

**Comments by the
Business at OECD (BIAC) Competition Committee
to the OECD Competition Committee**

Competition in the Circular Economy

June 15, 2023

I. Introduction

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

2. 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.

3. 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.

4. 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.

II. The Circular Economy

5. The circular economy affects many sectors in the economy. It is a model of production and consumption that involves sharing, leasing, reusing, repairing, refurbishing, and recycling existing materials and products for as long as possible with the aim to tackle global challenges such as climate change, biodiversity loss, waste, and pollution. In contrast, in a linear economy, natural resources are turned into products that are ultimately destined to become waste.

6. Many countries have introduced legislation to further achieve sustainability and environmental goals, and it is recognised that these measures must coexist alongside competition law policies. For example, the European Commission published on March 30, 2022, a “Circular Economy Package” that forms part of a broader wave of legislative reforms connected to Europe’s transition to a green economy. At the same time, the European Commission is updating its guidance for collaboration agreements in its Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-Operation Agreements

(Guidelines).¹ In line with the European Green Deal, the draft Guidelines contain a new chapter on how to self-assess horizontal sustainability agreements.

7. There is growing pressure from national governments, international organizations, NGOs, and consumers, demanding that companies develop business models that are clean and sustainable, including by reducing the use of plastic and other non-sustainable materials, increasing the use of returnables and recycled products, reducing carbon emissions, and replacing traditional equipment with clean energy solutions, while continuing supplying quality products at affordable prices. Companies want to innovate and challenge their competitors while at the same time, they need to keep costs down and affordable for their customers.

8. However, in the circular economy, many practices that are commendable from the point of view of our society may lead to increased costs for businesses. Some of these costs are then passed on to consumers. Such practices might consist of taking back packaging material (cardboard or glass) or used objects (such as furniture, textiles, electronics, batteries, and others) and, in the production chain, use either material that is more fit for recycling or more sustainable production processes.

9. There are many instances in which governments legislate to foster change in companies' behaviour such as the EU Waste Packaging Directive (which sets out recycling targets and aims to reduce packaging waste)² or the imposition on companies of a minimum price for plastic bags to incentivise customers to reuse them. Legislation, however, is not enough. In many instances industry players may have to act together with others who are often their competitors by either setting industry standards or entering into cooperation agreements that would accelerate the sustainability transition or reduce collective costs.

10. The adoption of certain sustainability practices may increase costs for companies (such as using a more expensive but better recyclable material), and therefore industry players are unlikely to take these actions on their own – businesses might fear losing customers if they make the switch while others do not. In the circular economy, whoever moves first cannot be said to always have an advantage but rather a cost disadvantage. Therefore, there is often a need to cooperate by setting up sectoral agreements or standards as well as entering into cooperation agreements between competitors. Many of these activities might raise competition law questions.

III. The Circular Economy and Competition Law

A. Acting Alone – First-Mover Disadvantage

11. There is much for enterprises to consider when progressing sustainability principles. Except in circumstances where doing so yields direct marketing advantages (usually to consumers), businesses do not typically have the incentives to be the first to make the change and incur the cost of investing in initiatives that do not have a direct return. Equally, they do not want to be left behind if other companies make the switch to be more sustainable and they do not. Indeed, there is recognition that the “first mover” has a disadvantage³ – increased costs for companies that alter manufacturing processes and materials used, which may result in the loss of customers to competitors who have not made the same changes.

¹ See *Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines*, EUR. COMM'N, https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

² European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, 1994 O.J. (L 365) 10.

³ See Competition & Mkts. Auth., *Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to Environmental sustainability agreements*, CMA177 (Feb. 28, 2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document_.pdf [hereinafter CMA Draft Guidance].

12. In order to overcome this disadvantage, one option is for companies to understand whether their competitors will undertake the same investments and changes. This will give companies comfort that they can each work towards environmental objectives without being at a competitive disadvantage. In concept, if permitted, these interactions may also potentially lead to sector wide arrangements about the processes, materials and goals that will be used. These arrangements could cover the use of certain processes, technical standards, or agreements that would improve the sustainability and climate impact of their products.

