BUSINESSatOECD

Comments by the *Business at OECD* Competition Committee to the OECD Competition Committee

Hearing on Sustainability and Competition

December 1, 2020

I. Introduction

1. *Business at OECD* appreciates the opportunity to submit these comments to the OECD Competition Committee for its Hearing on Sustainability and Competition (the Hearing). The OECD Competition Committee will consider the relationship between sustainability and competition. This topic has become increasingly important in recent years, with governments seeking to strengthen their commitment to greener and more sustainable policies and private entities being increasingly encouraged to align their conduct and business strategies with sustainable development goals. In this setting, conflicts may arise between sustainability goals and the protection of competition, for instance where companies cooperate to implement green initiatives, but where their collaboration might give rise to higher consumer prices in some markets.

2. *Business at OECD* 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, *Business at OECD* will focus on a number of two interrelated topics that are particularly relevant for adequately factoring in sustainability interests and considerations into competition enforcement, i.e. (i) the relationship between government action aimed at stimulating or mandating sustainable business ventures and antitrust enforcement; and (ii) the question how competition agencies can take sustainability interests into account and develop a framework for balancing those interests against potential negative effects on, for example, price competition in affected markets.

3. *Business at OECD* notes that there is some overlap between the issues that are relevant for the current Hearing with the topics that were discussed in the context of the 2010 OECD Roundtable on Horizontal Agreements in the Environmental Context.[1] Indeed, while the current debate on sustainable economic development has a broader scope than environmental issues only, many of the analytical questions are similar. In addition to its current submission, *Business at OECD* therefore respectfully refers to its submission for the 2010 Roundtable.[2]

4. *Business at OECD* is highly supportive of sustainable economic initiatives and believes that sustainability and economic growth challenges should preferably be addressed in a mutually reinforcing

[1] OECD, Horizontal Agreements in the Environmental Context, DAF/COMP(2010)39 (2010), *available at* http://www.oecd.org/competition/cartels/49139867.pdf.

[2] *See id.* at 131-37. *Business at OECD* notes that the Hearing will potentially discuss a number of Sustainable Development Goals, including tackling poverty and inequality, end hunger, achieve food security, promote sustainable agriculture, sustain affordable and clean energy, promote responsible consumption and production, protect labor rights and fight climate change. While *Business at OECD*'s comments are of importance to the interaction between antitrust law and each of these goals, they are particularly relevant for initiatives in relation to clean energy and environmental business initiatives.

manner. This is because sustainable, long-term economic growth is of fundamental importance for raising the necessary resources for addressing the challenges that may endanger sustainability initiatives. This requires supporting innovation, entrepreneurship and green growth across all sectors, focusing on where improvements that both are economically efficient and contribute to attaining sustainable development goals can best be achieved.

II. The Relationship Between Market-Based and Government Control Mechanisms Aimed at Achieving Sustainability Goals

5. *Business at OECD* appreciates that in some cases government intervention is warranted in the transformation to a more sustainable economy. However, it is important to carefully consider the types of intervention that are appropriate in a particular context to achieve the objective of a more sustainable growth model, as well as to adequately monitor their implementation and the impact and progress made. For instance, "green taxes" may have a major impact on companies' competitiveness and may thus take away scarce resources that could otherwise be invested in research, development and deployment of technology necessary for achieving green growth.[3] Where taxes or other policy instruments are employed, they should be based on a solid cost-benefit analysis, be transparent, non-distortive and be both economically and environmentally effective. More generally, *Business at OECD* emphasizes the importance of removing barriers to investment and trade and counsels against green or sustainable trade measures that may give rise to protectionism. Finally, *Business at OECD* requests specific attention to the importance of competitiveness losses resulting from asymmetrical sustainability policies among various countries.

