



POLICY ROUNDTABLES

Horizontal Agreements in the Environmental Context 2010

Introduction

The OECD Competition Committee debated Horizontal Agreements in the Environmental Context in October 2010. This document includes an executive summary, a joint contribution from Denmark, Finland, Iceland, Norway and Sweden, written submissions from Australia, Canada, Germany, Israel, Italy, Japan, the Netherlands, Poland, Spain, Turkey, the United Kingdom, the United States, the European Union, Pakistan and BIAC, as well as an aide-memoire of the discussion.

Overview

The Committee discussed the question of when horizontal agreements relating to environmental objectives are necessary or efficient from a social perspective and when they should be discontinued pursuant to competition concerns. Such agreements can create interesting challenges for competition authorities. On the one hand, they may improve efficiency and consumer welfare, such as by enabling risk sharing and cost savings and by facilitating innovation. On the other hand, they can also facilitate anticompetitive conduct like cartel formation.

Related Topics

Electricity: Renewables and Smart Grids (2010)
Pro-Active Policies for Green Growth and the Market Economy (2010)
Emission Permits and Competition (2010)
Environmental Regulation and Competition (2006)
Competition Policy and Environment (1995)

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COMPETITION COMMITTEE**

HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Horizontal Agreements in the Environmental Context held by the Competition Committee in October 2010.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les accords horizontaux dans le contexte environnemental qui s'est tenue en octobre 2010 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable and the written submissions, several key points emerge:

- (1) *When examining an agreement among competitors that pursues environmental policy goals, most competition authorities will apply the generally applicable analytical framework and consider only whether the agreement produces direct economic benefits typically cognisable under their competition laws; they will not consider non-economic benefits related solely to environmental policies in their evaluation. In some jurisdictions, however, a broader public interest test may allow a competition authority to consider a wider range of benefits related to environmental policy objectives when examining the lawfulness of an agreement among competitors.*

A wide range of horizontal agreements among competitors can affect environmental policy objectives, including mergers among firms with environmental activities, industry joint ventures in waste management and recycling, and more collaborative arrangements such as agreements setting environment-related standards, agreements on reducing environmentally harmful substances, and agreements on how to handle the costs of environmental protection measures.

Competition authorities in most member and observer countries must examine agreements that pursue environmental goals under the framework that is generally applicable to all competition law analysis. Accordingly, if an agreement is found to potentially restrict competition, a competition authority will consider as justifications only direct economic benefits that are typically recognised in competition law analysis, such as cost savings, innovation, improved quality, and other efficiencies. Non-economic benefits and more remote economic benefits that do not accrue to the users of the products or services covered by the agreement will not be taken into account when determining whether an environmental agreement violates a jurisdiction's competition laws.

The United Kingdom's contribution to the roundtable provides a useful discussion of these principles, although it also recognises the difficulties arising in gray area cases. To illustrate the application of the framework, the contribution notes that the benefits of a co-operation agreement among public transport providers that resulted in reduced road congestion could be considered a sufficiently direct economic benefit to be considered in the competition law analysis of the agreement; on the other hand, the effects of an agreement on the reduction of environmentally harmful emissions would be characterised as non-economic benefits that would not be included in a competition analysis even if it can be said that the agreement had broader benefits for society; and an agreement on the use of biodegradable packaging materials would produce cognisable economic benefits only if there was evidence that most consumers valued biodegradability as part of the product's quality dimensions.

In jurisdictions with a public interest test, competition authorities likely will be able to take a broader range of benefits into account when determining the lawfulness of a horizontal agreement having environmental policy goals. An example of such a jurisdiction is Australia, where the ACCC may exempt an agreement from competition law when the benefits to the public outweigh the public detriments. Under this standard, the ACCC has been able to exempt an industry agreement imposing a levy on greenhouse

gas refrigerants on the ground that it was likely to assist Australia in its efforts to comply with its international greenhouse gas commitments.

- (2) *Because pricing restraints conflict with the core goals of competition laws, competition authorities will typically challenge environmental agreements among competitors that directly affect the price at which they sell their products to customers. For example, agreements to pass on environmental charges to customers would almost invariably be considered unlawful even if it could be argued that such a pass-on might motivate customer conduct consistent with environmental policy goals.*

Roundtable participants widely viewed agreements to pass on environmental charges to customers as violations of competition law unless the agreements are authorised by statute or regulation, as agreements among competitors on pricing are considered contrary to the basic policy goals of competition laws. Such an assessment would apply even if the passed-on environmental charge represent only a small component of the total price of a product or if passing on environmental charges arguably might induce customers to act more consistently with environmental policy goals.

Certain jurisdictions, however, have allowed agreements to pass on environmental charges in narrowly circumscribed situations. One example is an agreement among wholesalers to pass on recycling charges for packaging materials to producers who were responsible for creating the packaging materials in the first place. In this specific case, legislation had required producers to bear the costs of recycling and the agreement established the most efficient scheme to implement the government mandated recycling scheme.

Agreements among competitors on how to treat environmental charges can also raise competition concerns if they lead to greater commonality of costs, which may have spill-over effects on competition in a downstream market. The circumstances in which cost commonalities may raise competition concerns in downstream markets depend on the market characteristics and conditions of competition in each case.

- (3) *Standard setting agreements can be an effective way to achieve environmental policy goals, such as when an industry agrees to eliminate harmful substances from its products. But standard setting agreements can also be an opportunity for rivals to reduce competition by harmonising product characteristics, which can facilitate co-ordination, and/or by creating barriers to entry.*

Standard setting can be seen as an effective way to move an entire industry towards the production of more environmentally friendly products in line with public policy goals, as it can avoid potentially more cumbersome, government-imposed regulation. But standard setting in the environmental context, as in most contexts, has the potential to reduce competition. For example, rivals can use the process to eliminate opportunities for product differentiation, which may facilitate collusive outcomes. Standards can also be used to create barriers to entry for new competitors. Standards in the environmental context can also be used to eliminate products that may appear less desirable in light of environmental protection goals but are also cheaper. This would reduce choice and increase price for customer groups that prefer the low price product, might help competitors to co-ordinate their conduct as there is less product variation, and may make it more difficult for new suppliers to enter the market with a low price product.

Delegates discussed two approaches that competition authorities can take to ensure that standard setting does not harm competition more than is necessary to achieve legitimate environmental goals. Competition authorities can get involved early, at the beginning of the standardisation process, and work with industry and government to ensure that all participants are aware of the risks of competition law violations, seek proper advice, and ensure that discussions at meetings are strictly limited to the environmental goals the standardisation process is designed to achieve. Another approach focuses on a

review of the outcomes of the process to ensure that any reduction of competition that standardisation entails is outweighed by efficiency gains that will ultimately benefit consumers.

- (4) *Agreements on industry-wide waste management and recycling schemes can serve important environmental policy goals but they can also substantially limit competition among participants and/or from new entrants, including competition from newly emerging rival schemes. Experience has shown that intervening against anticompetitive restrictions does not undermine the environmental policy goals, but can on the contrary make waste management and recycling schemes more efficient and effective.*

Competition authorities in several jurisdictions have intervened against restrictions imposed by waste management and recycling schemes, including schemes for recycling glass, packaging waste, and products that contain lead. The provisions most commonly examined by competition authorities concern limitations on independent collection and recycling services, quotas allocating recycled product to users based on historical market shares, and exclusivity-type provisions that prevent participants from dealing with third parties, thus preventing the development of rival waste management and recycling schemes. Several case reports during the roundtable confirmed that interventions to remove anticompetitive restraints did not undermine the environmental protection goals that the schemes pursued, but on the contrary led to better functioning markets.

For example, some of the cases in which recycled product was allocated to manufacturers based on their historical market shares involved recycled lead, a valuable input for batteries and similar products. These allocation systems were considered anticompetitive as they protected the position of incumbent market players by guaranteeing them cheaper access to a valuable input; they distort competition for the recycled product and make it more difficult for new producers to obtain.

The delegates discussed whether in these cases increased competition for the input could undermine environmental policy goals as it could be argued that competition would drive the price up and make the recycled product less competitive relative to non-recycled product. Such concerns, however, have apparently not influenced the decisions of competition authorities. There are several explanations for the reluctance to accept such arguments: higher prices for the recycled raw material should also provide incentives for additional recycling efforts, which would make the effect of greater competition on price more uncertain; moreover, the consistent experience has been that increased competition has made recycling schemes more efficient and effective, thus leading ultimately to more recycling at lower costs. In addition, accepting the argument that using greater amounts of the (more expensive) recuperated product is more valuable for society than using newly mined (cheaper) product would require competition authorities to prioritise non-economic environmental goals over welfare-oriented competition goals, and most competition authorities feel they are not authorised to consider such a trade-off.

Cases involving the question whether there should be more than one waste collection and recycling scheme in a given industry provided another useful illustration for how intervention to remove competitive constraints can further environmental goals. Delegates mentioned several instances in which governments that sought to improve the collection and recycling rates in certain industries favoured the creation of an industry-wide, single recycling system in which all stakeholders collaborated. This approach was based on the assumption that excluding competition in favour of an industry-wide system would facilitate necessary co-ordination and benefit from greater scale efficiencies, and therefore result in greater recycling rates at lower costs.

Such an approach has been largely discredited today. Experience suggests that competition among recycling schemes produces substantial benefits and leads to higher recycling rates at lower costs, as competitive pressure forces the schemes to improve their efficiency and to pass on benefits to consumers.

A particularly persuasive illustration is packaging waste collection and recycling in Germany. Initially designed with government support as an industry-wide system in which all players participated in a cartel-like arrangement, the marketplace has gradually become more competitive as a result of competition law enforcement and advocacy efforts to eliminate restraints and encourage entry. The result has been a substantial increase in recycling rates at significantly lower costs.

There might be a better case for encouraging a single collection and recycling scheme at the outset in order to get recycling efforts off the ground. But any arguments in favour of a single system should be critically reviewed to examine whether competition would be the superior alternative from the start, and if a single system is accepted care must be taken that any restrictions that may prevent new entry are phased out as soon as possible.

- (5) *Governments are frequently involved when competitors enter into agreements related to environmental policy goals. Advocacy efforts by competition authorities are needed to ensure that the desire to pursue legitimate environmental policy goals does not lead to unnecessary restrictions of competition.*

The cases presented during the roundtable highlighted that in most cases governments are involved in agreements among competitors that pursue environmental policy goals, for example by encouraging an industry to agree on product standards that further environmental policy goals, by mandating the formation of industry-wide recovery and recycling systems, or by imposing environmental fees. Thus, this is an area for sustained advocacy efforts by competition authorities to ensure that agreements do not restrict competition or do not contain restrictions that go beyond what is necessary to achieve mandatory environmental policy goals, and in particular that they cannot be used by incumbents to create entry barriers for new competitors.

SYNTHÈSE

par le Secrétariat

En analysant les débats qui ont eu lieu lors de la table ronde et les contributions écrites, plusieurs grands axes de réflexion se dégagent :

- (1) *Lorsqu'elles examinent un accord visant des objectifs de politique environnementale conclu entre concurrents, la plupart des autorités de la concurrence mettent en œuvre le cadre d'analyse généralement applicable et se demandent seulement si l'accord en question produit des avantages économiques directs qui peuvent être reconnus en règle générale par le droit de la concurrence de leur pays ; elles ne s'intéressent pas, dans leur évaluation, aux effets non économiques résultant uniquement des politiques environnementales. Dans certains pays toutefois, l'autorité de la concurrence peut tenir compte, pour déterminer la légalité d'un accord conclu entre concurrents, d'un éventail plus large d'avantages relevant des objectifs de politique environnementale, en se fondant sur un critère plus général d'intérêt public.*

Toutes sortes d'accords horizontaux entre concurrents peuvent avoir une incidence sur les objectifs de politique environnementale, notamment les fusions entre entreprises exerçant des activités environnementales, les coentreprises formées au sein d'un même secteur pour assurer le traitement et le recyclage des déchets et les accords plus axés sur la collaboration comme ceux définissant des normes environnementales, les accords relatifs à la réduction des émissions de substances polluantes et les accords régissant les modalités de prise en charge des coûts des mesures de protection de l'environnement.

Les autorités de la concurrence de la plupart des pays de l'OCDE et des pays observateurs doivent contrôler les accords visant des objectifs environnementaux à l'aide du dispositif généralement applicable à toutes les analyses réalisées sous l'angle du droit de la concurrence. De ce fait, si elle estime qu'un accord est de nature à restreindre la concurrence, l'autorité de la concurrence retiendra uniquement comme justifications les avantages économiques directs, comme les réductions de coûts, l'innovation, l'amélioration de la qualité et autres gains d'efficacité, qui sont généralement reconnus aux fins de l'analyse sous l'angle du droit de la concurrence. Les avantages non économiques et les avantages économiques plus périphériques dont ne bénéficient pas les utilisateurs des produits et services couverts par l'accord n'entrent donc pas en ligne de compte lorsque l'autorité de la concurrence doit déterminer si un accord environnemental est contraire ou non au droit de la concurrence national.

La contribution du Royaume-Uni à la table ronde propose un examen utile de ces principes, tout en reconnaissant aussi les difficultés que posent les zones d'ombre. Cette contribution relève, à titre d'exemple que l'autorité de la concurrence peut juger que la réduction de la saturation du trafic induite par un accord de coopération conclu entre des exploitants de réseaux de transports publics représente un avantage économique suffisamment direct pour en tenir compte lors de l'évaluation de cet accord sous l'angle du droit de la concurrence. En revanche, elle considérerait les effets d'un tel accord sur la réduction des émissions polluantes comme des avantages non économiques et ne les prendrait donc pas en compte pour mener une analyse sous l'angle de la concurrence même s'il s'avère que l'accord a eu des retombées plus générales pour la collectivité. Un accord portant sur l'utilisation de matériaux d'emballage biodégradables ne produirait ainsi des avantages économiques reconnus du point de vue du droit de la

concurrence que s'il s'avère que les consommateurs, dans leur majorité, estiment que la biodégradabilité constitue l'une des composantes qualitatives du produit.

Dans les pays appliquant le critère de l'intérêt public, les autorités de la concurrence prendront probablement en compte un éventail plus large d'avantages pour déterminer la légalité d'un accord horizontal visant des objectifs de politique environnementale. L'Australie en est un exemple. L'ACCC peut ainsi exempter un accord de l'application du droit de la concurrence lorsque les avantages pour le public l'emportent sur les désavantages. Conformément à cette norme, l'ACCC a pu ainsi exempter un accord sectoriel imposant une écotaxe aux réfrigérants à effet de serre, au motif que ce texte était de nature à soutenir les efforts déployés par l'Australie pour respecter ses engagements internationaux en matière de réduction des émissions de gaz à effet de serre.

(2) *Les restrictions en matière de prix étant contraires aux principaux objectifs du droit de la concurrence, les autorités de la concurrence remettront généralement en cause les accords environnementaux conclus entre des concurrents qui ont un impact direct sur les prix auxquels ils vendent leurs produits aux consommateurs. Ainsi, les accords visant à répercuter les coûts environnementaux sur les consommateurs seront presque invariablement considérés comme illégaux, même si l'on peut faire valoir que cela pourrait inciter les consommateurs à adopter un comportement conforme aux objectifs de la politique environnementale.*

Considérant que tout accord sur les prix conclu entre concurrents est fondamentalement contraire aux objectifs du droit de la concurrence, la plupart des participants à la table ronde estiment que les accords visant à répercuter les coûts environnementaux sur les consommateurs sont contraires au droit de la concurrence, sauf si une loi ou une réglementation les autorisent par ailleurs. Ce principe s'appliquerait même si les coûts environnementaux répercutés ne représentaient qu'une petite fraction du prix total d'un produit ou si la répercussion de ces coûts pouvait inciter les consommateurs à agir d'une manière plus conforme aux objectifs de la politique environnementale.

Certains pays ont toutefois autorisé de tels accords dans des situations bien précises. Un accord conclu entre des grossistes en vue de répercuter les coûts du recyclage des matériaux d'emballage sur les producteurs qui sont responsables au départ de la production de ces matériaux en est un exemple. Dans ce cas précis, la législation imposait aux producteurs de supporter les coûts du recyclage et l'accord conclu mettait donc en place le dispositif le plus efficace pour mettre en œuvre le plan de gestion des déchets d'emballage imposé par les pouvoirs publics.

Les accords entre concurrents sur les modalités de prise en charge des coûts environnementaux peuvent aussi susciter des préoccupations du point de vue de la concurrence s'ils ont pour effet une plus grande mutualisation de ces coûts, ce qui est susceptible d'avoir une incidence sur la concurrence d'un marché en aval. Les cas où une mutualisation des coûts peut être à l'origine de problèmes de concurrence sur les marchés d'aval dépendent, à chaque fois, des caractéristiques du marché concerné et des conditions de concurrence qui y prévalent.

(3) *Les accords de normalisation peuvent être un moyen efficace d'atteindre des objectifs de politique environnementale, ce qui est le cas par exemple quand un secteur d'activité accepte d'éliminer les substances polluantes de ses produits. Cela étant, de tels accords peuvent également donner à des concurrents l'occasion de restreindre la concurrence en harmonisant les caractéristiques de leurs produits, ce qui peut favoriser les pratiques coordonnées, et/ou en érigeant des obstacles à l'entrée.*

On peut considérer la normalisation comme un moyen efficace pour inciter un secteur d'activité entier à fabriquer des produits plus écologiques, conformes aux objectifs des politiques publiques, puisqu'elle

peut éviter d'avoir recours à une réglementation plus lourde, imposée par les pouvoirs publics. Cela étant, la normalisation dans le contexte environnemental, comme dans la plupart des contextes, peut éventuellement restreindre la concurrence. Des concurrents peuvent ainsi se servir de ce processus pour éliminer les possibilités de différenciation des produits, ce qui peut favoriser la collusion. Les normes peuvent aussi servir à mettre en place des obstacles à l'entrée de nouveaux concurrents. Dans le contexte environnemental, elles peuvent en outre être utilisées pour éliminer des produits dont la fabrication paraît moins souhaitable compte tenu des objectifs de protection de l'environnement, mais qui sont aussi moins chers. Cela restreindrait le choix et ferait monter les prix pour les catégories de consommateurs privilégiant les produits à moindre prix, pourrait aider les concurrents à coordonner leur action en raison de la moindre diversité des produits et compliquer l'accès au marché des nouveaux fournisseurs proposant des produits à bas prix.

Les délégués ont examiné deux approches que les autorités de la concurrence peuvent adopter pour assurer que la normalisation ne porte pas atteinte à la concurrence plus que cela n'est nécessaire pour atteindre des objectifs environnementaux légitimes. Les autorités de la concurrence peuvent s'impliquer très tôt, dès le début du processus de normalisation et coopérer avec le secteur d'activité concerné et avec les pouvoirs publics pour assurer que tous les intervenants sont informés des risques d'infraction au droit de la concurrence, cherchent à être correctement conseillés et veillent à ce que les discussions qui se déroulent lors de réunions entre les acteurs du secteur s'en tiennent strictement aux objectifs environnementaux visés par le processus de normalisation. Une autre approche consiste à examiner les retombées du processus pour s'assurer que les gains d'efficacité dont bénéficieront les consommateurs en dernier ressort l'emportent sur la réduction de la concurrence induite par la normalisation.

(4) *Les accords portant sur les plans sectoriels de traitement et de recyclage des déchets peuvent servir d'importants objectifs de politique environnementale mais aussi limiter substantiellement la concurrence entre les acteurs du marché et/ou les nouveaux entrants, notamment la concurrence liée à l'émergence de systèmes rivaux. L'expérience a montré que les interventions visant à lutter contre les restrictions anticoncurrentielles ne remettent pas en cause les objectifs de la politique environnementale mais au contraire peuvent rendre plus efficaces et efficaces les systèmes de gestion et de recyclage des déchets.*

Les autorités de la concurrence de plusieurs pays sont intervenues pour lutter contre les restrictions de concurrence imposées par des systèmes de gestion et de recyclage des déchets, notamment les systèmes de recyclage du verre, des déchets d'emballage et des produits contenant du plomb. Elles s'intéressent le plus souvent aux clauses limitant les services de collecte et de recyclage indépendants, aux clauses attribuant des quotas de produits recyclés aux producteurs en fonction de leurs parts de marché passées et aux clauses d'exclusivité ou assimilées empêchant les participants de traiter avec des tiers et contrecarrant ainsi la mise en place de systèmes concurrents de gestion et de recyclage des déchets. Plusieurs affaires exposées lors de la table ronde ont confirmé que les interventions visant à supprimer les restrictions anticoncurrentielles n'ont pas remis en cause les objectifs de la politique environnementale visés par ce type de projet, mais ont conduit au contraire à un meilleur fonctionnement des marchés.

