

Unclassified

English - Or. English

13 June 2023

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

Cancels & replaces the same document of 9 June 2023

Competition in the Circular Economy – Summaries of Contributions

15 June 2023

This document reproduces summaries of contributions 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>

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03521800

Table of contents

Summaries of Contributions 3
Australia..... 4
Austria..... 5
BIAC..... 6
Canada 7
Egypt..... 8
France..... 9
Hungary 11
Italy 12
Japan 13
Latvia..... 14
Romania 15
Spain 16

Summaries of Contributions

This document contains summaries of the various written contributions received for the discussion on Competition in the Circular Economy (140th OECD Competition Committee meeting on 14-16 June 2023). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia

This paper responds to the OECD Competition Committee’s call for country contributions to the Roundtable on “Competition in the Circular Economy”, to be held in June 2023. It provides information complementing and expanding on Australia and New Zealand’s joint submission for the “Sustainability and Competition” roundtable held on 23 July 2020. It introduces the circular economy state of play in Australia, highlights recent work of the ACCC with a circular economy nexus, and foreshadows the future direction of the ACCC’s work on sustainability.

Increasing the circularity of Australia’s economy is important for Australia to meet its domestic and international commitments to reduce greenhouse gas emissions and transition to a net zero economy. While competition law is not the preferred or primary tool for achieving circular economy goals, it is an important regulatory lever for the transition from a take, make, waste economy to one that reduces, reuses and recycles energy and materials.

Robust competition can propel the circular economy innovations that consumers, investors and government are increasingly calling for in Australia. However, while competition enabled by effective implementation of Australia’s Competition and Consumer Act 2010 (CCA), in tandem with national competition policy, plays an important role in supporting competition that fans the transition to a circular economy, the move to a circular economy gives rise to incentives to collaborate, and there is a risk that the spectre of competition law enforcement could dampen collaboration in pursuit of circularity.

Australia’s competition law framework, which includes the ability for the Australian Competition and Consumer Commission (ACCC) to grant an exemption in the public interest for agreements that may otherwise breach competition law, is well placed to deal with the interaction between competition law and business/industry collaboration to achieve circularity. In addition to primary competition laws, the Australian Competition and Consumer Commission (ACCC) – which enforces compliance with the CCA – has a range of compliance and enforcement powers that seek to address competition and fair-trading issues in the circular economy. Some recent examples and case studies are explored in this paper.

Austria

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. 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 (reduce, repair, remanufacture, recycle, recover). Circularity poses the question of determining whether a high degree of coordination and standardization of product properties is required to effectively implement the “RE”-principles 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. This question can be addressed by competition authorities- at the European level - under Art 101 (3) TFEU. The Austrian legislator has introduced 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.” 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. 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.

BIAC

Business at OECD (BIAC) welcomes the opportunity to submit comments for the roundtable on competition in the circular economy.

In the last few years, the circular economy has become increasingly important as it is viewed as one of the means to combat global warming. Protection of the environment and mitigating harm caused by the linear economy is at the forefront of the world stage. Countries around the world recognise that businesses may need to work together to encourage the 3Rs of the circular economy – reducing, reusing, and recycling of waste. Some competition authorities have been debating for some time how competition law can avoid being a roadblock to competitors’ collaborations necessary to achieve environmental goals.

While it is laudable to notice that many competition authorities have or have started issuing guidance on how they will assess cooperation for environmental reasons, sometimes guidance does not go far enough. Competition law exists to protect consumers, and it must not be the obstacle to the achievement of sustainability objectives that would help create clean and safe communities for those same consumers. There must be a balance.

BIAC believes that competition laws as currently designed could be compatible with the circular economy as long as their implementation is flexible enough to avoid stopping or disincentivising cooperation that has clear environmental objectives such as climate change and pollution and poses no or minimal risks to competition.

Canada

Like other governments around the world, Canadian governments at the federal, provincial and territorial levels are adopting policies and rules to support a transition to a circular economy. Some of these policies and rules have an impact on competition in the marketplace.

Value-retention processes (VRPs) are essential activities in a circular economy. However, there are obstacles preventing independent firms from being more involved in VRPs.

The Bureau promotes pro-competitive policies in the VRP sector in general and repair activities in particular. It encourages measures to guarantee that the tools, manuals and spare parts needed to diagnose and repair goods are available to repairers other than those from the network of original equipment manufacturers.