6. In many cases, particularly in the sustainability area, however, market-based mechanisms, rather than the use of conventional command and control mechanisms, are more likely to stimulate markets to function more efficiently. This is so because many of these markets are subject to market failures, are highly complex and technical, and display information asymmetries. As a result, sectoral regulators, competition agencies, and legislative institutions may lack the knowledge to optimally regulate the economic activities at issue and may therefore have to rely in varying degrees and in various ways on the regulated economic entities that possess more knowledge and experience with the activity at hand. In general terms, *Business at OECD* favors this type of regulation over command and control mechanisms.

7. Nowadays, agreements among industry participants relating to environmental and other sustainability objectives occur frequently. They may, for example, relate to environmental quality standards, the use of process or technical standards that require the use of a particular technology or practice in carrying out specific commercial activities, or initiatives to improve the sustainable production of products in developing. One other example is an agreement among competing manufacturers to jointly develop, produce and sell an environmentally superior product that the contracting parties would otherwise not have been able to develop. Competing market participants may also agree on ways to reduce the energy consumption or increase the reusable and recyclable content of their products, to procure products from sustainable sources, or to reduce environmentally unfriendly emissions. While these agreements may be made on a purely voluntary basis, many are made in response to regulations that seek to attain sustainable goals or are encouraged by central or local public institutions.

[3] More generally, *Business at OECD* is also concerned about the increasing regulatory burden and associated costs on companies, while there is also a risk of a regulatory race-to-the bottom with companies seeking to achieve compliance at minimal costs instead of exploring innovative ways to becoming more sustainable. In addition, environmental regulation risks not going far enough because of political pressure and may involve lengthy legislative and implementation processes.

8. However, the increased scope for self-regulation and the accompanying need for cooperation among (potential) competitors in the environmental and other sustainability areas increasingly raises intricate questions regarding the (dis)application of competition law and the reconciliation of competition law concerns with sustainability objectives. For instance, fishery conservation efforts by fishermen in the form of catch limitations may help to combat resource depletion, but antitrust law may be an obstacle to those efforts.[4]

9. The tension between the application of competition law and the attainment of environmental and other sustainability goals raises an important preliminary question, namely how and under which circumstances business conduct that is, on a narrow interpretation, restrictive of competition, but is nonetheless desirable for sustainability reasons, should and could be immunized from the application of competition law. Competition agencies and legislators may resort to various means to accommodate sustainability concerns.

10. First, certain sectors or economic activities may be explicitly granted immunity from antitrust liability or may have implied immunity through pervasive regulation. For instance, in the U.S., the Capper-Volstead Act grants immunity to activities of agriculture producer co-operatives, including price-setting,[5] while the Fishermen's Collective Marketing Act grants immunity to fishing co-operatives.[6] It seems that these general exemptions may, in a limited number of cases, be helpful for companies to engage in agreements that further environmental objectives but that also involve restraints on competition. However, for the broader economy, such blanket exemptions from competition laws do not seem feasible or appropriate.

11. When governments and competition agencies consider to disapply the competition rules to a particular sector or particular business transactions for reasons associated with sustainability goals, they are required to act within the boundaries of their legislative mandate and within the boundaries set by relevant case law. It appears that—particularly in the EC—governments' discretion to immunize sustainability initiatives is limited.

12. Under the EU State action doctrine, sometimes referred to as state compulsion doctrine, conduct by undertakings is not subject to EU competition law rules, and thus to Article 101 TFEU, where this conduct was *compelled* by state action.[7] However, the scope of this doctrine is limited because it only applies where national legislation (i) requires undertakings to act in an anticompetitive manner or (ii) creates a legal framework which itself eliminates any possibility of competitive activity on their part. In contrast, where national legislation merely encourages or facilitates anticompetitive conduct, private firms remain subject to the prohibition of Article 101 TFEU.[8] This question has for instance been discussed

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4 *See, e.g.*, Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH & LEE L. REV. 3 (2004).

5 7 U.S.C. § 291.

6 15 U.S.C. § 521.