Ainsi, certaines affaires dans le cadre desquelles le produit recyclé a été attribué aux producteurs en fonction de leurs parts de marché passées concernaient le plomb recyclé, matériau précieux entrant dans la fabrication des piles et de produits analogues. Ces dispositifs d'attribution de quotas ont été jugés anticoncurrentiels car ils protégeaient la position des acteurs historiques du marché en leur garantissant un accès à moindre coût à cet intrant précieux ; ils faussent la concurrence pour ce produit recyclé et les nouveaux entrants ont de ce fait d'autant plus de mal à s'en procurer.

Les délégués se sont demandé si dans ces affaires, une intensification de la concurrence pour l'intrant concerné pourrait remettre en cause les objectifs de la politique environnementale puisque l'on peut faire

valoir que la concurrence renchérit le produit recyclé, qui devient donc moins concurrentiel que le produit non recyclé. Ces préoccupations n'ont toutefois apparemment pas influé sur les décisions rendues par les autorités de la concurrence. Plusieurs raisons expliquent pourquoi elles rechignent à retenir de tels arguments : le renchérissement de la matière première recyclée devrait aussi inciter les acteurs du marché à poursuivre leurs efforts de recyclage, ce qui rendrait plus incertain l'effet de l'intensification de la concurrence sur les prix ; de plus, l'expérience montre systématiquement que l'intensification de la concurrence rend les systèmes de recyclage plus efficaces et efficaces, ce qui donne lieu, en définitive, à une hausse, à moindre coût, des taux de recyclage. En outre, retenir l'argument selon lequel la consommation de volumes plus importants du produit (plus cher) issu de la récupération est plus avantageux pour la collectivité que l'utilisation du produit (moins onéreux) fraîchement extrait obligerait les autorités de la concurrence à faire primer les objectifs environnementaux sur les objectifs de la politique de la concurrence axés sur le bien-être économique et la plupart des autorités de la concurrence estiment ne pas être autorisées à envisager un tel compromis.

Les affaires dans lesquelles les autorités se demandent si la mise en place de plusieurs systèmes de collecte et de recyclage des déchets pour un secteur donné est nécessaire sont également utiles, à titre d'exemple, pour comprendre de quelle manière les interventions visant à supprimer les restrictions de la concurrence peuvent conforter la réalisation d'objectifs environnementaux. Les délégués ont cité plusieurs cas où les pouvoirs publics, désireux d'améliorer les taux de collecte et de recyclage dans certains secteurs, ont favorisé la mise en place d'un unique système sectoriel de recyclage auquel l'ensemble des parties concernées collaboraient. Cette approche reposait sur l'hypothèse selon laquelle l'exclusion de la concurrence au profit d'un tel système favoriserait une nécessaire coordination et permettrait de bénéficier d'efficacité d'échelle plus importantes, ce qui aboutirait à une hausse à moindre coût des taux de recyclage.

Or une telle approche est largement discréditée aujourd'hui. L'expérience donne à penser au contraire que la concurrence entre plusieurs systèmes de recyclage produit des avantages substantiels et aboutit à une hausse, à moindre coût, des taux de recyclage, puisque les pressions concurrentielles contraignent les différents systèmes à gagner en efficacité et à répercuter les avantages sur les consommateurs. La collecte et le recyclage des emballages en Allemagne en est un exemple particulièrement convaincant. D'abord mis en place avec le soutien des pouvoirs publics sous la forme d'un unique système sectoriel, auquel tous les acteurs participaient dans le cadre d'un dispositif assimilable à une entente, le marché est progressivement devenu plus concurrentiel par suite de l'application du droit de la concurrence et des efforts de sensibilisation visant à éliminer les restrictions et à favoriser l'entrée de nouveaux concurrents. Il en a résulté une hausse des taux de recyclage pour un coût nettement réduit.

Certains arguments peuvent certes plaider en faveur de la mise en place, au départ, d'un unique système en vue de donner une première impulsion aux efforts de recyclage. Cela étant, tous les arguments en faveur d'un tel système doivent être soigneusement pesés afin de déterminer si la concurrence entre plusieurs systèmes ne serait pas au contraire, dès le départ, la meilleure solution et, si l'autorité de la concurrence approuve malgré tout la mise en place d'un système unique, il convient alors de veiller à supprimer le plus rapidement possible toute restriction susceptible d'empêcher l'arrivée de nouveaux entrants.

- (5) *Les pouvoirs publics interviennent fréquemment quand des concurrents concluent des accords visant des objectifs de politique environnementale. Les efforts de sensibilisation déployés par les autorités de la concurrence sont alors indispensables pour assurer que le désir de poursuivre des objectifs légitimes de politique environnementale n'a pas pour effet de restreindre inutilement la concurrence.*

Les affaires exposées lors de la table ronde mettent en évidence que dans la plupart d'entre elles, les pouvoirs publics sont intervenus dans des accords conclus entre concurrents en vue d'atteindre des objectifs de politique environnementale, en incitant par exemple un secteur à accepter, pour ses produits,

des normes qui confortent les objectifs de politique environnementale, en imposant la mise en place de systèmes sectoriels de récupération et recyclage des déchets ou en imposant des redevances environnementales. C'est donc un domaine dans lequel les autorités de la concurrence doivent poursuivre leurs efforts de sensibilisation pour assurer que ces accords ne restreignent pas la concurrence ou ne prévoient pas de restrictions allant au-delà de ce qui est nécessaire pour atteindre les objectifs de politique environnementale visés et en particulier, que les opérateurs en place ne peuvent pas s'en servir pour ériger de nouveaux obstacles à l'entrée de nouveaux concurrents.

CALL FOR CONTRIBUTIONS



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

Competition Committee

The Chairman

COMP/2010.102

19 July 2010

TO ALL COMPETITION DELEGATES AND OBSERVERS

Re: Competition Committee Meeting (27-28 October 2010) - Roundtable on Horizontal Agreements in the Environmental Context - Call for Country Contributions

Dear Delegate/Observer,

At its June 2010 meeting, the Competition Committee agreed to hold a roundtable discussion on horizontal agreements in the environmental context. This letter is an invitation for written submissions to that roundtable.

This will be one of three roundtables held in October under the general theme of green growth (the other two being i) emissions trading and ii) pro-active policies for green growth and the market economy). In this one, we will strive to gain a better understanding of when horizontal agreements relating to environmental objectives are necessary or efficient from a social perspective and when they should be discontinued pursuant to competition concerns. The agreements to be discussed in this context include joint ventures, other collaborations among competitors, mergers, and cartels. We will cover agreements that are made in response to environmental regulations as well as those that are made on a purely voluntary basis to pursue environmental objectives.

In previous roundtables, such as Environmental Regulation and Competition (2006), the Committee has discussed the general relationship between competition and environmental policies. We have not, however, focused on agreements among competitors that relate to environmental aims. These agreements can lead to highly interesting challenges for competition authorities. On the one hand, the agreements can improve both efficiency and consumer welfare, such as by enabling risk sharing and cost savings and by facilitating innovation. On the other hand, the agreements can also facilitate conduct like cartel formation.

Suppose, for example, that a jurisdiction enacts regulations that require an industry to reduce the level of its carbon dioxide output. The industry players then meet and come to an agreement under which they will act in a coordinated fashion to meet the new regulatory requirements and/or to pass on the extra costs to consumers. How should competition agencies analyze such an agreement? What factors should be taken into account as the competition agency decides whether or not to intervene? Should those factors include including environmental policy objectives, which would then be weighed against competition concerns? Should there ever be an exemption for anticompetitive conduct that advances environmental goals?

Perhaps the answer depends on whether the conduct in question is a merger, a joint venture, or a cartel-like agreement? A similar dilemma can occur in mergers, for example. Suppose a polluting firm with sunk costs invested in an old technology wants to merge with a non-polluting firm with newer technology. The parties argue that a benefit of the merger is that it will be easier to shut down the polluting plant(s) and reallocate production to the non-polluting firm. Specifically, they argue that it is easier to make such changes when both types of plants are owned by the same firm. Should that contention be taken into account in the merger analysis? What level of proof should be required?



There will be no Secretariat background paper. Therefore, the quality and utility of this roundtable depends on your written contributions, so I look forward to your submissions. Indeed, this roundtable is particularly dependent on discussing actual cases, so it is highly recommended that you include descriptions of relevant cases from your jurisdictions.

To help you with your written contributions, I am attaching a number of more specific issues and questions that you should discuss in your submission. The attached list is not intended to be comprehensive, though. Delegations are encouraged to raise and address other issues, as well, based on their own experience with relevant cases. Initial research suggests that the literature in this specific area is limited, but a brief bibliography is also attached.

Please advise the Secretariat **by 1 September 2010 at the latest** if you will be making a written contribution. Written submissions are due **by 4 October 2010**. Failure to meet that deadline could result in a contribution not being distributed to delegates over OLIS in a timely fashion in advance of the meeting.

All communications regarding documentation for this roundtable should be sent to Mrs. Rebecca Lambert, Tel. - (331) 45 24 75 56; Fax - (331) 45 24 96 95; E-mail – rebecca.lambert@oecd.org. Jeremy West would be pleased to answer any substantive questions you may have about the roundtable. His phone number and e-mail address are: (331) 45 24 17 51, jeremy.west@oecd.org.

Sincerely yours,

Frédéric Jenny
Chairman
Competition Committee



Some Suggested Issues and Questions for Consideration in Country Submissions

- *The general problem.* When they are made for the sake of the environment, when do horizontal agreements – including joint ventures, other competitor collaborations, cartels, and mergers – cross the line and become unlawful for the sake of competition?
 - What factors should competition authorities take into account when analyzing such agreements?
 - Some possibilities include cost savings, innovation, market power, and risk diversification.
 - But should the factors include environmental policy objectives, too, such as cleaner air? Why or why not?
- *Dealing with pressure to relax the rules against cartels.* How should agencies handle pressure from other parts of the government to take a light-handed approach toward environment-related conduct? For example, cartels are ordinarily illegal per se, but what if not only companies but other government ministries argue in favour of allowing a cartel, claiming that close cooperation and/or output reduction will benefit the environment in a particular case (such as the carbon dioxide reduction example given in the text of the letter)? Should the per se rule against cartels be abandoned in the environmental context? If so, why and under what circumstances? Furthermore, to what extent should it be relaxed? If the per se rule should not be abandoned, then how can agencies persuasively make the case that cartel-induced output reduction is always a net social harm – even when the cartel is formed to advance environmental objectives?
- *Similar questions with respect to joint ventures, other competitor collaborations, and mergers.* The same kinds of questions apply to the issue of relaxing the rules for analyzing environmentally-motivated joint ventures, competitor collaborations and mergers. For example, suppose that the major players in an industry want to collaborate to set pro-environment standards among themselves. Should the competition authorities apply less scrutiny to such arrangements? Why or why not? If so, under what conditions is a lower level of scrutiny warranted?
- *Administrative guidance.* Is it appropriate for competition agencies to intervene when they believe that another government agency's administrative guidance on environmental regulations could inadvertently lead to a cartel? If so, under what circumstances?
- *Agency experience.* Please describe cases from your jurisdiction in which relevant issues have arisen. Examples of relevant cases include, for instance, agreements related to the collection of used refrigerants, e.g. freon. From an environmental perspective, society wants an exhaustive collection system. However, if a competitive system is in place then the players will have lower margins and may cut corners in order to save costs, leading to arguments that allowing them to collude or simply granting monopolies would raise margins and quality assurance. Of course, that would mean that society would have to pay more, as well.

Have you come across any cases in which competition has led to a better outcome for the environment?



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APPEL À CONTRIBUTIONS



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

Competition Committee

The Chairman

COMP/2010.102

19 July 2010

À TOUS LES DÉLÉGUÉS ET OBSERVATEURS

Objet: Réunion du Comité de la Concurrence (27-28 Octobre 2010) – Table ronde sur les accords horizontaux dans le contexte environnemental – Appel à Contributions

Chers délégué / Observateur,

Lors de sa réunion de juin 2010, le Comité de la Concurrence a convenu de tenir une table ronde sur les accords horizontaux dans le contexte environnemental. Cette lettre est un appel à contributions pour cette table ronde.

Celle-ci sera l'une des trois tables rondes qui auront lieu en Octobre sous le thème général de la croissance verte (les deux autres étant i) droits d'émissions et concurrence et ii) politiques proactives pour une croissance verte et l'économie de marché). Dans cette table ronde, nous nous efforcerons de mieux comprendre quand les ententes horizontales ayant trait à des objectifs environnementaux sont nécessaires ou efficaces dans une perspective sociale et quand elles devraient être abandonnées en raison des problèmes de concurrence qu'elles posent. Les accords à examiner dans ce contexte comprennent les coentreprises, d'autres collaborations entre concurrents, les fusions et les cartels. Nous couvrirons les accords existants en réponse aux réglementations environnementales ainsi que ceux existant sur une base purement volontaire en vue d'objectifs environnementaux.

Lors des tables rondes précédentes, en particulier celle sur la réglementation environnementale et la concurrence (2006), le Comité a discuté de la relation entre la concurrence et les politiques environnementales. Cependant, nous n'avons pas encore centré nos travaux sur les ententes entre concurrents qui se rapportent à des objectifs environnementaux. Ces accords peuvent conduire à des défis très intéressants pour les autorités de la concurrence. D'une part, les accords peuvent améliorer l'efficacité et le bien-être du consommateur, par exemple en permettant à la fois le partage des risques, les économies de coûts et en facilitant l'innovation. D'autre part, ces accords peuvent également faciliter des comportements tels que la formation de cartels.

Supposons, par exemple, qu'une juridiction édicte des règlements qui exigent qu'une industrie réduise le niveau de sa production de dioxyde de carbone. Les acteurs de l'industrie se réunissent et parviennent à un accord en vertu duquel ils agiront de façon coordonnée pour répondre aux nouvelles exigences réglementaires et/ou pour répercuter les coûts supplémentaires sur les consommateurs. Comment les autorités de la concurrence devraient-elles analyser un tel accord? Quels facteurs devraient être pris en compte quand l'autorité de la concurrence décide ou non d'intervenir? Si ces facteurs comprennent notamment les objectifs de politique environnementale, lesquels devraient ensuite jouer contre les questions de concurrence? Faudrait-il avoir une dérogation pour comportement anticoncurrentiel mettant des objectifs de progrès environnementaux en évidence?

Peut-être la réponse dépendra-t-elle du type de conduite en question : s'agit-il d'une fusion, d'une joint-venture ou d'un accord de type entente? Un dilemme similaire peut se produire dans les fusions, par exemple. Supposons qu'une entreprise polluante avec des coûts irrécupérables investis dans une technologie ancienne souhaite fusionner avec une entreprise non polluante avec des technologies plus récentes. Les parties font valoir pour justifier la fusion, qu'il sera plus facile de fermer l'usine polluante et réaffecter la production à l'entreprise non polluante. Plus précisément, elles soutiendront qu'il est plus facile de faire de tels changements lorsque les deux



types d'usines sont la propriété de la même entreprise. Est-ce que cette assertion devrait être prise en compte dans l'analyse de cette fusion? Quel niveau de preuve doit être exigé?

Le Secrétariat ne présentera pas de note de référence. Par conséquent, la qualité et l'utilité de cette table ronde repose sur vos contributions écrites ; donc je me réjouis de vos soumissions. En effet, cette table ronde dépend très particulièrement de la discussion de cas réels : il est donc fortement recommandé d'inclure des descriptions de cas pertinents survenus dans vos juridictions.

A titre d'inspiration, je joins un certain nombre de questions plus spécifiques que vous devriez aborder dans votre contribution. Cependant, cette liste n'est pas exhaustive. Les délégations sont ainsi invitées à aborder d'autres questions en fonction de leur propre expérience. Les premières recherches suggèrent que la littérature dans ce domaine spécifique est limitée, mais vous trouverez ci-joint une brève bibliographie.

Nous vous remercions de bien vouloir indiquer au Secrétariat d'ici **le 1er Septembre 2010** si vous comptez soumettre une contribution écrite. Elles devront nous parvenir le **4 Octobre 2010** au plus tard. En cas de non-respect de ce délai, votre contribution risque de ne pas être diffusée sur OLIS à temps pour la réunion.

Toutes les communications relatives à la documentation pour cette table ronde doivent être envoyées à Mme Rebecca Lambert, tél. - (331) 45 24 75 56, Fax - (331) 45 24 96 95, E-mail - rebecca.lambert @ oecd.org. Jeremy West répondra volontiers à toutes les questions de fond sur cette table ronde. Son numéro de téléphone et adresse e-mail sont les suivants: (331) 45 24 17 51, jeremy.west @ oecd.org.

Cordialement,,

Frédéric Jenny
Président
Comité de la Concurrence



Quelques questions pour considération dans les contributions des pays

- *Problématique générale.* Quand pensez vous que les accords horizontaux conclus pour le bien de l'environnement, - y compris les coentreprises, les collaborations entre concurrents, les ententes et les fusions – dépassent les limites et deviennent illégales pour des raisons de concurrence?
 - Quels facteurs les autorités de la concurrence devraient-elles prendre en compte lors de l'analyse de tels accords?
 - Certaines possibilités comprennent des économies de coûts, l'innovation, le pouvoir de marché et la diversification des risques.
 - Cependant, ces facteurs devraient-ils comprendre aussi des objectifs de politique environnementale comme l'air plus propre? Pourquoi ou pourquoi pas?
- *Gérer la pression pour assouplir les règles contre les ententes.* Comment les Autorités devraient-elles gérer la pression d'autres parties du gouvernement pour adopter une approche allégée en matière d'environnement? Par exemple, les ententes sont généralement illégales *per se*, mais que faire si non seulement les entreprises, mais d'autres ministères plaident en faveur d'une entente, en affirmant que la coopération étroite et/ou la réduction de la production serait bénéfique pour l'environnement dans un cas particulier (comme l'exemple de réduction de dioxyde de carbone donnée dans la lettre)? Est-ce que la règle *per se* contre les ententes devrait être abandonnée dans le contexte de l'environnement? Si oui, pourquoi et dans quelles circonstances? Par ailleurs, dans quelle mesure devrait-elle être assouplie? Si la règle *per se* ne devrait pas être abandonnée, alors comment les autorités pourraient-elles faire valoir de manière persuasive que le résultat d'une entente est toujours un préjudice social net - même quand l'entente est formée pour faire progresser les objectifs environnementaux?
- *Des questions similaires à l'égard de joint-ventures, des collaborations entre concurrents et des fusions.* Le même genre de questions s'applique à la question de l'assouplissement des règles d'analyse de joint-ventures à but environnementale, des collaborations entre concurrents et des fusions. Par exemple, supposons que les principaux acteurs dans une industrie veulent collaborer pour régler des normes pro-environnementales entre eux. Est-ce que les autorités de concurrence devraient examiner de façon moins minutieuse ces arrangements? Pourquoi ou pourquoi pas? Si oui, sous quelles conditions un niveau de surveillance plus faible serait-il justifiée?
- *Des conseils d'administration.* Est-il approprié pour les autorités de la concurrence d'intervenir au sein d'une autre partie du gouvernement si elles jugent que l'encadrement administratif sur la réglementation environnementale conduit involontairement à une entente? Si oui, dans quelles circonstances?
- *L'expérience de l'Autorité.* Nous vous prions de décrire des cas dans laquelle des questions pertinentes ont surgi dans votre juridiction. Par exemple, des accords relatifs à la collecte des fluides frigorigènes utilisés, par exemple, le fréon. Du point de vue environnemental, la société veut un système de collecte exhaustive. Cependant, si un système concurrentiel est en place, les acteurs auront alors des marges plus faibles et peuvent faire le nécessaire pour diminuer les coûts. Ceci pourrait justifier de la collusion ou simplement en accordant des monopoles, augmenterait les marges et l'assurance qualité. Bien sûr, cela signifierait que la société aurait à payer plus cher, aussi.

