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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Competition in the Circular Economy – Note by Austria

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This document reproduces a written contribution from Austria submitted for Item 7 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/competition-in-the-circular-economy.htm>

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1. In the discussions on possible strategies and efforts to achieve a more sustainable and climate neutral economy and society, the transition towards a circular economy is often seen as a key element.

2. Despite the lack of a generally applicable definition of the concept of circular economy, still a number of main pillars and basic concepts in contrast to the traditional linear concept of “take-make-use-dispose” can be identified. Those are sometimes referred to as (depending on the respective source) the 4 to 6 REs:

- RE-DUCE refers to the minimisation of use of resources at the production stage
- RE-USE means keeping a product in use for as long as possible, requiring long-lasting products
- RE-PAIR instead of disposing broken items, requiring a design that allows for repair
- RE-MANUFACTURE as a partial reuse of functioning parts in a new product
- RE-CYCLE means the decomposition of a product into its raw materials
- RE-COVER the energy contained in any substance as a last resort

3. In this sense, the European Green Deal refers to a circular economy action plan as a policy strategy to support the circular design of all products based on a common methodology and principles, with a priority on reducing and reusing materials before recycling them. Further mentioned are measures to encourage businesses to offer, and to allow consumers to choose, reusable, durable and repairable (“right to repair”) products. As regards the avoidance of waste, the potential of such a sustainable product policy to reduce waste significantly and to create a robust and integrated single market for secondary raw materials and by-products is highlighted. Where waste cannot be avoided, its economic value must be recovered and its impact on the environment and on climate change avoided or minimised.

4. In several places of the text of the Green Deal reference is made to the need to create a regulatory framework and set minimum legal standards in pursuit of these goals.

5. On the other hand, the Green Deal also acknowledges that achieving a climate neutral and circular economy requires the full mobilisation of industry including a deeper cooperation across value chains and promoting new forms of collaboration with industry and investments in strategic value chains as essential components.

6. The already mentioned circular economy action plan, introduced in March 2020, focuses on several key value chains, identified as those with a high environmental impact in the production process and a big circularity potential (e.g. electronics & ICT, vehicles & batteries, Construction & building, plastics, textiles). Another emphasis lies on the implementation of a functioning waste market policy building on reduction, recycling and the provision of functioning markets for secondary raw materials.

7. It follows from the above that the implementation of principles of circularity touches on questions of competition law. Under these aspects, product properties no longer only affect the relationship between the manufacturer and the immediate consumer of a given product, but must also take into account additional factors like the use over an extended further life cycle, including the reusability of certain components and thus

compatibility with other products or the suitability for collection, separation and recycling. The autonomous determination of business decisions on product characteristics required as a principle of competition law may be limited by the consideration of those principles of the circular economy. A high degree of coordination and standardization of product properties is therefore required to effectively implement the “RE”-principles mentioned and in order to establish systems for an efficient handling in practice. This need for coordination is not limited to undertakings on the same level of the value chain but also extends to downstream, or neighbouring economic stages due to the necessary consideration of the possibilities of subsequent further use, treatment or recycling.

8. Ultimately, this amounts to the question of balancing the effects of a possible restriction of competition with positive effects for the individual consumer or the society as a whole through a more sustainable use of resources, which - on the European level - is done under Art 101 (3) TFEU. The European Commission’s draft guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (“horizontal guidelines”) now dedicate an own chapter on this balancing exercise in the context of agreements serving sustainability goals. Though stretching the interpretation of the notions of benefits and fair share, Union Law is still reaching its limits, where it comes to the consideration of positive effects accruing completely out of the markets concerned by a restriction of competition.

9. In line with the call to support the Green Deal’s goals through action in all policy fields, the Austrian legislator has gone a step further by introducing an extended possibility of exempting “sustainability agreements” from the ban on cartels under national law. This was effected by a further specification of the “traditional” fair-share-criterion:

“Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy.”

10. According to the explanatory notes to the amendment among the possible aspects that may contribute to an ecologically sustainable economy, the transition to a circular economy is explicitly mentioned. Thus agreements between undertakings, even if they have a restrictive effect on competition, may still be permissible within the scope of Austrian national law, if they substantially contribute to circular economy goals.

11. The Austrian Competition Authority, following a call by the legislator, has published guidelines on the practical application of the sustainability exemption under Sec. 2 para 1 Cartel Act. In the following, some of the aspects dealt with there are described with a particular focus to aspects that might be relevant in the context of circular economy objectives.

