. We did not deal with such claim and are not aware of firms abandoning green collective initiatives because of competition law concerns.

3.8. Did you, in any case, assess the impact of a conduct on green product quality or green innovation?

22. We did not yet have a case which required us to do so.

3.9. Did you, in any case, assess and quantify the non-economic environmental effects of a conduct?

23. We did not yet have a case which required us to do so.

3.10. Have you ever taken the impact on the environment into account as part of a fining/settlement or commitment procedure?

24. No.

4. Merger control

4.1. Have you assessed any mergers where you implicitly or explicitly considered impact on environment and climate change?

25. No.

4.2. Has your agency blocked or cleared any merger based on (economic or non-economic) environmental factors? Could you describe the rationale for the decision?

26. No.

4.3. Have merging parties submitted environment-related arguments (e.g., positive effects for green innovation/reduction of environmental harm)? If so, what evidence did they bring? How did you assess them? How did you analyse the specificity and verifiability of the merger efficiencies?

27. No.

4.4. Have you ever accepted commitments or imposed remedies to address the environmental impact of a merger?

5. Advocacy

5.1. Describe, if any, the advocacy efforts that your agency has undertaken so far to promote competition with a positive impact on the environment. For instance, has your agency submitted any law proposals or brought advocacy initiatives with regards to environment and competition, environment and State aid, or environment and public procurement?

28. We have not only within the ECN context, but also in conferences and publications defended the views expressed sub A, and unambiguously expressed our support for the initiatives taken by our Dutch and Greek colleagues.

5.2. Do you have or do you plan on adopting any guidelines on the interplay between competition and environmental protection and climate change or other initiatives?

29. We closely follow the initiatives of our colleagues and insist on the need of undertakings (and authorities) for EU guidance which we hope to be in line with the views expressed in this contribution.

5.3. Do you offer to provide individual ex ante formal or informal guidance to firms on their green co-operation agreements or practices?

30. We are open to offer such guidance.

5.4. How do you respond to legal initiatives that would reduce the scope of the competition law to allow for co-operation or mergers that would otherwise be prohibited?

31. Given our views on the application of the rules of competition we have not yet faced such initiatives.