B. Standards and Voluntary Codes of Conduct

13. Competitors might want to enter into standardisation agreements to harmonise certain aspects of products, for example sustainable packaging materials to facilitate less waste or production technology to reduce carbon emissions. An example is establishing a green label or logo for products that meet certain minimum requirements so companies that meet that standard can use the logo. The adoption of such standard can be costly if it requires changes to products or the operation. While in many instances the adoption of such standards would be pro-competitive and would afford consumers a more informed choice, there are some competition issues that can arise. The draft EU horizontal guidance provides a clear example of what the EU authorities will consider when looking at standards in this area:

- The process for developing the standard must be transparent and all interested competitors can participate in the process.
- The standard should not impose on undertakings that do not wish to participate in the standard an obligation to comply with the standard.
- Participating undertakings should remain free to adopt for themselves a higher sustainability standard that the one agreed with the other parties to the agreement.
- The parties to the standard should not exchange commercially sensitive information that is not necessary for the development, adoption, or the modification of the standard.
- Effective and non-discriminatory access to the outcome of the standardisation procedure should be ensured.
- The standard should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market.
- There should be a mechanism or a monitoring system in place to ensure that undertakings that adopt the standard comply with the requirement of the standard.

14. The European Commission has applied such principles in several cases such as *Eco-Emballages* in France⁴ and *DSD* in Germany.⁵

C. Agreements

15. In many instances, it might be less costly and more efficient for certain companies to achieve and accelerate sustainability goals by agreeing to eliminate first-mover disadvantages and sharing costs. For example, two soft drinks producers could agree to jointly set up a recycling facility for their bottles. In fact, a recent example involves an initiative between Coca-Cola, Pepsi-Cola, and Dr. Pepper where the

⁴ Commission Decision of 15 June 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/34.950 – Eco-Emballages), 2001 O.J. (L 233) 37.

⁵ Commission Decision of 20 April 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/34493 – DSD), 2001 O.J. (L 166) 1.

companies teamed up “to tackle America’s plastic waste problem through a multi-faceted industry initiative called ‘Every Bottle Back.’”⁶ This initiative includes four core components:

- Reducing the use of new (virgin) plastic in the U.S. Progress will be measured using WWF’s ReSource: Plastic accounting methodology, and data collected will be used to drive actionable solutions.
- Investing \$100 million to improve the sorting, processing, and collection of discarded plastic bottles in four key U.S. regions. The industry-backed fund, which will be administered by the Recycling Partnership and Closed Loop Partners, will attract an additional \$300 million in matching grants and investment to increase the amount of recycled plastic available to be remade into beverage bottles.
- Launching a public awareness and community outreach campaign to promote both recycling and the value of 100% recyclable bottles. According to a poll conducted by Public Opinion Strategies (POS) on behalf of ABA, nearly half of U.S. consumers are unaware that the country’s leading beverage companies are making 100% recyclable bottles.
- Working together to use packaging to remind consumers that PET bottles are 100% recyclable and can be remade into new bottles. U.S. beverage companies began to introduce voluntary messaging on packaging labels in late 2020.

16. Moreover, within the EU, five food companies (Mars, Mondelēz International, Nestlé, PepsiCo, and Unilever) have cooperated to create the “Flexible Packaging Initiative.”⁷ As part of this, the companies have committed to increasing investment and providing support for a series of public policy interventions to accelerate the transition toward a circular economy for flexible packaging across Europe.

17. Another EU initiative, the Circular Economy for Flexible Packaging (CEFLEX), is a collaboration of over 180 European companies, associations and organisations that represent the entire value chain of flexible packaging and work together to make all flexible packaging in Europe circular by 2025.⁸

18. As noted, it is clear that these initiatives would not have occurred without cooperation among different parties. Indeed, as Coca-Cola stated in its press release: “We know we cannot do this alone and, in order to meet our goals and those of our industry, we need to work in partnership to drive collective action to ensure our bottles have second, third and fourth lives through continued recycling and re-use.”⁹

D. Circular Economy and Competition Law

19. The increased scope for self-regulation and the accompanying need for cooperation amongst competitors raises complex questions and concerns that such agreements may be seen to be anticompetitive. Cooperation between businesses where, for example, they all agree to switch to being sustainable together, leads to coordinated behaviour. There is a risk that such behaviour, even when highly beneficial to society overall, could be pursued as an alleged infringement.