Avez-vous rencontré des cas dans lesquels la concurrence a conduit à un meilleur résultat pour l'environnement?



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AUSTRALIA

1. Overview of Australian laws regulating horizontal agreements

Agreements between competitors, 'horizontal agreements', can provide efficiency gains however can also frustrate the competitive process. Australia's national competition and consumer law, the *Trade Practices Act 1974* (TPA) possesses strong prohibitions against anticompetitive conduct together with flexible provisions that recognise and exempt schemes whose benefits outweigh their anticompetitive detriments.

Agreements between businesses are prohibited if they have the purpose, effect or likely effect of substantially lessening competition. Per se illegality is however applied to horizontal agreements that are most likely to cause competitive harm, for example agreements to fix prices, restrict outputs, rig bids or share markets.

While the competition provisions of the TPA are based on likely competitive harm, the TPA provides scope for matters that may contravene its provisions to be 'authorised' if the public benefit from the conduct would outweigh any public detriment. Schemes with significant environmental benefits have been authorised in a number of industries under this feature of the TPA.

The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering the TPA, including exercising the powers under the TPA to grant an 'authorisation', that is, to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the TPA. The process for considering an application for authorisation is discussed below.

2. The authorisation process

Part VII of the TPA provides for authorisations, notifications and clearances. Authorisation may be sought in relation to any of the competition provisions under Part IV of the TPA, except in relation to abuse of dominance.

A party seeking authorisation must apply to the ACCC, specifying in detail the conduct which it seeks to have authorised. This is done by submitting an application, which can be initiated by the parties engaging in the conduct, or on their behalf, for example by a trade association. Immunity does not commence until the authorisation is granted by the ACCC. The ACCC cannot authorise conduct retrospectively.

Although the parties submit an application containing the details of any proposed arrangements on a prescribed form, they must satisfy the ACCC that the conduct in which they propose to engage delivers a net public benefit. This requires making a comprehensive submission supporting the application.

The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment. This may involve conduct being authorised subject to conditions.

As part of the authorisation process, the ACCC invites third parties whose interests may be affected by the arrangements to make submissions on the proposed arrangements. Following public consultation, the applicants are provided with the opportunity to respond to any submissions made by interested parties. Once consultation is completed, the ACCC issues a draft determination either proposing to grant or deny authorisation (and invite submissions on the draft determination). It concludes the process by holding any final consultations prior to the release of the final determination. This process is required to be completed within six months.

3. Environmental claims and public benefit analysis

There are formal steps under the TPA that the ACCC must undertake in assessing an application for authorisation. The primary consideration of an application for authorisation by the ACCC is the assessment of the impact that the conduct would have. This is commonly referred to as the ‘future with-and-without test’. The test and its application is discussed below.

3.1 Counterfactual and the assessing impact of the arrangements

Under the test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation was granted with those generated if the authorisation was not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Public benefit is not defined in the TPA; however in practical terms it has been given its widest possible meaning to include:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements...the achievement of the economic goals of efficiency and progress.¹

The next step is to assess any detriment. Public detriment is also not defined in the TPA, but is also given a wide interpretation, including:

...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.²

In assessing the benefits said to flow from anti-competitive conduct, the ACCC will consider both economic and non-economic claims. Parties need to make submissions to the ACCC providing evidence of the claimed benefits. It is not sufficient for parties to merely make assertions that benefits will flow from the conduct for which authorisation is sought. In many cases, parties will seek the expertise of economists or other experts in providing evidence to the ACCC as to how claimed benefits may arise and the extent of those benefits.

3.2 Environmental benefits

In recent years, the ACCC has considered applications for authorisations by parties claiming that anti-competitive conduct will deliver various environmental benefits. Generally, the ACCC considers that a

¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

² Ibid, n 1 at 42,683.

scheme or arrangement which achieves the goal of providing greater protection of the environment is likely to result in a benefit to the public.

In many cases, the conduct for which authorisation is sought has received support from not only other market participants, but scientific organisations and government. In the most part, the environmental benefits claimed by parties relate to promoting environmental best practice (such as promoting recycling initiatives) or encouraging the use of new technology.

A few of the claimed environmental benefits from some recent authorisations which have been granted by the ACCC are outlined below. The background to the applications for authorisation from which they derive are at Attachment 1.

3.2.1 *Imposition of a levy on refrigerants*

A levy was proposed on the refrigerant industry for ozone depleting and synthetic greenhouse gas refrigerants imported as bulk or contained in equipment, and sold in Australia (the program). The agreement on the industry levy effectively amounted to a price agreement between competitors.

It was claimed the program provided a public benefit by assisting importers of refrigerant gases to comply with their legislative obligations and encouraging industry to engage in environmentally sound practices. The public submissions by interested parties commended the program, noting it was an effective mechanism to protect the environment, including that it had been very successful in reducing stratospheric ozone destruction and preventing approximately 8 million tonnes of CO₂-e emissions into the atmosphere.

The scheme was said to assist Australia in meeting its international obligations to control the consumption and production of ozone depleting substances under the *Montreal Protocol on Substances that Deplete the Ozone Layer 1987*. Thus far, the program has prevented the emission of enough ozone depleting refrigerant to destroy 7.5 million tonnes of stratospheric ozone. It was also claimed that the program had made a significant contribution to Australia meeting the greenhouse emission reduction targets set out in the *Kyoto Protocol of the United Nations Framework Convention on Climate Change*.

The ACCC considered that the ongoing operation of the program facilitated by an increase in the levy on refrigerant gas imported and sold in Australia was likely to result in both efficiency and environmental benefits. In addition, the ACCC considered that the continuation of the program and its associated activities was likely to assist Australia in its efforts to comply with its international greenhouse gas commitments.

The ACCC authorised the program.³

3.2.2 *Processing and disposal of food and garden organics*

An authorisation was sought for the joint tender and contract for the services of a contractor/s deemed suitable to provide regional transfer, processing and disposal of food and garden organics and the marketing and sale of any materials or products derived from that transfer or processing to local government council areas.

It was claimed that the conduct would result in environmental benefits. The primary aim of the agreement was to divert waste materials from landfill and convert them, at a cost, to a resource of some

³ Application for revocation and substitution of authorisation A91008 – Authorisation A91079 dated 14 May 2008.

economic value. This was said to result in reduced resource usage and lower environmental impact, including reduced risk of surface and ground water pollution from production of greenhouse gases and leachate.

Resource recovery facilitated by the arrangements was also said to reduce depletion of naturally occurring materials and result in the production of goods such as fertilisers for use in parks and gardens in the Inner Sydney region and elsewhere, thus providing benefits to the environment.

The ACCC concluded that the proposed arrangements were likely to result in a reduction in environmental damage from waste production and management. In the ACCC's consideration of the environmental benefits claimed, the ACCC recognised that there were arguments for and against resource recovery and the environmental benefits that would flow from this and that the public benefits claimed by the applicant were only a part of the total benefits claimed. The ACCC authorised the conduct.⁴

3.2.3 *Collection of agricultural and veterinary chemicals*

An application was made on behalf of a number of signatories to a waste reduction scheme. The application concerned a proposed agreement to impose a four cent per litre/kilogram levy on manufacturers and suppliers of agricultural and veterinary chemicals, with a view to passing on the levy to end users, effectively amounting to an anti-competitive agreement. The scheme incorporated programs to collect unwanted agricultural and veterinary (AgVet) chemical containers. Similar schemes and programs had been authorised in the past.

Significant environmental benefits were said to arise as a result of the arrangements, such as the safe removal of AgVet containers from mainstream waste streams that, without the scheme, would otherwise be disposed of in landfill, or when containers were buried on farm land or burnt. Similarly, it was claimed that the scheme and its associated programs promoted recycling by encouraging users of AgVet chemicals to buy resealable, water soluble cardboard or paper containers.

Interested parties that were invited to comment on the application for authorisation considered that there were environmental benefits flowing from the conduct through prevention of potentially environmentally damaging disposal methods like on-farm storage, burning and burying of containers. The vast majority of interested parties were supportive of the scheme and considered that it had delivered positive outcomes. The ACCC considered that the conduct the subject of the authorisation had resulted in significant environmental benefits and would be likely to continue to do so. The ACCC authorised the conduct.⁵

4. **Conclusion**

The competition laws of Australia enable environmental and competition objectives to be considered under a single framework. This flexibility ensures environmental policy obligations are achieved together with the promotion of competition. In doing the competition laws of Australia provide for the realisation of the highest possible welfare levels.

⁴ Application for authorisation A91096 dated 29 October 2008.

⁵ Application for authorisation A91105 dated 21 January 2009.

ATTACHMENT 1

OVERVIEW OF APPLICATIONS FOR AUTHORISATION

1. Imposition of a levy on refrigerants

On 19 December 2007, Refrigerant Reclaim Australia Ltd lodged application A91079 seeking revocation of A91008 and its substitution by a new authorisation to allow Refrigerant Reclaim Australia Ltd to increase the levy from \$1.50 to \$2.00 per kilogram of ozone depleting and synthetic greenhouse gas refrigerants imported as bulk or contained in equipment and sold in Australia.

The applicant, Refrigerant Reclaim Australia (RRA) had an authorisation in place since 1994 for the industry to agree to impose a levy to fund the collection and disposal of ozone depleting substances and synthetic greenhouse gases. The levy was initially set at \$1 per kilogram on refrigerant gases sold by importers of those gases. The ACCC granted authorisation in 2006 for RRA to increase the levy to \$1.50.

Application A91079 sought the revocation of authorisation A91008 and its substitution by a new authorisation to allow RRA to increase the levy from \$1.50 to \$2.00 per kilogram of ozone depleting and synthetic greenhouse gas refrigerants imported as bulk or contained in equipment and sold in Australia.

Australia is party to a number of international protocols and agreements which relate to reducing ozone depleting and greenhouse gas emissions including reducing the use of harmful refrigerant gases. These agreements include the *Vienna Convention for the Protection of the Ozone Layer 1985* and the *Montreal Protocol on Substances that Deplete the Ozone Layer 1987*. At the time of formulating these agreements, their primary purpose was to begin the process of addressing the potentially harmful effects of human activities on the ozone layer. As a signatory to the Vienna Convention and the Montreal Protocols, Australia made an international commitment to control the consumption and production of ozone depleting substances.

In assessing the impact of the arrangements, the ACCC considered that the current arrangements may limit the potential for new commercial entities to enter the industry in place of or in competition with RRA. The current industry structure, which supports a non-profit, industry funded entity, may create a barrier to entry for an organisation that is capable of disposing of refrigerant gases more efficiently than RRA.

The ACCC was of the view that the imposition of a revised levy at a higher rate of \$2.00 was likely to result in an increase in the cost of products containing refrigerant gases. The ACCC considered it likely that the businesses that were acquiring refrigerant gases from the importers were then likely to pass this increase on to end consumers. It appeared that ultimately this increase would lead to higher prices being paid by end consumers.

In summary, the ACCC formed the view that it was likely to be considerably cheaper and more efficient for there to be a single, industry funded disposal program than for each individual importer to fund its own reclamation and recycling program. The ACCC considered that, insofar as these efficiencies resulted in cost savings for importers of refrigerant gases and were passed on to consumers, the levy increase was likely to result in a public benefit.

The ACCC granted authorisation A91079 to RRA until 31 December 2010.¹

2. Processing and disposal of food and garden organics

On 23 July 2008, the Inner Sydney Waste Management Group of Councils (ISWMG) applied for authorisation, proposing to jointly tender and contract for the services of a contractors or contractors deemed suitable to provide regional transfer, processing and disposal of food and garden organics, and the marketing and sale of any material or products derived from that transfer or processing to the respective local government areas.

The ISWMG is a voluntary association that was formed to develop cooperative solutions to the member councils' municipal waste and resource recovery management issues. Each of the member councils is a signatory to the Inner Sydney Councils Food and Garden Organics Processing Project, an agreement between the ISWMG councils to pursue a long-term strategy for the processing of co-collected municipal food and garden organics.

The ISWMG believed the proposed joint tender and contract arrangements would result in the following public detriments: (a) the food and garden organic waste segment of the ISWMG's waste stream will be captured by one waste management company, without contest, for at least 10 years, and (b) the high cost of land near the Inner Sydney region might result in costs of building a new facility being passed on to the ISWMG via the proposed contract. The ACCC considered that the public detriment generated by the proposed arrangements was likely to be minimal.

The ISWMG submitted that the likely effect of the proposed joint tender and contract arrangements would be to increase competition in the relevant markets by providing an incentive for waste management companies to invest in research and development of waste management technologies and research to improve the marketability of end products from the waste stream. In this way, the waste management companies may minimise landfill costs and levies.

The ACCC noted that the proposed arrangements were likely to result in a reduced number of individual suppliers of co-collected food and garden organic waste. However, the ACCC accepted that the councils of the ISWMG represent only a small proportion of the overall supply of waste organics and, therefore, the resulting public detriment was likely to be relatively small.

In summary, the ACCC considered that the proposed arrangements may result in public benefits in the form of reduced depletion of natural resources and reduced negative environmental impact of municipal waste disposal. The ACCC also considered the proposed arrangements may create useable products from the treatment process. The likely beneficiaries of these effects would not only include residents of the ISWMG region, but also the inhabitants of the greater Sydney region.

The ACCC granted authorisation A91096 until 31 January 2020.²

3. Collection of agricultural and veterinary chemicals

On 31 October 2008, AgStewardship Australia Limited applied for authorisation on behalf of the proposed signatories of the Industry Waste Reduction Scheme to impose a four cent levy per litre/kilogram on manufacturers and suppliers of Agricultural and Veterinary (AgVet) chemicals. The levy would be

¹ Authorisation A91079 - <http://www.accc.gov.au/content/index.phtml/itemId/806487/fromItemId/401858>.

² Authorisation A91096 - <http://www.accc.gov.au/content/index.phtml/itemId/837088/fromItemId/401858>.

ultimately passed on to end users. The Scheme incorporated the drumMUSTER and ChemClear programs, which provided for the collection of unwanted, empty AgVet chemical containers.

The National Farmers Federation (NFF), Croplife Australia Limited (Croplife), Animal Health Alliance (AHA), Veterinary Manufacturers and Distributors Association (VMDA) and the Australian Local Government Association (ALGA) have together developed a Scheme for the safe collection and recycling of AgVet chemical containers.

The scheme was formerly covered by authorisation A90963, which expired on 31 December 2008. AgStewardship would be a new governance arrangement for the Scheme.

The scheme is funded by way of a four cent per litre/kilogram levy that is imposed on manufacturers and suppliers of AgVet chemical containers. The levy is passed onto farmers and other users of crop protection and on-farm animal health products. Only manufacturers, suppliers and end users are involved. By its nature, the agreement between signatories to the scheme on a price for the levy was likely to result in some anticompetitive detriment. The ACCC also considered that the increased prices to end users and access issues generate some small public detriment.

AgStewardship submitted that the purpose of passing the levy on to end users was to encourage the purchase of products that are packaged in returnable containers or watersoluble bags or boxed containers (which are not subject to the levy). The funds collected cover costs associated with the implementation of the program, employment of regional consultants, reimbursement of councils and community groups for construction of compounds, container inspection, charges by processors to collect the containers and paying external contractors for ChemClear® collections. The funds collected will also be used in the promotion and communication of the program.

There are currently 72 manufacturers that pay the levy. Of these, 14 are members of Croplife and 10 are members of AHA. The remainder includes members of VMDA and independent suppliers of AgVet chemicals to farmers and other end users. It is not compulsory for VMDA members or independent suppliers to contribute to the Scheme.

The ACCC noted that the scheme, including the levy, had been in place since 1998. The vast majority of interested parties were supportive of the Scheme and considered that it had delivered positive outcomes. The ACCC considered that the continued operation of the Scheme facilitated by a four cent levy per litre/kilogram on AgVet chemicals was likely to result in public benefits in the form of significant environmental benefits.

In summary, the ACCC noted that the establishment of AgStewardship was intended to improve the structure of the scheme. To the extent that this resulted in improved operation of the Scheme, this would enhance the public benefits arising. The ACCC therefore considered that despite the anticompetitive detriment that was likely to flow from increased prices and some access issues, the continued operation of the Scheme facilitated by a four cent levy per litre/kilogram of AgVet chemicals was likely to result in public benefits, in the form of significant environmental benefits.

The ACCC granted authorisation A911095 to AgStewardship until 21 January 2014.³

³ Authorisation A91105 - <http://www.accc.gov.au/content/index.phtml/itemId/848024/fromItemId/401858>.

CANADA

1. Introduction

This paper addresses some of the issues surrounding the interrelationship between competition policy and environmental policy from a Canadian perspective. In Canada, as in many other nations throughout the world, competition policy focuses on the promotion of competition within markets as it provides for the efficient allocation of resources, greater choice of products and services, and the maximization of economic welfare. At the same time, one of the key objectives of Canadian environmental policy is to address the negative externalities associated with environmental pollution.¹ These policy objectives, while quite different in nature share the common trait of influencing the Canadian marketplace.

2. The interaction between competition and environmental policies

Environmental policy, particularly in the area dealing with designated waste materials, is intended to affect the actions of both waste generators and processors. Consequently, it not only affects the households that consume products and produce waste, but also the businesses that produce and market these products.

One of the recent policy approaches to address the treatment of designated waste materials in Canada has been the emergence of provincial legislation that assigns the responsibility for disposal of waste material to the original producers or first importers of the product at the end of its normal life cycle. This policy approach, known as "Extended Producer Responsibility" (EPR) has been the focus of the Canadian Council of Minister of the Environment (the Council) which published a discussion paper in 2009 titled *Towards A Proposed Canada-Wide Action Plan for Extended Producer Responsibility*.

The EPR approach to dealing with designated waste material has prompted the development of collaborative arrangements between market participants (which includes competitors).

There are obvious benefits to this type of industry collaboration. The most efficient means of waste collection, transportation and processing involves the exploitation of network and scale efficiencies. Collaborative programs for funding, collection and processing of the same types of waste through some joint-mechanism allow these economies to be realized. Recognizing this, many of the waste recycling programs that are being implemented throughout the various provinces in Canada have been organized and run by collaborative stewardship programs. The design and implementation of these programs are good examples of the interaction between competition policy and environmental policy.

Collaborative environmental programs designed to deal with waste management can often require the use of a centralized body to co-ordinate the establishment of "eco-fees" for consumption and industry fees and standards for collection, transportation and processing of waste materials. Additionally, obligations under EPR-based programs impose costs on both consumers and competitors. These costs can become strategic

¹ Issues generally addressed by environmental policy include (but are not limited to) air and water pollution, waste management, ecosystem management, biodiversity protection, and the protection of natural resources, wildlife and endangered species.

variables in the ability of firms to enter, compete and expand in both the primary markets associated with products and in the waste markets that deal with the products at the end of their life cycle.

3. The competition policy approach to collaboration in Canada

In Canada, the Commissioner of Competition is responsible for the administration and enforcement of the *Competition Act* (the Act). The Competition Bureau (the Bureau) is the organization that assists the Commissioner in carrying out her statutory mandate.

In 2009, Canada made significant amendments to the Act that included changes to the provisions dealing with collaborative behaviour between firms.

The amendments to the conspiracy provision of the Act create a more effective criminal prohibition that is reserved for agreements commonly recognized as the most egregious forms of anti-competitive conduct; namely, agreements between competitors to fix prices, allocate markets or restrict output that in substance have no purpose or consideration other than restraining competition, and which are considered to be deserving of condemnation without an inquiry into their competitive effects.

Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under a new civil provision, set out in section 90.1 of the Act, that prohibit agreements only where they are likely to substantially lessen or prevent competition.

There are a number of different types of efficiency gains that may be realized through competitor collaborations. Subsections 90.1(4) to (6) create a framework where efficiency gains likely to be brought about by an agreement are considered against the anti-competitive effects that are likely to result from the agreement.

Hence, in a broader competition policy context, one can distinguish between agreements that are targeted as offences under competition law which promote collusion on the setting of price, the quantity of output and the freedom to compete, and those collaborative arrangements which are encouraged because they are pro-competitive and lead to welfare enhancing innovations and enhanced exports.