7 *See, e.g.*, Case C-280/08 P, Deutsche Telekom v Commission, 2010 E.C.R. I-09555.

8 *Id.,* ¶¶ 80-82. In addition, EU member states that encourage or facilitate anti-competitive conduct are liable for infringing the rules of the European Treaties if their actions render the competition rules ineffective. *Id*. In the U.S., "courts must interpret the Sherman Act in a way that respects the ability of government to take and the rights of citizens to request government action – even when that government action limits or eliminates competition." FED. TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE 3 (2006), *available at* https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf.

in the context of a Dutch draft law initiative which seeks to translate private sustainability initiatives into legislation.[9]

13. The recent and much-discussed Dutch *Chicken of Tomorrow* initiative, illustrates the limitations of the state action doctrine under European law.[10] Indeed, in that case, the state action doctrine did not apply, because even though the government was involved in, and encouraged, the initiative, the Netherlands did not take any specific legislative or governmental measure which would have compelled the undertakings involved (farmers, meat processors and supermarkets) to take any action to replace regularly produced chicken with a more sustainable chicken.[11]

14. From a sustainability perspective, it may be tempting to consider widening the scope of the EU State action doctrine. However, this would raise a number of difficulties, because the doctrine is well-established in EU case-law generally and any attempted variation to that line of case-law would affect the scope of EU competition law well beyond the field of sustainability. Such a major change is unlikely and probably undesirable as it could impair the proper functioning of the competition law regime.[12]

15. Under EU law, there are a limited number of other approaches that EU member states may consider immunizing sustainability initiatives that potentially raise antitrust concerns. However, while these approaches may in specific cases enable to endorse a sustainability initiative, they do not provide a general, solid, and effective basis for firms to engage in sustainability initiatives without a significant risk that their initiatives will be challenged under EU competition law.[13]

16. First, EU competition law permits (industry-wide) sustainability initiatives, such as the reduction of CO2 emissions, as long as the initiative does not impose defined obligations on methods of achieving the objectives.[14] It is clear that in many cases such general aspirational schemes without binding commitments will be insufficient to meet the sustainability objectives at hand.

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[9] Mariska van de Sanden & Hera Butt, *Competition Law and Sustainability Initiatives: Dutch Bill Provides More Leeway*, KLUWER COMPETITION LAW BLOG (Sept. 23, 2019, *available at* http://competitionlawblog.kluwercompetitionlaw.com/2019/09/23/competition-law-and-sustainability-initiatives-dutch-bill-provides-more-leeway/. Under the draft law, businesses and individuals would be able to propose a sustainability initiative to the government which, after having consulted the Dutch Competition Authority, would assess this initiative and, provided certain conditions are met, could adopt it in the form of an administrative order.

[10] Auth. for Consumers & Mkts., ACM's Analysis of the Sustainability Arrangements Concerning the 'Chicken of Tomorrow' (Jan. 2015), *available at* https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf [hereinafter Chicken of Tomorrow].

[11] The Chicken of Tomorrow case concerned the introduction of a higher environmental and animal welfare standard for chicken breast agreed between broiler farmers, meat processors and supermarkets in the Netherlands. Following a public concern regarding the poor living conditions of chickens in factory farms, the companies wanted to improve the conditions in which the animals were reared and to sell better quality chicken meat. The environmental and animal welfare benefits were monetized on the basis of a willingness-to-pay analysis. The ACM welcomed the initiative, however, it concluded that although consumers were willing to pay more for sustainable chicken meat, on the whole they would not sufficiently benefit from the initiative as they would not be willing to pay the price increase that such a measure would entail.

[12] As further discussed below, one alternative, at least in Europe, would be for the European Commission to stipulate that it would allow EU members states under well-defined conditions to encourage and facilitate sustainability-driven business initiatives, without taking enforcement action. Member states themselves may also have some limited means to develop approaches regarding prioritization and sanctioning in the event of government -sponsored sustainability initiatives.