12. The guidelines try to give a broader background for the assessment of sustainability agreements, which also bridges the gap to the legal requirements of the Union as laid down in the existing as well as in the draft horizontal guidelines. Therefore, a relatively large amount of space is devoted to the discussion of agreements serving sustainability goals, which from the outside fall outside the scope of the ban on cartels or are unlikely to raise concerns.

13. Particularly in connection with the realization of aspects of the circular economy, it often seems necessary to make agreements about product properties (such as materials used, material requirements, shape, and size) or about organizational processes in order to enable the intended further use or reuse or ability for recycling. As long as such agreements do not affect any parameters that are decisive for the consumer’s choice and have no

noticeable effects on prices or the variety of offers or affect competition on upstream or downstream markets, such cooperations will usually not raise any concerns.

14. The same applies to the development of standards in a transparent process, compliance with which makes it easier to achieve circular economy objectives if standardization agreements are formulated openly and non-exclusively, and participation in them remains voluntary.

15. Where after examining these requirements reasonable doubts remain that an agreement may have an appreciable restrictive effect on competition, a five-stage test should make it easier to assess the admissibility for exemption according to the new regulation.

16. In relation to the “traditional” conditions for an exemption, it is noted that often a reference to the sustainability effects will not be necessary at all. Rather, sustainability agreements oftentimes offer manifest economic advantages that can be passed on to consumers and offset their disadvantages from an agreement. Particularly measures that contribute to an extended longevity or usability of products or increase their (resale) value at the end of their service life can meet these requirements.

17. Having said that, agreements under scrutiny of the Austrian sustainability exemption must fulfil the following five conditions:

1. Creation of benefits (efficiencies) through the cooperation: The legislator adheres to the “traditional” concept that requires the creation of efficiencies in the form of an improvement in the production or distribution of goods or the promotion of technical or economic progress. By demanding for a so-called “innovative step” brought about by the cooperation, anti-competitive forms of cooperation are excluded from the scope. For example, mere price fixing agreements or direct output restrictions may also lead to a lower environmental impact through reduced demand and/or production but do not qualify as beneficiary from an overall macroeconomic perspective. In the context, which is of interest here, efficiencies from a cooperation will particularly have to concern the implementation of one of the “RE”-principles.
2. Contribution to an ecologically sustainable or climate-neutral economy: Efficiency gains emanating from the cooperation under scrutiny must result in a contribution to ecologic sustainability goals covered by the law, among them the transition to a circular economy. Technical improvements in one or more of the areas specific to effecting a circular economy will therefore be eligible to fulfil this criterion in principle.
3. Substantiality of contribution: While the fair-share criterion of the “traditional” exemption is fulfilled by way of a legal fiction, the legislator makes it clear that not any insignificant contribution towards ecologic sustainability shall suffice. Rather the inclusion of this criterion of substantiality has to be seen as a substitute for an actual fair-share and is to guarantee an overall balance between negative effects from the restriction to competition and positive (sustainability) effects to society as a whole in the sense of a full compensation. It is therefore a safeguard-mechanism to help distinguish true efforts on sustainability from only alleged sustainability arguments (“greenwashing”).
4. Indispensability of restrictions to the attainment of this (substantial) contribution: This requirement is taken without any changes from the “traditional” exemption. Here like there it serves to implement the principle of proportionality. Only the mildest means necessary to achieve a valid aim are admissible. If individual

undertakings could achieve the goals set under the agreement under scrutiny, cooperation (and the restriction of competition related to it) is simply not necessary. Likewise, overshooting restrictions on competition that do not contribute to the achievement of the objectives cannot be justified. This criterion has another important function in situations where statutory obligations exist. Those have to be met by all market participants anyway; cooperation therefore is not indispensable. However, cooperation may contribute to a quicker or more cost efficient solution. Such benefits may be considered under the traditional exemption.

5. No (complete) elimination of competition: This criterion also remains unaltered and therefore requires a certain degree of residual competition in the market affected by the cooperation. This for example is the case, if a restriction of competition only relates to one of several relevant parameters of competition or only to parts of the market. A temporary restriction of competition may also fall in this category if there are no negative effects on long-term market development. In the context of parameters for achieving a circular economy, it appears unlikely that they are so far reaching as to completely eliminate competition.
18. As a result, the Austrian regulation on the exemption on sustainability-agreements is able to adequately consider factors that are essential for the transition to a circular economy. Although the scope of national antitrust law is limited by the criterion of the impairment of trade between member states, some of the considerations made can certainly flow into a broader debate.