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Environmental Considerations in Competition Enforcement – Summaries of contributions

1 December 2021

This document reproduces summaries of contributions submitted for Item 1 of the 136th OECD Competition Committee meeting on 1-3 December 2021.

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

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Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on Environmentation Considerations in Competition Enforcement (136th Meeting of the Competition Committee on 1-3 December 2021). 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 *.

Austria

In Austria, with the amendments of the Austrian Cartel Act (KaWeRÄG 2021)[1], which entered into force on 10 September 2021, sustainability criteria are explicitly included in Austrian antitrust law for the first time. An exemption of business cooperation for the purpose of an eco-sustainable or climate-neutral economy from the cartel prohibition was introduced. The new provision extends the general exemption from the cartel prohibition in Section 2 (1) Cartel Act to the effect that consumer sharing in efficiency profits is considered to exist whenever these efficiency profits contribute to an ecologically sustainable or climate-neutral economy (including hence out of market efficiencies).

[1] Federal Law amending the Cartel Act 2005 and the Competition Act, BGBl. I No. 176/2021.

Belgium

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.

In interim measures cases: Article IV.71 CEL explicitly 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.

Brazil

The article begins by establishing the inherent connection between the environmental impact of human activities, the economy, and antitrust enforcement. It then addresses whether environmental concerns should be considered in deciding the cases brought to CADE, and how this topic should be tackled, especially in light of the undergoing crises of climate change and COVID-19.

For this purpose, first we highlight that environmental concerns have been considered in CADE's adjudication for a reasonable amount of time. Some of these cases are presented throughout the article, divided in three categories: indifferent cases, in which the environmental concerns brought do not play a fundamental role in the decision; soft cases, in which these factors directly influenced the decision, in one way or another; and hard cases, in which environmental and antitrust matters closely interact and play extremely important parts.

The contribution examines 13 indifferent cases, one of them being case No. 08700.003713/2015-34, a factory sale between the parties Suzano Papel e Celulose and Ibema Participações S.A. The decision simply states that the polyethylene used in the production of plastic meets "sustainable requirements", and that the choosing of products' packaging depends not only on costs but also on environmental matters.

Regarding soft cases, case No. 08012007776/2008-99 is brought as an example: the acquisition of Hybro Broiler Breeder's operations, involving the companies Hendrix Genetics B.V and Cobb-Vantress Inc. The decision considers, for instance, that, "If a transaction lessens production costs considerably whilst puts biodiversity in jeopardy, should competition law be indifferent to it?" which demonstrates the importance of environmental concerns to the ruling.

Finally, concerning hard cases, we present the VALE–Ferrous merger. Although the merger, did not incur any competition concerns by itself and was approved by CADE's Superintendent General Office unconditionally, a third party to the case lodged an appeal before CADE's Administrative Court claiming that the environmental concerns brought by a class action lawsuit pending in the Judiciary should be considered by the decision. Commissioner Mauricio Bandeira Maia deemed it is not sufficient that merger applicants observe only antitrust regulations where other legal obligations also apply; however, he also determined CADE has no expertise in those matters and therefore should not interfere in that regard.

In conclusion, the contribution addresses the relationship between the economy and the environment, especially with reference to two principles of the Brazilian Constitution: the protection of free competition and the environment. When analysing M&A cases, therefore, CADE cannot and should not shut its eyes to the self-evident economic consequences of environmental issues.

Greece

In the face of the climate emergency and important social challenges that will certainly result from the Green transition, it is the HCC's conviction that it is important to equip all public policies with the tools to accommodate and enhance sustainability initiatives from both the public and the private sector. Sustainability-oriented policies will benefit the well-being of citizens and consumers but may also be a means of acquiring a competitive advantage, thus serving a broader industrial policy agenda. Business requires some legal certainty, but also a complex system of nudges and incentives in order to integrate sustainability objectives in their business strategies.

The HCC has taken various initiatives in realizing the potential to facilitate the Green transition such as drafting a Staff Working Paper on Sustainability Issues and Competition Law, organizing a high-level conference on this topic; commissioning a Technical Report on Sustainability and Competition; co-leading (together with the Dutch ACM) a European Competition Network (ECN) project of the Working Group on Horizontals and Abuse "Sustainability and Antitrust"; and also pursing more innovative initiatives such as the creation of a sustainability and competition 'sandbox'.

