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

Environmental Considerations in Competition Enforcement – Note by BIAC

1 December 2021

This document reproduces a written contribution from BIAC 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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BIAC

1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to submit these comments to the OECD Competition Committee for its Roundtable on Environmental Considerations in Competition Enforcement. It welcomes the Committee’s continued focus on competition enforcement in the context of sustainability efforts and fully endorses the focus on environmental agreements and climate change challenges. Without doubt, these challenges pose urgent and existential questions for humanity.¹

2. BIAC builds on its previous comments submitted in the context of the 2010 OECD roundtable on horizontal agreements in the environmental context,² as well as the more recent 2020 roundtable on sustainability and competition.³

3. BIAC notes that it is hard to overestimate the importance of the global challenge that lies ahead and the urgency required to tackle it. In these comments, BIAC will focus on (i) the urgent need for engagement on this topic from competition agencies worldwide (Sections II and III); (ii) the need for a globally consistent, or at least globally aligned, approach by competition agencies, to match the truly global challenge we face, and the many invariably global initiatives that such a challenge brings in its wake (Section IV); and (iii) the need for a holistic and comprehensive, “root and branch”, review of competition policy so that it is promoting, and not hindering, efforts to improve the environment and combat climate change in an impactful manner (Section V). Nonetheless, BIAC recognizes that competition agencies are best positioned to contribute by addressing the competition-related aspects of this global challenge, which are further developed within these comments and by refraining from actions where the underlying issues are not competition ones. The paper ends with some concluding remarks (Section VI).

2. An Issue That Neither Business Nor Competition Agencies Can Ignore

4. The recent UN Climate Change Conference (COP26) in Glasgow has reminded all of us of the enormity of the challenge that lies ahead.⁴ There is a clear sense of the need to

¹ The climate change agenda is itself underpinned by a strong component of the need for social justice. For this reason, BIAC believes that, whilst the most urgent focus should be on environmental agreements, the broader sustainability agenda, including human rights and living wages, cannot and should not be ignored. The comments in this paper should therefore be read across to sustainability initiatives in pursuit of the broader United Nations Sustainable Development Goals.

² OECD, Horizontal Agreements in the Environmental Context, DAF/COMP(2010)39, 131-137 (Nov. 12, 2011), <http://www.oecd.org/competition/cartels/49139867.pdf>.

³ OECD, Sustainability and Competition—Note by BIAC, DAF/COMP/WD(2020)71 (Nov. 13, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)71/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)71/en/pdf) [hereinafter BIAC Comment on Sustainability].

⁴ See United Nations Framework Convention on Climate Change, Decision -/CP.26—Glasgow Climate Pact (Nov. 13, 2021), https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf.

accelerate the pace of emissions reductions.⁵ The pledges and commitments announced at COP26—whether viewed as sufficient or not—will need to be implemented and delivered. Governments can and will do their part, but they cannot legislate beyond their borders or for every conceivable scenario in the timeframes required. Nor can they legislate—individually—for the sheer scale of global transformation needed, in some cases requiring the decarbonization of entire industry sectors, such as energy production or transportation.⁶ The fact that the seventeenth—and final—goal of the UN Sustainable Development Goals is to “strengthen the means of implementation and revitalize the global partnership for sustainable development,” espousing “multi-stakeholder partnerships,” is no coincidence.

5. Making hard choices is often difficult for governments, especially those they believe will be unpopular with their citizens because, amongst other things, they may lead to increased costs or reduced choices. Instead, they often articulate aims and objectives for other participants in civil society to address, especially businesses and consumers, who are then tasked with achieving the desired end-result. Governments and other public institutions may broker, encourage, incentivize, and pressurize, but often fall short of legal imposition; businesses—and competition agencies—are frequently left to navigate through these complexities.

6. There is no doubt that businesses—large and small—are and will continue to be called upon to play their part in adopting sustainable practices and products and address climate change, beyond mere compliance with the law,⁷ and may be left to fill the gap due to lack of or delayed or inadequate government action. There are many good reasons for them to do so, especially since they are increasingly required to report on corporate social responsibility matters.⁸ Moreover, with climate change and environmental degradation becoming a mainstream social and political issue, the pressure on business to make truly transformational change has become immense. Multiple stakeholders, including

⁵ *Id.* ¶ 17 (“recognizes that limiting global warming to 1.5 °C by 2100 requires **rapid, deep and sustained reductions in global greenhouse gas emissions**, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century.”(emphasis added)). *Id.* ¶ 18 (“accelerated action in this critical decade”).

⁶ This should not prevent governments from being bolder and considering global, not just national, interests when making legislative interventions to promote environment goals.

⁷ Compliance with environmental legislation is a necessary first step. Two notable examples of robust enforcement of environmental regulations include: the 2017 criminal fine and guilty plea agreed by Volkswagen AG with the US Justice Department for misreporting emissions tests; and the 2020 settlement with Daimler AG over similar misreporting. US Deputy Attorney General Jeffrey Rosen noted that both cases demonstrate “commitment to enforcing our nation’s environmental laws and protecting Americans from air pollution.” See Press Release, U.S. Dep’t of Justice, Antitrust Div., Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), <https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six>; Press Release, U.S. Dep’t of Justice, Antitrust Div., The U.S. Reaches \$1.5 Billion Settlement with Daimler AG Over Emissions Cheating in Mercedes-Benz Diesel Vehicles (Sept. 14, 2020), <https://www.justice.gov/opa/pr/us-reaches-15-billion-settlement-daimler-ag-over-emissions-cheating-mercedes-benz-diesel>.