20. Furthermore, given the cost implications of sustainability, there is an incentive for companies to enter into collaboration agreements with their competitors to reduce costs, share resources, and agree a common position. Cooperation may also necessitate a certain degree of information being shared between those involved.

21. To the extent that competition law considers only the potential coordination among competitors and any negative effects, and fails to embrace the synergies, efficiencies, and extra-market benefits of

⁶ Press Release, The Coca-Cola Co., Coca-Cola Joins Industry Effort to Reduce Use and Boost Collection of Plastic (Oct. 28, 2019), <https://www.coca-colacompany.com/news/coca-cola-reduces-use-of-plastic>.

⁷ Flexible packaging Initiative, <https://flexiblepackaginginitiative.eu/>.

⁸ CEFLEX, <https://ceflex.eu/>.

⁹ Coca-Cola Press Release, *supra* note 6.

coordinated behaviour, it may inhibit collective action that stands to materially benefit society. Companies may have the means and ability to substantially reduce pollution and improve the environment but may be hamstrung by the potential liability that might accompany such joint activity. It seems therefore that not all competition law concerns can be reconciled with objectives in a circular economy. This tension raises an important question: in which circumstances business conduct that may result in some restriction of competition should be considered desirable if it pursues a legitimate goal in relation to sustainability.

22. It is worth stating that BIAC agrees with competition authorities that blanket dismissal of competition considerations under the umbrella of apparent sustainability is not desirable, as the protection of competition is an extremely important objective. The protection of the environment is also important, and the two might in some cases be at loggerheads. But we auspicate a more flexible approach, which entails that authorities become more receptive, or at least less visibly hostile, to efficiency considerations.

IV. Competition Law and Exception for the Circular Economy

23. Competition frameworks generally have clear rules about anti-competitive behaviour. Nonetheless, where an agreement is found to be in breach of competition law, an exemption to the rules may apply where certain criteria are met, and efficiencies are found. Such is the case in Europe.

24. When determining whether any exemption will apply, regulators will consider the restrictions in place in light of a number of factors including indispensability, consumer benefit, efficiency gains and the elimination of competition. There is therefore in theory leeway and scope for regulators to take account of the benefits of the producers cooperating with each other in the circular economy, recognising that not all agreements between competitors are illegal and some, while prima facie anticompetitive, are in fact beneficial.

25. However, there is currently a lot of uncertainty on whether non-economic goals should be taken into account as efficiencies. In its draft guidelines, the EU states that the parties are allowed to prove that their agreement genuinely pursues a sustainability goal and is not a disguised restriction by object. If such defence is successful, the restriction will be analysed as a restriction by effect meaning that it will only be prohibited if it can be proven to effectively restrict competition. But some restrictions will be considered always an infringement by object: an example is an agreement on how to translate increased costs resulting from the adoption of a sustainability standard into increased sales prices or an agreement to put pressure on third parties to refrain from marketing products that do not comply with a sustainability standard.

A. Guidelines and Guidance

26. Some competition authorities, such as the Netherlands Authority for Consumers and Markets (ACM), Austria's Federal Competition Authority, the UK Competition and Markets Authority (CMA), Japan's Fair Trade Commission, and DG Comp in the EU, have started to consider sustainability in the competition law world and prepared some guidance for businesses. A few national competition authorities (e.g., France and Italy) have indicated that they will do so, too. Some of the guidance is quite helpful and it goes further than the traditional guidance on cooperation agreements.