In relation to the evaluation of agreements that bring sustainability benefits, the HCC considers that it should make efforts to enforce competition law in a way that does not jeopardise private and public sustainability strategies. This is not about authorising what some have called 'Green cartels', but adopting a similar hospitable approach taken for R&D horizontal agreements and agreements promoting innovation.

Furthermore, in view of the legal uncertainty and the recognised need for a rapid transition to the Green economy, the HCC is of the opinion that more efforts should be made in order to provide undertakings with the legal certainty they need in order to make the necessary investments. This also requires more targeted competition law interventions that provide a clear set of rules to follow.

Lastly, in terms of advocacy actions, the HCC is of the opinion that this transition process can be facilitated with the development of a sustainability and competition 'sandbox', for the industry to experiment with new business formats that aim to realize more quickly and efficiently sustainability goals, which involve cooperation between competing undertakings or even more permanent changes in market structure in order to be accomplished. This proposal would essentially also promote a new competition enforcement culture, in which the role of the competition authority is not only to punish, but also to act pre-emptively in markets.

Italy

The Italian Competition Authority (the Authority or the AGCM) has dealt with environmental considerations in some antitrust investigations, advocacy opinions and market studies regarding two sectors: the more traditional waste management and recycling sector, whose framework is primarily based on the achievement of environmental objectives, and an emerging sector which is going to play a fundamental role in the future for the transition to a greener economy, the development of battery-powered electric vehicles, electric mobility services and infrastructure.

The cases assessed by the Italian Competition Authority in the waste and electric mobility sectors have so far highlighted that anti-competitive conduct can hinder the achievement of environmental objectives that are sometimes also set in the legislation. In that regard, the removal of the illegal conduct can help the development of a more competitive framework and the achievement of a more sustainable environment.

In the waste and recycling sector the Italian law established monopolistic consortia as the default companies for managing waste recycling nationwide on behalf of their members for a flat fee, with the idea that market mechanisms would not be sufficient to provide a service that was desirable for environmental protection purposes. However, while the consortium-based system played a fundamental role in fostering waste recycling, which was previously practically inexistent in Italy, the Authority's interventions have shown that Italy's recycling model was no longer capable to deliver environmental benefits for which it was set up and that an increase of competition, through an alignment of fees to actual costs and entry by alternative consortia would also improve environmental protection.

More recently, the AGCM elaborated environmental considerations in the emerging sector of electric mobility in Italy, in the context of a unilateral conduct investigation. While the conduct concerned an ancillary service, the Authority considered its wider repercussion, in terms of detrimental effects to a more rapid diffusion of electric vehicles and, therefore, to the transition towards a more environmentally sustainable mobility. These environmental considerations were also included in the final decision ascertaining the infringement and, in particular, when assessing the gravity of the conduct for the purpose of sanction setting.

Mexico

The Mexican Federal Economic Competition Commission (COFECE or Commission) has the objective of protecting and promoting competition policy in Mexico. However, the Commission's experience shows that, under particular circumstances, while pursuing the aforementioned objective it can also address environmental considerations through its competition advocacy actions. This contribution presents COFECE's experience in the electricity industry, where competition advocacy initiatives have simultaneously resulted in pursuing other public policy objectives, specifically environmental sustainability. The document provides an explanation of the regulatory changes carried out in Mexico during 2013-2014 in the electricity industry that sought, among other objectives, to motive the implementation of efficient electricity generation projects. This legal framework incorporated the Clean Energy Certificates (CEL) and requested COFECE to assess the CEL market two years after the entry into force of this new market. The document provides the main competition concerns identified in the CEL market study, as well as some of the recommendations made by COFECE to address them. It briefly explains the negative impact of these problems in fulfilling the clean generation goals envisaged in the Mexican regulations and the international environmental commitments undertaken by the country. In addition, it explains that this situation will be further aggravated if the Presidential bill for the constitutional reform of the electricity industry presented last September 2021 to Congress is passed and enacted.

Romania

The Romanian Competition Authority ("RCC") has monitored the waste management market, including the legislative and regulatory measures taken by the Government and provided advice and expertise, using the competition advocacy tools to protect and promote the its functioning as a competitive market.