⁸ One study has found there are currently over 600 ESG reporting provisions globally, with many having differing interpretations of sustainability. EY, The Future of Sustainability Reporting Standards (June 2021), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/sustainability/ey-the-future-of-sustainability-reporting-standards-june-2021.pdf.

consumers,⁹ investors,¹⁰ and activists¹¹ are driving this change agenda. Pressure will continue to mount for businesses to be accurate and transparent, as instances of greenwashing undermine belief in their commitment to environmental and social progress.¹²

7. Whilst businesses can determine unilaterally how to pursue environmental objectives,¹³ this will not always be feasible in practice. There may be circumstances in which environmental objectives may not be achieved or may not be achieved as comprehensively or as quickly if it is left purely to market forces and the process of competition. This will be particularly true in hard-to-abate sectors, such as iron and steel production and many forms of transport, where the path to decarbonization, including the

⁹ One in three consumers claim to have stopped purchasing certain brands due to sustainability related concerns, with thirty-four percent of consumers knowingly paying extra for greener products and services. *Shifting Sands: Are consumers still embracing sustainability? Changes and key findings in sustainability and consumer behaviour in 2021*, DELOITTE (Mar. 2021), <https://www2.deloitte.com/uk/en/pages/consumer-business/articles/sustainable-consumer.html>.

¹⁰ In May 2021, Blackrock, the world's largest asset manager and top BP investor, backed a shareholder resolution calling for faster climate action, which BP's board opposed. Ron Bousso & Simon Jessop, *BlackRock goes against BP board in climate resolution vote*, Reuters (May 28, 2021), <https://www.reuters.com/business/sustainable-business/blackrock-goes-against-bp-board-climate-resolution-vote-2021-05-28/>.

¹¹ NGOs and environmental activists play a leading role in changing public perception, regulation and case law regarding corporate responsibility relating to climate change. A prime example of this is *Milieudefensie et al. v. Royal Dutch Shell plc.*, brought by seven environmental organizations, as a result of which, in May 2021, a Dutch court ordered Royal Dutch Shell to reduce its global carbon emissions from its 2019 levels by fort-five percent by 2030, in line with the Paris Climate Agreement. It is considered to be the first major climate change litigation ruling against a corporation, based on the assertion that Shell's contributions to climate change violate its duty of care under Dutch law and the European Convention on Human Rights. Case Number C/09/571932 / HA ZA 19-379, Judgment of 26 May 2021, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>.

¹² In January 2021, the European Commission and national consumer authorities released the results of a screening of websites for greenwashing claims, in which they found that in forty-two percent of cases the claims were exaggerated, false or deceptive and could potentially qualify as unfair commercial practices under EU rules. Press Release, Eur. Comm'n, Screening of websites for 'greenwashing': half of green claims lack evidence (Jan. 28, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269. The UK competition authority has taken steps to address the issue of misleading environmental claims by publishing a Green Claims Code in September 2021. This comes ahead of a planned review in early 2022 of misleading green claims on and offline. Press Release, Competition & Mkts. Auth., Greenwashing: CMA puts businesses on notice (Sept. 20, 2021), <https://www.gov.uk/government/news/greenwashing-cma-puts-businesses-on-notice>. Likewise, the Netherlands Authority for Consumers and Markets (ACM) has issued guidelines on sustainability claims. Auth. For Cons. & Mkts., Guidelines: Sustainability Claims (Jan. 28, 2021), <https://www.acm.nl/sites/default/files/documents/guidelines-suustainability-claims.pdf>.

¹³ As the Dutch ACM has observed: "undertakings are often themselves able to make their production processes more sustainable, either because various types of regulation offer sufficient incentives to do so, because they are able to gain a competitive advantage with such a move, or because they aim to make their production processes more sustainable anyway." Auth. Cons. & Mkts., Second Draft Guidelines on Sustainability Agreements (Jan. 26, 2021), ¶ 38, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf>.

development of alternatives, may not always be clear-cut or even known at present. This is equally true where it is necessary for the majority (if not all) of an industry to change in order to make any meaningful impact. This reality is at odds with antitrust laws, which tend to focus on confining “exemptable” horizontal cooperation agreements to those where the collective market share is below a defined “low” threshold. As the Business and Sustainable Development Commission¹⁴ states in its *Better Business, Better World* report:

“Business as usual” will not achieve this market transformation. Nor will disruptive innovation by a few sustainable pioneers be enough to drive the shift: the whole sector has to move. Forward-looking business leaders are working with sector peers and stakeholders to map their collective route to a sustainable competitive playing field, identifying tipping points, prioritising the key technology and policy levers, developing new skill profiles and jobs, quantifying new financing requirements, and laying out the elements of a just transition. Over the next 15 years, driving system change in line with the Global Goals with sector peers will be an essential, differentiating skill for a world-class business leader.¹⁵

8. Unilateral efforts are often also hampered by the fear of first-mover disadvantage,¹⁶ this notion that seeking to improve environmental outcomes will place a company at a competitive disadvantage towards its competitors. For example, refusing to purchase plastic packaging or timber from deforested areas, or by introducing a more sustainable or recyclable product.¹⁷ Moreover, if competitors do not follow the environmental initiative of the first mover, because the market does not push them in that direction, there will be little to no meaningful environmental impact, with a worse overall outcome for society as a whole. In this regard, BIAC notes that one of the key reasons for the rejection by the Netherlands Authority for Consumers and Markets (ACM) of the *SER Energieakkord*¹⁸ was

¹⁴ Launched in Davos in January 2016, the Business and Sustainable Development Commission brings together leaders from business, finance, civil society, labour, and international organisations, with the twin aims of mapping the economic prize that could be available to business if the UN Sustainable Development Goals are achieved, and describing how business can contribute to delivering these goals.

¹⁵ Business and Sustainable Development Commission, *Better Business Better World* 15 (Jan. 2017), <https://sustainabledevelopment.un.org/content/documents/2399BetterBusinessBetterWorld.pdf>.