[13] Hellenic Competition Comm'n, Staff Discussion Paper on Sustainability Issues and Competition Law (Sept. 2020), *available at* https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.

[14] See, for example, the JAMA/KAMA agreements, which involved a voluntary commitment on reducing carbon dioxide (CO2) emissions from new passenger cars sold in the EU by the Association of Japanese Automobile Manufacturers (JAMA) and the Association of Korean Automobile Manufacturers (KAMA). The EC considered that these agreements were not within the

17. One other approach is based on the *Wouters* line of case law, which provides that the competition rules do not apply to restrictions of competition which are necessary for- and proportionate for achieving a legitimate public interest.[15] The doctrine requires that the agreed upon restriction of competition is the only way through which the objective can be attained.[16] A main handicap is however that the notion of "public interest" is not defined, although the involvement of the government in a given matter may constitute a presumption that the subject matter is of public interest. In practical terms, this means that there can be significant uncertainty whether a private environmental or other sustainability initiative, even when backed by the government, is immune under the EU competition rules.

18. It has been suggested that commitments made by EU Member States to comply with international norms, such as the United Nations Guiding Principles on Business and Human Rights[17] and the OECD Guidelines on Multinational Companies[18] would constitute a legitimate public interest within the meaning of *Wouters*, which may greatly facilitate the disapplication of the competition rules to sustainability initiatives.[19] While the *Wouters* doctrine is of direct relevance for European and non-European jurisdictions, *Business at OECD* encourages particularly the European participants of this Hearing to further investigate this avenue and to reflect on further guidance, both with respect to the notion of public interest, as well as with respect to the requirements of necessity and proportionality within the meaning of *Wouters* to explore in which situations sustainability initiatives may fall within the scope of the *Wouters* doctrine and be exempt from the application of the European (and national) competition rules.

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scope of the Article 101(1). Press Release, Eur. Comm'n, Commission Welcomes Commitments by Japanese and Korean Carmakers To Cut CO2 Emissions (Apr. 14, 2000), IP/00/381, *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_00_381. See also the CO2 reduction initiative undertaken by the Association of European Automobile Manufacturers. Press Release, Eur. Comm'n, Commission and ACEA Agree on CO2 Emissions From Cars (July 29, 1998), IP/98/734, *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_98_734. Another example is the DSD Case concerning the collection of plastic waste where because the agreement gave rise to a new market (plastic waste management), the Commission took the view that the agreement furthered competition, despite setting prices and establishing exclusivity. Press Release, Eur. Comm'n, The Commission Defines The Conditions For Packaging Waste Disposal Systems to be Compatible With the European Competition Law in the DSD Case (Sept. 18, 2001), IP/01/1279, *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_01_1279.

[15] Case C-309/99, Wouters, 2002 E.C.R. I-01577, para 57. Pursuant to the *Wouters* doctrine, a restriction of competition is acceptable if it pursues a public interest objective and the restriction is both necessary and proportionate to achieve the objective.

[16] *See* Suzanne Kingston, *Competition Law in an Environmental Crisis*, 10 J. EUR. COMPETITION L. & PRAC. 517 (2019); OECD, Climate Change and Competition Law—Note by Simon Holmes, DAF/COMP/WD(2020)94, ¶ 18 (Oct. 27, 2020), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)94&docLanguage=en. The case law of the CJEU makes clear that the independence of lawyers, the protection of users of geological services (Case C-136-12, Consiglio nazionale del geologi, (July 18, 2013), para 53, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0136.) and the proper organization of sports competition (C-519/04 P, Meca Medina, (July 18, 2006), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62004CJ0519.) constitute public interests.

[17] UNITED NATIONS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), *available at* https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[18] OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), *available at* https://www.oecd.org/daf/inv/mne/48004323.pdf.