27. For example, the draft document issued by the UK CMA on February 28, 2023 (Guidance) sets out what may be considered to be a "consumer" when looking at whether consumer benefits are achieved.¹⁰ This criterion has always been extremely important as part of the exemption framework and as a general rule, the criterion will be met where the benefit to consumers is economic. The Guidance states that the parties need to be able to show that the benefits that result from the agreement are passed on to UK

¹⁰ CMA Draft Guidance, *supra* note 3, at 22-24.

consumers and that those benefits outweigh the harm that UK consumers will suffer as a result of the agreement.¹¹ The relevant consumers are those who consume the products and services to which the agreement relates. It is not normally appropriate to offset the harm to consumers in one market against the benefits arising to a different set of consumers in another market. However, the Guidance acknowledges that when two markets are related, benefits achieved on separate markets can be taken into account provided that the consumers affected by the restriction and receiving the benefit are substantially the same or substantially overlap.¹² But going further, the Guidance acknowledges that for climate change agreements, “fair share to consumers” includes the totality of UK consumers rather than apportioning those benefits between consumers within the market affected by the agreement and those in other markets.¹³

28. In the circular economy, the consumers within the market affected by the agreement and those in other markets might not always be the same, so this recognition of how to assess the benefits to consumers in this area is extremely important.

29. Similarly in the EU, the European Commission’s revised 2022 *Guidelines on Vertical Restraints* refer explicitly to sustainability objectives which must be taken into account when assessing vertical agreements under Article 101 TFEU and contain examples of certain vertical agreements that promote sustainability objectives, thereby benefitting from an exemption under Article 101(3) TFEU.¹⁴ For example, selective distribution systems may include certain qualitative criteria (e.g., suppliers could require distributors to provide recharging services or recycling facilities in their outlets or to ensure that goods are delivered via sustainable means) or agreements could include non-compete obligations aimed at securing the long-term viability of green investments

30. In addition, the Commission’s draft guidelines on horizontal cooperation have a new section on how to self-assess horizontal sustainability agreements.¹⁵ This is a new category of agreement, which often have positive effects on competition because they contribute to sustainable development, enabling new products or markets, while improving product quality, or supply or distribution conditions. The draft Guidelines provide a “soft safe harbour” for such agreements where seven cumulative conditions are fulfilled. If all seven conditions are satisfied, the agreement is unlikely to produce appreciable negative effects on competition and will therefore be exempt from the scope of the Article 101(1) TFEU.¹⁶

31. As part of the analysis, the Commission has confirmed that it will take a broad view of benefits that are relevant to the competitive analysis, in particular in relation to consumers. While consumer benefits typically derive from the direct consumption or the use of the products (improved quality or a price decrease due to cost efficiencies), the Commission has acknowledged that for sustainability agreements, benefits may also be indirect (e.g., as a result of the impact of their sustainable consumption on others).

30. Further, individual consumption may lead to sustainability benefits to a larger group of the society or contribute substantially to an ecologically sustainable or climate-neutral economy. For example, the Guidelines note that consumers may be unwilling to pay a higher price for a product produced with a green but expensive technology. To ensure that the benefits related to the use of that green technology materialise, a collaboration agreement within the sector to phase out the polluting technology may be necessary. This is referred to as “collective benefits,” because they can benefit a wider group of consumers in the relevant market. However, for a restriction to be justified by collective benefits, there needs to be a significant overlap between those who suffer the harm of the restriction and those who benefit. However, by requiring

¹¹ *Id.* at 21.

¹² *Id.* at 22-23.

¹³ *Id.* at 25.

¹⁴ Guidelines on Vertical Restraints 2022/C 248/01, 2022 O.J. (C 248) 1, ¶ 8.

¹⁵ Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Mar. 1, 2022), available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

¹⁶ *Id.* at 136-137.

that collective benefits accrue to consumers in the relevant market (or show consumers' willingness to pay), the Commission takes approach which can be considered too narrow. For climate change, which is a global issue, environmental benefits accrue to all.

32. The U.S. authorities have had little to say on issues relating to sustainability. In testimony before the U.S. Congress, both AAG Kanter and FTC Chair Khan have made their views clear that there is no exception to the U.S. antitrust laws for environmental, social and governance (ESG) initiatives. They testified that they would act against any collusive agreements that lessened supply, and that ESG considerations, and in addition, that ESG efficiencies would “never” be sufficiently compelling to approve a merger that had potential anticompetitive effects.