¹⁶ *Id.*, at 55 (“Business leaders that choose to align their strategy with the Global Goals anticipate that, sooner or later, their business will start to incur costs that their competitors don’t face. This is true across all industries. In commodity sectors, current low prices are aggravating cost pressures, making it hard for progressive businesses to ‘internalise’ environmental or social costs that competitors are not willing to bear. Even in more differentiated sectors, such as consumer goods, cost pressures are intense, partly because of slow growth in middle-class purchasing power.”).

¹⁷ See Sustainability Cooperations Between Competitors & Art. 101 TFEU, Unilever submission to DG COMP, at 15, https://www.unilever.com/Images/unilever_submission_sustainability_competition_law_tcm244-551751_en.pdf (reference to studies and experience on the issue of compaction). Unilateral action on compaction does not generally lead consumers to switch to smaller packs if conventional packs remain available since they (wrongly) assume they will get more value for money from the “larger” packs.

¹⁸ The proposal envisaged the coordinated closure of five coal power plants from the 1980s. The ACM rejected reduced CO2 emissions as a relevant benefit on the basis that the participants would subsequently make fewer claims to emission allowances and other parties would then be able to use these allowances through the EU system of emissions trading (ETS), thus cancelling out any reduction. See Auth. for Cons. & Mkts, Analysis by the Netherlands Authority for Consumers and

because reduced carbon dioxide emissions were not accepted as an environmental benefit given that they would be “cancelled out by an increase in emissions elsewhere.”¹⁹ The accepted positive environmental benefits—the emission reductions of NO_x, SO₂ and particles—did not outweigh the anticipated price effects of the proposal.

9. It is easy to see that if the coordinated closure of five old coal powered electricity plants is perceived to make no meaningful contribution to the reduction of carbon dioxide emissions, unilateral action to close individual plants would have even less success. Competition law pushes companies to act individually; the desire and need to make a meaningful environmental impact pushes companies to act, not only collectively, but in an as all-encompassing way as possible.

3. Moving the Needle Through Collective Action

10. BIAC notes that “environmental” agreements between businesses, or collective sustainability initiatives more broadly, can be complex and will not easily lend themselves to simple definition or categorization. They will often be a compendium of measures. BIAC outlines below the types of collective initiatives that are candidates for consideration to “move the needle” in the fight against climate change and environmental degradation. They portray a business community that is “thinking outside the box” and pushing for ambitious and, in some cases, transformational change.

3.1. Collective Target-Setting, Standards and Voluntary Codes

11. At their most basic, environmental agreements may simply manifest themselves as a collective commitment to achieve a certain goal or objective. They are typically (voluntary) industry codes of conduct focusing on environmental and climate practices that allow for transparent, reasonable, and non-discriminatory criteria,²⁰ sometimes accompanied by associated labels.²¹ They often go beyond national legislation or regulation and leave members free to determine how best to meet the targets. Examples include:²²

Markets (ACM) of the planned agreement on closing down coal power plants from the 1980s as part of the Social and Economic Council of the Netherlands’ *SER Energieakkoord*, https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf [hereinafter ACM Analysis of *Energieakkoord*]. This is not dissimilar to the “market substitution” or “carbon leakage” defence often deployed in climate change litigation, although a Dutch court rejected the notion in the *Milieudefensie et al. v. Royal Dutch Shell plc* case when determining Shell’s obligations. See Case Number C/09/571932 / HA ZA 19-379, *supra* note 11.

¹⁹ ACM Analysis of *Energieakkoord*, *supra* note 18, at 4.

²⁰ See, e.g., UNEP, Technical Report 40: Voluntary Industry Codes of Conduct for the Environment, (1998), <https://digitallibrary.un.org/record/411563?ln=en>.

²¹ Examples include free trade, biodegradable, ecolabels for third party certified voluntary schemes, and self-declared environmental schemes. Mandatory schemes remain an exception (largely confined to energy efficiency labelling), though some voluntary schemes include mandatory requirements that apply should a party choose to use the label. See OECD, Environmental Labelling And Information Schemes, <https://www.oecd.org/env/policy-perspectives-environmental-labelling-and-information-schemes.pdf>.

²² More than 20 years ago, in *ACEA* and *JAMA* and *KAMA*, associations of automobile manufacturers made commitments on behalf of their members to reduce CO₂ emissions from cars.

- The Oil and Gas Climate Initiative (OGCI), a CEO-led initiative that aims to accelerate the industry response to climate change, focused on action that will reduce carbon dioxide and methane emissions, as well as flaring and on investments in technologies to capture and either use or store carbon emissions.²³
- The “New Plastics Economy” Global Commitment of 2021, signed by more than 500 packaging producers, brands, retailers, and recyclers who committed (among further, less specific goals) to a “common vision of a circular economy for plastics,” including to 100 % of plastic packaging to be reusable, recyclable, or compostable by 2025).²⁴
- The UN Environment Programme (UNEP) Finance Initiative Guidelines for Climate Target Setting for Banks, launched by the thirty-eight signatories to Collective Commitment to Climate Action (CCCA), including detailed guidance on target-setting.²⁵
- The “2050 Pathways Platform” to develop long-term, net zero-GHG, climate-resilient and sustainable-development pathways, joined by governments on all levels and 196 companies.²⁶

12. These initiatives are often underpinned by the sharing of good practices, systems, and tools to assess risk, as well as control or monitor business activities from a sustainability perspective. They also often involve information exchange on parameters to be measured and may involve collective systems to conduct due diligence and monitoring of third parties. For example, the joint mapping of harvesting locations and deforestation incidents. Joint engagement with stakeholders, including governments and regulators is another key aspect.