4. Regulated conduct under the competition Act in Canada

While a clear distinction is made in the Act between the treatment of anti-competitive and pro-competitive collaborative activity between competitors, public policy considerations, including environmental objectives, are distinct from pure considerations of competition and are, as such, beyond the scope of the Bureau's mandate under the Act.

The Bureau has, however, issued guidance in a technical bulletin, outlining the Bureau's general approach to the enforcement of the Act with respect to conduct which may be regulated by another federal, provincial or municipal law or legislative regime.² Hence conduct which might be deemed to be collusive and potentially anti-competitive, but that is regulated by environmental legislation, would be carefully assessed by the Bureau to determine the appropriate enforcement response. Given the complexity and the need to consider the specific facts of each situation, it not possible to generalize on how the Bureau would proceed where environmental legislation has prompted firms to collaborate in an anti-competitive fashion. However, the Bureau bulletin points out that:

² Competition Bureau (2010), "Technical Bulletin on Regulated Conduct", available at: <http://www.competitionbureau.gc.ca>.

“Generally, in determining whether conduct regulated by another law will be pursued under the Act, the Bureau will carefully consider the purpose of the Act and any other law said to be applicable to the conduct, the interests sought to be protected by both laws, the impugned conduct, the potentially applicable provision(s) of the Act and of the other law, the parties involved, and the principles of statutory interpretation applicable to the case.”³

In addition to the enforcement provisions of the Act dealing with collusive behaviour, the Commissioner of Competition also has the statutory authority, pursuant to sections 125 and 126 of the Act, to make representations to boards, commissions or other tribunals in respect of competition. This function is an effective advocacy tool influencing the design and the implementation of policy initiatives that impact the state of competition in the markets they affect.

5. Competition and environmental policies: Finding a balance

In Canada, while competition policy is promoted through a federal statute, most legislation dealing with environmental policy is imposed by provincial and municipal governments. Hence, in this particular area, there is a challenge to policy makers to find some mechanism for the co-ordination of policy priorities between different levels of government.

The state of competition in any market, which is normally supported through the enforcement of competition law, can be significantly distorted by regulation if it alters the incentive structure of the market and promotes some collaborative behaviour on the part of market participants who would normally compete with one another.

From a competition policy perspective, it is recognized that some public policy objectives can only be realized by imposing policies, laws and regulations on markets which can effect competition. The challenge for policy makers is to find the proper balance between competition and these other policy objectives. Recognizing the promotion of competition as an important underlying principle with any policy objective greatly assists policy makers in achieving this proper balance.

One means of recognizing the importance of competition is to consider the following six guiding principles of regulation when designing and implementing any policy, law or regulation:

- Regulation should have clearly defined and specific objectives

Effective regulation must be premised on clearly defined and specific objectives so as to improve transparency and reduce the likelihood that regulation will be used to pursue private interests under the guise of public protection. Any regulatory model should state the reasons for its existence and the outcomes it intends to achieve. Rather than simply presenting broad general principles, the model should address specific problems.

- Restrictions should be directly linked to clear and verifiable outcomes

Specific restrictions chosen to achieve regulatory objectives should be directly linked to intended outcomes. To this end, any regulatory model should include performance standards that tie restrictions to outcomes through evidence rather than theory alone.

³ *Id.* at p. 2.

- Regulation should be the minimum necessary to achieve stated objectives

Regulation should only extend to what is reasonably required to achieve the policy objective and should not restrict competition any more than necessary. When considering regulatory options, regulators should look to regulatory models that exist across the country or elsewhere that have been shown to meet the intended policy objectives, while not compromising the quality, choice and price levels associated with healthy competition.

It is often the case that multiple restrictions aim to achieve the same objective. Such overlap may indicate that there is more than the minimum necessary level of regulation in place.

- The regulatory process must be impartial and not self-serving

Those empowered to oversee regulatory models should ensure they have the best and most effective governance structure. To this end, the model should reflect broad representation. The decision making process should involve representatives from the key groups affected by the regulation. A transparent and impartial governance structure ensures that self-regulatory activities are carried out in the public interest. With broad representation, it is more difficult for one market participant or group of participants to control the regulatory process and manipulate it to their advantage.

- A regulatory model should allow for periodic assessment of its effectiveness and be subject to regular reviews

Regulators should produce annual reports on their activities and regularly review the regulatory model to ensure it effectively meets *current* needs. In light of ever-changing technology and market conditions, regulators must continually question the effectiveness of current restrictions. Those responsible for regulation should continually review restrictions to identify the ones that have imposed unnecessary costs as well as those whose goals that could be better achieved through less intrusive approaches. Regulatory models can have unanticipated results either in the markets they directly affect or in ancillary markets. Without a dynamic review mechanism, regulatory models run the risk of losing their relevancy and/or becoming sub-optimal responses to policy objectives.

- A primary objective of the regulatory framework should be to promote open and effectively competitive markets

To help minimize unnecessary or overly restrictive regulation, all regulators should promote competition as one of the primary objectives. Competition is generally the most effective way to promote the efficient, low-cost and innovative supply of products meeting consumers' tastes and needs. A market is open and effectively competitive, and provides the maximum benefits of low prices and the efficient use of economic resources, when the following conditions are met:

- all potential competitors have the ability to compete, subject to any necessary technical, safety or other such requirements, based on their costs and ability to meet consumer demands at a lower price; and
- no participant in the market has sufficient market power to profitably sustain a significant and non-transitory price increase.

These principles line up well with another valuable policy tool: the Competition Assessment Toolkit. This toolkit, which was produced by the Organization for Economic Co-operation and Development (OECD) in its report titled *Guiding Principles for Regulatory Quality and Performance*, was developed with the purpose of assisting policy makers in the attaining policy goals in ways least restrictive of competition. It does this by providing policymakers with a series of questions that can be applied to any policy initiative which will identify, at the developmental stage of legislation or policies, options which unnecessarily restrict the functioning of the market. It also assists in determining alternative approaches to achieving policy objectives that would be less intrusive on the normal competitive dynamic of the markets they impact.

4. Conclusion

Canada's competition policy is strong and well developed. Environmental policy will continue to evolve and legislative initiatives will continue to impact markets. The challenge for policymakers will be finding the proper balance between meeting environmental objectives and maintaining and promoting competitive markets.

DENMARK, FINLAND, ICELAND, NORWAY AND SWEDEN

Competition policy and green growth

Green growth is a concept that involves rethinking economic growth, mainly how economies can grow in a more sustainable way. It has evolved out of a strong and increasing policy emphasis on the development of a new economic and social framework that would enable economic growth and development while at the same time preventing environmental degradation and enhancing quality of life. Thus it has been argued that together with innovation, the greening process can be a long-term driver of economic growth through for instance investments in renewable energy and improved efficiency in the use of energy and materials. Reflecting this new policy focus, the OECD has adopted a mandate to develop a Green Growth Strategy.¹

A successful shift towards the ambitions underlying the green growth strategy can only be achieved through cost efficient and coherent policies. Competition policy has an important role in this context. It is up to the competition authorities to ensure that this relationship receives due attention.

Economic theory and empirical evidence support the view that competition is desirable because it contributes to efficiency in economic activity, thereby increasing the welfare of consumers and society. The rivalry between competing firms ensures that only the most efficient and innovative firms develop and stay in the market. While it is difficult to measure the degree to which effective competition affects productivity and the economy more generally, a number of extensive studies have found a link between stronger competition and higher productivity growth. So competition contributes to economic growth.

There are also important links between competition and environmental policy. Using market mechanisms is important in green growth strategies, as it allows appropriate prices to be determined. These price signals ensure that the correct incentives are in place for pollution abatement and innovation in green technology. Ensuring effective competition is important in this context, since otherwise price signals reflecting environmental externalities can not be effectively transmitted.

Effective competition and low barriers to entry are also crucial to innovation and market dynamics, which again play an important role in achieving environmental goals at a lower cost. Thus, given a well designed environmental policy, competition supports the achievement of environmental goals in a cost efficient way.

Environmental regulations, practices or enforcement may affect competition negatively. This in turn may increase the social costs of achieving environmental goals. However, pro-competitive legislation is becoming stronger and is being more effectively enforced in many countries. Thus, one of the challenges the competition authorities face in this regard is to contribute to ensure that green legislation will not affect competition negatively and that, instead, pro-competitive legislation is employed. Various means of advocacy channels can be used towards this aim.

¹ OECD (2009). "A Proposal for Developing a Green Growth Strategy", (2009)147/REV1.

As explained above, the growing political emphasis on environmental policy does impact markets and competition. At their semi-annual meeting in the Faroe Islands in March 2010 the Directors General of the Nordic competition authorities discussed some of the challenges facing their organisations as a result of the shift towards green growth.

To establish a common ground for the task of addressing future challenges in this context, they agreed to produce a joint Nordic report focusing on the relationship between environmental and competition policies.

Perhaps the most important conclusion to be drawn from the report is that competition policy has an important role to play in the development and implementation of a green growth strategy, and in facilitating a successful shift to green growth. The report consists of three main chapters: First, it explores the relationship between competition policy and environmental policy. Thereafter it takes a closer look at certain environmental policy aspects and some of the conflicts that have arisen or might arise between these and competition policy. Finally, it describes how environmental policies are reflected in the practices of market participants through different green schemes. The report concludes with some forward looking perspectives.

A brief summary of the main features and recommendations is presented below. The report is available in an electronic format at the respective competition authorities' websites².

1. The relationship between competition policy and environmental policy

Environmental and competition policy share the common objective of safeguarding and promoting social welfare.

Effective competition can support environmental policy by allowing price signals that reflect environmental externalities to be effectively transmitted. Competition also reinforces environmental policy in that competition-induced innovation efforts and efficiency improvements may be considered important components in a successful environmental policy.

However, environmental policy may harm competition by for instance increasing barriers to market entry. Thus, the OECD recommends that environmental regulatory agencies routinely undertake competition impact assessments with regard to their environmental proposals. The national competition authorities can assist in such assessments, and they must be vigilant in pointing out the restrictive effects on competition of various regulations in the environmental area.

Environmental benefits might be argued as a defence for horizontal practices or arrangements otherwise deemed restrictive under competition law. However, there are strict requirements to be fulfilled in this regard. The measure in question must be proportional to its aims. There must also be net economic benefits in terms of reduced environmental pressure resulting from the practices or arrangements, as compared to a baseline where no action is taken, and the expected economic benefits must outweigh the costs. Such costs include the effects of reduced competition, along with compliance costs for economic operators and effects on third parties.³

² The Competition Authorities websites are respectively: <http://www.konkurrencestyrelsen.dk/en/> (Denmark); <http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?> (Finland); <http://www.samkeppni.is/samkeppni/en/> (Iceland); <http://www.konkurransetilsynet.no/en/> (Norway) and http://www.kkv.se/default_218.aspx (Sweden).

³ See Commission notice: "Guidelines on the applicability of Article 81 of the EC treaty to horizontal cooperation agreements" (2001/C 3/02).

2. Environmental policy instruments and competition implications

Governments can choose between two broad categories of policy tools in seeking to respond to and correct for negative environmental externalities: economic and administrative policy tools. Economic tools such as taxes and subsidies work indirectly via the price mechanism while tradable permits work in terms of regulated quantities traded in a market. Regulations of a more administrative character are those that include for example specifications of maximum permitted emissions or detailed requirements for products, production processes or technologies. Such approaches are often referred to as command and control approaches.

The workings and competitive ramifications of the main environmental policy tools are summarised below.

2.1 *Taxes and subsidies*

Environmental taxes are an important tool for solving the environmental externality problem, not least because direct taxes on emissions are considered economically efficient. Environmental taxes give polluters an incentive to reduce their pollution to the point where further reduction would cost more than paying the tax. There are, however, important challenges. One is to determine the correct tax level. Another relates to the fact that efficiency requires all polluters to face the same tax level at the margin. Tradable emission permits can resolve the problem of how to determine the correct environmental tax level, provided that certain requirements are met.

Subsidies can refer to a variety of transfers, payments, supports (such as tax exemptions) and protections associated with government policies. When considering the introduction of subsidies as a means of achieving environmental goals, it is important to conduct a broad analysis of the net effects on welfare before reaching a decision. Conversely, environmental policies that involve the elimination of environmentally harmful subsidies are generally in line with competition policy.

2.2 *Tradable emission permits*

The EU Emission Trading Scheme (ETS) is regarded as one of the cornerstones of EU climate policy. The price of tradable emission permits plays a role similar to that of a tax. In the ETS, the total number of permits issued and the marginal abatement costs together determine the price for carbon emissions. Thus, for a given total quota, the actual carbon emissions price is determined by the market. The Nordic competition authorities have on several occasions argued that emission permits in general should be auctioned and should cover as many emission sources as possible, and also that incumbents should have no preferential treatment compared to newcomers.

For an emission trading scheme to function properly, competition in the permit market must be effective. When auctioning emission permits, auction design is important to ensure efficient pricing and avoid collusion. Thus, the competition authorities must seek to deter and detect collusive practices before, during and after the auction process.

2.3 *Green public procurement*

Public procurement is in itself a powerful tool, given its size in relation to GDP in the respective Nordic countries. Green public procurement (GPP) can hasten the development of markets for green goods. But a certain amount of caution should be exercised before it is used.

GPP should only be used if the external effect is not internalized by other regulatory instruments. If other regulatory instruments fulfil the object of internalizing an external effect, adding further regulatory

instruments, for instance by imposing environmental criteria in public procurement may lead to inefficiencies from a socio-economic point of view. If the external effect is partly internalized by other regulatory instruments, GPP could be used and be designed to complement the policy tool in place.

It is also important to be aware that GPP can have a negative impact on competition if the restrictions imposed lead to significantly fewer firms being able to submit bids. This may increase the costs for the procuring entities. GPP can also lead to higher prices due to investments being required to enable actors to submit bids. Finally, if the use of GPP is to have a real impact on the environment, it is important that the procuring entity identifies product groups for which there is considerable procurement and that the volume of product used actually has a significant impact on the environment.

More fundamentally, the criteria and procurement process must comply with the basic principles of European Community law on public procurement, including non-discrimination, equal treatment, transparency, proportionality and mutual recognition.

2.4 *Restrictive effects of green measures and the importance of advocacy*

The transition to green growth implies that a host of green instruments will be implemented in many different areas. Promoting correct pricing of environmental goods is crucial to a cost-efficient environmental policy and proper innovation incentives. This can best be achieved through effective competition, since otherwise price signals reflecting environmental externalities cannot be effectively transmitted. Thus the competition authorities have the essential task of advocating market based instruments in environmental policy.

Competition authorities also have an important role in identifying and analysing regulations that may unduly distort or restrict competition. When assessing the competitive impact of specific regulatory green measures, the OECD Competition Assessment Toolkit offers valuable guidance, both for the competition authorities and the relevant sector authorities. In many instances, green measures can be restructured to minimise harm to competition.

Furthermore, competition authorities should advocate green measures that are less distorting to competition and endeavour to promote an efficient compromise between competition and environmental policy where appropriate. This role of the competition authorities may also contribute significantly to the task of improving regulatory quality in the environmental area.

To succeed, initiatives must be timely, and political support should be sought. In addition, it is clear that changes take time and therefore perseverance may be required.

3. Business practices in green markets

Environmental policies can be reflected by business practices related to various green schemes, for instance recycling or waste management or different certification arrangements. Many of the schemes have given rise to concern from a competition policy viewpoint. However, many of them can be designed in such a way that competition in fact supports environmental goals more cost efficiently.

3.1 *Antitrust and green markets*

In the European Commission's guidelines,⁴ the section focusing on horizontal environmental agreements, it is stated that, by nature, such agreements should be considered in breach of Article 101(1) TFEU if the cooperation does not truly concern environmental objectives but serves to conceal anti-competitive practices. And even though a particular environmental scheme may be endorsed by the authorities, this can not be used as an excuse for practices implying abuse of dominance.

Although some cases may be relatively clear-cut, there may be a host of borderline cases. Moreover, it is possible that even though some particular environmental agreement may raise concern from a competition point of view, i.e. since the agreement falls under Article 101(1) TFEU, or the national equivalents, the agreement might also bring economic benefits. These benefits may even at individual or aggregate consumer level outweigh the negative effects on competition. For this to be the case, it should be clear that the measure cannot be achieved through less restrictive means, i.e. that it is proportionate to the aim. The economic benefits should furthermore stem from reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken, to pass the test in Article 101(3) TFEU, i.e. the expected economic benefits must outweigh the costs in terms of reduced competition.

3.2 *Restrictive practices in recycling and waste management*

Recycling and waste management are booming industries in many countries. Industry wide arrangements through for instance branch organisations or industry-owned schemes have become quite common, and are in many cases endorsed by the environmental authorities. This applies in particular to recycling and waste management. Most environmentally related cases encountered by the Nordic competition authorities in recent years have related to recycling and waste management.

As these cases clearly show, while there may be good arguments in favour of industry wide arrangements, including economies of scale, operational efficiency, and avoidance of non-participating producers getting a 'free ride', various aspects of these schemes may also cause serious competition concerns through:

- risk of spillover effects,
- bundling of demand, and
- pricing and fee structure.

The cases also show that in many instances, there are alternative approaches based on competition, or at least approaches involving a less restrictive impact on competition, via which the environmental authorities can reach their objectives in a more cost efficient way. The competition authorities have important roles, both in applying the competition law to such cases where the anti-competitive effects outweigh any benefits and in advocating competition based solutions more widely.

It is also worth noting that a significant share of the considered by the Nordic competition authorities related to green schemes have been closed through the application of 'soft enforcement', where the elements in the schemes causing concern were changed voluntarily in response to the views expressed by the competition authorities.

⁴ See Commission notice: "Guidelines on the applicability of Article 81 of the EC treaty to horizontal cooperation agreements" (2001/C 3/02).

3.3 *Certification arrangements and competition concerns*

Product certification highlights the specific characteristics of a product. Certification is primarily used to signify that a product has one or more credence attributes, which are characteristics that are invisible and difficult to judge. For that reason, certification can significantly reduce the transaction costs associated with information gathering. When buyers get more information it will become easier for them to adapt their consumption choices according to preferences. More information may also lead to a better functioning of the market due to increased consumer mobility.

Certification has become a key element in marketing organic food products and has also been receiving growing attention in sectors like construction and taxi services. When certification is introduced, producers have a greater incentive to develop product qualities that consumers demand.

Businesses may, however, have incentives to influence the certification criteria so that their own products are favoured compared to competing products. Furthermore, increasing the costs to rivals may be attempted, e.g. by lobbying for a narrow product category definition or monitoring mechanisms that disfavour competitors. In cases where the certification standard places foreign producers at a disadvantage, this may have a negative impact on international trade flows and international competition.

The effect of certification on welfare depends on how well the certification standard is designed (it needs to be non-discriminatory) and whether effective competition prevails. The competition authorities have an important role in this context through advocacy and, where appropriate, enforcement.

4. Forward looking perspectives

Competition has a significant impact on the efficiency of environmental policy. Consequently, competition policy and the efficient enforcement of competition law should be an integral part of any green growth strategy. Environmental and competition policies share the common objective of safeguarding and promoting social welfare so we must strive to make the execution of environmental policy and competition policy mutually supportive.

Experience has shown that existing environmental policies or schemes may restrict competition by raising barriers to entry and limiting incentives or opportunities for effective competition. The Nordic competition authorities have been active in pointing out these limiting effects.

The Nordic competition authorities have been firm and outspoken advocates of market based approaches in environmental policy. In the design of market based policy instruments, it is important to consider how well the ‘newly created’ markets will function. If it appears likely that price formation in a newly formed market, for example, will be strongly affected by market power, a different design would be welcome.

Competition advocacy and competition enforcement focusing on the restrictive effects of various green schemes on competition will remain an important task for the competition authorities in the future and constitute an important contribution to the overall success of green growth strategies.

Advocacy efforts on the part of competition authorities will lend important support to the OECD Ministers’ aim of “establishing appropriate regulations and policies to ensure clear and long-term price signals encouraging efficient environmental outcomes”.