[19] *See, e.g.*, Jeanine Wubbels, Wat kunnen we doen aan de remmende werking van het mededingingsrecht op duurzaamheidsinitiatieven? [What can we do about the inhibitory effect of competition law on sustainability initiatives?], Markt & Mededinging, Nov. 2016, nr 5 (in Dutch). *See also* Gareth Davies, *Article 86 EC, The EC's Economic Approach to Competition Law, and the General Interest*, 5 EUR. COMPETITION J. 567 (2009).

III. The Ways In Which Competition Law Regimes May Integrate Sustainability Issues: General Observations Regarding Competition Agencies' Task

19. In the absence of antitrust immunity, the question arises which means competition agencies have to accommodate the positive effects of sustainability initiatives.

20. In the U.S., when confronted with a private sustainability initiative among competitors, courts must determine whether to apply the *per se* rule or the rule of reason standard of analysis to horizontal restraints. While a firm body of case law has been established that horizontal restraints that support a pro-competitive benefit will be analyzed under the rule of reason standard,[20] case law indicates that environmental concerns do not factor in the courts' antitrust analysis.[21] Moreover, it seems that there exists significant uncertainty that horizontal agreements that seek to conserve scarce public resources should be considered a pro-competitive benefit and thus be subject to the rule of reason analysis, as opposed to the per se test.[22] These uncertainties provide a significant disincentive for U.S. companies to self-regulate in the interest of environmental conservation (and other sustainability objectives).

21. Outside the courts, competition agencies can play an important role in decreasing the uncertainty surrounding potentially environmentally beneficial horizontal restraints through *ex ante* opinions on proposed collaborations. In the U.S., the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have sought to add certainty through a joint publication of Antitrust Guidelines for Collaboration Among Competitors,[23] which provides safe harbors for certain horizontal agreements or joint R&D ventures that provide pro-competitive benefits.[24] Under these Guidelines, companies who wish to enter into a horizontal arrangement can request the DOJ to provide a "business review letter" regarding the legality of the proposed arrangement. While this process has been repeatedly utilized by U.S. companies for traditional efficiency-enhancing arrangements, the DOJ has yet to offer an opinion as to whether it views the mitigation of environmental concerns as a potential pro-competitive benefit.[25]

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[20] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); and Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

[21] *See* Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 414 n.9 (3d Cir. 1997) ("while the environmental quality of energy sources may be a worthwhile concern, it does not appear to be a problem whose solution is found in the Sherman Act"); *In re* Multidistrict Vehicle Air Pollution, 538 F.2d 231, 236 (9th Cir. 1976) (affirming dismissal of claim of horizontal collusion amongst four largest automobile manufacturers to thwart development of pollution control technologies because the alleged harm was "environmental, not economic in the antitrust sense").

[22] Cases involving horizontal agreements to limit fishing production apply the *per se* rule in the absence of statutory immunity, despite the conservation of limited resources being an arguable pro-competitive benefit. *See* Gulf Coast Shrimpers & Oystermans Ass'n v. United States, 236 F.2d 658 (5th Cir. 1956); Local 36 of Int'l Fishermen & Allied Workers of Am. v. United States, 177 F.2d 320 (9th Cir. 1949); Manaka v. Monterey Sardine Indus., Inc., 41 F. Supp. 531 (N.D. Cal. 1941); Columbia Rivers Packers Ass'n v. Hinton, 34 F. Supp. 970 (D. Or. 1939).

[23] U.S. DEP'T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (Apr. 2000), *available at* https://www.justice.gov/atr/page/file/1098461/download.

[24] The guidelines provide a safety zone for horizontal collaborations that make up less than 20% of the relevant product market and joint R&D ventures that leave at least three independent R&D ventures remaining in a relevant "innovation market." *Id*., § 4-2-4.3.

[25] In July 2019, four automakers 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), *available at* https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-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), *available at* https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html.

22. The integration of environmental and other sustainability benefits into the analysis under European competition law of horizontal agreements among competitors is equally problematic, albeit for different reasons.