13. While target-setting mechanisms are often characterized by the freedom for participants to determine how to meet the targets, they may nonetheless lead to companies behaving in the same or similar manner in the market in practice. This is especially where the commitment to the targets is binding and the targets and standards are defined at such a level of detail that there are *de facto* limited alternatives as to how to achieve the goals.

The targets were set on behalf of all members collectively rather than individually, and as long as the average target was met, each member was free to apply more or less stringent targets. Members were free to determine how to meet the target, allowing for the development of competing CO₂-efficient technologies. *See* Press Release, Eur. Comm’n, Commitment by European Car Manufacturers to reduce CO₂ emissions from passenger cars complies with EU Competition rules (Oct. 6, 1998), IP/98/865, https://ec.europa.eu/commission/presscorner/detail/en/IP_98_865; Press Release, Eur. Comm’n, Commitments by Japanese and Korean Car Manufacturers to reduce CO₂ emissions (Dec. 1, 1999), IP/99/922.

²³ The OGCI 12 member companies (BP, Chevron, CNPC, Eni, Equinor, ExxonMobil, Occidental, Petrobras, Repsol, Aramco, Shell and Total, accounting for almost thirty percent of global operated oil and gas production), explicitly support the Paris Agreement and its aims, and collectively invest over \$7B each year in low carbon solutions.

²⁴ New Plastics Economy, The Global Commitment 2021 Progress Report, <https://ellenmacarthurfoundation.org/global-commitment/overview>; New Plastics Economy, A Vision of a Circular Economy for Plastics, <https://emf.thirdlight.com/link/86tanzqdbppx-8rdpns/@/preview/1?o>.

²⁵ *See* UNEP, Guidelines for Climate Target Setting for Banks (Apr. 2021), <https://www.unepfi.org/publications/guidelines-for-climate-target-setting-for-banks/>.

²⁶ 2050 Pathways Platform, <https://www.2050pathways.org/>.

14. Voluntary industry commitments can be of limited value. While they may be easier to agree upon, they can be abandoned at any time and even used for “green-washing” by individual companies who may have no real intention to substantially change behavior and are simply seeking a label for marketing purposes. Even where companies adhere to standards, voluntary systems do have shortcomings.²⁷ As the United Nations Environment Programme notes in its *Technical Report on Voluntary Industry Codes of Conduct for the Environment*, there are a number of things that voluntary codes cannot do, namely:

Deal with negligent or consistently poor performers. It is difficult for industry associations to enforce a member’s compliance to a voluntary code. This is the free-rider problem—companies can benefit from an industry’s collective efforts without incurring the expense of contributing to them.

...

Ensure global application and harmonization.

...

*Address more complex sustainable development challenges.*²⁸

15. The report surmises: “Voluntary efforts cannot, on their own, achieve the level of environmental protection needed today. . . . Voluntary codes and measures have their limits in what they are able to accomplish, as do government measures and regulations.”²⁹

16. Such concerns may lead to a need for businesses to agree on binding standards, within the parameters of competition law, that are stricter than national laws or attempt to reinforce government or mutually-agreed standards through binding commitments. Voluntary targets can be inadequate and, where competition laws permit, binding commitments are more effective, which is why it is critical that competition authorities around the world clarify in case law or guidelines when competitors can agree binding commitments and mandatory standards. Examples include:

- Harmonization of packaging materials to facilitate recycling.
- Harmonization of packaging sizes (and hence product content) to reduce waste.
- Mutually binding commitments to replace virgin plastics by recycled plastics.
- Collective commitments to replace conventional flexible packaging—which cannot be recycled with today’s processing technology—with mono-materials (e.g. all-polyethylene) which are fully recyclable, e.g. for sachets (without foreclosing future solutions for innovative materials).
- Agreements between competitors where they commit to respect laws and agree to demand legal compliance from suppliers and other business partners, for example, in respect of deforestation legislation which applies to the cultivation of commodities such as palm oil, soya, beef or pulp and paper.³⁰

²⁷ See Changing Markets Foundation, *The False Promise of Certification* (May 2018), https://changingmarkets.org/wp-content/uploads/2018/05/False-promise_full-report-ENG.pdf (reviewing case studies in the fisheries, palm oil and textiles sectors).

²⁸ UNEP, *supra*, note 20, at 8-9.

²⁹ *Id.* at 8.

³⁰ It is widely acknowledged that deforestation (particularly through forest fires) is predominantly due to insufficient enforcement of existing laws, not a lack of legislation. See Rizki Akbar Putra,

- A joint commitment to modify the terms of business with non-compliant entities.
- A collective commitment not to purchase from non-compliant supply entities. This could include agreements by competitors to only source from suppliers who meet specified criteria (e.g. child labor free, slavery free, minimum living wages, regeneration standards). This in particular is urgent as such agreements could lead companies to be vulnerable to a charge of running a collective boycott and must be quickly clarified by competition authorities.