33. At the state level in the U.S., issues relating to sustainability have sometimes become a political issue, as reflected in the recent action by 22 Republican State Attorneys General demanding 28 insurance companies provide documents and communications to establish their relationship with two insurance-related alliances and the commitments they may have made to limit the use of fossil fuels to curb climate change. The attorneys general argue that the alliances could violate antitrust laws as they push companies to align with the Paris Agreement.

34. The American Bar Association, however, has prepared a detailed and extremely well-reasoned report analysing issues of sustainability and the circumstances in which joint action might be consistent with, or contrary to, competition principles.¹⁷ The document evaluates parameters of competition, horizontal and vertical agreements, the quantifiability and beneficiaries of sustainability agreements, theories of harm, efficiency defences and more. In short, it is a useful reference for holistic consideration of competition issues related to sustainability.¹⁸

V. The Need for Guidance and Informal Advice

35. Regulators should provide certainty for businesses who are committed to achieving sustainability objectives. To achieve the circular economy, the application of competition law cannot be rigid and inflexible, and regulators must be more open to considering the criteria what the parties are seeking to achieve and in light of future effects and benefits.

36. The guidance must be clear, enabling businesses to proceed within a clearly defined set of boundaries. To be successful, there must not only be incentives for businesses to collaborate but also guidance as to how to manage the collaboration. There must be certainty, so businesses understand what is considered acceptable from a competition law point of view, while seeking to realise environmental objectives.

37. Without certainty, businesses are unlikely to join with others in their sector. Moreover, the first-mover disadvantage acknowledged above would result in a reluctance to branch out on their own.

38. The guidance that authorities are publishing is valuable. But competition authorities should also have an open-door policy in relation to agreements pursuing sustainability objectives. For example, the recently published “Green Guidelines” by the JFTC offer companies the opportunity to engage in public or confidential consultations with staff to assess whether their proposed collaboration would face problems with Japan’s Anti-monopoly Act.¹⁹ Companies should have the possibility to approach the authority,

¹⁷ ABA, Sustainability and Competition Law: Report of the International Developments and Comments Task Force (Aug. 11, 2021), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/august-2021/comments-82621-greece.pdf.

¹⁸ In 2020, The International Chamber of Commerce also prepared a useful report entitled *Competition Policy and Environmental Sustainability*. <https://iccwbo.org/wp-content/uploads/sites/3/2020/12/2020-compolicyandenviromsustainability.pdf>

¹⁹ Japan Fair Trade Comm’n, Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act (Mar. 31, 2023), https://www.jftc.go.jp/file/230331EN_GreenGuidelines.pdf.

discuss potential agreements that pursue sustainability objectives, and gain reasonable certainty of the enforcement risks tied to those agreements. Companies should be required to provide sufficient evidence to the authorities of the impacts and benefits of the action and be able to engage in a productive dialogue aimed to achieve a beneficial outcome.

39. Even “informal advice” about enforcement intentions, which is non-binding, would provide much needed clarity and comfort. It would also be beneficial for any such opinions to be made public so that other companies can benefit from the resulting guidance.

40. One final point is that, while welcoming the flexibility that competition authorities are showing in this area, there is a need for a globally consistent approach by competition authorities.

VI. Conclusion

41. Competition law will and must coexist alongside any circular economy or sustainability ventures. While there is a need for flexibility to ensure environmental goals and measures are achievable, there will be necessary crossover to ensure that the economic market and consumers are not illegally impacted.

42. BIAC considers that the circular economy is important for all and must be considered as an intrinsic part of business planning. Environmental protection and the circular economy must be a global endeavour, with competition law applying to any agreements between businesses. There are rules in place to ensure that infringements are dealt with, but there must be flexibility in the regulators’ approach, as businesses need reasonable certainty.

43. In light of the goals of the 3Rs and the circular economy, it must be queried whether costly investigations and financial penalties on the parties to agreements legitimately focused on environmental sustainability is the correct approach for regulators. It is laudable that businesses wish to be sustainable and alongside this, regulators must be flexible in their approach to the application of competition law. Legitimate collaboration must be encouraged.

44. BIAC welcomes the guidance that authorities are providing and encourages more authorities to do likewise and to operate in a consistent manner globally.