In addition, considering the profound and constant changes required to make the transition to a greener economy, the Bureau continues to deepen knowledge and strengthen cooperation on competition and green growth. By hosting the Competition and Green Growth Summit in September 2022, the Bureau took a step further in that direction.

Egypt

The challenge faced by businesses in Egypt is to balance resource-efficient and climate-neutral products with the need for resilience in a volatile economic environment. The circular economy has become central to Egypt's sustainability agenda, providing a safeguard for developing against economic disruptions and resource scarcity.

While competition may seem contradictory to the circular economy, it also lays the groundwork for circular initiatives as it drives efficiency and innovation. It is however unlikely for circular business models to develop organically in competitive settings.

Developing countries face opportunities and challenges in adopting a circular economy. Innovation primarily involving technology adaptation reduces the first-mover disadvantage. However, limited consumer awareness and willingness to pay for green products affect the business case for investment-intensive circular activities. Nonetheless, challenging economic conditions and rising inflation can create opportunities for circular models centered around sharing and longevity to thrive.

Competition authorities, have a proactive role in facilitating the transition to a circular economy. The Egyptian Competition Authority (ECA) monitors key industries relevant to the circular economy as well as public tenders and procurement in relevant markets. Circular economy factors are systematically incorporated into competition assessments.

At some instances, circular economy and competition objectives align. In case of conflicting objectives, the ECA strikes a balance between competition and circular economy objectives to ensure competition does not hinder nor is unduly hindered by the promotion of the transition to a circular economy, requiring careful consideration and intervention.

Practical challenges arise in assessing the circular economy due to informality in some key relevant sectors and the lack of standardized benchmarks for certain aspects of circular economy.

France

The French Energy Transition for Green Growth Law of 18 August 2015 recognised the transition to a circular economy as a national goal and one of the pillars of sustainable development. At European level, in the wake of the European Green Deal, the European Commission presented on 11 March 2020 an action plan for the circular economy presenting several areas to promote sustainable product design and circularity in production processes.

Although, at first glance, competition policy does not appear to be at the forefront of sustainability and circular economy issues, the competition authorities have a role to play in supporting the necessary transformations of the economy and promoting the principles of competition, which aim to ensure that markets operate efficiently and encourage innovation.

As part of its 2023-2024 roadmap, the *Autorité de la concurrence* (hereinafter the “*Autorité*”) reiterated its commitment to continue and expand its actions in support of the ecological transition, in every aspect of its intervention.

In the area of the circular economy, the *Autorité* has intervened on several occasions since 2010 on the basis of its contentious and advisory powers, as well as in merger control. This sustained activity in the field of the circular economy continued with the publication in 16 June 2022 of a new opinion on the reorganisation of the household plastic packaging sector

The management of household waste in France is based on the principle of extended producer responsibility (hereinafter "EPR") defined in Article L. 541-10 of the French Environmental Code as the "*obligation for any physical or legal person that develops, manufactures, handles, processes, sells or imports waste-generating products or the components and materials used in their manufacture [...] to be able to or to help to prevent and manage the waste that comes from such products [...]*".

In its opinion of June 2022, the *Autorité* examined the competitive impact of a draft decree that is part of the more global modification of the organisation of the EPR sector for household plastic packaging. Its analysis focused first on the exclusivity granted to eco-organisations for the management of certain wastes, then on the balancing mechanism provided for by the draft decree, the purpose of which is to ensure that the eco-organisations share out their obligations to take back and recycle the waste flows covered by the exclusivity measure, in proportion to their respective upstream market shares.

On the first issue, the *Autorité* considered that the exclusivity measure was necessary to achieve the objective of developing the sector which implies major investments to modernise the sorting and recycling industrial tool. The *Autorité* nevertheless expressed reservations about the exclusivity framework, in that the measure did not appear to be limited in time. To limit the long-term effects, the *Autorité* recommended the inclusion of a provision on the duration of the exclusivity so that it does not extend beyond the future approval period, i.e. the end of 2029 at the latest, and, in any case, that an audit be carried out at the end of 2025 to examine the industrial capacities for sorting, resorting and recycling in the sector and analyse the appropriateness of maintaining or not maintaining the exclusivity measure.