3.2. Creating New Markets and Opportunities

17. Certain environmental efforts will require the pooling of resources to address some of the most intractable and entrenched problems. They can arise as (i) R&D required for product innovation, (ii) the collective demand for the development of a product mature enough and facilities sizeable enough for scaled production, and/or (iii) logistics infrastructures that, too, depend on scale. The climate change debate is all too often focused on changing supply, but it is equally important to change demand. Examples of this include:

- The *DSD* case was about a countrywide collection and packaging recovery system in Germany. Contractors had to supply DSD exclusively and at a pre-set price. The European Commission endorsed the co-operation agreements on the basis that they were necessary for “the establishment of a new, functioning market in the recovery of sorted plastic and composite packaging.”³¹
- Chemical (or “molecular”) recycling,³² which will likely entail establishing adequate joint waste collection & sorting infrastructures for (chemically) recyclable plastics, as well as creating demand to take prototype technology to a level where mass production becomes viable—through volume commitments and/or joint sourcing.
- Joint determination of the most sustainable alternative to hard-to-abate transport fuels, e.g., marine, and developing the required infrastructure for its deployment.
- Collective commitments to buy (e.g., through joint procurement alliances), to encourage changes in production (such as land use) or promote investment in new technologies (e.g., to produce steel in a less carbon-intensive manner).³³

3.3. Phasing Out, Withdrawing or Replacing Non-Sustainable Products or Processes

18. There is a need to phase out, withdraw, and in some cases replace non-sustainable products (coal, fossil fuels) and processes (gas flaring) on an urgent basis. This has occurred in the past and there is likely going to be increased pressure to do so in the future:

Lax Law Enforcement Causing Indonesia’s Forest Fires: Greenpeace, DW (Sept. 17, 2019), <https://p.dw.com/p/3Pixw>.

³¹ Case COMP D3/34493—DSD, Comm’n Decision, 2001 O.J. (L 319) 1, ¶ 114.

³² Where plastic waste is broken down to original building blocks to remove colour and impurities and then to create new high-quality plastics. The process is fully circular as it can be repeated over and over again.

³³ See Pim Vercoulen, *Carbon-neutral steel production: is it a possibility?*, CAMBRIDGE ECON. (Nov. 25, 2019), <https://www.camecon.com/blog/carbon-neutral-steel-production/>.

- The *CEDEC* case involved an agreement to cease the manufacture and/or import of certain energy-inefficient washing machines.³⁴
- Joint R&D and development of more environmentally friendly products, which may supplant/replace existing products.
- Industry commitments to use only those types of plastics in packaging that are deemed safe for recycling, thus phasing out, for example, PVC or oxo-degradable additives.
- Temporary fishing moratoria to stop overfishing and ensure long-term sustainability of fishing resources and biodiversity.
- Moratoria on conversion of natural habitats to put an end to, for example, soy expansion into natural habitats in Latin America, or converting drained land back into wetlands.

3.4. Joint Financial Contributions to Advance Environmental Objectives

19. Businesses are also considering funding mechanisms to help promote environmentally friendly outcomes. In many cases, actors will be asked to make sacrifices (avoid unsustainable practices) or additional investments (seek new technologies) and may need financial incentives to do so. This will invariably raise costs and pose the question as to who should pay for these funds:

- Agreements to impose a fixed levy, which is passed on to consumers in order to drive collection/recycling and innovation.³⁵
- In *ZVEI/Arge Bat*, the European Commission endorsed an industry-financed take-back and recycling scheme for used batteries; the (variable) disposal costs would be an integral part of the price and shown separately on producer and importer invoices.³⁶
- Joint incentives for suppliers/producers to switch to more sustainable products or production methods. For example, to confine agriculture to certain areas, such as already cleared land.
- The “Sea The Future” initiative foresees voluntary industry contributions payable on plastics produced from fossil fuels. The idea is to increase demand for plastic waste to drive collection efforts and the development of recycling technologies competitive against plastic from fossil fuels. The funds raised will be channeled

³⁴ Case IV.F.1/36.718—CECED, Comm’n Decision, 2000 O.J. (L 187) 47. The European Commission exempted the arrangement.

³⁵ In the *Battery Stewardship* case, the ACCC considered that battery importers did not have an incentive to act unilaterally to impose a levy to fund the collection of end-of-use batteries. To achieve the public benefits identified there was a need for importers to reach an agreement to impose a levy. The ACCC did not consider the agreement to impose the levy increased the likelihood of co-ordination among importers, wholesalers and retailers on price and other areas in which they competed. See Determination, Application for authorisation AA1000476 lodged by Battery Stewardship Council in respect of the Battery Stewardship Scheme Authorisation Number: AA1000476 (Sept. 4, 2020), ¶ 4.54, <https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2004.09.20%20-%20PR%20-%20AA1000476%20-%20BSC%20.pdf>.

³⁶ Case IV/F1/36.172—ZVEI/Arge Bat, Comm’n Decision, 1998 O.J. (C 172) 13.

into new recycling technologies, collection infrastructure, and the recovery, where possible, of existing marine and terrestrial pollution.³⁷

- Joint business contributions to finance officially recognized and/or third party-certified environmental inspectors, notably where regulations on deforestation, by way of example, exist but enforcement is ineffective due to lack of government resources.

4. An Urgent Need for Practical and Globally Aligned Guidance

20. Section III provides an outline of the urge for and detail of many anticipated collective initiatives. Where does competition law stand on this issue? BIAC respectfully submits that, regrettably, it still stands in the way of many useful, even necessary, actions.

21. There are legitimate and well-founded concerns for business as to whether initiatives might be found to infringe antitrust rules. Given the sheer breadth and complexity of what is likely to be needed, businesses are understandably wary of the application of competition law to their actions. It is easy to see, even from the examples above, how collective action could be construed as giving rise to antitrust risk on the basis of: information exchange, standard-setting, collective boycotts, capacity reduction, dampening innovation, and price-fixing. Businesses are left facing competing demands of regulation and soft government expectations, with a sense that both consumers and investors believe there is more to business than maximizing profits, with competition policy unwilling or unable to answer fundamental questions and provide a safe legal framework.³⁸

22. High-profile enforcement actions or threats of enforcement against businesses, even if ultimately not pursued, do nothing to allay these fears, but simply exacerbate them:³⁹

- In 2016, the Indonesian competition authority (KPPU) threatened to fine palm-oil traders who had decided not to buy palm oil from farmers that engaged in illegal deforestation, giving in to political pressure after initially endorsing the initiative.⁴⁰

³⁷ Press Release, Minderoo Foundation, Global Industry Initiative Launched To End Plastic Pollution (Sept. 25, 2019), <https://www.minderoo.org/minderoo-foundation/news/global-industry-initiative-launched-to-end-plastic-pollution/>.