The deposit-return system for non-reusable packaging has been recently introduced, with the purpose to limit the impact of packaging on the environment and to reduce its final disposal, by introducing new requirements to optimize their sustainable management.

The deposit-return system is highly important for the entire market, in view of ensuring the sustainable management of packaging, to achieve and overcome the environmental targets set at European level, to preserve and improve the quality of the environment, to protect human health and to ensure the wise and efficient use of natural resources.

RCC has formulated proposals and recommendations to be considered before transposing the bill for the introduction of the deposit-return system for non-reusable packaging into law, in order to ensure a legal, fair and pro-competitive framework on the waste management market.

South Africa

The term "sustainability" has come to encompass much more than the capacity of the environment to endure over time. In South Africa sustainability is often discussed in connection with our economic development. In a country such as ours which is plagued by poverty, inequality and high levels of unemployment, there is a growing recognition that our development - no matter how ambitious - will have no meaning or relevance unless it is sustainable.

This recognition is what prompted our law makers to write sustainability into the very fabric of our current competition law which was promulgated in 1998: The Competition Act 89 of 1998. They did so by adding public interest factors into considerations on mergers and acquisitions and on exemption applications. What this means is that, in South Africa, we must consider the effect of a merger on the public interest and not just on the relevant market as defined in traditional economics.

When the public interest criteria were included in the Competition Act during the policy and legislative process, approximately 20 years ago, entrenched business interests became concerned about the possible arbitrary use of public interest criteria. However, the argument which triumphed contended that competition policy could not ignore the social needs of the people and that competition was not a value in its own right but only in so far as it met socially desirable objectives. Therefore, in addition to the key competition objectives of efficiency and consumer welfare, the Competition Act includes objectives like protection of small and medium sized enterprises, the promotion of employment and the growth of black-owned enterprises.

Both in the case of mergers and exemptions, the list of public interest factors in the Competition Act is defined and exhaustive. Section 12A(3) of the Competition Act provides that:

> *(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –*
> *a particular industrial sector or region;*
> *employment;*
> *the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*
> *the ability of national industries to compete in international markets.*

In the case of exemption applications, section 10 of the Competition Act provides that firms wishing to engage in anti-competitive conduct may apply to the Competition Commission for an exemption of the firms' practices or agreements from the provisions of the Competition Act. In terms of this section, the Competition Commission may grant the exemption if:

> *any restriction imposed on the firms concerned by the agreement or practice concerned, or category of either agreements or practices concerned, is required to attain an objective mentioned in paragraph (b); and*
> *the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives:*
> *maintenance or promotion of exports;*
> *promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;*

change in productive capacity necessary to stop decline in an industry; or the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.

Recent amendments to the Act further strengthened the position of small businesses and firms owned by historically disadvantaged persons when it comes to mergers and in the case of exemption applications.

While the Competition Commission has not yet assessed any case impacted solely by environmental concerns, we highlight two cases that have touched on this issue in the past.

In an August 2020 merger filed with the Competition Commission, the market definition hinged partly on whether customers of the merging parties considered the environmental sustainability of waste management processes as a significant factor when choosing a healthcare waste management supplier. A key question in defining the market here was whether incineration technology and thermal desorption - a form of burn technology that treats waste via pyrolysis technology, not combustion - were interchangeable processes in the treatment of pharmaceutical waste. It turned out that environmental sustainability was a fact that some customers considered when choosing a supplier. This ultimately helped to shape the market definition in this case.

A second case concerned food security and the sustainability of South Africa's staple food reserves. According to Tejvan Pettinger (2018) environmental sustainability is concerned with several issues including the long-term health of ecosystems, that is, protecting the long-term productivity and health of resources to meet future economic and social needs, e.g. protecting food supplies, farm land and fishing stocks. The protection of South Africa's food supplies is precisely what two environmental non-governmental organisations – Biowatch and The African Centre for Biodiversity (ACB) – were concerned with in 2011 when they applied to intervene in legal proceedings in the merger between Pannar Seeds and Pioneer Hi-Bred International. These non-profit organisations participated in the merger proceedings and influenced the outcome of the Tribunal's decision.