Regarding the balancing mechanism, the *Autorité* noted that this mechanism would risk strengthening the position of the dominant player on the upstream market for membership on the downstream market for take-back and recycling. The *Autorité* therefore

recommended limiting the benefit to eco-organisations with an upstream market share of less than 50%, assessing the effects of the mechanism on the market, authorising the Agency for Environment and Energy Management to collect and make available optimal information, and, lastly, having the agreement between the eco-organisations monitored by an independent body.

Hungary

The first section gives an overview into Hungary's circular economy. It highlights that (i) biomass and food, (ii) construction, and (iii) plastics with a special emphasis on design, production, (re)use, and end-of-life stages are those areas, which will be critical to the Hungarian circular economy transition according to the OECD. The Circular Economy Technology Platform is also introduced, as one of the most recent developments in Hungary, which integrates the sectoral knowledge (such as, construction, telecommunication, energy, agriculture etc.) of undertakings, governmental and non-governmental institutions as well as several interest groups in order to accelerate the circular economy transition.

The second section discusses the role of circular economy within the Hungarian competition law framework. It is highlighted that while the Hungarian Competition Act does not explicitly include a reference to circular economy, it nevertheless provides a rather flexible framework for such an interpretation through two of its exemption clauses: (i) the "protection of the environment" exemption in case of anti-competitive agreements and (ii) the "public interest" exception with regard to merger control. These exemption clauses are then brought into context of the findings of relevant accelerated sector inquiries, some market analyses and that of a case study by putting them into practise and drawing attention to potential grounds for their misuse.

The third section provides additional inputs through relevant sectoral legislative acts. It is shown that recent sectoral legislations can be considered as milestones regarding circular economy objectives since they no longer focus exclusively on waste management (that is, on the end-of-life cycle of products and materials) but extend circularity to the whole life cycle of products – including product design, manufacturing, supply and distribution. Therefore, it is highlighted, that the range of economic activities that can be brought in alignment with circular objectives in the context of competition law has also become much broader.

The fourth section raises awareness to potential future challenges, illustrating how competition and circular economy objectives may not always coincide with each other. It will be shown by the recent example of a waste management concession that is given to the MOL Group for the period of 35 years, which will not only strongly transform the former market structure but will at the same time also grant significant market power to a leading vertically integrated oil, gas and chemical corporation.

Italy

The Autorità Garante della Concorrenza e del Mercato (hereafter the Authority or the AGCM) has devoted increasing efforts to promote competition to the benefit of circular economy, especially in the last few years, and has concluded a number of important cases using the full range of tools at its disposal, namely antitrust (with several abuse of dominance cases by waste management consortia and an investigation targeting an agreement between purchasers of waste), consumer protection (with two far-reaching decisions on planned obsolescence) and advocacy interventions, as well as in the context of Italy's legality rating programme.

The extensive experience gained by the AGCM has shown that traditional competition policy can effectively be used to promote the circular economy, without the emergence of any particular tensions between them. Indeed, while the international debate has focused the attention on how to incorporate considerations about sustainability and circular economy in the competition assessment, the Authority's experience has highlighted that competition agencies can prioritize enforcement and advocacy cases in which the attainment of public interest objectives may also be achieved via a vigorous application of competition law and principles.

While public enforcement generates positive spillover effects upon the proper functioning of circular economies, our enforcement and advocacy experience shows that intervening in such markets also has an immediate and positive effect on all the actors involved, including end users. First, when competition works smoothly, waste holders end up paying less (and may even receive a positive compensation) to have their waste treated. Second, efficient material recovery has the potential to lower prices for products created with secondary materials through lower prices for raw materials. Third, enhancing competition in the circular economy helps to ensure that efficient players benefit from their long-term investments, thus incentivizing circularity.

Japan

The Japanese government declared goals of reducing greenhouse gas emission as of 2030 and 2050 in 2021. For achieving those goals, it is needed to build the “Green Society.”

The Japan Fair Trade Commission (JFTC) has long been involved in advocacy activities to support initiatives of enterprises for promoting the circular economy, including the formulation of the “Guidelines Concerning Joint Activities for Recycling under the Antimonopoly Act” (Recycle Guidelines) in 2001 and the publications of collections of major consultation cases. Given that enterprises are expected to be more active and concrete in their efforts to realize a green society in years to come, the JFTC is also required to promote such efforts more than ever.