Box 1. Main Points and Recommendations

- Environmental and competition policy share the common objective of safeguarding and promoting enhanced social welfare
- Effective competition facilitates the transmittance of relevant price signals that reflect environmental externalities. It also ensures economically correct prices of externalities where markets for emission permits are practicable
- Environmental policy involving the abolishment of environmentally harmful subsidies is in general in harmony with competition policy
- Environmental benefits might be argued as a defence for horizontal agreements otherwise deemed restrictive under competition law
 - To be accepted, such arguments must show that the measure is proportional towards its aim
 - The net economic benefits in terms of reduced environmental pressure resulting from the practices or the arrangements must be clear
- Environmental regulation may harm competition, for instance by raising barriers to entry into the market
 - The OECD recommends that environmental regulatory agencies routinely conduct competition impact assessments of their environmental proposals. The competition authorities can assist in such assessments
- In order to maximise social welfare with respect to both competition and environmental policy, we must strive to make the execution of environmental policy and competition policy mutually supportive

GERMANY

1. Introduction

The rising significance of environmental protection issues over the past decades has conferred increased importance to the interplay of competition law and environmental law in the practice of competition authorities. Given the importance that environmental aspects – both as a basis for opening up new markets and as a general political concern – have gained for the economy and for businesses, it is fitting that competition agencies should be aware of developments in the environmental area. Consequently, the European Commission has already paid particular attention to environmental agreements in its Horizontal Guidelines of 2001.¹

In the Bundeskartellamt's practice, environmental agreements between competitors are analysed on the same basis as other horizontal agreements. This submission seeks to first provide an overview of the legal framework (2.) and it will continue by giving case examples (3.)

2. Legal framework

Where, in the application of the legal provisions, conflicts between environmental law and competition law may arise, it is important to remember that neither sphere can claim to generally take priority over the other. The Bundeskartellamt takes due consideration of this in applying competition law.

Environmental regulation and the obligations that it imposes on businesses and individuals are an important factor in promoting the emergence of certain new markets. For example, most waste management markets exist largely due to environmental regulations. These regulations are not only important factors in creating the markets concerned, but they also set important parameters for the functioning of the markets, and are therefore key elements to consider when applying competition law. If competition law and environmental law turn out to be in conflict with one another in a particular case, a mechanism for resolution is needed. An obvious solution is to pursue the environmental objectives while imposing as little restriction as possible on competition.²

Cases in the environmental context are decided by the Bundeskartellamt on the basis of competition law and in accordance with the national legislation for waste management. Furthermore the Bundeskartellamt has to interpret national waste management legislation³ and environmental legislation in accordance with European competition law.

¹ The European Commission defined environmental agreement as agreements “by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives [...]. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations.” Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements - OJ C 3, 6 January 2001, p. 2 ff, para 179. Please note that the Horizontal Guidelines are currently under review.

² ECJ, Judgement of 25 June 1998, C-203/96, *Chemische afvalstoffen Dusseldorp*; ECJ, Judgement of 23 May 2000, C-209/98, *Sydhavnens Sten/Københavns Kommune*.

³ The competent ministry stresses on its website: “German waste management is an important industrial sector and provides high-quality technology for the efficient use of waste as a resource and the environmental sound

In the Bundeskartellamt's experience, competition cases involving environmental issues can be dealt with under existing competition law.⁴ The need for a special statutory exemption on environmental grounds has not been identified. This is in line with European Law. The European Commission's Horizontal Guidelines that are currently in force include a chapter on environmental agreements.⁵ However in the current draft of the Horizontal Guidelines such a chapter is no longer included. The European Commission stresses that the removal of the chapter does not imply any downgrading for the assessment of environmental agreements.⁶ On the contrary, instead of having a chapter addressing a narrow aspect of environmental standards, the European Commission now makes it clear that environmental agreements are to be assessed under the relevant topical chapter of the Draft Horizontal Guidelines, on R&D, production, commercialisation or standardisation.

A conflict between environmental law and competition law is frequently invoked by parties in proceedings before the Bundeskartellamt who argue that their conduct – though possibly contrary to competition law – is justified under environmental law. However, practice has shown that the alleged conflict usually does not exist.

Under German law a restrictive agreement according to Section 1 of the Act against Restraints of Competition (ARC)⁷ and Art. 101 (1) TFEU⁸ may gain exemption under Section 2 ARC and Art. 101 (3) TFEU respectively, if the four conditions laid down in these rules are satisfied. These conditions are efficiency gains; fair share for consumers; indispensability of the restriction; no elimination of competition.

In its competition advocacy, the Bundeskartellamt strives to draw the attention of other government institutions to any possible anti-competitive effects that their policies might inadvertently entail. The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety and the Bundeskartellamt have consulted each other on issues of waste management legislation.

3. Case examples

This submission focuses on cases that concern Germany's Packaging Ordinance. The Packaging Ordinance⁹ is a regulation intended to ensure adequate waste management of packaging waste. To ensure an efficient recycling system, the Packaging Ordinance stipulates that every business which produces packaging or puts packaged products on the market in Germany must make certain that it fulfils the take-

disposal of the remaining residual waste. Germany supports sustainable waste management concepts for obtaining raw materials or energy from wastes. German waste management has the highest waste recovery quotas worldwide. There are numerous regulations which apply to this sector." See website of the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety at http://www.bmu.de/english/waste_management/general_information/doc/4304.php

⁴ For more details see Section 3.

⁵ See Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements - OJ C 3, 6 January 2001, p. 26 ff.

⁶ See MEMO/10/163 Commission consults on new regime for assessment of horizontal co-operation agreements, FAQs at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/163> .

⁷ An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf .

⁸ An English version of the Treaty on the functioning of the European Union is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>

⁹ Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen („Ordinance on the Avoidance and Recovery of Packaging Waste“), last amended 2 April 2009, BGBl. I, p. 531.

back and recycling obligations for all types of packaging. To ensure the take-back of sales packaging such businesses can conclude an agreement with a collection and disposal system licensed in Germany (so-called “Dual System”). Dual systems charge a “full service” fee, which includes the costs of collecting, sorting and recycling packaging, as well as the costs of municipal information campaigns. Today, more than 80% of sales packaging is taken back at or near households. Specific schemes with their own channels for taking back sales packaging exist for specific kinds of customers (restaurants, small trade, etc.). To date and due to the intervention of the competition authorities who have worked against a monopolisation of the market, nine dual systems for the collection and recovery of sales packaging exist and compete in Germany.

3.1 *Duales System Deutschland*

In 1990, the German government and industry designed the Duales System Deutschland (“DSD”) as the only nationwide dual system for the collection and recovery of sales packaging. The system was intended to fulfil the provisions of the Packaging Ordinance. In the discussion on how to deal with waste packaging, the general opinion among the relevant stakeholders – politics, waste disposal companies, industry – was that the desired outcome was only to be achieved if the activity was reserved to one service provider. The understanding was that competition was neither possible nor useful, that it would have negative effects on the environment and that the recovery system of sales packaging would even collapse.

A re-thinking took place, at least in part prompted by competition law proceedings of the European Commission¹⁰ and the Bundeskartellamt.¹¹ In a decision that became final in 2007, the European Commission ordered DSD not to inhibit (potentially) competing “dual systems” from contracting with the packaging waste collection companies. The Bundeskartellamt announced in 2002 that its policy of tolerating the restrictive agreements within the DSD system would end in 2006. Consequently, DSD decided to dismantle the cartel-like structure of the company. In 2003, companies from the waste management sector left the circle of silent partners. DSD was sold to a financial investor in 2005. The proceedings finally led to the opening of the waste disposal markets for competition.

The subsequent development has proved that the fear of the collapse of the collection and recovery system of sales packaging was unfounded. Competition has increased in the markets for the collection and recovery of the sales packaging, to the advantage of consumers. To put this in numbers, the cost for the collection and recovery of sales packaging amounted to about two billion Euros when DSD’s monopoly was in place. Today, with competition in this market, this amounts to about one billion Euros each year. The environmental objectives are achieved just as well in the competitive environment.

3.2 *Gesellschaft für Glasrecycling und Abfallvermeidung*

A further case concerned the collection and recycling of glass. The Bundeskartellamt reviewed this case in 2007.¹²

A substantial share of waste glass is used in the production of container glass – drink bottles, food jars, etc. More than 67 per cent of the waste glass used in this recycling process is recovered from household-oriented collections by dual systems. In 1993 German container glass manufacturers set up the

¹⁰ See for example the DSD prohibition decision by the European Commission dated 20 April 2001, OJ L 166, 2001, p. 1-24.

¹¹ See *Bundeskartellamt*, press release of 12 October 2004 (available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004_10_12.php).

¹² *Bundeskartellamt*, Decision of 31 May 2007, B 4-1006/06 available in German only at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell07/B4-1006-06.pdf?navid=37>.

glass recycling company “Gesellschaft für Glasrecycling und Abfallvermeidung” (“GGA”) to jointly purchase the entire waste glass recovered from household collections. The GGA purchased the entire waste glass centrally from the waste management companies and organized its delivery to special recycling plants. The container glass manufacturers retrieved quantities as required and settled the cost of reprocessing with the operators of the reprocessing plants. The GGA passed on its purchasing cost for the waste glass and transportation to member companies, all container glass manufacturers with production sites in Germany, in the form of standard tonnage prices.

This purchasing cartel limited the individual demand of the container glass manufacturers for secondary glass materials and was in contravention of German and European law.¹³ Above all the Bundeskartellamt ascertained in an examination that, contrary to claims made by the member companies, the cartel was not necessary to guarantee the recycling quotas for waste glass in the long term, which for years had exceeded 80 per cent. The production of container glass relies on a high utilization rate of waste glass.

The use of waste glass as a secondary raw material brought considerable cost savings to the glass producers, not only because it is cheaper to purchase than primary raw materials but because its lower melting temperature leads to significant energy savings. Therefore, in the Bundeskartellamt’s view there was an economic incentive to replace primary raw materials to a large extent with secondary raw materials in the production of container glass. In the proceedings before the Bundeskartellamt the members of the GGA had claimed that the purchasing cartel was indispensable for the achievement of environmental goals stipulated by the environmental protection regulations.¹⁴ However, the investigation of the Bundeskartellamt showed that this was not the case.

The Bundeskartellamt was able to assess and decide the case on the basis of the existing competition law. It gave consideration to the environmental arguments raised by the parties and weighed them in the existing framework of Art. 81 (3) EC (now Art. 101 (3) TFEU) and Section 2 ARC. The purchasing cartel led to the elimination of competition as it covered a substantial share of the waste glass markets. The Bundeskartellamt established that the stipulated environmental goals of recycling could be attained without the far-reaching elimination of competition.

The GGA case illustrates that there is hardly ever substance to the alleged conflict between competition law and environmental law. Furthermore, the case proved that the existing legal framework allows for a balance to be struck without the need for a special exemption.

4. Joint body for self-regulation by competing waste packaging compliance schemes

In Germany, there are now nine competing sales packaging take-back schemes in operation (see also above). The Packaging Ordinance requires the assurance from each compliance scheme that its collection of waste sales packaging covers all of Germany. In practice, this means that used sales packaging is collected jointly by the compliance schemes throughout Germany. For each region, the nine dual systems contract with the same company for the actual collecting. The collecting company is paid by the dual systems on a pro-rata basis (“shared use concept”).

In order to enable and ensure the joint full-area coverage requirement, the legislator ordered the compliance schemes to set up a joint body by January 1, 2009. Section 6 para 7 of the Packaging Ordinance stipulates:

¹³ *Bundeskartellamt*, Decision of 31 May 2007, B 4-1006/06, p. 44 ff.

¹⁴ *Bundeskartellamt*, Decision of 31 May 2007, B 4-1006/06, p. 71 ff.

“Compliance schemes shall take part in a joint body. This joint body shall have the following tasks in particular:

- 1. Assessment of the quantities of packaging of several compliance schemes in the area of a public body responsible for waste management to be assigned on a pro rata basis,*
 - 2. Allocation of the coordinated supplementary fees,*
 - 3. Coordination of tendering in a way that does not distort competition.*
- [...]”*

The compliance schemes have set up such a joint body. All major decisions are taken unanimously. Decisions of the compliance schemes within the body are also agreements among competitors that need to conform with competition law.

For the past two years, the Bundeskartellamt has monitored the joint body and discussed planned decisions with the compliance schemes in a number of cases. So far, the compliance schemes have discontinued activities that the Bundeskartellamt has criticized, so that a formal injunction has not been necessary. For example, the Bundeskartellamt criticized attempts by the compliance schemes to extend the scope of agreements beyond the three tasks prescribed by the packaging ordinance (see above). The Bundeskartellamt has pointed out that the joint body still does not fulfil its task of coordinating the tendering of local collection contracts in a way that does not distort competition. Currently the incumbent DSD still conducts all collection tenders. The situation with regard to the tenders for local collection contracts has not changed with the formation of the joint body.

5. Conclusion

In applying competition law, the Bundeskartellamt is well aware of the alleged potential for conflict that may arise between environmental law and competition law. However, in the relevant cases analysed so far, the intended environmental goals could be reached without straining the limits of competition law. Based on the Bundeskartellamt’s experience, there is no need for an environmental exemption from competition law.

ISRAEL

1. Overview

The Israel Antitrust Authority ("IAA") has become familiar with issues pertaining to horizontal agreements in the environmental context through its involvement in executive decisions and litigation of various cases before the Antitrust Tribunal ("the Tribunal") related thereto, and in legislative processes, some of which are ongoing at the present.

First, we shall briefly overview the regulation of restrictive arrangements, including the scope of discretion granted to the IAA and Tribunal. Following, we shall summarize the IAA's involvement in proceedings concerning restrictive arrangements in the market for the collection of beverage containers, as well as the IAA's role in the amendment of the law regulating that market. Finally, we shall discuss the IAA's ongoing involvement in the legislation of the proposed Regulation of the Treatment of Package Waste Law. In this framework we shall address some of the suggested issues and questions raised in the call for country contributions.

2. **General: Regulation of restrictive arrangements and mergers in Israel, and the consideration of effects on the environment**

2.1 *Restrictive Arrangements*

The Israeli Restrictive Trade Practices Law, 5748-1988 ("the Law") is designed, *inter alia*, to regulate restrictive arrangements, whether horizontal or vertical. Generally, being party to a restrictive arrangement is prohibited. However, according to the Law, one may apply to the Tribunal in order to receive approval for engaging in such, or apply for an exemption from the General Director.

The Tribunal may approve a restrictive arrangement where it believes that such arrangement is in the public interest. According to the Law, the IAA General Director is a respondent to all applications to the Tribunal seeking approval for restrictive arrangements. When considering whether the approval of a restrictive arrangement is in the public interest, the Law instructs the Tribunal to consider, *inter alia*, "whether the arrangement's expected utility to the public is substantially greater than the damage to the public or to any part thereof, or to anyone who is not party to the arrangement". Therefore, in cases like this, the law enables the Tribunal to approve a restrictive arrangement where it considers the positive effect the restrictive arrangement has on the environment is substantially greater than the damage to the public which could result from the restriction of competition entailed therein.

In contrast, the General Director's discretion is relatively limited, and she may only grant an exemption where the restrictive arrangement does not result in substantial harm to competition and the objective of the arrangement is not the reduction of competition.

To summarize, the Law provides relatively clear guidance as to the type of factors the General Director may consider: where effects on the environment resulting from a restrictive arrangement cannot be directly associated with the degree of competition in the relevant markets to the application, these effects are in many cases irrelevant to her decision, whether it is a decision to exempt a restrictive

arrangement or to intervene in a market.¹ These effects may however be considered by the Tribunal, as demonstrated above.

2.2 Mergers

According to the Law, certain mergers are subject to approval by the General Director. In this framework, the General Director may only consider factors concerning competition in the relevant markets. Neither she nor the Tribunal, to which one may appeal the General Director's decision, have the authority to consider "public welfare" factors, including positive effects the merger may have on the environment, where these are not directly linked to the competition in the relevant markets.

3. The collection of beverage containers

3.1 Overview

The IAA has been involved in several proceedings concerning the approval of a restrictive arrangement between the three largest producers of bottled and canned soft beverages. This arrangement is essentially a joint venture for the collection and recycling of beverage containers to which the Beverage Container Deposit Law, 5759-1999 (hereinafter: "**the Deposit Law**") applies.

The IAA has also taken a key position in the amendment of the Deposit Law, assuming its role as the Government's unofficial advisor on competition. As shall be further discussed, the knowledge and experience dealing with the market for the collection of beverage containers, accumulated by the IAA, enabled it to assist in the restructuring of the Deposit Law, in a manner we believe could promote competition and benefit the environment.

3.2 The deposit law

The Deposit Law was promulgated in an effort to encourage the collection and recycling of beverage containers. The system set up in Israel, whereby consumers pay a deposit and may then claim it upon the return of the container, is similar to those set up in other jurisdictions. To this end, collection targets were set; manufacturers and importers of beverages were required to set the sum of the deposit and to contract with a "recognised recycling corporation" whose sole purpose was the collection and recycling of beverage containers; vendors were required to reimburse consumers who returned containers; a recycling corporation which did not meet the collection targets was required to transfer double the sum of the deposit for every container not collected to a special fund established by the state; etc.

The system set up according to the Deposit Law suffered from two major inherent flaws. First, once the manufacturer or importer contracted with a recycling corporation, it was no longer directly accountable for failure to achieve the collection targets, thus significantly undermining the recognised concept of "manufacturer responsibility". Second, the collection and recycling targets were relatively flexible, as the Minister for the Protection of the Environment had the power to lower the targets by decree, subject to the approval of the Knesset's Economic Affairs Committee. As shall be explained, it is the opinion of the IAA that the results of these flaws were clearly manifested in the market for the collection of beverage containers.

¹ It should be noted, however, that such considerations may serve as grounds for a refusal to exempt a restrictive arrangement.

3.3 *The corporation for the collection of beverage containers*

The Corporation for the Collection of Beverage Containers ("the Collection Corporation") is a joint venture set up by the major players in the market for the manufacturing of soft beverages and bottled mineral water in Israel (the Central Company for Soft Beverages - a declared monopoly in "black" Cola beverages², Tempo, Yafora-Tavori, and Maaynot Eden³) and by two large supermarket chains (Supersol and Ribua-Kachol Israel), which later exited from the joint venture. The manufacturers of soft drinks which were, and still are, parties to this joint venture, held most of the market between them, and as a result, were also responsible for the vast majority of beverage containers to which the Deposit Law applied, and which were to be collected.

As is evident, this joint venture created both horizontal and vertical links between manufacturers of soft drinks and retailers, thus it is considered a restrictive arrangement, an exemption or approval for which is required by law. The parties to the joint venture therefore applied to the Tribunal three times (in 2001, 2004 and 2008) for approval; the Tribunal twice approved the arrangement (subject to certain conditions designed to remedy the concerns for competition which shall be addressed below) for a limited time, and the third application is still being heard. All applications were based, *inter alia*, on the importance of the activity in which the Collection Corporation is engaged, and the negative effect on the environment and social welfare, were the arrangement not approved.

3.4 *Issues related to competition presented before the tribunal*

3.4.1 *The first application for approval (2001)*

As aforementioned, the General Director is a respondent in applications for approval of restrictive arrangements, acting as a type of *amici curiae* of the Tribunal. In this framework, the General Director brought her position before the Tribunal.

The General Director supported the first application for approval submitted in 2001. The General Director contended that the operation of the collection corporation did not have any business aspects, and that the purposes for which it was established - the preservation of a clean environment and promotion of recycling - had nothing to do with competition.

The General Director however identified two major issues pertaining to competition, which could result from the collaboration between competitors, in particular where these competitors hold the vast majority of the market: the risk the collaboration in the framework of the collection corporation may effect competition in other markets; and the effects of the creation of a monopoly in the market for the collection of beverage containers. Subsequent to an agreement reached between the General Director and the applicants, the Tribunal subjected its approval to "duty to deal" type conditions, in order to ensure that competitors of the applicants would be able to purchase the collection corporation's services on an equal basis, at a non-prohibitive price etc, as well as other provisions, such as limitation on the type and scope of information exchanges, designed to ensure that competition between the applicants is not affected.

² According to the Law, the General Director shall declare the existence of a monopoly where a concentration of more than half of the total supply or acquisition of an asset, or more than half of the total provision or acquisition of a service is in the hands of one person.

³ Some of these companies had overlapping activities in other markets, such as the market for beer etc. as well.