³⁸ Maarten Pieter Schinkel & Leonard Treuren, *Green Antitrust: Friendly Fire in the Fight Against Climate Change*, (Amsterdam Law School Legal Studies Research Paper No. 2020-72, Nov. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749147; Michelle Meagher & Simon Roberts, *The Footprint of Competition: Power, Value Distribution and Exploitation in the Food Supply Chain*, in COMPETITION LAW, CLIMATE CHANGE & ENVIRONMENTAL SUSTAINABILITY (2021).

³⁹ This is without prejudice to the general pursuit of naked cartels that seek to delay mandatory standards or technologies or agree on how the increased costs of compliance should be passed on. See, e.g., the European Commission decisions in respect of the *trucks case* (https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39824); Case AT.40178—Car Emissions, Comm'n Decision (July 8, 2021), https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf.

⁴⁰ See Arlina Arshad, *Jakarta Wants Oil Majors To Ditch 'Zero Deforestation' Pact*, THE STRAITS TIMES (Apr. 15, 2016), <https://www.straitstimes.com/world/jakarta-wants-oil-majors-to-ditch-zero-deforestation-pact>.

- The Brazilian competition agency (CADE) has been urged to investigate a soy-bean moratorium barring grain traders from buying oilseed from deforested areas in the Amazon.⁴¹
- The US Department of Justice (DOJ) opened an antitrust probe against car manufacturers that had agreed with the State of California to apply stricter emissions standards.⁴²

23. BIAC has documented elsewhere the general dearth, with certain notable exceptions,⁴³ of meaningful guidance from competition agencies worldwide.⁴⁴ The challenges of addressing climate change and environmental degradation are extremely serious and urgent. They will require bold engagement from everyone including governments, business, consumers, and competition agencies.

24. An urgent effort is required to produce guidance that is clear, practical (i.e., addresses the issues faced by business in practice), all-encompassing (see Section V below) and, critically, globally aligned.

25. BIAC cannot stress enough how important it is to have guidance that is globally consistent or at least globally aligned. This is in large part due to the global nature of the challenge we face. After all, climate change does not respect borders. In turn, many of the environmental initiatives will be global in nature or, even when localized, may have global impacts, in terms of both environmental benefits and consequences on competition. Consider, for example, measures to combat deforestation in Latin America or Asia,⁴⁵ which

⁴¹ See Roberto Samora, *Europe says Brazil's move to end soy moratorium threatens \$5-billion market*, REUTERS (Nov. 25, 2019), <https://www.reuters.com/article/us-brazil-soybeans-environment/europe-says-brazils-move-to-end-soy-moratorium-threatens-5-billion-market-idUSKBN1XZ1CV>.

⁴² In July 2019, four car manufacturers announced that they had reached an agreement in principle with the State of California on emissions standards that would be stricter than those being sought by the White House. Press Release, Office of the Governor, California and Major Automakers Reach Groundbreaking Framework Agreement on Clean Emission Standards (July 25, 2019), <https://www.gov.ca.gov/2019/07/25/california-and-majorautomakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/>. The DOJ opened an antitrust probe that was closed in February 2020. Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>.

⁴³ In January 2021, the Netherlands ACM and the Hellenic Competition Commission published their *Technical Report on Sustainability and Competition* in view of the initiative undertaken by the European Commission in the framework of the Green Deal (see https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/2165_f998b905c20c0426f068e512186c6ec4.html). Additionally, in July 2020, the ACM issued the first draft version of “Sustainability agreements” guidance, followed by a second draft version of *Guidelines on Sustainability Agreements: Opportunities within competition law* with an accompanying note published in January 2021 (see <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>; <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>; <https://www.acm.nl/sites/default/files/documents/memo-concerning-the-results-of-the-public-consultationof-the-guidelines-on-sustainability-agreements-.pdf>).

⁴⁴ BIAC Comment on Sustainability, *supra*, note 3.

⁴⁵ Measures that go beyond, for example, mandatory due diligence for operators placing forest risk commodities on the EU market. See Eur. Parl., Report with recommendations to the Commission on

are likely to have a significant impact on local producers throughout these regions but are also likely to have a knock-on effect on consumers globally, as well as contributing to the fight against climate change, which benefits everyone in the world.

26. In the absence of a coherent and aligned approach by competition agencies worldwide, businesses contemplating environmental initiatives will face a dilemma. On the one hand, they can play it safe, base their analysis on those affected jurisdictions with no or incomplete guidance. In doing so, they would forego opportunities or pursue safe initiatives that are less impactful. Alternately, they can rely on the more limited but comprehensive and meaningful guidance that is available from certain jurisdictions and hope that the agencies of other jurisdictions will align despite the real the risk of a challenge.

5. All-Encompassing, “Root and Branch” Review of Competition Policy

27. There needs to be greater global consistency over the extent to which competition agencies take environmental considerations into account when enforcing their powers and over the analytical framework they employ to do so. The adoption of an “open door” and “full transparency” policy by regulators is fundamental to any coherent approach by agencies around the world. The provision of guidance can come in the form of case-by-case assessment, which will be important in shaping policy, as long as decisions and the thinking behind them are fully publicized. BIAC encourages agencies to use all mechanisms at their disposal, whether informal guidance⁴⁶ or more formal procedures,⁴⁷ to encourage businesses to come forward with initiatives so that they can be discussed. In this context, the Hellenic Competition Commission’s proposal of a “Sustainability Sandbox” is a thoughtful contribution with a pragmatic approach, where companies can experiment under the supervision of the competition authority, without being punished for things that might otherwise be violations of the law.⁴⁸ This is precisely the type of encouragement businesses need to think freely about transformational change, in a “safe space” without fear of challenge.