23. The European Commission has adopted several policy documents that provide guidance to national competition agencies on how to apply the European competition rules and conduct relevant economic analysis.[26] In these guidelines, the Commission states that, in principle, the national competition authorities (NCAs) should not balance economic, competition-related arguments with other public policy arguments, such as the protection of public health, but rather that non-competition interests should only "be taken into account to the extent they can be *subsumed* under the four conditions of Article [101(3) TFEU]."[27] It is uncertain whether the European Commission will maintain this strict enforcement approach in the future version of its guidelines on horizontal cooperation.[28]

24. In practice, the European Commission has been willing, albeit extremely cautiously, to integrate environmental and other non-economic interests in its exemption decisions under Article 101(3) TFEU to the extent that those interests could be subsumed under the conditions of that provision, particularly the condition that the agreement at hand must "contribute[] to improving the production or distribution of goods or to promoting technical or economic progress."[29] In general, however, the Commission only used non-competition interests, such as environmental benefits, as complementary arguments to substantiate that the economic conditions of Article 101(3) TFEU had been met.[30] This approach has been condoned by the European Court of Justice.[31]

25. Only very exceptionally, particularly in the CECED case, did the Commission appear to come close to treating environmental interests as a core argument for granting an exemption for a restrictive agreement.[32] Following the CECED case, it has been suggested that with regard to the protection of the environment, the Commission is willing to adopt a broader welfare approach that allows for the translation of environmental benefits into economic values that are important for consumers and that can, like productive efficiencies, be directly balanced as independent factors against the restriction of

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[26] *See* Eur. Comm'n, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 O.J. (C 11) 1; Eur Comm'n, Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), 2004 O.J. (C 101) 97.

[27] 2004 O.J. (C 101) 97, ¶ 42.

[28] The European Commission is currently reviewing the two safe harbor block exemption regulations and the accompanying guidelines on horizontal cooperation agreements which will expire on December 31, 2022. *See Review of the two Horizontal Block Exemption Regulations*, EUR. COMM'N, *available at* https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html.

[29] Art. 101(3) TFEU.

[30] *See* Saskia Lavrijssen, *What Role For National Competition Authorities in Protecting Non-Competition Interests After Lisbon?*, 35 EUR. L. REV. 636 (2010). Note that in *Exxon/Shell*, the Commission acknowledged under "Advantages for consumers" that "the avoidance of environmental risks. . . will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern." Case No. IV/33.640—Exxon/Shell, Comm'n Decision, 1994 O.J. (L 144) 20, ¶ 71. Similarly, in *Philips/Osram*, the Commission noted that the use of cleaner facilities would "result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities." Case No. IV/34.252—Philips-Osram, Comm'n Decision, 1994 O.J. (L 378) 37, ¶ 27.

[31] *See* Case T-528/93, Métropole, 1996 E.C.R. II-649.

[32] Case IV.F.1/36.718—CECED, 2000 O.J. (L 187) 47. In CECED, the EC considered that the expected price increase was compensated by lower energy bills for consumers and less pollution. It took into account the net contribution to the improvement of the environmental situation overall.

competition.[33] Despite these developments, it remains unclear whether and to what extent environmental protection can play a separate role in applying Article 101(3) TFEU.

26. *Business at OECD* submits that the state of affairs as set out above is unsatisfactory as it may discourage companies from entering into horizontal environmental and other sustainability agreements that may, on balance, enhance welfare.

27. The Dutch *Tomorrow's Chicken* case illustrates the two main complications with respect to the evaluation of sustainability efficiencies.[34] The first complication is to place an adequate economic value on sustainability benefits.[35] A small number of cases show that progress is being made in quantifying those benefits: the EC *CECED* case, Coal-Fired Power Plants[36] and Chickens of Tomorrow in the Netherlands show new techniques for the valuation of benefits from environmental resources and initiatives.