3.4.2 *The second application for approval*

In 2004, however, the General Director opposed the application, basing his position on the analysis of the Collection Corporation's first years of operation.⁴ The General Director claimed that in this period, the Collection Corporation – a monopoly in the collection of beverage containers, had already manifested its ability to take advantage of the flaws in the deposit system. For instance, the Collection Corporation managed to convince the Minister for the Protection of the Environment and the Knesset Committee for Economic Affairs that it is unable to meet the collection targets prescribed by law, and thus brought about the lowering of these targets. The General Director further claimed that the Collection Corporation's operation was inefficient, and that the resources wasted could have been invested in the collection of additional beverage containers.

In addition, the General Director contended there was a risk that the collection corporation could exert market power, which could be manifested in setting poor service standards to businesses to which consumers brought their empty containers (for example, by lowering the frequency of collection), in the unilateral lowering of handling fees paid to private collectors in order to lower the total amount of containers collected, etc.

To summarize, the General Director was of the opinion that analysis of the operation of the Collection Corporation proved that its continued operation is not only to the detriment of competition, but also had negative effects on the environment, especially as collection targets and totals were lowered as a result, *inter alia*, of the pressure it had exerted as aforementioned. The General Director therefore recommended that the Tribunal refuse the application for approval.

The Tribunal nevertheless approved the restrictive arrangement, subject to the same conditions as in the previous proceeding. The Tribunal stated, *inter alia*, that the existence of a monopoly in the market for collection of beverage containers could reduce management, hauling and other costs. Though aware of the problems associated with the Collection Corporation's operation, the Tribunal found that there was a real risk that no alternative would be established under the deposit system in force at the time. Considering the effect on the environment of a situation where no recycling corporation exists, the Tribunal found that the approval of the arrangement would be in the public benefit.

3.4.3 *The current application before the tribunal and the recent amendments to the deposit law*

A third application for approval was submitted to the Tribunal in 2008, with the General Director's initial opposition. However, at the beginning of 2010 the Knesset amended the Deposit Law in a manner designed to remedy the flaws both the Tribunal and the IAA had identified: first, under the amended law, when manufacturers and importers of beverages contract with a recognised recycling corporation, their responsibility to meet collection and recycling targets is no longer be shifted to others; second, the statutory collection and recycling targets may no longer be lowered by ministerial decree.

The IAA played a key role in the legislative process, offering its advice and insight based on the acquaintance with the relevant markets as well as the operation of the Collection Corporation. The IAA believes the restructuring of the Deposit System could be beneficial to the competition in the market for the collection of beverage containers, and ultimately, to the environment.

Subsequent to the amendment of the Deposit Law, the General Director has notified the Tribunal that it is no longer opposed to the approval of the restrictive arrangement. This position is based, *inter alia*, on

⁴ The General Director's opinion in the proceeding which is currently being held shall be addressed below.

economies of scale and cost savings resulting from the collaboration of the applicants, and on the effect other amendments which were not discussed in this framework.

3.5 Summary

The IAA has been deeply involved in the regulation of the market for the collection of beverage containers, by taking part both in proceedings before the Antitrust Tribunal, and in legislative processes. In such frameworks the IAA may suggest that certain factors, which would not normally be considered by the IAA in its daily exercise of its authority, be considered by the Tribunal or legislator. That said, the IAA is not in the position to set general policy targets for the protection of the environment. The IAA does however believe that competition could be beneficial to the protection of the environment, and therefore voices its opinion in favor of competition wherever appropriate.

In this context it is important to note one of the more important lessons which can be learned from the IAA's involvement in the market for the collection of beverage containers, and that is the importance of the structuring of the environmental regulation in a manner which promotes competition, or at least allows it to occur.

4. Involvement in the legislation of the regulation of the treatment of package waste law

The Knesset's Committee for Economic Affairs is currently in the process of preparing the proposed Regulation of the Treatment of Package Waste Law ("Package Waste Law") for a vote by the Knesset. The Package Waste Law is modeled upon the European directive concerning package waste, and is designed to regulate the treatment of package waste, *inter alia*, in terms of the reduction and recycling thereof. Recycling goals were set for each type of waste, and all manufacturers and importers of packaged goods shall be bound to contract with a "recognised body" which will have the responsibility to collect and recycle packages.

The IAA has been accompanying the preparation of the bill from its early stages and, assuming its informal role as the Government's advisor on competition, has been advising the Ministry for the Protection of the Environment on different matters.

In general, the IAA has stressed that the existence of competition in the markets for the collection and recycling of package waste, could be to the benefit of all – producers, importers, consumers, and the environment, in terms, for example, of lowering operation costs, ensuring producers and importers have freedom of choice between recognised bodies thus raising the probability that recycling targets are met and providing a basis for the direct imposition of fines upon manufacturers and importers where they aren't. The IAA has also commented on specific provisions included in the bill, especially where those may impede competition by raising entry barriers or enabling the exchange of information between competitors.

The legislative process is still ongoing and it is too early to predict whether the IAA's efforts to leave an open door for competition between recognised bodies will bear fruit.

5. Summary

As stated above, the General Director's ability to take environmental consideration into account when making decisions concerning restrictive arrangements or mergers is rather limited, and generally may be done only where a direct link between the effect on the environment and the competitive process exists. Factors such as cost savings, innovation, market power, risk diversification etc. can usually be regarded as such, and should be considered by the General Director.

When the General Director assumes her role as respondent to applications for the approval of restrictive arrangements before the Tribunal (or as the Government's advisor on competition matters) she may take environmental effects into consideration. However, as explained above, the General Director's tendency is to focus on issues directly linked to competition and to the functioning of competitive markets..

The Tribunal however has greater latitude to consider the effects a restrictive arrangement has on the environment. Where evidence of such effects is required, the Tribunal may receive it from those who are able to provide it. The Israeli regulation of restrictive arrangements may therefore allow a cartel to exist, if its public utility is great enough to offset the injury it may inflict

To summarize this point, while the General Director may not exempt a restrictive arrangement, which otherwise would not be worthy of exemption, for the sole reason that the arrangement will benefit the environment, it seems that at least in theory the Tribunal may do so, after considering the General Director's opinion on the effect over competition in the relevant market. Since Tribunal precedents hold that the Tribunal will not approve naked arrangements, such approval might be possible only if the Tribunal were to find that the arrangement in question is not naked. This could be a partial solution to the tension which could sometimes arise between competition and environment. The same type of solution is however inapplicable to mergers under the Law.

Finally, the experience gained from the IAA's involvement in the market for the collection of beverage containers, and from its participation in the legislation of Package Waste Law, shows how important it is for the IAA to offer its advice to other Government bodies. The IAA seeks to promote competition, and it will therefore provide the appropriate guidance wherever necessary.

ITALY

1. Introduction

In Italy, the collection of different types of recyclable materials is organized through industry consortiums. These consortiums are participated by producers and recycling companies and are responsible for the collection of waste or used materials, which they afterwards redistribute to recycling companies. The establishment and the activity of the consortiums are regulated by law.

The consortiums constitute a typical example of agreements with environmental objectives. The justification for the promotion of consortiums, from an environmental policy point of view, is that they perform activities that require some degree of coordination and that would not be otherwise provided by firms. It has been argued that this is a market failure case with social costs involved in case the collection of used (and sometimes toxic) materials were not performed.

However, these materials can often be re-used in new productive cycles and there are markets for recyclable materials that might work competitively.

It is arguable, therefore, that the restrictions established by regulation are proportionate to the objectives of environmental policy. Moreover, in some cases, the participants in the consortiums seem to adopt anticompetitive conducts that go beyond the restrictions outlined in the regulation. There seems to be ground, therefore, for an intervention from a competition policy point of view.

2. The interventions of the Italian Competition Authority

The Italian Competition Authority has addressed these issues, from a general point of view, in a market study on packaging waste, closed in July 2008¹.

The market study examined the regulation and activity of the packaging waste consortium (CONAI) and those for several recyclable materials (paper, glass etc.). The main conclusions were:

- regulation should allow the creation of more than a single consortium for the collection of each recyclable material;
- consortiums might create unjustified restrictions in the collection activity;
- they harm competition among recycling companies, if the collected materials were assigned to the different companies in a concerted way, usually reflecting historical market shares.

The Italian Competition Authority outlined the competitive restrictions stemming from the regulatory framework both in the conclusions of the market study and through its advocacy power in several reports².

¹ IC 26 Packaging waste market, closed on July 3rd 2008.

² Advocacy Report AS 478, October 9, 2008 on implementation of European Directive 2066/66/CE and S1005, February 2009.

In its reports the Authority advocated: i) that the regulatory framework should allow for the establishment of more than one consortium for the collection of each used material; ii) that the rules on participation to the consortiums should be designed in such a way as to promote competition among participants (for example through competitive bids for the assignment of the collected materials).

Some of the Authority's suggestions have been followed in recent regulation allowing for the establishment of more than one consortium for collection of some materials.

In some instances the conduct of the firms participating in the consortiums restricted competition, in addition to the competitive restrictions stemming from the regulatory framework. In April 2009 the Italian Competition Authority concluded an investigation into anti-competitive agreements in the lead battery recycling industry imposing a fine of over 13 million euros³. More recently an investigation was open into the conduct of the consortium responsible for the collection of waste packaging containing cellulose, COMIECO⁴.

Box 2. CASE I697 COBAT- recycling of used lead batteries

In the case on the lead battery recycling industry the Authority deemed that COBAT⁵, the mandatory consortium for collection of used lead batteries and several lead recycling companies, through the battery lead recyclers industry association, had restricted competition in the national markets for the collection and recycling of used lead batteries. The investigation was launched following complaints from lead battery manufacturers and companies involved in collecting used batteries to export abroad.

COBAT had been established in 1988, with law n. 475/1988 as the exclusive consortium for the collection of used lead batteries. The purpose for its establishment was to face the environmental problems caused by the abandonment of lead batteries and wastes containing lead that are particularly toxic, while they can be recycled and reused. The consortium was established in order to grant the collection of used lead batteries, stocking them and distributing them to the recycling companies, while ensuring elimination of waste material that can not be reused, in accordance with rules established by environmental laws. In 2002 a change of regulation eliminated exclusivity.

The relevant markets affected by the restrictions were: i) the market for the collection of used lead batteries and ii) the market for the recycling of lead batteries. The geographic scope of both markets is national.

Two anticompetitive agreements were ascertained in the course of the investigation.

The first one concerned COBAT itself and the provisions of the agreements it signed with recycling companies. In particular: a) The quantities of lead batteries assigned each year by COBAT to the recycling companies was established in proportion to the productive capacity of each company – thus in effect maintaining historical shares; b) If a recycling company acquired used batteries directly from a collector, without going through the consortium, COBAT would reduce by the same amount the quantity of lead batteries it assigned to that recycling company.

In the Authority's view, the contractual provisions set by COBAT restricted competition by discouraging both the creation of alternative collection systems and created obstacles to recycling activities independent of those administered by the Consortium, thus maintaining the status quo in the national lead batteries recycling market.

Other collusive conducts by the recycling companies were detected through the documentation collected during inspections. The companies exchanged information on their output and on the quantities of lead batteries that they received by COBAT. Through this information exchange the recycling companies came to a concerted repartition of used lead batteries received by COBAT and hindered any attempt to develop recycling activities outside the Consortium, thus preventing manufacturers from taking advantage of a commercial practice for recycling used batteries that would have led to a reduction in the cost of producing new batteries. The industry association of recycling companies, AIRPB, took an active coordinating role and was used by the companies as to reach common decisions.

³ I697 COBAT Riciclaggio delle batterie esauste closed on April 29, 2009.

⁴ I730 Gestione dei rifiuti cartacei COMIECO case opened on March 24, 2010

⁵ Consorzio obbligatorio batterie al piombo esauste e rifiuti piombosi.

The decision of the Italian Competition Authority was overturned by the First Instance Administrative Tribunal on March 9, 2010. The main objection to the findings of the Authority by the Tribunal was that the conduct of the consortium and its participants found its base in the regulation. According to the Tribunal, the Consortium has been created in order to serve public interest objectives (health and environment protection) and its conduct should therefore fall into the provisions contained in Article 8, 2 of Law 287/90, stating that the provisions of the Italian competition law "... do not apply to undertakings which, by law, are entrusted with the operation of services of general economic interest or operate on the market in a monopoly situation, only in so far as this is indispensable to perform the specific tasks assigned to them".

The Authority appealed the Tribunal's decision. In the view of the Authority the competitive restrictions in COBAT's conduct were not indispensable to pursue its public policy objective. The case is now pending in front of the Council of State.

3. Conclusions

Environmental regulation might facilitate horizontal agreements that restrict competition in ways that are not necessary or proportionate to pursuing environmental objectives.

This has occurred, in Italy, with the establishment of consortiums for the collection of different types of recyclable materials. The Italian Competition Authority has focused its interventions on this issue on two levels.

On the first level the Authority has intervened through antitrust enforcement when, as in the cases of COBAT and COMIECO, the rules set by the consortiums restrict competition.

On the second, through advocacy, the Authority has promoted regulation that, even though taking into account environmental policy objectives, does not contain unnecessary restrictions to competition (for example allowing the creation of more than a single consortium for the collection of recyclable materials).

JAPAN

1. Introduction

In June 2000, the Basic Act on Establishing a Sound Material-Cycle Society was enacted that stipulated a basic framework for the formation of a recycling-based society, including clarification on the responsibilities of the central and local governments, businesses, and the public, so that a recycling-based society can be implemented through the overall efforts of these entities. Under the framework of this Act, so-called extended producer responsibility (EPR) is established as a general principle, where the producers bear certain responsibility for the products, etc., they produce even after these products have been used and become waste.

With regard to activities for recycling, etc., on the part of businesses, it is considered desirable that the application of competitive principles will promote further efforts toward recycling, etc. However, in many cases, activities for recycling, etc., are characterized by weak incentives for businesses because they require continuous additional concomitant costs on the part of businesses and do not necessarily lead to direct benefits for individual producers. Therefore, there are often cases where laws or ordinances must make recycling, etc., mandatory, or in which businesses work toward recycling in response to strong social requests. In such cases, unless businesses jointly carry out activities for recycling, etc., it is sometimes difficult to build recycling systems or to promote recycling efficiently, which in certain cases results in difficulties in fulfilling the obligations as stipulated in the laws or ordinances. On the other hand, if such joint activities form a momentum of their own toward the smooth establishment of a recycling system and further developments, they will lead to the vitalization of the recycling market and create new demand in the market, the effect of which is expected to promote competition.

It is therefore necessary to duly consider the necessities of such activities from social and public objectives and the effect of promoting competition when conducting examinations on the existence or non-existence of problems related to the Antimonopoly Act (AMA) concerning joint activities by businesses toward recycling, etc. This contribution paper explains the views of the JFTC on horizontal agreements in the environmental context and introduces the JFTC's experiences, including its guidelines and consultation cases.

2. Views on horizontal agreements in the environmental context

Article 3 of the AMA prohibits "a substantial restraint of competition in any particular field of trade contrary to the public interest," which results from private monopolization or unreasonable restraint of trade such as cartels, etc. Furthermore, Article 19 of the AMA prohibits "unfair trade practices" which include such acts as refusing to supply or restricting the quantity or substance of goods or services pertaining to the supply to a certain enterprise concertedly with a competitor without justifiable grounds (concerted refusal to trade), etc. Therefore, even if horizontal agreements are concluded with the aim of environmental conservation, such agreements will be prohibited if they violate these provisions.

However, when a horizontal agreement has the purpose of environmental conservation, it is more often the case that inquiries are made on whether such purposes should be taken into account in determining possible violation of the AMA. The following are points of view described by the JFTC with regard to the action of businesses based on social and public objectives including environmental conservation.

- In many instances, a trade association's self-regulation activities that are intended for socially beneficial purposes, and that include the establishment of standards and codes related to the business activities of constituent firms, as well as the use of compliance with said standards and codes, pose no particular problem in light of the Antimonopoly Act. However, there may be cases in which self-regulation, depending on its content or conditions, impedes or restrains competition in terms of the diversity of goods or services or the manner in which business operations are conducted. (Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act)
- A joint R&D project which is intended to address so-called externalities, such as developing an environmental or safety measure, may not in itself immediately exclude the possibility for such project to pose a problem under the Antimonopoly Act. However, considering it may not be easy to carry out the project by a single undertaking in light of its cost, risk, and so forth related to the research, it is less likely to pose a problem under the Antimonopoly Act in such a case. (Guidelines Concerning Joint Research and Development under the Antimonopoly Act)

Based on these points, the JFTC has the view that the framework of horizontal agreements in the environmental context should be arranged without impeding the competition in the market while the JFTC considers the necessity of concluding such agreements on a case by case basis.

In addition, when other administrative agencies strengthen regulations or implement administrative guidance with the aim of environmental conservation, the JFTC holds consultations with these administrative agencies and arranges coordination with the AMA and the competition policy so that such regulations or administrative guidance will not induce violations against the AMA.

3. Guidelines concerning joint activities for recycling under the antimonopoly act

In accordance with the enactment of the Basic Act on Establishing a Sound Material-Cycle Society, whereby a basic framework was stipulated for the formation of a recycling-based society, the JFTC formulated the "Guidelines Concerning Joint Activities for Recycling under the Antimonopoly Act" (published by the JFTC on June 26, 2001, and last amended on January 1, 2010) to clarify the points of view concerning joint activities for recycling under the AMA.

Under these guidelines, the JFTC 1) demonstrates its basic recognition of recycling, etc., and describes its viewpoints under the AMA on 2) joint development of recycling systems and 3) joint activities by enterprises toward recycling, etc., by introducing and explaining actual cases.

- Basic recognition of recycling, etc.

In the examination into the existence or non-existence of problems related to the AMA concerning joint activities by enterprises toward recycling, etc., it is therefore necessary to duly consider the necessities from their social and public objectives. However, even if such necessities can be considered, problems related to the AMA arise in cases where joint actions on recycling, etc., among the enterprises result in adverse effects on the competitive order of the product and recycling markets.

- Joint Development of Recycling Systems

Specific examples of recycling systems that are developed by enterprises in joint operations include cases of using processing facilities jointly for waste recycling, or establishing such facilities jointly, such as when consumer electronics manufacturers establish factories for reprocessing and recycling household electrical appliances that have been disposed of, etc.

In determining whether the above-mentioned joint operations become problems under the AMA, examinations are undertaken into what effect the joint operations have on the product and recycling markets.

- Product Market

In the event that enterprises develop a recycling system in a joint operation to deal with product waste, although the necessary costs for recycling, etc. (usage charges for recycling facilities, usage charges for collection facilities, transportation charges, etc.) are shared, in cases where the proportion of the required costs for recycling, etc., of the product concerned compared to the selling prices are small, the joint operation has an indirect effect on competition in the product market itself, and is therefore considered unlikely to become a problem under the AMA.

However, if the recycling system covers a broad scope, for example, by the inclusion of the collection and transportation of waste and the process for recycling, there will be cases where the proportion of the required costs for recycling, etc., of the product concerned through joint operations are large compared to the selling prices. In such cases and when the total share of the participating enterprises in the product market becomes large, it would have an effect on competition in the product market and become problematic under the AMA as an “unreasonable restraint of trade.”

Furthermore, in the event that enterprises jointly develop a recycling system because it is difficult to independently develop a recycling system in doing business in the product market, by denying or restricting the use of that recycling system to new entrants or certain existing enterprises without justifiable grounds, by for example, obstructing new entry of other enterprises into the product market or causing difficulties in the business activities of existing enterprises, in the case that such actions substantially restrain competition in the product market, they shall fall under the provisions prohibiting private monopolization or unreasonable restraint of trade.

In addition, even if such actions do not substantially restrain competition in the product market, if there is a possibility that such actions cause difficulties in the normal business activities of enterprises that are denied or restricted participation in the recycling system, they shall be problematic under the provisions prohibiting unfair trade practices as concerted refusal to trade.

- Recycling Market

Because the construction of recycling systems creates the recycling market and new opportunities for trade in the recycling market could be expected to expand, it is normally unlikely to restrain competition in the recycling market and therefore become a problem under the AMA. However, in cases where many enterprises develop a recycling system jointly and by doing so cause difficulties in the business activities for the existing recycling enterprises or make difficulties for other enterprises to enter the recycling market, resulting in the substantial restraint of competition in the recycling market, such cases fall under the provisions prohibiting private monopolization or unreasonable restraint of trade.