28. A case-by-case approach will take time, however, and unfortunately time is in short supply in this “critical decade.” In addition to the “open door” and “full transparency” policy, BIAC urges competition agencies to undertake a “root and branch” review of competition policy to assess whether it helps or hinders in the pursuit of saving the

an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL), A9-0179/2020 (Oct. 7, 2021), https://www.europarl.europa.eu/doceo/document/A-9-2020-0179_EN.pdf. In the UK, the Government consulted on a similar proposal in August-October 2020. *Due Diligence On Forest Risk Commodities*, UK GOV’T, <https://consult.defra.gov.uk/eu/due-diligence-on-forest-risk-commodities/>.

⁴⁶ Such as informal guidance in the EU or the use of business review letters in the U.S.

⁴⁷ Such as exemption procedures or official findings of inapplicability, where available and relevant. BIAC also commends pro-active publication of guidance on non-infringing activity, even in the context of an infringement decision. *See, e.g.*, Letter from Olivier Guersent, Dir. Gen., DG Competition, Eur. Comm’n, regarding Case AT.40178 – Car Emissions (July 8, 2021), https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022302_3050_5.pdf (guidance letter by the European Commission in the *car emissions* case).

⁴⁸ *See Public consultation: Proposal for the Creation of a Sandbox For Sustainability and Competition in the Greek Market*, HELLENIC COMPETITION COMM’N, <https://www.epant.gr/en/enimerosi/sandbox.html>.

environment. Ultimately, the review needs to culminate in fulsome guidance on every aspect of competition policy that might be engaged by environmental initiatives. While we fully appreciate that each agency will be constrained by the constitutional context and existing legislation and jurisprudence, we urge a systematic review and ensuing guidance that addresses the considerations below.⁴⁹

29. *Exclusions and Derogations*: BIAC urges clarity on whether state involvement in environmental initiatives will impact the competition assessment and, if so, to what extent and in what circumstances. In particular: whether state involvement, short of a legal mandate, can ever serve to legitimize an environmental agreement between private parties that goes beyond “voluntary” measures, bearing in mind the points made above as to the likely scope of involvement of public bodies; the scope and limitations, if any, of the ability for private parties to collectively lobby government on regulation, and the extent to which they may do so in respect of agreements that have been made, even if they have not met with agency approval;⁵⁰ whether state regulation on a particular topic exhausts the ability for private parties to take action or whether they are able, in principle, to commit to higher standards and agree on monitoring and enforcement systems; whether the pursuit of a public interest objective, especially one that is clearly articulated by a public body, could serve to immunize restrictions under certain conditions.⁵¹ In addition, governments and competition agencies should consider whether certain sectors or economic activities may be explicitly granted immunity or derogations from the competition rules.⁵²

30. *Classification of Infringements and Appreciability of Effects*: BIAC urges competition agencies, where possible, to avoid automatic classification of restrictions in the context of environmental agreements as harmful to competition without an analysis of their effects.⁵³ We wholeheartedly endorse the spirit of the ACM’s Guidelines when they state “ACM’s enforcement policy in relation to sustainability agreements is aimed at finding solutions that will make it possible to be able to reap the sustainability benefits of

⁴⁹ The European Commission has started along this path, with an open and wide consultation process and a policy brief. See *Competition Policy in Support of Europe’s Green Ambition*, COMPETITION POLICY BRIEF 2021-01 (Sept. 2021), <https://op.europa.eu/s/uCnf>.

⁵⁰ See ACM Second Draft Guidelines on Sustainability Agreements, *supra* note 13, ¶ 74 (“First, the undertakings may choose to submit their initiative to the legislature. That is because general rules that serve the public interest do not fall under the scope of the Dutch Competition Act. If an initiative is converted into regulations, the sustainability objective that the initiative aims to realize may yet be realized after all.”).

⁵¹ For example, the debate under EU law, as to the potential application of the *Wouters* case law, which broadly speaking rules that restrictions may fall outside of the prohibition on restrictive arrangements altogether if they are inherent to the pursuit of a public interest objective and do not go beyond what is necessary in pursuing that objective, in accordance with the principle of proportionality.

⁵² For example, in the U.S., the Capper-Volstead Act grants immunity to activities of agriculture producer co-operatives, including price-fixing, while the Fishermen’s Collective Marketing Act grants immunity to fishing co-operatives. In the EU, the Common Market Organisation Regulation, exempts from the application of Article 101 TFEU sustainability agreements concluded between producers and/or other actors from the food value chain aimed at achieving higher standards than required by law in terms of environmental protection, climate change prevention, animal health and animal welfare.

⁵³ For example, object categorisation under EU law, or *per se* treatment under U.S. law.

initiatives, and is not aimed at enforcement based on fines.”⁵⁴ Such an approach assists businesses to be creative in their sustainability efforts and be open with the competition authorities on their thought process. BIAC also urges competition authorities to consider, and re-think if necessary, the approach to appreciability of effects and any *de minimis* doctrine they may apply, in light of the specific characteristics that may be displayed by many environmental agreements. Significantly, many of them will seek to build a broad consensus for maximum environmental impact so market share thresholds may be misplaced, and many will be global in nature, where the effect will be small and spread out across many jurisdictions. Likewise, effects guidance that is tailored to environmental agreements across multiple issues would be most welcome, especially regarding information exchange, standard-setting (including with monitoring and enforcement mechanisms), collective bargaining and purchase boycotts, and output or product restrictions.