28. The second complicating question is whether and to which extent (current and future) "out of market" efficiencies can be taken on board when calculating the net effect of sustainability initiatives.

29. In many sustainability initiatives the question arises whether three types of positive effects can be factored into the Article 101(3) analysis: (i) benefits for the entire society; (ii) "out of market" efficiencies; and (iii) benefits for non-users (e.g., employees). The European Commission appears to take the view that the European competition rules do not permit that (restrictive sustainability) arrangements make consumers of the product or service worse off.[37] This would imply that general societal benefits, benefits for non-users, and "out of market" benefits cannot be taken into account. Accordingly, it seems that the benefits of a horizontal agreement among manufacturers of clothing that aims at improving the situation of, for example, Asian workers in the textiles production chain may not be factored into the analysis under Article 101(3) TFEU.[38]

30. The issue of whether to credit "out-of-market" efficiencies has also been at the heart of the European Commission's airline alliance decisions, *Star*, *Oneworld* and *Skyteam*.[39] In these cases, revenue sharing eliminates all competition on a "trunk" route, for example London-New York, but increased connectivity for "behind" and "beyond" passengers. These cases presented analytical difficulties because the harm to London-New York passengers can be small relative to the benefits for many multiples of passengers connecting to UK and U.S. cities via London and New York City. The European Commission

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33 *See* Lavrijssen, *supra* note 30.

34 Chicken of Tomorrow, *supra* note 10.

35 In 2011, the UK authority (OFT) suggested in a submission to an OECD roundtable that product biodegradability or "rainforest friendly" coffee might count as direct economic benefits if consumers placed a value on those features. *See* OECD, Horizontal Agreements, *supra* note 1, at 101-02.

36 Auth. Consumers & Mkts, Notitie ACM over sluiting 5 kolencentrales in SER Energieakkoord (Sept. 26, 2013), *available at* https://www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM-over-sluiting-5-kolencentrales-in-SER-Energieakkoord (in Dutch). The agreement in Coal-Fired Power Plants case concerned the closure of five old coal-fired power plants agreed between Dutch energy producers. Emission reductions of SO2, NO2 and particulate matters were monetized on the basis of shadow prices and avoided damage costs. ACM stopped the agreement because it was estimated to result in net welfare loss.

37 The question is whether "consumers" in this regard includes both current and future consumers. If so, the suggestion is that benefits for future (generations) of consumers may be taken into account. *See* Wubbels, *supra* note 19.

38 *Id*.

39 Case COMP/39.596—BA/AA/IB (Oneworld), Comm'n Decision (July 14, 2010), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_4342_9.pdf; Case COMP/AT.39595—Continental/United/Lufthansa/Air Canada (Star), Comm'n Decision (May 23, 2013), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39595/39595_3012_4.pdf; Case AT.39964—Air France/KLM/Alitalia/Delta (Skyteam), Comm'n Decision (May 12, 2015), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39964/39964_1755_5.pdf.

settled for the argument that if passengers are "substantially the same" (terminology referred to in the Guidelines on Article 101(3) TFEU), then one can credit these out-of-market efficiencies.[40]

31. *Business at OECD* notes that in many cases the argument can be made that environmental and other sustainability efficiencies benefit us all, as cleaner or more sustainable environment is a public good. Accordingly, in principle, the "substantially the same" condition is always met. The logical consequence would be that sustainability benefits could be credited against harm resulting from an agreement.[41]

32. The case law of the European Community Courts also appears to support the notion that "out-of-market" efficiencies can be taken on board when evaluating the efficiencies of agreements under Article 101 TFEU.[42] Some national courts have done this as well.[43]