In addition, in cases where enterprises jointly develop a recycling system that covers a broad scope, there is often no other recycling system existing in the recycling market. In such cases, having examined whether it is necessary for enterprises to jointly develop a recycling system and if there are alternative means, the JFTC will consider (1) if participation in the recycling system is free and (2) if the development of a recycling system by each participating enterprises is unreasonably restrained, and thereby determines if any problems arise under the AMA.

- Joint Activities Pertaining to Recycling, etc.

In the event that enterprises jointly develop or a trade association develops a recycling system, there are cases where various ancillary arrangements are made concerning the development of such a system for the purpose of its efficient operation, etc. In addition, even when a recycling system is not jointly developed, there are cases where similar arrangements are made by enterprises or a trade association in order to enhance the effectiveness of recycling, etc.

The guidelines show the viewpoints under the AMA with regard to the following 6 cases: (1)Decision on a target for recycling ratio, etc., (2)Integration of specifications for components that are easy to recycle and component standardization, (3)Joint research and development of products that are easy to recycle, (4)Standardization of formats of waste management forms (so-called “Manifest”) and enforcement of their use, (5)Joint activities concerning recycling expenses and (6)Development of a deposit system.

Table: The principles of the Antimonopoly Act for the joint activities pertaining to recycling, etc.

Types of Joint Activities	The viewpoints under the Antimonopoly Act
<i>Decision on a target for recycling ratio, etc.</i>	No problem in principle under the AMA, except for the cases where unduly discriminatory compliance with the target is forced among the members, or where the product of the member who failed to reach the target is unduly excluded from the market.
<i>Integration of specifications for components that are easy to recycle and component standardization</i>	No problem in principle under the AMA, except for the cases where a specific manufacturer or component manufacturer is unduly discriminated against or forced to observe the standards.
<i>Joint research and development of products that are easy to recycle</i>	Less problematic if it is considered to be difficult for a single manufacturer to carry out the R&D in terms of related risk, cost, etc.
<i>Standardization of format of waste management forms (so-called “Manifest”) and enforcement of their use</i>	No problem.
<i>Joint activities concerning recycling expenses(1)</i> - <i>Setting voluntary standards regarding the collection method, the timing of collection, and the displaying method</i>	No problem in principle, except for the cases where the trade association and the like forces observance of the voluntary standards they formulated.
<i>Joint activities concerning recycling expenses(2)</i> - <i>Joint determination of specific recycling costs or fees by manufacturers and sellers</i>	Causes a problem.
<i>Development of a deposit system*</i>	Usually no problem, except for the cases where trade associations or enterprises jointly determine the amount of deposit which is higher than the payback amount for covering collection cost.

* A system that entails collecting a specific amount of deposit at the time of sale of the product, and returning the same amount once the waste is collected.

4. A consultation case from businesses and the reply of the JFTC

The JFTC provides consultation services to give advice regarding whether a specific action planned by an enterprise or trade association will constitute a problem under the AMA. The following introduces the case of “The initiative to impose a charge for plastic shopping bags (hereinafter, referred to as “plastic bags”) on consumers”, one of the consultations related to horizontal agreements concluded in the environmental context.

4.1 Contents of the consultation

Each retailer in the city A has so far been providing free plastic bags to its customers for shopping.

For the last several years, each retailer in the city A has been involved in activities to reduce the use of plastic bags by customers, for example, by introducing a point system. (Customers get a point every time they refuse to use a plastic bag and can get a discount from the retailer based on the acquired points.)

While the introduction of a point system reduced the use of plastic bags to a certain level, its effect seems to have peaked and thus, to further promote the reduction of their use, retailers have focused on an initiative to impose a fee for using plastic bags.

However, only a fraction of retailers actually introduced a fee on plastic bags due to retailers' concern that their competitors might deprive them of their customers if they charge for plastic bags ahead of their competitors who provide free plastic bags.

In such a situation, the Revised Act on the Promotion of Sorted Collection and Recycling of Containers and Packaging was enforced in April 2007, where the introduction of fee-based plastic bags is regarded as one of the recommended actions by retailers to further reduce the use of plastic bags. However, in the city A, while the consensus was formed among the residents that they should reduce garbage through reducing the use of plastic bags, it is hard to say that they have reached the consensus that fee-based plastic bags should be implemented as a practical method of containing the use, and accordingly, very few retailers decided to introduce fee-based plastic bags ahead of their competitors.

In response to this situation, the city A decided to set up a committee by calling for the participation of resident groups and respective retailers in the city to consider how to reduce the use of plastic bags. Although it was up to each retailer whether to participate in this committee or not, almost all the retailers in the city decided to join the committee.

The city A explained the reason why it also called for the participation of the resident groups in the committee, stating that it would be necessary to listen to the consumers' opinions since consumers will be imposed certain financial burdens if fee-based plastic bags are introduced as the most effective method for the reduction of plastic bag use.

After the discussion at the committee mentioned in above, the city A, the resident groups, and participating retailers in this city (hereinafter, referred to as "Three Parties") concluded an agreement that customers should pay for the plastic bags when they buy things at retailers in the city starting from xx date/month, 2007, at the unit price of 5 yen per bag.

Does such an approach to introducing fee-based plastic bags for reducing bag use constitute any problem under the AMA?

4.2 Views under the Antimonopoly Act

It is necessary to examine this case as one where participating retailers, etc., agreed to cooperatively decide the implementation of fee-based plastic bags and their unit price.

In this case, the business activity subject to the agreements in question is that each participating retailer provides a plastic bag at the price of 5 yen. Generally speaking, it can be said that the customers seldom visit the retailer for the purpose of buying its plastic bags and the act of providing plastic bags to the customers is regarded as one of ancillary services rather than the act of selling goods, from the viewpoint of business activity on the part of retailers.

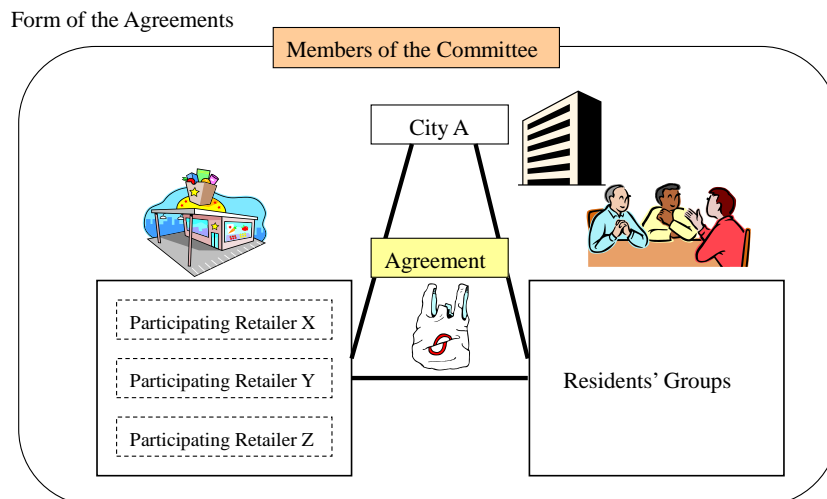
Therefore, the market in which participating retailers compete with each other is considered not the trade of plastic bags but the trade of all the goods sold by the concerned retailers.

Since almost all of the retailers in the city A will join this initiative, customers who need plastic bags will have very little room to choose retailers that provide free or inexpensive plastic bags.

However, the following can be considered:

- The decision in this case does not restrict competition for selling goods by retailers.
- Plastic bags are not necessarily indispensable for customers when they shop in retailers, and they never visit retailers to buy plastic bags.
- Social awareness of the necessity of reducing plastic bag use has been prevailing, which justifies the appropriateness of the aim of this initiative.
- The contents of agreements in this case are regarded within the scope that it is reasonably necessary with respect to their objectives from the following reasons:
 - Conventional methods such as the point system only produce limited effects
 - for achieving the goal of bag use reduction, while in contrast, introducing fee-based plastic bags can be considered more effective than the point system.
 - If the unit price of the bag is not fixed, a lower unit price would be implemented, which might result in failing to reach the goal of bag use reduction.
 - The 5-yen unit price as a result of agreements on the unit price cannot be considered as a too expensive burden for customers to achieve the objective.

Based on the above mentioned, this case does not immediately constitute a problem under the AMA.



NETHERLANDS

1. Introduction

This paper delineates the views of the Netherlands Competition Authority (NMa) towards horizontal agreements in an environmental context, as prepared for the OECD roundtable on this subject in October 2010.

When enforcing competition law, various interests need to be weighed. Several ‘hard’ economic interests play a role, but from time to time, less tangible factors come into play as well. These may be ‘public interests’ other than effective competition. Public interests are interests that, completely or partially, are considered to be deserving of government protection. On occasion, competition policy overlaps with other public interests. In this paper the NMa will explain how it deals with the specific public interest “environmental issues” in assessing competition cases.¹

As is the case in many other countries, sustainable growth and the environment have become important issues in the Netherlands. As a result, the NMa is increasingly confronted with the complaint that competition law impedes sustainable development.² The NMa is aware of the fact that in certain circumstances agreements between competitors may be beneficial for the environment. In fact, sustainable growth may at times fully depend on competitors collaborating. However, the NMa believes such collaboration should not be at the expense of effective competition. As the NMa is mandated to enforce the Competition Act and is not empowered to make decisions on other policy issues, it only has a certain amount of leeway in which it can take public interests into consideration in the course of its enforcement of the competition law. The legislator provides the framework for the operation of market forces and in doing so, the NMa’s area of work.

2. Public interests and competition

Effective competition is an economic and public interest. It is fair to say that consumer welfare is currently considered to be the main goal of competition law. Hence, competition should not be considered as an end in itself, but rather as a means to increase prosperity.³

¹ This paper is partly based on the section ‘Public interests and competition’ from the NMa’s Annual report 2009 ‘Weighing Interest’ and on an article by Pieter Kalbfleisch, titled ‘The Assessment of Interests in Competition Law: A Balancing Act’ published in: Mario Monti e.a. (ed.) Economic Law and Justice in Times of Globalisation; Festschrift for Carl Baudenbacher; Nomos verlag 2007, p. 455-474.

² According to the SER, the Dutch Competition Act leaves sufficient room for parties to make agreements in order to achieve noneconomic objectives. Although rigid enforcement of competition law principles may well be a limiting factor for sustainable development, it can hardly be called the main stumbling block. Social and Economic Council of the Netherlands (SER): Making sustainable growth work (2010/03 E), March 2010. Download English summary: http://www.ser.nl/~media/Files/Internet/Talen/Engels/2010/2010_03_en.ashx.

³ However, having said this, economists have widely diverging opinions on what the ‘right’ definition of welfare should be. In a nutshell, their discussion boils down to the question of whether we should accept restrictions to competition, simply because they lead to a ‘bigger pie’ for society as a whole (more welfare to be shared), or whether we should also look at the consumers’ share of that pie. This is a sensitive issue

Other public interests that have been discussed in case law and literature in connection with competition law cover various areas, including social policy, industrial policy, regional policy, environmental policy and cultural policy. Some of these areas have generally been dismissed as a rationale for special treatment under competition law. Most economists tend to agree that restriction of competition is not a good way to stimulate industrial and regional development.

However, in circumstances where certain public interests are at stake, these may override all but the most serious of competition concerns. The best known examples are environmental considerations and consumer protection. These interests are sometimes called ‘non-economic interests’, but upon closer inspection they can be often just as economic or non-economic as other interests, more commonly dealt with under competition law. Environmental protection is generally justified by the desire of preserving scarce natural resources, which can be welfare-enhancing in itself. If consumer protection is at stake, it is often because of an information asymmetry between suppliers and customers. In such cases, compensating measures may protect consumers from taking wrong decisions, making them potentially welfare-enhancing.

It is the legislator who by means of rules and regulations “decides” to exclude certain sectors from the operation of market forces. It is also the legislator who through that same process decides how the interrelation between competition and other interests works in practice. The NMa is obliged to apply the Dutch Competition Act within the legal frameworks provided by other legislation.⁴ For instance, in applying the Dutch Competition Act, the NMa may never render ineffective the application of other Acts (such as for example the Environmental Management Act).⁵

2.1 *Market failure and efficiencies*

In line with Article 101 (1) TFEU, Article 6 (1) Dutch Competition Act is a general prohibition of anti-competitive agreements and concerted practices. However, under their respective third paragraphs, efficiency-enhancing forms of collaboration between undertakings are exempted from this prohibition.

When enforcing Article 6 (3) Dutch Competition Act and Article 101 (3) TFEU, remaining competition usually guarantees that consumers will receive a fair share of the benefits. In practice, this implies a standard that says: collaborative agreements are condonable as long as they are profitable for the companies involved as well as for consumers. If an agreement meets the requirements of Article 6 (3) Dutch Competition Act, there are strong indications that it will also lead to greater welfare.

Arguments with respect to public interests tend to be brought into play when there is a form of market failure. A possible solution for solving market failures is through government intervention. In fact, the concept of market failure (and a public interest) is also the *raison d’être* of competition policy itself. Since many market-power issues decrease welfare and some forms of market power cannot or will not be solved

since it not only touches upon welfare creation but also on its distribution. In general, competition authorities tend to accept consumer welfare as their primary criterion.

⁴ NMa Annual report 2001, page 13.

⁵ In order to prevent an ineffective application of the Environment Management Act and to prevent unnecessary competition restrictions the NMa liaises regularly with the Ministry of Spatial planning, Housing and the Environment (VROM) in instances which concern regulation of waste management. Until 2004 this was formally arranged in a protocol signed by VROM and the NMa. This was to provide for the smooth running of procedures involving VROM (in its approval of the waste management system) and the NMa. Due to some amendments of the Dutch Competition Act the protocol became outdated. Today informal contacts between civil servants from the Ministry and the NMa take place on at least a semi annual occurrence.

by private parties (for instance by the competitive process within a ‘reasonable’ time limit, e.g. natural monopolies, creation of dominance by mergers or collusion), government intervention is thought necessary. From this perspective, ensuring effective competition can be considered a public interest.

Governments however often leave responsibility for market intervention to the market participants themselves, for example in the form of self-regulation. Hence, every competition authority gets its share of firms and sectors invoking public interests in defence of their anti-competitive rules and by-laws. Given the goal of increasing consumer welfare, competition authorities cannot categorically dismiss all arguments that are based on market failure. They need to carefully and critically weigh these arguments, whilst being aware of the fact that those who bring forward special public interest arguments often also have their own interests in restricting competition.

Frequently, in times of economic crisis, a particular sector may argue that the way to cope with a market failure in their sector is to allow anti-competitive agreements. Such sectors often argue that this is the best way of protecting public interests. Their argument is that it is necessary, to avoid the free-rider problem, to have the solution to a market failure cover the entire market. However, such arguments do not address the damage that such agreements inflict on the self-corrective functioning of the market, and in particular the way in which the market safeguards consumer choice. In such situations, the Competition Authority bears a great responsibility to weigh up the pros and cons of a potentially anti-competitive agreement, which aims to protect a public interest.

The question can be raised how a competition authority can measure the value of the special interest that an agreement wishes to protect. When a public interest is at stake, it is very difficult to measure in a direct way the value which society attaches to it. The determination of the value of a public interest necessarily implies an involvement of the political process and political decision making. Therefore, if a competition authority wishes to take into account a specific public interest, it should find out whether there is a political basis that can justify the anti-competitive restrictions. Such a justification would ideally rest on a political decision that clearly defines the policy objective that is involved, as well as the role that self-regulation is expected to play in achieving this objective. When such justification is not available, it may be much more difficult for a competition authority to strike a balance between the different interests involved.⁶

3. NMa’s assessment practice

In the past, the NMa has dealt with some horizontal agreement cases in which the environment played an important role. The NMa’s primary experience is in the waste management systems sector.⁷

⁶ De Vries underlines the role of ‘integration clauses’ (e.g. Article 6, 151.4, 152.1, 153.2) in this respect and even pleads for an explicit reference to special public policy objectives in the EC Treaty competition rules. Sybe A. de Vries, *Tensions within the Internal Market: the Functioning of the Internal Market and the Development of Horizontal and Flanking Policies*, European Law Publishing, 2006. Ottervanger states that while competition enforcement should take other public policies (such as culture, animal welfare, global warming) into consideration, it is in no way superior to these other policies, in fact there exists no hierarchy between these other public policies and competition enforcement. Ottervanger, *Maatschappelijk verantwoord concurreren – Mededingingsrecht in een veranderende wereld*, Markt en Mededinging June 2010 I No. 3 pp 93-99.

⁷ Synthetic framework elements (case 1982), White and Brown goods (case 1153), Electrical (gardening) tools (case 1751), Hot water boilers (case 1752), Heating-systems and hot water systems (case 1753), Sewing-, Knitting- and embroidery-machines (case 1754), Electrical music instruments (case 1755), Batteries (case 51 and 3142), Paper-recycling (case 139 and 3007), Car wreck recycling system (case 115 and case 2026).

In the Netherlands there is generally one waste management system per waste category in place, covering the total Dutch market. It is however possible for (a group of) undertakings obligated under national legislation to recycle their waste, to set up a competitive system. In the view of the NMa, multiple waste management systems per waste category will most likely provide more incentives to compete, be efficient, innovative and deliver qualitatively good services for the best prices. In the waste management systems the NMa has dealt with to date, competition between recycling companies within the waste management system exists as a result of regular tender procedures. This provides an incentive to remain cost efficient.

The main competition issue addressed by the NMa in the waste management cases was that producers and importers agreed to pass on the costs of disposal to consumers. In most of these cases, the NMa has decided that the obligation to pass on the costs for the exploitation of the waste management system to the consumer do not fall under the exemption of Article 101 (3) TFEU. According to the NMa, that part of the arrangement was actually price fixing, and consumers did not receive a fair share of the advantages of the system. However, in the White and Brown goods-case the NMa did grant the exemption for the pass through obligation for the specific aspects concerning the historical stock of electric and electronic equipment. This decision was in line with the European WEEE-Directive⁸ which entered into force during this procedure.

In 2001 the NMa dealt with a waste management system for the recovery and recycling of car wrecks.⁹ At that time there was no statutory obligation to dispose of car wrecks by means of a recycling system. This collective system had been set up in the Netherlands prior to the End-of Life Vehicles Directive.¹⁰ The recycling of car wrecks was at that time not economically profitable. This waste management system ensured that recycling was cheaper than the incineration or shredding of old products.¹¹

The system also contained an obligation to pass on a disposal fee of 45 EURO to the consumer. Because the uniform waste disposal fee only resulted in a very minor cost harmonisation, coordination of prices and market behaviour between the parties to the agreements was therefore deemed non-existent. In addition, the NMa stated that setting up a recycling system also has environmental advantages. Before the existence of the system the non economically profitable waste was shredded and dumped. From an environmental point of view, the NMa preferred the recycling system. For these reasons, the NMa decided that agreement was not an infringement of the prohibition contained in Article 6 (1) Dutch Competition Act.

One of the NMa's very first cases in 1998, the STIBAT case, also dealt with waste management. In this case, approval was given to a cooperation between battery producers and importers with respect to the collection and processing of used batteries.¹² In this case, each firm was under a legal obligation¹³ to

⁸ Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), OJ 2003 L 37/24.

⁹ Car wreck recycling system (case 115 and case 2026).

¹⁰ Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles, OJ 2000 L 269/34.

¹¹ Commission Notice: 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation Agreements', (2001/C 3/02), chapter 7. Agreements which give rise to genuine market creation, for instance recycling agreements, will not generally restrict competition, provided that and for as long as, the parties would not be capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist.

¹² Batteries (case 51 and 3142).

collect the batteries that they had brought into circulation for recycling. In its assessment, the NMa acknowledged that the avoidance of environmental harm can be welfare enhancing. The specific efficiency enhancing effect of the operation included, more specifically, the superior logistics of the system in comparison with individual collection and processing. This was in turn beneficial to consumers as it offered an opportunity to keep costs to a minimum.

The assessment of this case was based on a combination of political and economic factors, which included newly implemented legislation which required producers to recycle batteries in the general interest of protection of the environment. The legislation, and the NMa's decision to allow the battery producers to cooperate, was based on a variety of factors. The manufacturers were seen to be the best placed to ensure that environmental damage was prevented before it occurred. This was preferred not only for environmental reasons, but also as a way of limiting the costs of the environmental damage prevention.