31. *Non-Applicability*: BIAC urges specific guidance on those instances of collaboration that clearly will not be restrictive of competition and will therefore be allowed. While this may seem superfluous, we should not underestimate the authoritative weight that agency guidance has with business. Explicit recognition of uncontroversial initiatives will also assist businesses when scoping initiatives, allowing them to perform a clear trade-off between more ambitious environmental targets and a more intricate competition law assessment.

32. *Exemption*: BIAC urges for deep and committed thought to be given to the exemption or balancing of interest analysis. While we welcome the initiatives undertaken by a number of countries in this regard, including most recently Austria, which is proposing the first explicit inclusion of environmental consideration into its exemption criteria,⁵⁵ there is much more work that needs to be done. It is especially important that we do not end up with an unworkable patchwork of different approaches on such an important topic. Some of the highest environmental impact initiatives are likely to require detailed balancing/exemption exercises. BIAC has commented previously on some of the open issues in this debate,⁵⁶ namely that the assessment should: (i) allow for qualitative,⁵⁷ and not just quantitative, efficiencies to be taken into account; (ii) be longer-term in nature and not be based exclusively on “willingness to pay” studies;⁵⁸ and (iii) accept “out of market”

⁵⁴ See ACM Second Draft Guidelines on Sustainability Agreements, *supra* note 13, ¶ 15.

⁵⁵ When the Cartel and Competition Law Amendment Act 2021 is adopted, the Austrian legislator will be one of the first to explicitly include considerations regarding environmental sustainability into its competition law. As the proposal currently stands, the following wording will be added to § 2 Cartel Act (the Austrian equivalent of Article 101 para 3 TFEU): *Consumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress contributes to an ecologically sustainable or climate-neutral economy.* (See https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00114/index.shtml.)

⁵⁶ BIAC Comment on Sustainability, *supra*, note 3, ¶¶ 19-32.

⁵⁷ Guidance should recognize explicitly that qualitative efficiencies, where the value is created in the form of new or improved products, greater product variety, etc., are relevant. From a consumer perspective, a more sustainable product is often a better product so that product sustainability itself is a qualitative benefit.

⁵⁸ Willingness to pay studies take no account of long-term improvements/efficiencies. The introduction of more sustainable practices and technologies frequently comes with more or less temporary cost increases that, especially where the sustainability gain is substantial, businesses may be forced to pass on to consumers until the initial investment has paid itself off. Whilst there may

efficiencies, especially where, as with climate change, the benefits accrue to society as a whole.

33. *Enforcement*: As noted above, BIAC urges an “open door” and “full transparency” policy that encourages businesses to work with competition agencies in developing initiatives that maximize environmental impact whilst protecting competition. An explicit commitment not to fine parties to environmental agreements that have been entered into in good faith would also go a long way at assuaging business concerns with the uncertain enforcement landscape globally.⁵⁹

34. *Fulsome Guidance*: BIAC urges competition authorities to publish general guidance that is clear and practical, on an urgent basis. This is particularly pertinent to the types of initiative, covered in this submission, that could “move the needle” on environmental protection but could also easily be construed as serious antitrust violations. For example: agreements to roll-out innovation in specified local, national or regional markets (where, for example, there is capacity, sourcing, demand or recycling challenges) without being vulnerable to a charge of market sharing or market allocation; agreements to allocate volumes for input (for example, when competitors are supporting and purchasing from the same sustainable source) without being vulnerable to a charge of forming a buying cartel; agreements to align on pricing elements in order to introduce sustainable and easily recyclable but more expensive packaging (to deal with the first mover disadvantage), or agreements on minimum prices/volumes to sustainable suppliers, without being vulnerable to a cartel charge; agreements not to purchase from non-sustainable suppliers (for example, those who do not use regenerative farming methods), without being vulnerable to a charge of a collective boycott; agreements on standards (and not just minimum or maximum standards) when a standard is necessary to drive through change (e.g. for recycling).

35. *Advocacy*: Finally, BIAC urges competition agencies to be bold and pro-active in their advocacy efforts, for example, in advocating to government for regulatory changes that create the right industry wide incentives; in pro-actively recommending or supporting moves to make voluntary commitments into binding legislative or regulatory standards; and in ensuring governments maintain a fair and competitive level playing field when devising subsidies, incentives, and taxes.

6. Conclusion

36. Businesses have a critical role to play in advancing the climate agenda, and they need to understand the opportunities, and limits, of taking bold action to move the needle on the most existential of threats. BIAC strongly recommends that agencies work towards a transparent and consistent approach in addressing the competition-related aspects of these

need to be some evidence that consumers appreciate the sustainability of a product, this could be provided in several forms, such as attitudinal surveys, voting patterns etc., especially as that “appreciation” may not translate—at least not in the short term—into a willingness to pay a higher price.

⁵⁹ See ACM Second Draft Guidelines on Sustainability Agreements, *supra* note 13, ¶ 72 (“With regard to sustainability agreements that have been published, and where these Guidelines have been followed in good faith, but which later turn out not to be compatible with the Dutch Competition Act, adjustments to such agreements may be agreed on in consultation with ACM, or following an ACM intervention. In those cases, ACM will not impose any fines. This also applies to agreements that have been discussed with ACM well in advance, and where ACM, at that point, did not identify any major risks.”).

global challenges. It is difficult to imagine a topic on which global convergence on an analytical framework is more pressing since the challenges and many of the most significant initiatives to address them are global. This paper has sought to provide the skeleton of such a framework through its comments on a root and branch review of competition policy.

37. BIAC submits that progress needs to be rapid that can be achieved by invoking the combined resources of the competition agencies, economists, and the business community, with the goal of reaching some consensus on key analytical steps. BIAC continues to stand ready to assist in this critical endeavor.