IV. Concluding Observations and Recommendations

33. The above discussion provides *Business at OECD*'s assessment of the unnecessarily diverging approaches that competition agencies have taken to the incorporation of environmental and other sustainability interests into competition enforcement. The U.S., in particular, appears to have rejected the environmental interests as a consideration in its analysis. While the EU and its members have made efforts to take environmental concerns into account, the approach has been *ad hoc* and has resulted in diverging outcomes with no clear analytical framework. In light of this, *Business at OECD* strongly recommends that agencies work towards a transparent and consistent approach to factor sustainability benefits into the analysis of potentially anti-competitive agreements.[44] In fact, it is difficult to imagine a topic on which global convergence is more pressing since the challenges and many of the most significant initiatives to address them are global. Specific attention in this respect should be given to the methodologies to

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[40] Case COMP/AT.39595, *supra* note 39, ¶ 57. This approach is not satisfactory as a matter of economics. But there may be (political) reasons not to credit out of market efficiencies: for example, what if the harm is to customers in a small country, but the benefits are to customers in a large country?

[41] The draft Dutch Guidelines on Sustainability Agreements acknowledge the principle used by the European Commission that users should be compensated at least for the harm caused by the restriction of competition to them. In that context, users should, for each relevant market, be seen as a group. ACM, the Dutch agency, believes there is good reason to deviate from this basic principle if two criteria are met: (i) the agreement aims to prevent or limit any obvious environmental damage; and (ii) the agreement helps, in an efficient manner, comply with an international or national standard to prevent environmental damage to which the government is bound. The draft states that that, with regard to environmental-damage agreements, it should be possible to take into account benefits for others than merely the users, including the society as a whole. *See* Auth. Consumers & Mkts., Draft Guidelines: Sustainability Agreements (July 2020), *available at* https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

[42] The Court of First Instance in 2002 pointed out in *Compagnie Générale Maritime* that "the advantages arising from the agreement in question, not only for the relevant market, . . . but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement." Case T-86/95, Compagnie Générale Maritime v. Comm'n, 202 E.C.R. II-01011, ¶ 343. In *Mastercard*, the General Court pointed out that "the appreciable objective advantages to which the first condition of article 81(3) EC relates may arise not only for the relevant market but also for every other market on which the agreement in question might have beneficial effects." Case T-111/08, MasterCard Inc. v. Comm'n, ¶ 228, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008TJ0111.

[43] For example, a German court upheld the German competition authority's decision that had found that the federal state of Baden-Württemberg had infringed competition law by engaging in a distribution cartel with private and public forest owners, holding that sustainability concerns related to management of forests, climate, water balance or clean air could not be taken into account within Article 101(3). Judgment of the Dusseldorf Higher Regional Court of 15 March 2017, ¶ 335.

[44] While *Business at OECD* supports the recent initiatives taken by countries such as The Netherlands, Germany, France and Greece, it notes the risk that these sustainability initiatives may lead to a patchwork of regulation that may be difficult for business to navigate.

account for (i) sustainability benefits for the entire society; (ii) "out of market" efficiencies; and (iii) benefits for non-users (e.g., employees).

34. In addition to the need for a general framework that is more hospitable to environmental and other sustainable benefits, *Business at OECD* encourages national competition agencies to consider the use of safe harbors for business ventures that are most likely to generate sustainability efficiencies. For instance, it would be appropriate for the European Commission to consider including a specific section on environmental and sustainable cooperation in the context of the future Horizontal Guidelines.

35. Once it is accepted that horizontal agreements aimed at attaining sustainability goals should not be considered naked restraints, the next step in enforcement is for the agencies to establish better and more tools for guidance on the types of agreements that enhance overall welfare. At a minimum, the agencies should collaborate on a consistent and transparent process to allow business to submit their proposed arrangement for an *ex ante* legal opinion. While the methods of substantive analysis are admittedly a more difficult issue, *Business at OECD* submits that progress can be achieved by invoking the combined resources of the competition agencies, economists, and business community, with the goal of reaching some consensus on how sustainable benefits should be measured and weighed against competitive costs. A prerequisite to this approach is the explicit recognition by competition agencies that sustainable benefits are economic and cognizable efficiencies.