With this background, the JFTC formulated the “Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act” (Green Guidelines), which was published on March 31 2023, for the purposes of preventing anticompetitive conduct that stifles innovation such as the creation of new technologies, and of encouraging the activities of enterprises toward the realization of a green society, by further improving predictability for enterprises and transparency in the application and enforcement of the Antimonopoly Act in relation to the activities of enterprises.

The Green Guidelines do not change the JFTC's existing views on the Antimonopoly Act. However, based on the above objectives, the Green Guidelines explain the JFTC's views regarding Antimonopoly Act and green initiatives comprehensively in terms of all types of conducts including not only joint activities but also vertical restrains, abuse of a superior bargaining position and mergers, providing as many as 76 supposed cases of acts which pose problems under the Antimonopoly Act and acts which do not. This is one of the features of the Green Guidelines and provides overall information to enterprises and thereby enables them to understand and utilize the Green Guidelines easily. The contents of the Green Guidelines are expected to be continuously reviewed according to future changes in markets and business activities, specific cases of law enforcement and consultation, and other relevant factors.

Latvia

In this contribution, the Latvian Competition Council (hereinafter – the CC) provides information on its practice regarding the assessment of the competition situation in different markets in relation to the implementation and application of circular economy principles. The legal framework allows the Competition Authority to include circular economy considerations in its analysis of cases. When assessing the competitive situation in a given market, the competition authority shall take into account and analyse the efficiency factors, their impact on the competitive situation in the relevant market and in other related markets, if necessary. The competitive situation on the market and the efficiency factors interact in many respects, they are related to resource efficiency as well as other characteristics related to the circular economy.

The CC has not encountered any significant conflict between the objectives of competition law and the conceptual foundations of the circular economy. When confronted with a potential conflict, the CC has always taken the position that restrictions on competition or changes in market structure can only be justified on the basis of economically justified and long-term efficiency gains for society and the economy.

If the planned change in market structure and/or a significant reduction in competition on the market does not lead to economic benefits and is not justified by the application of circular economy principles, the CC may adopt a decision on abuse of dominance, prohibition of merger or interim relief (in case the situation needs to be addressed urgently in order to protect market structure and competition). In the view of the CC, competition law should not be seen as an obstacle to the initiative and development of a circular economy. Collective initiatives by market participants, including in the context of the circular economy, should be assessed from a competition law perspective through the prism of agreements or mergers. In view of the above, in the process of assessing mergers and agreements, the CC assesses not only the impact of the merger on competition, but also the efficiency benefits of the proposed merger/agreement, and the economic benefits to society by promoting the principles of the circular economy.

Whenever the CC provides the opinion on draft regulatory acts, it takes into account both the aspects and efficiency criteria for the successful development of the circular economy and the conditions for ensuring fair competition. If the regulatory framework may lead to changes in market structure or other factors affecting competition, the CC proposes that an economic analysis be carried out before the draft legislation is taken forward for approval in order to ascertain whether and how the proposed legislation will change the competitive situation. If the proposed changes would be most likely to changing the market structure or otherwise affect the competitive situation, the CC will propose an economic assessment. The economic analysis should establish whether the proposed legislation, is the only way to ensure that the principles of the circular economy are implemented and that certain objectives, including environmental objectives, are achieved.

Romania

The Romanian Competition Council (“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 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, achieving and overcoming the environmental targets set at European level, preserving and improving the quality of the environment, protecting human health and ensuring 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.

Spain

This contribution by the Spanish National Markets and Competition Commission¹ (CNMC) addresses the topic of the Roundtable on “Competition in the circular economy”.

The circular economy in a broad sense has been gaining importance in recent years given the role it plays in achieving the Sustainable Development Goals (SDG) and the opportunities in terms of productivity and employment through innovation and the creation of new markets.

Consistently, the number of entrepreneurial initiatives and regulations in this field have also increased. Given this growing importance, the CNMC has carried out various activities which are covered in this two-part document:

The first part summarises the regulatory and market framework on packaging waste management and the main competition enforcement activities carried out -some of them ongoing- related to the circular economy.

The second part describes the CNMC’s advocacy initiatives concerning the circular economy.

¹ This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents.