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COMPETITION AND CONSUMER PROTECTION POLICIES **FOR SUSTAINABILITY**

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NOTE

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I. INTRODUCTION

The World Commission on Environment and Development published *Our Common Future* in 1987, also known as the Brundtland Report, stating that development should be sustainable to "ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs".[1] As noted in the report, there are "three main interdependent domains of action that are necessary to guarantee sustainable development translated into economic growth, social development and environmental protection".[2] For example, pursuing and achieving economic growth without considering environmental impacts can imply significant costs in counteracting negative externalities in the future.

The United Nations is leading efforts to foster sustainable development. In 2015, Member States adopted the 2030 Agenda for Sustainable Development as a universal call to action to end poverty, protect the planet and ensure that, by 2030, all people enjoy peace and prosperity.[3] Sustainable Development Goal 12 on ensuring responsible consumption and production patterns includes targets applicable to various stakeholders, including Governments, businesses and consumers.

UNCTAD recently provided a significant contribution. Member States, at the fifteenth session of the United Nations Conference on Trade and Development, in the Bridgetown Covenant, identified climate change, biodiversity loss and environmental degradation as key challenges for sustainable development. In addition, they stated that the present situation "presents a significant challenge regarding how to ensure an increase in prosperity without unsustainable production and consumption patterns. As the world has prospered over the last decades, yearly emissions of greenhouse gases have increased dramatically, with the negative impacts hitting particularly the most vulnerable and the poorest segments of the population from developing countries. To ensure prosperity for all is achieved and is sustainable, greater emphasis must be placed on decoupling economic growth from environmental degradation, in line with relevant conventions and international agreements."[4]

Competition and consumer protection laws and policies play a key role in supporting sustainability initiatives, as they address market failures and help provide a level playing field in which businesses and consumers can make the best choices. Businesses are driven to innovate production, distribution and sales processes in order to attain sustainability advantages if they result in greater profitability. For sustainable choices to be preferred by consumers, clear and accurate information must be transmitted to them and understood. In turn, empowered consumers are a driving force in encouraging business innovation, investment and competition with regard to sustainability. Businesses worldwide are increasingly taking responsibility for developing a more sustainable economy by setting higher standards than those required by law.[5] Often, they act individually, but sometimes coordinated action with competitors may be needed to reach a certain outcome. Competition law, in principle, prohibits cooperation agreements and, therefore, there might be circumstances in which competition law and sustainability initiatives are in conflict. To encourage sustainability initiatives, the competition authorities of member States are increasingly providing guidance on what is admissible under competition law. A debate is taking place among competition experts on which types of sustainability benefits should count as efficiency gains that offset anticompetitive effects, if at all.[6] Further discussions are required to determine whether different types of sustainability benefits, such as limiting climate change-related effects and conserving biodiversity, could be considered factors that could modulate the enforcement of competition law. Labour and animal welfare standards that traditionally fall outside the scope of antitrust review are increasingly considered in competition analysis. Although such standards can be related to sustainability goals, they are more readily incorporated into existing antitrust frameworks.[7]

With regard to consumer protection, the notion of consumers as passive receivers of goods and services is giving way to the consideration of consumers as actors for change. Issues such as the use of non-reusable plastic or the sustainability of food parcels being delivered in plastic have heightened awareness among consumers of the common and shared responsibility to transition to a greener economy worldwide.[8] A recent study shows that young consumers are more likely to choose brands based on ethical values and lessen meat and animal product consumption; however, across the demographic board, between 1 in 10 and

1 in 3 agree with the statement "the biggest obstacle to adopting more sustainability-based consumer behaviours is quite simply apathy", suggesting that brands need to do more to engage with consumers.[9] In order to overcome such apathy, it is important to inform consumers of the social, economic and environmental impacts of their choices, while ensuring that sustainable goods and services are produced and made available to all. Another recent survey shows that respect for biodiversity is gaining relevance among consumers and impacting their choices: 62 per cent of surveyed participants bought products from companies they believed respected biodiversity and 82 per cent considered that companies had a moral obligation to ensure they had a positive impact on people and biodiversity.[10] In addition, the Biodiversity Barometer shows that awareness of biodiversity is particularly high among consumers in countries with a high level of biodiversity, such as Brazil, China, Colombia and Viet Nam.[11] A variety of tools to promote sustainability have been implemented including, but not limited to, taxes and charges, standards and mandatory labels and public subsidies and incentives. For example, over 120 countries have adopted some form of legislation to regulate plastic bags; Kenya introduced a ban on plastic bags in 2017 and the United Kingdom, in 2021, obligated retailers of any size to charge a minimum of £0.10 for plastic bags.[12]

Consumer empowerment and voluntary business efforts can significantly promote sustainable consumption and production. When empowered consumers value the importance of sustainable products and make well-informed decisions, businesses may be encouraged to compete with regard to sustainability. Increasing concern about the environment also encourages consumers to access information about the manufacturing and supply chains of businesses; 68 per cent of highly empowered consumers plan to step up their efforts to identify brands that reduce their environmental impact and 61 per cent seek out energy efficient labels when making purchases.[13] In this regard, competition and consumer protection policies intersect with sustainability. Businesses innovate production, distribution and sales processes in order to gain sustainability advantages if consumers value the importance of sustainability and are informed about its attributes in products. Empowered consumers can be a driving force, to encourage business innovation, investment and competition on sustainability.

The interplay between competition law and sustainability is explored in this report, followed by a stocktaking of initiatives undertaken by competition authorities. In addition, the promotion of sustainable consumption is addressed through the lens of consumer protection policy, with examples from different jurisdictions on consumer information and education, business initiatives towards consumers and enforcement and guidance actions undertaken by consumer protection authorities.

II. COMPETITION AND SUSTAINABILITY

Most jurisdictions do not currently consider sustainability in competition analysis; however, the two issues have already begun to interact. The examples in this section show how, even without a fixed approach, competition authorities will need to contend with both in the near future.

In July 2021, the European Commission found that three car manufacturers had breached article 101(1) of the Treaty on the Functioning of the European Union, which prohibits cartels and other restrictive business practices, by colluding on technical development in nitrogen oxide cleaning, whereby the manufacturers possessed the technology to reduce harmful emissions beyond legally required levels under European Union emissions standards yet avoided competing in the use of the full potential of the technology, thereby denying consumers the ability to choose less-polluting vehicles; and the Commission imposed a fine of €875,189,000.[14] The firms were not fined based on damage to the environment, yet the case indicates that firms have recognized sustainability as a factor that is important in consumer choice and that antitrust analysis can, at minimum, include a consideration of the environmental effects of some anticompetitive activity. In addition, it demonstrates that competition authorities need to be educated about environmental concerns, to identify suspect behaviour.

Merger control has already begun to interact with sustainability concerns. In Brazil, in 2008, biodiversity was considered in a merger review involving the acquisition of a bird breeding business, whereby the transaction was expected to considerably reduce production costs, but also harmed biodiversity by limiting the genetic variety of birds available to humans.[15] Article 170 of the Federal Constitution of 1988 establishes environmental protection and free competition as economic principles, and the Administrative Council for Economic Defense considered whether biodiversity issues should be included in the competition assessment, concluding that the merging parties should not dispose of genetic lines acquired in the short term since it would not be possible to compensate the reduction of genetic variety through efficiencies generated by the new business.

In 2010, the Competition Commission of South Africa initially prohibited a merger between two firms – one the then-largest independent seed company in South Africa, with an extensive maize germplasm inventory, and the other a major United States of America-based subsidiary of a leading American multinational chemical company – on the grounds that it would substantially lessen competition in the maize seed market, then approved the merger with conditions.[16] The merger had environmental impacts in South Africa, and the African Centre for Biodiversity raised ecological concerns, including regarding the likely genetic modification of maize seeds, stating that seeds were “at the heart of a healthy food system” and that farmers had “nurtured thousands of varieties, adapting these to changing conditions with each growing season”.[17] An ex post assessment of the merger noted the negative effects on seed varieties and in other biodiversity-related areas.[18] The case demonstrates that mergers, and other competitive behaviour, can impact ecological sustainability, and that competition authorities can increasingly be called upon to contend with such issues.

The approaches taken in and the results of the two cases differ, yet they both demonstrate that environmental concerns have a place in antitrust analysis. In the former example from Brazil, the competition authority explicitly addressed ecological concerns. Competition authorities will need to contend with such concerns as sustainability issues become more important among the public. Currently, however, a universally accepted method for incorporating sustainability in economic competition analysis is not available.

In this chapter, countries and agencies that have begun to account for sustainability in competition enforcement are highlighted. This reflects the trend of allowing exceptions for anticompetitive activity where it provides ecological benefits.[19] However, this is not a universally accepted view and there are economic arguments to the contrary, which state that attempting to incorporate both ecological and economic concerns into antitrust analysis can harm both; that there are no grounds to believe that competition restrictions will incentivize firms to take more sustainable approaches; that more stringent competition might further sustainability-related goals more effectively than allowing companies to collaborate or merge; and that allowing firms to cite ecological concerns might offer

the chance to "greenwash" anticompetitive activities, allowing them to continue to harm consumers economically and to use sustainability as a shield against antitrust enforcement.[20]

If, exceptionally, there have been instances where competition and sustainability-related goals were in sync, antitrust laws and approaches should not be changed to accommodate such rare instances. There appears to be a trend against such a view, yet it is important to understand it in exploring the landscape of sustainability and economic policy.

A. COOPERATION AGREEMENTS ON SUSTAINABILITY

Cooperation agreements can play a key role in sustainable development and the production of sustainable goods. However, investing in sustainable products involves a variety of risks. One of the primary concerns is the possibility of the first mover disadvantage, which includes the increased cost of creating sustainable products and processes that, in turn, necessarily leads to price increases. In addition, if consumers do not value sustainability, or are not well informed about its attributes in products, firms cannot ensure enough sales to recoup the associated costs. Therefore, the first mover may take an outsized risk in creating sustainable goods without a reasonable belief in the success of the products. To counteract this disadvantage, there may be circumstances in which firms need to cooperate or collaborate with competitors. In this regard, the business community has been drawing attention to the fact that competition law, in principle, prohibits cooperation agreements that serve sustainability objectives.

In Indonesia, the palm oil pledge, a voluntary zero deforestation agreement between the Chamber of Commerce and Industry and business actors in the palm oil industry, signed in 2014, was disbanded in 2016 after the Competition Commission decided that, despite ecological benefits, the pledge should not be implemented due to its anticompetitive effects. A key aspect of the pledge was that signatories should buy palm oil only from farmers employing sustainable cultivation methods, which were more expensive than traditional methods and priced out farmers who could not afford to adopt the new methods. The decision is a source of concern among environmental groups, such as Friends of the Earth International Indonesia.[21]

In July 2022, the Authority for Consumers and Markets of the Netherlands stated that an arrangement between soft drink suppliers to discontinue plastic handles on all soft drink and water multipacks would not restrict competition. The Authority determined that the handles did not play a role in the competitive process and that the agreement offered participants the opportunity to continue making their own decisions as to when and how to discontinue adding handles to multipacks. With regard to sustainability claims, "companies must be honest about sustainability aspects and are only allowed to use clear, correct and relevant sustainability claims".[22] The Authority applied the draft guidelines regarding sustainability agreements and found that the following two categories applied in this situation: agreements that incentivize undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings; and agreements that are aimed at improving product quality, while, at the same time, certain products or products that are produced in a less sustainable manner are discontinued.[23] In contrast, the Authority, in a case that served to demonstrate some of the underlying conflicts between competition law enforcement and sustainability initiatives, found that a planned industry-wide agreement in the chicken meat sector did not qualify for an exemption from the cartel prohibition (box 1).

Another example of potential conflicts between competition law and non-economic goals, including sustainability initiatives, may be seen in the investigation by the United States Department of Justice of four motor vehicle manufacturers that collectively agreed to meet the vehicle emissions standards set by the California Air Resources Board, which were more stringent than those set by the United States Government. The Department of Justice considered whether the collective agreement violated antitrust law by limiting consumer choice, with an assistant attorney general stating that popular ends, including environmental protection, could not justify violations of competition law. In 2020, the Department of Justice concluded that no laws had been violated.[24]

B. MERGER CONTROL

Merger regimes can also affect sustainability initiatives. In the European Union, for example, in 2021, the European Commission Directorate General for Competition noted that the preference of consumers for sustainable products, services and technologies

BOX 1
The Netherlands: Decision on sustainable chicken meat

In 2013, an industry-wide agreement on sustainable chicken meat (referred to as the "chicken of tomorrow") was reached between producers, suppliers and retailers, primarily aimed at improving the welfare of chickens purchased by supermarkets. Among others, the new standards included a slower growing chicken (with a lifetime of 45 rather than 40 days), fewer chickens per square meter in barns (19 rather than 21), more dark hours and various environmental measures. The parties agreed to completely replace all chickens in participating supermarkets in the Netherlands with sustainable chicken meat by 2020, which would cover around 95 per cent of all chickens sold to consumers. Prices were not covered under the agreement. In addition, the export market was not covered; the Netherlands is one of the largest exporters of broiler meat in Europe and more than half the production of broiler chickens is exported.

The Authority for Consumers and Markets concluded that the agreement breached article 101(1) of the Treaty on the Functioning of the European Union and Netherlands law, and assessed whether the agreement could be exempted on the basis of the four criteria in article 101(3), namely, whether it would contribute to improving the production or distribution process or to promoting technical or economic progress; whether it would allow consumers a fair share of the resulting benefits; whether it did not impose on the parties concerned restrictions not indispensable to achieving these objectives; and whether it did not give the parties any possibility of eliminating competition in respect of substantial elements of the products in question.

The Authority studied the willingness of consumers to pay for the chicken of tomorrow; survey results showed that the additional price consumers were willing to pay was less than the additional cost that the agreement would generate. In addition, supermarkets had already been offering chicken meat produced in more sustainable ways for many years and, therefore, the Authority did not concur that no supermarket would want to be the first to move to more sustainable chicken meat for fear of losing consumers to rivals (i.e. first mover disadvantage). Therefore, the agreement would not meet the fair share and indispensability criteria under article 101(3).

Based on the assessment, in 2015, the Authority announced its decision that the industry-wide agreement would restrict competition in the Netherlands market and the agreement was subsequently terminated.

Source: UNCTAD, based on information provided by the Authority for Consumers and Markets of the Netherlands. See https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow and https://www.acm.nl/en/publications/welfare-todays-chicken-and-chicken-tomorrow.

could be a differentiating factor in conducting merger reviews and defining markets.[25] Such preferences have already affected and will continue to affect merger enforcement, and should be examined by competition authorities. In addition to considering changes in consumer behaviour, the European Commission considered "killer" acquisition, whereby incumbent companies with a strong market position acquire nascent businesses active in "green" innovation. This is of concern as most such innovation is conducted by smaller businesses and the acquisitions involved could fall below merger notification thresholds and, even if they did not, the grounds on which acquisitions could be blocked or have conditions imposed under substantive merger regimes remains unclear.

By contrast, while likely to lessen competition, mergers could contribute to sustainability-related innovation. Under traditional merger review regimes, merging parties must prove that efficiency gains from sustainability outweigh the restrictive effects on competition, as is also the case for cooperation agreements. How efficiencies arising from sustainability should be quantified is as yet unclear, as is the extent to which benefits to society, beyond consumers in the relevant market, may be taken into account as efficiency gains. One proposal is to consider a longer time horizon for societal and sustainability-related gains, to properly account for their relationship with a proposed merger. However, questions remain with regard to out-of-market effects in antitrust and merger analysis.

The United States Federal Trade Commission, in 2019, with regard to an asset purchase agreement between two significant manufacturers and distributors of private label ready-to-eat cereal in the United States,

stated that natural and organic cereals did not belong in the same market as conventional cereals, noting that retailers typically sourced conventional cereals through separate processes; many suppliers of natural and organic cereals were not the same as the suppliers of conventional cereals; and natural and organic cereals tended to have healthier and more expensive inputs and were consequently priced significantly higher than conventional cereals.[26]

In contrast, the European Commission did not define a separate market for non-conventional coffee, such as organic or fairtrade coffee, with regard to a decision on a proposed joint venture in 2015 between two of the leading global coffee manufacturers, from the Netherlands and the United States.[27] A market investigation by the European Commission showed that a supplier active only in conventional coffee would be able to initiate, swiftly and without significant costs, the production and sale of non-conventional coffee and vice versa (supply-side substitutability). This case serves to demonstrate the absence of a fixed approach to defining separate markets for sustainable and unsustainable products.

In some jurisdictions, such as Germany and South Africa, sustainability is one of the public interest factors that may be considered in a merger review. In Germany, the Federal Cartel Office considers whether concentration is likely to "significantly impede effective competition"; other policy considerations, including sustainability, are then taken into account by the Federal Ministry for Economic Affairs and Energy; since the introduction of merger control, there have been 10 successful applications for ministerial authorization.[28] According to the competition act, the Ministry can authorize a merger prohibited by the Federal Cartel Office if the "restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest" and "authorization may be granted only if the scope of the restraint of competition does not jeopardize the market economy system".[29] Public interest includes, but is not limited to, the optimization of resource allocation, technical progress and welfare in general. In addition, competitive effects beyond the relevant market may be considered. For example, in 2019, the Ministry, citing environmental goals, granted authorization for a planned joint venture between two parties that planned to pool plain bearing production activities. The Federal Cartel Office had prohibited the merger after investigations had shown that the two parties were the major competitors in a market that was already highly concentrated and that the merger could exacerbate the situation. Despite competition concerns, the Ministry authorized the merger, subject to conditions, based on the overriding public interest, including with regard to achieving the transition to sustainable energy and environmental objectives.[30] Traditionally, ministerial approval is only granted in exceptional cases based on public interest considerations, and the competition authority continues to monitor the companies concerned. This case serves to demonstrate the significant role that sustainability can play in merger review.

In South Africa, Competition Act 89 of 1998 stipulates that public interest should be considered in merger reviews, which enables sustainability to be factored in.[31] If the Competition Commission finds that a merger is likely to substantially prevent or lessen competition, it must then consider several factors stipulated in Competition Act 89, one of which is that a merger can be justified on substantial public interest grounds, including with regard to particular sectors and industries, employment, the ability of small and medium-sized enterprises or firms owned by traditionally disadvantaged persons to enter the market, the ability of national firms to compete in international markets and the promotion of ownership, particularly by traditionally disadvantaged persons and workers. The Commission would likely be able to refer to public interest in particular sectors in order to assess mergers from a sustainability perspective; if the Commission found a substantially negative effect on the environment, it could reject a merger or approve it with conditions.

Competition authorities should provide guidance on what is permitted and prohibited under competition law, to promote sustainability-related initiatives. To that end, the competition authorities in several countries in Europe and the European Commission have amended competition laws or published associated guidelines.[32] For example, in 2021, the Authority for Consumers and Markets of the Netherlands published the second draft guidelines on sustainability agreements (see section C(4)).

C. RECENT TRENDS AND DEVELOPMENTS IN SUSTAINABILITY IN DIFFERENT JURISDICTIONS

1. Australia

The antitrust approach in Australia is suited to examining the relationship between the two issues of

sustainability and competition law. The Competition and Consumer Commission has the power to authorize mergers and anticompetitive arrangements if there is a likely public benefit.[33] With regard to non-mergers, the Commission may allow anticompetitive conduct if it will result in a net public benefit. This is determined by weighing public benefit against public detriment; depending on the type of conduct, if the benefit outweighs the detriment and the conduct does not substantially lessen competition, the Commission may permit it to continue. Public benefit and detriment are not defined in Competition and Consumer Act 2010, but they have traditionally been treated broadly. The Competition Tribunal, which can review Commission authorization decisions, has stated that public benefits include "anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress [and] the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources... efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency"; and described public detriment as "any impairment to the community generally, any harm or damage to the aims pursued by the society, including as one of its principal elements the achievement of the goal of economic efficiency".[34] The Competition and Consumer Act does not limit the Commission to only considering economic efficiencies, and the Commission can take a more nuanced approach in analysis. In practice, the Commission has taken sustainability-focused initiatives into account when judging non-merger authorizations. For example, in 2018, the Commission allowed Tyre Stewardship to continue a scheme that involved the imposition of obligations on participants to commit to the environmentally sound use of used tyres and to only deal with accredited businesses along the supply chain; and a levy of $A0.25 per tyre on importers, to be used in developing and promoting new uses for tyre-derived products. The Commission authorized the scheme although it limited competition because it was likely to increase the number of tyres being disposed of in an environmentally friendly way.[35] The Commission stated that it would monitor the scheme over the period of authorization and, if participation did not improve, would suggest that the Government should consider regulation.[36]

2. Austria

An amendment to the competition law came into force in 2021; changes include the recognition of sustainability as a potential justification for restrictive agreements. The competition law, with regard to restrictive agreements, mirrors article 101 of the Treaty on the Functioning of the European Union, and the amendment expressly acknowledges sustainability, stating that "consumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress significantly contributes to an ecologically sustainable or climate-neutral economy".[37] That is, sustainability agreements do not need to have effects only in the relevant market. In June 2022, the Federal Competition Authority published draft guidelines on sustainability agreements, to provide guidance on how the new exemption will be interpreted and applied; the following five conditions must be met for agreements to benefit from the sustainability exemption: "the cooperation leads to efficiency gains; the efficiency gains contribute to an ecologically sustainable or climate neutral economy; their contribution to an ecologically sustainable or climate neutral economy is substantial; the restrictions imposed by the cooperation are indispensable for the realization of efficiency gains that contribute substantially to an ecologically sustainable or climate neutral economy; and the cooperation does not open up opportunities for competition to be eliminated in respect of a substantial proportion of the goods or services in question".[38] Notably, the exemption applies to agreements not affecting trade between member States of the European Union and is limited to particular types of sustainability goals, namely, contributions to an ecologically sustainable or climate neutral economy including, but not limited to, transition to a circular economy, prevention and reduction of environmental damage, protection and restoration of biodiversity and ecosystems and sustainable use and protection of water resources. Other initiatives related to raising social or moral standards (e.g. labour or animal welfare standards) generally fall outside the scope of antitrust review, but may be considered through the application of traditional criteria, which are purely economic factors used in antitrust analysis.

3. China

The antitrust policy is unique as China is the only country in Asia and the Pacific that has the concept

of environmental sustainability explicitly included in the language of the competition law. The Antimonopoly Law contains prohibitions for horizontal and vertical agreements, among other issues. Article 15 provides for an exemption regime, with particular conditions to be met that would allow for collaboration agreements even if they restricted competition, in particular, the achievement of public benefits such as energy conservation, environmental protection and the provision of disaster relief; to obtain an exemption, an agreement must not seriously restrict competition and consumers must share in the resulting benefits.[39] The inclusion of these provisions is significant and indicates a willingness to consider sustainability in antitrust analysis. A case invoking this article has not yet been published and additional guidance on the matter has not yet been issued.

4. Netherlands

The Authority for Consumers and Markets issued the first draft guidelines on sustainability agreements in 2020 and, following public consultations, issued the second draft in 2021.[40] If a sustainability agreement is brought to the Authority in advance, and the Authority does not identify any major concerns, but the agreement is not compatible with the Competition Act of the Netherlands or article 101(1) of the Treaty on the Functioning of the European Union, the Authority will not subsequently impose a fine. At present, a timeline for when parties need to approach the Authority with proposed plans has not been defined. However, given this practice, businesses may be encouraged to present their sustainability plans to the Authority, rather than abandoning sustainable options because of concerns about competition enforcement. Environmental damage is defined in the guidelines as damage to the environment in the production and consumption of goods or services, such as from the emission of harmful air pollutants and greenhouse gases or from raw material waste.[41] With regard to the interpretation of fair share under article 101(3), the guidelines make a distinction between environmental damage agreements and other sustainability agreements, whereby if an environmental damage agreement helps, in an efficient manner, to comply with an international or national standard, or to achieve a concrete policy goal (to prevent such damage), users do not need to be compensated in full. The Authority states as follows: "It should be possible [to] take into account benefits for others than merely those of the users. In such situations, it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions."[42] The guidelines seem to maintain the same approach as shown in the Authority decision on chicken meat; as shown in an example consideration of whether users are allowed a fair share of the benefits (box 2), the guidelines indicate that an agreement to improve animal welfare does not qualify as an environmental damage agreement and, as such, is not exempt from the cartel prohibition, unless

BOX 2
The Netherlands: Guidelines on sustainability claims, example scenario

Five pig slaughterhouses wish to enter into an agreement covering the Netherlands market, whereby they will only offer pork that has certain green features, namely, in procuring pigs, several standards will be applied, aimed at improving the living conditions of pigs. The slaughterhouses have a combined market share of 80 per cent in terms of pork sales in the Netherlands. The competition analysis shows that this pork will become more expensive for consumers, at first by 10 per cent and, subsequently, as a result of economies of scale, by slightly less than 5 per cent at the end of a 10-year period. A similar improvement in living conditions for pigs cannot be achieved in a way that is less anticompetitive, because economies of scale can only be achieved through a market-wide agreement. The Authority for Consumers and Markets must consider the combined market share of the participating slaughterhouses and the projected price increase, and needs to make a quantitative assessment. Research has shown that consumers value the animal welfare standards of the new product and animal welfare can therefore be considered a qualitative improvement with regard to the product. However, consumers are willing to pay, on average, 3 per cent more for such meat, which is not enough to compensate them for the financial detriment due to the agreement. The Authority therefore decides that the agreement cannot be exempt from the cartel prohibition.

Source: UNCTAD, based on Authority for Consumers and Markets, Netherlands, 2021.

consumers are fully compensated by the benefits, which can be qualified based on willingness to pay the expected increased price.

5. New Zealand

The Commerce Commission generally "hold[s] the position that competition legislation should remain focused on protecting the competitive process by applying a consumer welfare standard".[43] However, competition framework exemptions and case history in New Zealand show that sustainability factors may be considered when appropriate. In New Zealand, changes that lessen competition may be permitted if they promote broader welfare, including welfare derived from sustainability-related initiatives not usually considered in competition analysis. Firms can apply to the Commerce Commission for authorization of a merger or arrangement that would otherwise be prohibited under Commerce Act 1986.[44] If the merger or arrangement will be of benefit to the public, it will be approved. This test was not designed to target sustainability, but has been used to account for sustainability-related goals in New Zealand. The High Court has previously endorsed comments that public benefit is anything of value to the community generally, "including the achievement of economic goals of efficiency and progress," but stated that such efficiency considerations "do not exhaust society's interest in the conduct of business that is the subject of the Commerce Act" and that the more efficient use of society's resources was therefore a benefit to the public deserving weight.[45] In two cases in 2001 and 2018, the High Court used the public benefit analysis in conjunction with ecological interests, accepting the relevant submissions from the Commerce Commission regarding the environment in making its public benefit determinations. For example, in 2011, the Commerce Commission approved an agreement between refrigerant wholesalers that agreed to supply refrigerants only to customers trained and licensed to safely handle them, partially because of the environmental benefits of the arrangement.[46] New Zealand does not have laws that link sustainability with competition, yet the comprehensive framework in place allows for the consideration of sustainability-related initiatives when appropriate.

6. United Kingdom

In 2021, the Competition and Markets Authority issued an information document for firms that clarified how to make sustainability-related agreements compliant with competition law.[47] In addition, the Authority published advice on how competition and consumer laws could contribute to meeting national environmental goals, noting that competition law was flexible and did not prevent firms from acting sustainably as, for example, it was already possible for companies to work together to lessen the environmental impact of their sector, by pooling resources or expertise, without breaching competition rules; and launched a task force within the Authority dedicated to sustainability issues, to lead engagement with relevant stakeholders, including government and partner organizations.[48]

7. European Union

In 2019, the European Commission presented a set of policy initiatives aimed at making the region climate neutral by 2050 ("European Green Deal") and stated that competition enforcers needed to ensure that they were doing their share in support of green policies.[49] If a restriction of competition under article 101(1) of the Treaty on the Functioning of the European Union has been determined, an exemption may be granted under article 101(3) if the following four criteria are satisfied: the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; consumers must receive a fair share of the resulting benefits; the restrictions must be essential to achieving these objectives; and the agreement must not give the parties any possibility of eliminating competition in respect of substantial elements of the products in question.[50] The European Commission, in a decision in 1999 related to a proceeding regarding the domestic washing machines product market, recognized collective environmental benefits as a category under the criterion of contribution to economic or technical progress.[51] European importers and manufacturers of washing machines agreed to phase out energy inefficient washing machines and applied for an exemption under article 101(3); the Commission approved the agreement, stating that the benefits to society brought about by the agreement appeared to be more than seven times greater than the increased purchase costs of more energy efficient washing machines and that "such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines".[52] In addition, individual purchasers were expected to recoup the increased costs of more expensive washing machines through

savings on electricity bills within nine to 40 months, depending on frequency of use and electricity prices.

In this regard, the interpretation of consumer and fair share plays a particularly important role in the sustainability debate. Some respondents to consultations on the European Green Deal stated that all citizens, not only consumers of a product, should be considered when sustainability is accounted for.[53] For example, if a consumer paid €10 more for a sustainable rather than a non-sustainable product, they might recoup €1 through societal benefits to all citizens. Such considerations have not previously been factored into competition analysis. Had the analysis prior to the decision in 1999 related to the domestic washing machines product market been conducted using such an approach, the court might have come to a different conclusion.

The Commission has noted that the objective of competition rules is to protect competition in the market and that the assessment of anticompetitive effects and the benefits of a practice are made within the confines of each relevant market; however, antitrust enforcement should remain anchored to the consumer welfare standard and at the same time, sustainability benefits for society should be taken into account, stating that "if an agreement leads to a reduction in pollution to the benefit of society, and assuming the benefits are significant, a fair share of them can be apportioned to the harmed consumers, the latter being part of society, and fully compensate them for the harm".[54] In March 2022, the Commission launched public consultations on the draft revised horizontal block exemption regulations on research and development and specialization and the horizontal guidelines.[55] The guidelines include a new chapter on the assessment of horizontal agreements pursuing sustainability objectives and outline the circumstances in which consumers may be deemed to receive a fair share of benefits (box 3).

8. International Competition Network

The Competition Authority of Hungary hosted the International Competition Network annual conference in 2021. The special project for the conference, on the topic of sustainable development and competition law, included a survey of competition authorities and non-governmental advisers on experiences in this area, which showed the following: an efficiency or welfare standard does not seem to impede sustainability cases and special competition law provisions do not seem to be conducive to such cases per se; legislative action does not seem to be imperative, but soft law and guidance are requested by advisers; sustainability considerations in competition law enforcement are not new, but case experience remains limited; and, at present, sustainability and competition is more of an issue in Europe than elsewhere, yet interest and anticipation extend beyond the region.[56]

BOX 3
European Commission: Draft revised horizontal guidelines – Examples with regard to the criterion that consumers must receive a fair share of the resulting benefits

Criterion is satisfied: Drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel were used. To the extent that a substantial overlap between consumers (drivers) and beneficiaries (citizens) can be established, the sustainability benefits from cleaner air are in principle relevant for the assessment and can be taken into account if they are significant enough to compensate consumers in the relevant market for any detriment.

Criterion is not satisfied: Consumers may buy clothing made of sustainable cotton that involves reduced chemical and water use on the land where it is cultivated. Such environmental benefits could in principle be taken into account as collective benefits. However, there is likely no substantial overlap between the consumers of the clothing and the beneficiaries of the environmental benefits, which occur only in the area where the cotton is grown. Therefore, it is unlikely that the collective benefits would accrue to the consumers in the relevant market. To the extent that consumers are willing to pay more if their clothing is made of sustainably grown cotton, the local environmental benefits can be taken into account as individual non-value benefits for the consumers of the clothing.

Source: UNCTAD, based on European Union, 2020, Guidelines on horizontal cooperation agreements, available at https://eur-lex.europa.eu/EN/legal-content/summary/guidelines-on-horizontal-cooperation-agreements.html. See also https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en.

III. CONSUMER PROTECTION AND SUSTAINABILITY

In 2015, the General Assembly adopted resolution 70/1 on the 2030 Agenda for Sustainable Development and resolution 70/186 on consumer protection, including the revised United Nations guidelines for consumer protection annexed to the resolution.[57] The 17 Sustainable Development Goals "recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality and spur economic growth," all while addressing climate change and working to preserve oceans and forests, and the achievement of the Goals requires the participation of responsible and empowered consumers.[58] In this context, UNCTAD published *Achieving the Sustainable Development Goals through Consumer Protection*, noting that the only way to unleash the potential transformative power of consumers in domestic and international trade is by ensuring a high level of consumer protection and fostering good business practices that seek the same goal.[59]

The international framework of the United Nations guidelines for consumer protection is described in this chapter, along with national and international consumer information and education programmes, business initiatives and enforcement and guidance actions carried out by consumer protection authorities.

A. UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The General Assembly adopted the United Nations guidelines for consumer protection in 1985. In 1999, they were expanded, to include a new section on the promotion of sustainable consumption (section H). In resolution 70/186, the General Assembly established the Intergovernmental Group of Experts on Consumer Protection Law and Policy, and the guidelines state that the Group of Experts will provide the institutional machinery (paragraph 95). The guidelines are the only internationally agreed global-level instrument on consumer protection, and have been widely implemented by UNCTAD member States.[60] Section H highlights the following, among other aspects: shared responsibility for sustainable consumption among all members of society, including States, informed consumers, businesses, labour organizations and environmental organizations; encouragement by Member States of the design, development and use of products and services that are safe and energy- and resource-efficient; and encouragement of consumers to both recycle wastes and purchase recycled products. The guidelines state that (paragraphs 4 to 7): Member States should develop, strengthen or maintain a consumer protection policy, setting priorities for the protection of consumers in accordance with the social, economic and environmental circumstances of the country and the needs of its population, and bearing in mind the costs and benefits of the proposed measures; the legitimate needs which the guidelines are intended to meet include consumer education, including education on the social, economic and environmental consequences of consumer choice, and the promotion of sustainable consumption patterns; all Member States should strive to promote sustainable consumption patterns and developed countries should take the lead in achieving sustainable consumption patterns; and policies for promoting sustainable consumption should take into account the goals of eradicating poverty, satisfying the basic human needs of all members of society and reducing inequality within and between countries.

In 2019, UNCTAD, in a note on the contribution of consumer protection to sustainable consumption, explored the connection between consumer protection and sustainable consumption, referring to the interplay between sustainable consumption, the Sustainable Development Goals and the United Nations guidelines for consumer protection. Consumer protection laws might not always include specific provisions on sustainable consumption, yet consumer protection authorities have used existing provisions to act in this area, engaging in consumer education and providing guidance to businesses, as well as addressing related cases.[61]

As indicated in the United Nations guidelines for consumer protection, responsibility for sustainable consumption patterns should be shared by all members of society, including consumers, businesses, labour organizations and environmental organizations. Member States should provide consumer education and awareness-raising initiatives on sustainability and, at the same time, closely monitor and scrutinize green claims, with regard to ensuring informed decisions

among consumers. Businesses should engage in sustainability initiatives in a responsible manner, such as by developing codes of conduct, self-regulation and good business practices. Consumers also have a duty to promote sustainable consumption, by refraining from purchasing goods and services that negatively affect their lives and those of future generations. The rights of consumers to safe and effective products and services go together with their responsibility to help preserve the planet.

B. CONSUMER EDUCATION AND INFORMATION

The United Nations guidelines for consumer protection state that national consumer protection policies should encourage consumer education (paragraph 14). Member States are encouraged to promote programmes related to consumer education and information, including coverage of aspects such as product labelling, environmental protection and the efficient use of materials, energy and water (paragraphs 42–44). In addition, with regard to the promotion of sustainable consumption, the guidelines state that Member States should develop and implement information programmes to raise awareness of the impact of consumption patterns (paragraph 51). Education and awareness initiatives that inform consumers, citizens and businesses of the importance of preserving the environment are crucial in both developed and developing countries.

The United Nations One Planet Network, involving Member States and interested stakeholders, including businesses and consumer groups and associations, is an initiative led by the United Nations Environment Programme that promotes tools or systems that guide consumers in making more sustainable choices about goods and services, including at the use and end-of-life stages. The tools take many forms, from labels on products to advertising, marketing and awareness-raising campaigns and communications between peers through social media or family and friend networks, as well as voluntary standards, ratings, marketing claims, life cycle assessments and other ways of communicating with consumers about environmental and social issues connected with products; and the tools may focus on a single issue or follow a life cycle approach, considering the impact of each stage of the product development process, including how a product is used and how it is treated responsibly at the end-of-life stage.[62]

Different groups of consumers have different consumption patterns, and member States should employ different strategies and tools among each targeted group, and also account for consumer behaviour biases. For example, crumpled, folded or torn paper can still be recycled, yet consumers may tend to recycle mostly intact paper; and consumers may be encouraged to behave in a more sustainable way if their commitments to eco-friendly behaviour are made public, such as by asking hotel guests to signal that they agree to reuse towels by hanging a card on their room door, which can increase towel reuse by 20 per cent.[63] The “intention-action gap” refers to the discrepancy between what consumers say they will do for sustainability and their actual behaviour, which may be less sustainable. Some studies confirm this gap, yet data on consumer sentiment and behaviour with regard to sustainable consumption remains scarce and lacks comparability worldwide.[64] As noted by the European Commission Competence Centre on Behavioural Insights, behavioural insights can be used to help ensure that environmental labels to effectively nudge consumers towards making greener consumption choices.[65]

As shown in the UNCTAD world consumer protection map, 37 of 104 respondents to an UNCTAD questionnaire have consumer education initiatives related to sustainable consumption.[66] Three examples of national and international initiatives are provided in this section.

1. Egypt

In 2017, the Ministry of Environment launched a national initiative on the reduction of plastic bag consumption, under the slogan “no more plastic bags”. The Ministry played a major role in mobilization and awareness in Egypt, to contribute to reducing the environmental impact of single-use plastic bags. The campaign also targeted women, as they play a pivotal role in the education of families, friends and the greater community with regard to the risks of using non-recyclable plastic bags.[67]

2. Sweden

The Consumer Agency has produced educational material on sustainable consumption, “Sustainable, of course!”, which consists of 24 lessons for use in secondary schools, including videos and quizzes on how to become a conscious consumer and take care of the planet by shopping smart, eating in an

environmentally friendly way, keeping track of money and submitting complaints about a purchase if needed.[68]

3. Eco schools

Eco schools were developed as a response to needs identified at the United Nations Conference on Environment and Development held in 1992 and were launched in 1994 in Denmark, Germany, Greece and the United Kingdom by the Foundation for Environmental Education. At present, 19 million students worldwide are participating in the programme, the main goal of which is for schools to gradually integrate a sustainable development dynamic or education on sustainable development, whereby students can acquire the necessary knowledge, skills and motivation to address related challenges and help shape sustainable development.[69]

C. BUSINESS GUIDANCE AND INITIATIVES

The United Nations guidelines for consumer protection state that businesses have a responsibility for promoting sustainable consumption through the design, production and distribution of goods and services (paragraph 50). The guidelines aim to encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers; set out principles for good business practices, including dealing fairly and honestly with consumers at all stages of the relationship, so that it becomes an integral part of the business culture; and state that Member States should establish consumer protection policies that encourage good business practices (paragraphs, 1, 11 and 14). In addition, the guidelines state that "consumer access to accurate information about the environmental impact of products and services should be encouraged through such means as product profiles, environmental reports by industry, information centres for consumers, voluntary and transparent eco-labelling programmes and product information hotlines" (paragraph 29).

In recent decades, increased awareness among consumers and concern about the social, economic and environmental impacts of production and consumption has led to increased demand for sustainable products. Respondents to a survey conducted by UNCTAD on the implications of the pandemic for trade in biodiversity-based products showed, since the start of the pandemic, a significant increase in demand for products perceived as ethical and/or sustainable.[70] To meet this demand, an increasing number of national and international initiatives aim to guide businesses and promote socially, economically and environmentally sustainable business practices. For example, Fairtrade International states that consumers are prioritizing sustainability; 86 per cent of consumers want more sustainable and equitable products in the post-pandemic market.[71]

In an effort to help conserve biodiversity, enhance livelihoods and encourage good business practices, UNCTAD and partners developed biotrade principles and criteria, established in 2007 and updated in 2020.[72] The guidelines, for Governments, businesses and civil society, are aimed at helping to conduct biodiversity-friendly trade, supportive of the conservation and sustainable use of biodiversity, as well as the fair and equitable sharing of benefits. The biotrade principles are implemented and fostered by government organizations, business associations, non-governmental organizations and companies in nearly 100 countries.

However, it is difficult for consumers to verify whether a product has been produced sustainably. Without such information, consumers will not be able to trust sustainability claims and, in turn, businesses will not be incentivized to shift to green production practices, eventually leading to market failure. In this context, voluntary sustainability standards have emerged as a tool with which to address information asymmetries that can lead to market failure, by guiding businesses into pursuing more sustainable production patterns. Such standards specify "requirements that producers, traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, environmental impacts, community relations, land use planning and others".[73] The standards can take various forms, such as standardization, certification, codes of conduct and labels. Despite their benefits, the adoption of such standards can be costly, as they establish new priorities and requirements for, and constraints on, production processes and the use of resources. In addition, since voluntary sustainability standards are mostly private standards, they may not be aligned with local government priorities and strategies. Given the potential benefits and challenges of the adoption of voluntary sustainability standards, it is important to understand more systematically whether benefits

outweigh unintended effects, which actors stand to gain or lose the most and which actions may be taken.

In response to this situation, UNCTAD developed the voluntary sustainability standards assessment toolkit, designed to identify challenges and perceptions behind the adoption of such standards in a particular value chain and country and to explore policy options in addressing them. The following five steps of the assessment combine qualitative and quantitative methods for analysing objective and perception-based data: value chain mapping; interview; survey; analysis; and policy options.[74]

In 2018, the International Chamber of Commerce revised the advertising and marketing communications code, which includes a chapter providing guidance on environmental claims in marketing communications, addressing honest and truthful presentation; scientific research; superiority and comparative claims; product life cycle, components and elements; signs and symbols; waste handling; and responsibility.[75]

Enabling legal frameworks and public–private partnerships have allowed standards and trademarks to flourish; three examples are provided in this section.

1. Chile

In 2020, the Government launched the "I choose to recycle" label as the first national certification of the level of recyclable materials, provided for containers or the packaging of food and beverages if the following three conditions are met: at least 80 per cent of the weight of the container is made of recyclable materials; these materials can be separated from the rest of the container for recycling; and there is demand from the recycling industry for these materials. The certification and validation process is carried out by an independent committee comprising public and private institutions, including the national consumer protection authority.[76]

2. United States

The Department of Agriculture certifies organic foods that are grown and processed according to federal guidelines, addressing, among other factors, soil quality, animal raising practices, pest and weed control and the use of additives. Organic producers rely on natural substances and physical, mechanical or biologically based farming methods to the fullest extent possible. To sell, label or represent organic products in the United States, products must be certified by a Department of Agriculture-accredited certification agency. The number of certified organic operations worldwide grew to 45,578 in 2020, with 28,454 located in the United States.[77]

3. Fairtrade International

Fairtrade marks are registered certification marks and trademarks owned and licensed by Fairtrade International. In order to bear fairtrade marks, a product must be certified against the criteria in the fairtrade standards. For example, the gold mark indicates the fair extraction and trading of all the gold used in a piece of jewellery, as well as the gold's physical traceability throughout the supply chain. If the criteria are not met, a producer organization can face suspension until remedial action can be undertaken and verified, or can be decertified. A trader standard aims to ensure that businesses buying products from fairtrade producers treat suppliers fairly. The Fairtrade International voluntary sustainability standards scheme encompasses 1,822 producer organizations in 72 countries.[78]

D. ENFORCEMENT AND GUIDANCE AGAINST GREENWASHING

The United Nations guidelines for consumer protection state that Member States, in close collaboration with manufacturers, distributors and consumer organizations, should take measures regarding misleading environmental claims or information in advertising and other marketing activities, and that the development of appropriate advertising codes and standards for the regulation and verification of environmental claims should be encouraged (paragraph 30). As noted, businesses innovate to gain sustainability advantages only when consumers value the importance of sustainability and are well-informed about its attributes in products. This virtuous circle can be undermined by false environmental claims, also known as greenwashing, which arises when businesses claim that their products are more sustainable than they are.[79] In a survey conducted by Euroconsumers in 2021, 53 per cent of respondents indicated that they were not able to distinguish between false and true green claims.[80] The prevalence of greenwashing reduces consumer confidence in sustainability claims, discouraging businesses from engaging in sustainability innovation and thereby hindering the achievement of Sustainable Development Goal 12. Therefore, the pursuit of true and reliable green claims should remain a priority for

member States. Under the European Green Deal, "companies making green claims should substantiate these against a standard methodology to assess their impact on the environment".[81] The International Consumer Protection and Enforcement Network has an active working group on misleading environmental claims, focused on sharing best practice and intelligence and on upskilling case officers; in 2020, the group conducted a coordinated and simultaneous investigation and found that 40 per cent of green claims online were potentially misleading.[82] In addition, the International Consumer Protection and Enforcement Network, in collaboration with the One Planet Network, organized two webinars in June 2022 on training consumer protection authorities on the guidelines for providing product sustainability information.[83]

Examples of national and international initiatives are provided in this section.

1. Netherlands

In 2020, the Authority for Consumers and Markets prepared guidelines on sustainability claims that provide the following five rules for companies that wish to make such claims: make clear what sustainability benefit the product offers; substantiate sustainability claims with facts and keep them up-to-date; ensure that comparisons with other products, services or companies are fair; be honest and specific about company efforts with regard to sustainability; and ensure that visual claims and labels are useful to consumers, not confusing.[84]

2. Republic of Korea

In February 2022, the Fair Trade Commission fined two companies ₩20,200,000,000 ($16,854,000) for issuing false labels and deceptive advertising related to the emissions of diesel passenger vehicles. The Commission determined that the companies had tampered with pollution mitigation devices by installing illegal software to ensure that vehicles performed at lower emission levels during certification tests compared with during ordinary driving conditions.[85]

3. United Kingdom

In 2021, following consultations, the Competition and Markets Authority issued guidance on making environmental claims on goods and services, which sets out the following key principles: claims must be truthful and accurate; claims must be clear and unambiguous; claims must not omit or hide important information; comparisons must be fair and meaningful; claims must consider the full life cycle of the product or service; and claims must be substantiated.[86] The guidance includes a checklist of statements that a business should be able to agree with when making a green claim. In July 2022, the Authority launched investigations into three fashion brands with regard to their green claims, given concerns that companies were "creating the impression that their products were sustainable or better for the environment, for example by making broad claims about the use of recycled materials in new clothing, with little to no information about the basis for those claims or exactly which products they related to".[87]

4. United States

In 2012, the Federal Trade Commission updated the guides for the use of environmental marketing claims.[88] The guides are aimed at assisting marketers in ensuring that claims about the environmental attributes of their products are truthful and substantiated; and providing some insight as to how consumers are likely to interpret claims related to whether products are environmentally safe, recycled, recyclable, ozone friendly or biodegradable, among others. The guides do not constitute independently enforceable regulations but serve to provide guidance to companies on how to promote the environmental benefits of products without deceiving consumers.

5. European Union

In 2021, the European Commission and national consumer authorities screened websites, with a focus on greenwashing, to identify breaches of European Union consumer law in online markets. The Commission and consumer authorities examined 344 claims in more detail and found that in over 50 per cent of cases, traders did not provide sufficient information for consumers to judge the accuracy of the claim; in 37 per cent of cases, the claim included general terms such as conscious, eco-friendly and sustainable, which aimed to convey an unsubstantiated impression to consumers that a product did not have negative impacts on the environment; and in 59 per cent of cases, traders did not provide easily accessible evidence to support the claim. In the overall assessment, taking various factors into account, in 42 per cent of cases, the authorities had reason to believe that the claim might be false or deceptive and could therefore potentially amount to an

unfair commercial practice under the unfair commercial practices directive. The Commission announced that national authorities would contact the companies concerned to point out the issues detected and to ensure that they were rectified where necessary.[89]

6. International initiatives

There are regional and international initiatives on providing advice to Governments in policymaking and the enforcement of consumer protection laws. For example, the subgroup on misleading and unfair business practices under the UNCTAD working group on consumer protection in electronic commerce, under the leadership of the Superintendence of Industry and Commerce of Colombia, issued a report on environmental claims in electronic commerce, compiling experiences from 18 countries in enforcement actions against greenwashing; the most frequent complaints related to the cosmetics and food sectors. The subgroup recommended that Governments assess the adequacy of current legislation on misleading advertising, to address misleading green claims and, if necessary include clauses on advertising related to environmental claims, particularly in digital markets; and noted that, given the different levels of enforcement experience among countries, improved cooperation and peer learning were important.[90]

In 2022, the Association of Southeast Asian Nations, with the participation of UNCTAD, prepared a toolkit on sustainable consumption, which may also be relevant for States other than members of the Association as it contains modules on concepts and principles of sustainable consumption; best regional and international practices and approaches to policies that promote sustainable consumption; tools and instruments used in influencing consumer behaviour; and details on the use of appropriate instruments and tools in selected sectors.[91]

The Organisation for Economic Co-operation and Development programme of work related to empowering consumers in the green transition will involve conducting a global policy review on the issue and developing empirical work on testing consumer attitudes towards sustainable consumption in different countries and testing the effectiveness of different types of green claims and digital methods for nudging consumers towards greener choices.[92]

IV. CONCLUSION

As sustainability becomes a priority policy objective for policymakers worldwide, markets will increasingly be expected to deliver sustainable results. Competition and consumer protection policies are conducive to improving the efficiency and fairness of markets and are therefore well placed to serve public policy goals. They can have a positive impact on sustainability, with regard to social, economic and/or environmental aspects.

Competition law and policy can be aligned with sustainability objectives, although there may be circumstances in which competition and sustainability initiatives are in conflict. To provide certainty to market actors, namely businesses, the competition authorities of member States need to provide clear guidance on what is permitted under competition law. However, with the exception of some countries in Europe, most competition authorities have not yet undertaken initiatives to encourage sustainability. At the same time, further discussions are required, to identify the types of sustainability benefits that can be recognized as efficiency gains, to offset anticompetitive effects, and be accepted by competition law enforcers. Jurisdictions with sustainability-related initiatives use a variety of approaches, including considering the mitigation of climate change effects as efficiency gains and applying efficiency gains across all citizens rather than only purchasers. In other instances, sustainability-related gains such as with regard to improved labour or animal welfare standards are not considered efficiency gains. In some areas, the application of competition law is exempted due to sustainability considerations. For example, in Austria, draft guidelines recognize biodiversity as an efficiency gain. As sustainability takes centre stage in economic policy discussions, clear guidance is needed on what is admissible in terms of competition. Such guidance should be complemented by a variety of advocacy tools and collaboration between authorities and sectoral regulators.[93] In this regard, international organizations such as UNCTAD can play an active role in facilitating discussions and exchanges of information, to encourage sustainability-related initiatives by companies in a way that safeguards market efficiencies.

Empowering consumers with regard to sustainable development through consumer protection is a shared goal and responsibility among all market actors, including Governments, businesses and consumers. Governments can recognize the promotion of sustainable consumption as a fundamental part of consumer policy and a priority in all government actions. An enabling legal and institutional framework is critical for the flourishment of responsible consumption and production patterns. In addition, ensuring policy coordination among relevant public bodies, including consumer-related and social and environmental authorities, should be a priority, and Governments should mobilize their convening power to develop and implement partnerships with businesses and relevant civil society organizations. As recommended in the United Nations guidelines for consumer protection, Member States should develop and implement strategies that promote sustainable consumption through a mix of policies that could include regulations; economic and social instruments; sectoral policies in such areas as land use, transport, energy and housing; information programmes to raise awareness of the impact of consumption patterns; removal of subsidies that promote unsustainable patterns of consumption and production; and promotion of sector-specific best practices in environmental management (paragraph 51). Governments should guide businesses in promoting the sustainable design, production and distribution of goods and services, including the provision of accurate information to consumers, namely through the application of voluntary sustainability standards. At the same time, Governments should enforce consumer protection laws against misleading and unfair commercial practices, particularly related to false environmental claims and greenwashing. The United Nations guidelines state that Member States should work towards ensuring that consumer protection enforcement agencies have the necessary human and financial resources to promote effective compliance and to obtain or facilitate redress for consumers in appropriate cases (paragraph 15). Other important actions that Governments could undertake include encouraging and facilitating sustainable consumption patterns that include recycling, adopting environmental health and safety standards, conducting impartial environmental testing of products and ensuring the safe management of environmentally hazardous products, as well as ensuring that manufacturers and/or retailers ensure the adequate availability of reliable

after-sales service and spare parts and enhance the development of safe second-hand markets.

Competition and consumer protection policies can play a decisive role in achieving Sustainable Development Goal 12 on ensuring responsible consumption and production patterns. UNCTAD, as the focal point within the United Nations for competition and consumer protection, encourages Governments, international organizations, businesses, consumer groups and academia to continue to reflect on the best ways in which such policies can be used to help improve the sustainability of markets.

NOTES

[1] The Commission was established in accordance with resolution 38/161 of 19 December 1983 of the General Assembly. See https://sustainabledevelopment.un.org/milestones/wced.

Note: All websites referred to in footnotes were accessed in January 2023.

[2] See LO Vreja, S Balan and C Mavrodin, 2016, Sustainability and the tragedy of the commons: A new perspective, International Conference on Competitiveness of Agro-food and Environmental Economy Proceedings, The Bucharest University of Economic Studies, (5)176–187.

[3] See https://www.undp.org/sustainable-development-goals.

[4] See https://unctad.org/meeting/fifteenth-session-united-nations-conference-trade-and-development-unctad-15.

[5] See https://www.unglobalcompact.org/what-is-gc/our-work/sustainable-development.

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[7] See https://www.bwb.gv.at/en/news/news-2022/detail/afca-publishes-draft-guidelines-on-the-application-sustainability-agreements-asking-for-comments.

[8] See https://hbr.org/2019/07/the-elusive-green-consumer and PM Coelho, B Corona, R ten Klooster and E Worrell, 2020, Sustainability of reusable packaging: Current situation and trends, *Resources, Conservation and Recycling*, 6.

[9] See https://www2.deloitte.com/ch/en/pages/consumer-business/articles/shifting-sands-sustainable-consumer.html.

[10] Union for Ethical Biotrade, 2020, Biodiversity barometer 2020, available at http://www.biodiversitybarometer.org/biodiversity-barometer-reports.

[11] See http://www.biodiversitybarometer.org/#consumer-views-homepage.

[12] See https://www.unep.org/resources/report/legal-limits-single-use-plastics-and-microplastics, http://kenyalaw.org/kenya_gazette/gazette/notice/181293 and https://www.gov.uk/guidance/carrier-bag-charges-retailers-responsibilities#:~:text=From%2021%20May%202021%20retailers,bags%20they%20sell%20in%20England.

[13] See https://www.forbes.com/sites/forrester/2021/01/21/empowered-consumers-call-for-sustainability-transformation.

[14] See https://ec.europa.eu/commission/presscorner/detail/es/ip_21_3581.

[15] See https://one.oecd.org/document/DAF/COMP/WD(2021)52/en/pdf, page 6.

[16] See https://one.oecd.org/document/DAF/COMP/WD(2021)53/en/pdf, page 7.

[17] Ibid, page 8.

[18] See https://www.researchgate.net/publication/328249635_Pioneer_Pannar_merger_Impact_Assessment.

[19] See, for example, discussions held at Competition and Consumer Day, 25 and 26 September 2019, Helsinki; Global Competition Law Centre Conference, 24 October 2019, Brussels; Competition Commission of Greece online event on competition law and sustainability, 28 September 2020; Organisation for Economic Co-operation and Development online event on sustainability and competition, 1 December 2020.

[20] Schinkel and Treuren, 2021.

[21] See https://www.straitstimes.com/world/jakarta-wants-oil-majors-to-ditch-zero-deforestation-pact.

[22] See https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles.

[23] See https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination.

[24] See https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html.

[25] European Commission, 2021, Competition policy brief No.1, available at https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1.

[26] See https://www.ftc.gov/system/files/documents/cases/d09388posttreehousecomplaint.pdf.

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[30] See https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2019/20190819-altmaier-ministererlaubnis-im-verfahren-miba-zollern.html.

[31] See https://one.oecd.org/document/DAF/COMP/WD(2021)53/en/pdf, page 2.

[32] See, for example, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law.

[33] See https://www.accc.gov.au/business/exemptions/authorisation.

[34] See https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf, page 7.

[35] Ibid, page 8.

[36] See https://www.accc.gov.au/media-release/accc-re-authorises-tyre-stewardship-scheme.

[37] VHSE Robertson, 2021, The new sustainability exemption in Austrian competition law, *Journal of European Competition Law and Practice*, see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3957551.

[38] See https://www.bwb.gv.at/en/news/detail/afca-publishes-final-guidelines-on-sustainability-agreements-for-companies.

[39] See https://www.icao.int/sustainability/Compendium/Documents/China/download-antimonopoly-law-in-china-63824%20(3).pdf.

[40] See https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination.

[41] Ibid.

[42] Authority for Consumers and Markets, Netherlands, 2021, Second draft version: Guidelines on sustainability agreements – Opportunities within competition law, available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[43] See https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf, page 2.

[44] Ibid, page 5. See https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87623.html.

[45] Ibid, page 6.

[46] Ibid, page 7.

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