In the STIBAT case, the NMa tested the necessity and proportionality of the restriction, especially given the relevance and value of the environmental protection which had been enshrined in specific legislation.¹⁴

4. Conclusion

The task of competition authorities when weighing other public interest against competition enforcement is twofold: on the one hand, maintaining competition in order to ensure that markets are sufficiently self-correcting, and on the other hand offering room for clear and objective efficiency gains of competition restricting agreements. In that regard, the NMa sees the need to carefully and critically weigh all arguments, whilst keeping in mind that it is not a policymaker.

¹³ Directive 1991/157/EEC of the Council of 29 March 1991 on on batteries and accumulators containing certain dangerous substances, OJ L 38-41.

¹⁴ Pieter Kalbfleisch, titled 'The Assessment of Interests in Competition Law: A Balancing Act' published in: Mario Monti e.a. (ed.) Economic Law and Justice in Times of Globalisation; Festschrift for Carl Baudenbacher; Nomos verlag 2007, p. 455-474.

POLAND

1. Introductory information

Polish competition authority (PCA, President of the Office of Competition and Consumer Protection) has intervened in many cases related to environmental issues. Most of them referred to municipal waste collection and disposal markets. However, most of these cases dealt with municipalities that were abusing their dominant position. The Authority has therefore limited experience with horizontal agreements in environmental context. PCA has recently decided in a cartel case¹, where waste removal companies have coordinated a price increase. However, since the parties raised no environment-related arguments in their defenses, such issues were not taken into account by the Authority.

Polish competition authority has also prohibited a horizontal merger in the market for battery recycling². The Agency is currently making efforts to influence the legislative process, advocating the preservation of the existing model of competition in the municipal waste removal markets, as the Polish Ministry of Environment is pushing for a reform, which would give monopoly on waste removal services to municipalities. Our contribution is based mostly on a merger case and on the experience with the advocacy efforts.

2. The general problem

PCA believes, that the agreements or mergers made for the sake of competition should be analyzed in the same way as other agreements and mergers. Otherwise “environmental defense” would quickly become an easy excuse for anticompetitive agreements/mergers, as some positive environmental effects are usually easy to demonstrate. If, for example, an agreement is aimed at decreasing output in a heavy industry, it will certainly create significant environmental benefits. Antitrust laws have provisions, which allow accounting for economic efficiencies and consumer benefits stemming from anticompetitive agreements and mergers. On the other hand, rejecting environmental defenses out of hand would also be a mistake. In the opinion of PCA, environmental benefits, such as cleaner air, should be accounted for on the same terms as all other consumer benefits/efficiencies. The problem with environmental benefits is the correct valuation of environmental goods and natural resources, as markets for some of these goods (e.g. biodiversity) do not exist. Therefore PCA views the problem as an accounting (valuation) problem, and not a fundamental problem which would call for a change in the general analytical framework.

3. Dealing with pressure to relax the rules against cartels

PCA has not experienced such pressures. We believe that the best way to address them is to use the general framework for dealing with efficiencies, i.e. demand that the parties demonstrate that the environmental benefits of the agreement cannot be achieved without restricting competition, that they will outweigh the expected anticompetitive effects, and that a fair share of the benefits will be passed on to the consumers. The above also applies to merger control.

¹ Decision nr RKT-110/2008 of 31 December 2008.

² Decision nr DKK1-421/66/08/AS of 5 March 2009.

4. Administrative guidance

PCA has no experience with administrative guidance encouraging the formation of a cartel. We envision, that PCA would intervene in such circumstances. The fact that the anticompetitive agreement was aided or required by an administrative agency might result in a reduction of the amount of fine levied on the cartelists (or the fine being waived altogether). PCA would also take steps to persuade the other administrative agency to change their guidelines.

5. Agency experience

5.1 *Competition Advocacy in the waste collection market*

The system of collection and disposal of municipal waste in Poland is currently based on the model of competition in the market. Waste collection companies, public and private, compete side-by-side in the local markets and conclude contracts for waste collection with individual inhabitants and housing cooperatives. In small municipalities, where no private companies operate, basic collection services are provided by municipal companies only. The waste collection companies have freedom of choosing the waste processing/dumping installation to which they transport the collected waste (usually a company-owned waste dump ground). In PCAs opinion, competition in the local waste collection markets is vigorous, especially in medium and large urban municipalities. Municipal governments organize collection when there are no private operators, issue permits for waste collection on their territory and can verify whether individual inhabitants (real estate owners) have concluded contracts for waste collection with private operators. Municipal governments can impose a “waste tax”. After doing so, the municipality organizes the collection of waste on its territory, and finances it from obligatory fees paid by all real estate owners. Therefore the decision to introduce a “waste tax” leads to an effective monopolization the local market for waste collection. The caveat is that such a decision has to be approved in a local referendum. That is the main reason why only a few of the 2479 municipalities managed to monopolize the waste collection markets through this procedure.

The current system is not working well for the sake of environment. Many inhabitants abstain from signing contracts, significant amounts of communal waste is disposed of illegally, through fly-tipping or in-home burning. Municipalities complain that private competitors compete unfairly (by using deposit sites that do not satisfy safety standards and evading the waste-deposition tax - a tax levied on companies who deposit untreated waste). Public and private waste management companies have no proper incentives to invest in modern treatment plants. As a result, about 90% of waste is deposited directly, without any treatment, which implies that Poland is in violation of EU obligations regarding recycling and recovery of municipal waste.

The Polish Ministry of Environment has proposed a new legislation, designed to resolve the environmental problems. The key elements of the proposal are:

- granting monopolies over waste collection to municipalities – the system will be financed through a waste tax, operators will be selected through public procurement;
- tightening the rules regarding the control over the flow of collected waste – waste treatment regions will be established;
- municipalities will organize the waste treatment system in their region – treatment plant operators will be selected through public procurement

PCA has analyzed the proposals and concluded, that the last two elements of the regulation are necessary for achieving the environmental goals and their benefits will outweigh the damage to competition. The first element, however – granting monopolies over waste collection to municipalities – is not necessary for achieving the environmental goals of the regulation. It will result in a drastic restriction

of competition, as public procurement in these markets will be a poor substitute for direct competition. The Ministry of Environment has provided no empirical studies which would prove that the environmental benefits of this element of the regulation would outweigh the damage resulting from the restriction of competition. The only argument seems to be that such system exists in most countries which have succeeded in fulfilling their environmental obligations. Positive counter examples (e.g. Ireland) have been disregarded. PCA has therefore actively opposed the first key element of the legislation³. PCA has also launched a market study to gain a better understanding of the waste collection markets to obtain a reliable benchmark for evaluating the actual impact of the new legislation.

5.2 *Agency experience in merger control*

On March 5th, 2009, PCA has decided to prohibit the acquisition of Baterpol Sp. z o.o. by Orzel Bialy S.A. The proposed merger was of a horizontal nature, with both parties operating in the same product market, defined as the market of buying and transformation of scrap lead-acid batteries. Sulfuric acid solution, metallic lead and its compounds are highly toxic and are present in large quantities in the lead-acid batteries, which are considered hazardous waste, hence it is important that they are subject to a correct process of collection and recycling.

The geographic dimension of the relevant market was determined to be national. The main argument for such market delineation were environmental regulations which restricted the exports of hazardous waste⁴.

In the defined relevant market, there were no other undertakings present, besides the merging parties. Hence, the merger would turn a duopolistic market structure into a monopsony.

In their notification, the acquiring party claimed that the acquisition was necessary to complete all environmental requirements of Directive 2006/66/EC of the European parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators. Directive 2006/66/EC was to be implemented in the Polish legal system by a new batteries and accumulators act after the merger control proceeded. The parties claimed they needed to merge to increase their efficiency by cost savings, which would allow them to invest more in innovative techniques, inter alia more environmentally friendly techniques.

In PCAs opinion, there were no objective economic benefits that would occur after the merger. In the opinion of the competition authority, it was not sufficiently proven that the benefits identified by the applicant, which would be the consequence of the transaction, were likely to outweigh its negative effects. There were also no convincing arguments, which would confirm that these benefits could only be achieved through the implementation of the concentration.

PCA emphasised, that the concentration would eliminate competition in the relevant market. PCA has noted the very high rigidity of the supply of battery scrap, which results from the legal obligation to recycle scrap batteries. As suppliers are required by law to recycle scrap batteries, the incentive to increase the price in order to attract supply would disappear after the merger, resulting in a price decrease. Even if the merger cost savings materialized, it is extremely doubtful whether they would be transferred to any extent to the suppliers of the applicant.

Put in other terms, environmental arguments of the applicant did not outweigh the very high social cost resulting from the consequences of a merger to monopsony in the market with price-inelastic supply.

³ At the time that this contribution was being written, the Council of Ministers has not yet made the final decision regarding that element of the proposal.

⁴ The fundamental regulations are Article 4.9 of the Basel Convention and Article 9.1 of the Polish Waste Act.

SPAIN

1. Introduction

Both environment and competition policies are horizontal policies that aim at improving efficiency in the economy as a whole.

On the one hand, environment policy aims at achieving sustainable growth in the long run mainly through an improvement of productive efficiency. Energy and resource savings through the recovery, recycling and re-use of raw materials result in lower costs of production.

On the other hand, competition policy mainly aims at improving allocative efficiency. By keeping firms competing against each other, competition policy allows consumers to benefit from the lower costs of production and the higher product quality and diversity that technical progress and better resource allocation bring forth.

Therefore, environment and competition policies are complementary policies allowing the economy as a whole to be more efficient by stimulating firms to produce with lower costs and by translating these lower costs of production to lower prices of goods and services for the consumers.

Although, as we have seen, environment and competition policies are complementary, their actual implementation may be in confrontation, since environmental regulations usually encourage the conclusion of agreements between economic agents in order to achieve more efficiency in the management of waste material.

In this contribution we will thus make a brief discussion of the general problem raised by the simultaneous implementation of environment and competition policies, in the first place, and, in the second place, we will make a brief discussion of three cases that the Spanish Competition Authority has recently analysed in the waste management sector.

2. The general problem: Competition concerns on the implementation of environmental regulation on waste management

In the management of waste material there are involved several activities vertically related ranging from selective collection, through transport to treatment and recycling.

In this sector there are significant entrance barriers for undertakings stemming both from the need to make heavy investment in treatment plants and from the need to obtain the necessary administrative authorisations. Heavy investment in treatment plants results, in turn, in large economies of scale, which, together with the small size of the market in many countries, lead to non-competitive market structures. In particular, the markets involved in waste management tend to be natural monopolies or oligopolies. This is especially true for treatment and recycling.

Environmental regulation that allows undertakings to enter into agreements between themselves in order to manage the waste collectively may result in a reduction of coordination costs among the different

players in these markets. This, in turn, may allow the sector to increase the amount of waste recycled and, thus, to produce with lower average costs thanks to further exploitation of economies of scale.

However, consumers may not benefit from this improvement in productive efficiency if coordination among the players in the sector results in additional entrance barriers for potential competitors, reinforcing the monopolistic or oligopolistic tendencies of these markets.

The Spanish Acts on waste management follow the principle of producer responsibility introduced by EC Directives. Manufactures, distributors and importers are responsible for the collection and recovery of the waste they have produced on the Spanish territory. These agents may fulfil their obligations either through an *individual solution* -they recover the waste material from the customers at the points of sale-, or through a *collective system*, known as Management Integrated Systems (MIS). In practice, most waste producers opt to join a MIS to fulfil their legal obligations.

MIS involve that producers of the waste organise the whole recycling chain. To do so, they have to conclude agreements with two kinds of agents: local authorities, in order to obtain the necessary administrative authorisations, and the players of the different markets involved in waste management, in order to subcontract the different services.

Taking into account the nature of a collective system, in some cases undertakings may find it profitable to integrate vertically in order to circumvent competition regulation and in order to internalize coordination costs, which, in turn, may lead to additional cost savings.

Therefore, environmental regulation in the waste management sector mainly raises two kinds of concerns for competition policy. On the one hand, most waste producers decide to adhere to a collective system to fulfil their legal obligations, which lead to the creation of monopolies or duopolies in the market of waste management. On the other hand, when the size of the market is large enough, we observe oligopolistic market structures with vertically integrated operators.

As we shall see with the cases discussed below, competition policy has to deal with the classical problems of abuse of a dominant position, in the case of monopolies, and of collusive practices, in the case of oligopolies.

3. Competition enforcement in the Spanish waste management sector

In recent years, the Spanish Competition Authority has dealt with three important cases in the waste management sector.

The first one (the ECOVIDRIO case) is related to an abuse of a dominant position by the only collective system in charge of the management of glass packaging waste in Spain.

The second case (the SIGNUS ECOVALOR case) is related to an abuse of a dominant position in the market of the management of end-of-life tyres by a collective system with a net dominant position.

The third case (the CONSENU/ECOTEC case) is related to collusive practices by the main operators in the healthcare waste management sector.

3.1 *The ECOVIDRIO case*

3.1.1 *ECOVIDRIO*

ECOVIDRIO is the managing entity of a collective system for the collection and treatment of glass packaging waste. It is a non-profit entity financed by the contributions of glass packaging companies.

In particular ECOVIDRIO carries out the organisational and financial management tasks and subcontracts the collection and recovery services to specialized companies.

ECOVIDRIO is the only collective system for the management of glass packaging waste in Spain and most companies have opted to fulfil their legal obligations through it, which makes it a *de facto* monopoly in the market for the management of glass packaging waste.

3.1.2 *Track record*

In 2003, the Spanish Competition Authority imposed a fine on REVISA –the association of glass packaging producers- and ECOVIDRIO for sharing-out the market for glass recovery geographically between 1997 and 2001.

The Spanish Competition Authority imposed an additional fine on ECOVIDRIO for abusing its dominant position in the market for the management of glass packaging waste.

In 2005 the Spanish Competition Authority granted ECOVIDRIO an individual authorisation for the functioning of its collective system. The Spanish Competition Authority set several conditions aiming at preventing ECOVIDRIO from abusing its market power.

In particular, ECOVIDRIO was obliged, among other things, to apply objective, transparent and non-discriminatory conditions in the competitive bids to contract the services for the collection and treatment of glass packaging waste.

3.1.3 *Current situation*

In 2008 the Spanish Competition Authority instituted proceedings against ECOVIDRIO.

The Spanish Competition Authority found evidence that ECOVIDRIO had systematically infringed the conditions set in the individual authorisation since 2005 and, thus, that it had incurred in an abuse of its dominant position in the market for the management of glass packaging waste.

In particular, the Spanish Competition Authority found that ECOVIDRIO had faked the competitive bids for the collection and treatment services favouring the undertakings affiliated with its collective system and was able to expel at least one competitor from the market for collection of glass packaging waste.

In July of 2010 the Spanish Competition Authority resolved to levy a fine of €1,000,000 on ECOVIDRIO.

3.2 *The SIGNUS ECOVALOR case*

3.2.1 *Management of end-of-life tyres (ELT)*

ELT are managed in Spain mainly through two collective systems: SIGNUS ECOVALOR and TNU.

SIGNUS ECOVALOR was created by the five major producers of replacement tyres (Bridgestone, Continental Tires, Goodyear Dunlop Tires, Michelin and Pirelli), which have a joint market share of 80% in Spain.

TNU was created by the major tyre importers, which have a joint market share of 18% in the market for replacement tyres in Spain.

SIGNUS and TNU are the managing entities of their respective collective systems. They are non-profit entities and are financed by ELT producers. ELT producers pay a fee for every tyre put to sale in Spain for the first time. ELT producers, on their part, translate this fee to final customers.

3.2.2 *SIGNUS ECOVALOR*

SIGNUS ECOVALOR carries out the organisational and financial management tasks. It subcontracts the collection and recovery services to specialized companies through competitive bids.

It charges a fee for every sale, independently on whether the tyre will be finally exported and, thus, will not be managed in Spain.

To solve this problem SIGNUS ECOVALOR established a mechanism of refund. Any economic agent that has bought a replacement tyre to a producer adhered to SIGNUS ECOVALOR and that exports the tyre can demand SIGNUS ECOVALOR to refund the fee.

However, SIGNUS ECOVALOR does not refund 100% of the fee. It retains 15% of the fee, 7% in concept of costs of verification and refund application and 8% in concept of costs not directly related to ELT management, such as marketing or R&D.

In some cases, these economic agents also have the legal obligation to manage ELT. This is the case for importers, for example. When the latter are adhered to SIGNUS ECOVALOR, it only retains 7% of the fee, because it considers that these agents were already supporting the general costs not directly related to ELT management.

3.2.3 *Current situation*

In 2009 the Spanish Competition Authority opened proceedings against SIGNUS ECOVALOR for a possible abuse of a dominant position, since when the fee it charges is refunded on re-export, a smaller amount is retained from companies affiliated with SIGNUS ECOVALOR than from other companies.

In March of 2010, SIGNUS proposed commitments to resolve the effects on competition derived from this practice. These commitments guarantee, in particular, that the refund is strictly based on objective criteria and, therefore, they eliminate the discrimination against those agents that are not adhered to SIGNUS ECOVALOR.

Based on these commitments, in May of 2010 the Spanish Competition Authority resolved the termination of the sanctioning proceedings.

In 2009 the Spanish Competition Authority also analysed the competitive bids carried out by SIGNUS ECOVALOR and it did not find any evidence of prohibited conducts.

3.3 *The CONSENUR/ECOTEC case*

3.3.1 *The market for the management of healthcare waste*

In 2007 there were 10 operators in the healthcare waste management sector in Spain.

The 3 largest companies in the market are CONSENUR (with a market share of 42.59%), CESPA (26.58%) and SISTEMAS INTEGRALES SANITARIOS-SIS (8.39%). The rest of operators have market shares below 6%.

These companies are vertically integrated operators and they not only carry out the organisational tasks for the waste management but they also carry out the different services, from transport to treatment and recovery of the wastes.

Finally, in this market public sector clients make up 56.6% of demand.

3.3.2 *Current situation*

In 2008 the Spanish Competition Authority opened proceedings against CONSENUR, CESPAS, SIS and INTERLUN for collusive conduct.

The Spanish Competition Authority proved that these companies had formed a trust to divide up public sector healthcare tenders in a large part of Spain during several years (at least from 1997).

The probe demonstrated that public sector clients were shared by coordinating the presentation of bid in the various tenders called by healthcare authorities in different regions, either through the creation of temporary joint ventures -when it was technically and economically feasible for the main companies to compete against each other- or through other arrangements, such as abstaining from participating in certain tenders, submitting uncompetitive bids or agreeing the terms of the bids that were to be presented.

In January of 2010 the Spanish Competition Authority resolved to levy aggregate fines of €7,045,000 on the four operators.

4. Final remarks

As we have seen, the markets involved in the waste management sector tend to be natural monopolies or oligopolies and the environmental regulation in this sector reinforces this tendency. In particular, it makes it easier for undertakings to abuse a dominant position and to collude in order to expel actual or potential competitors from the market.

The goal of competition policy in this context must thus be to avoid the building of additional entrance barriers on the part of the operators in these markets. The main concern for competition stems from the ownership and access to treatment infrastructures –mainly treatment plants-. Ownership of treatment plants allows dominant undertakings to charge abusive fees to those operators that are legally obliged to manage their waste but do not have access to treatment infrastructures. Furthermore, the creation of collective systems by dominant undertakings allows them to charge discriminatory fees to those operators that have not adhered to the collective system but want to fulfil their legal obligations through it.

To sum up, access to treatment infrastructures should be a key element for competition authorities when assessing a case. Competition concerns in the waste management sector are therefore similar to those observed in other sectors such as telecommunications and energy supply.

TURKEY

1. Introduction

Environmental regulations have become one of the chief policy areas for states as a consequence of rapidly arising environmental problems, particularly from the beginning of the 20th century. Environmental regulations call for solutions of environmental problems by assigning responsibilities to various actors in the society ranging from final consumers to firms and to the state. Since fulfillment of the requirements of the environmental regulations in most cases entail collaboration between different actors, the number of agreements concluded on environmental affairs has increased in parallel to the increase in the number of these regulations. Agreements in environmental context¹ can take various forms: they may come into being as a result of specific obligations in the regulations or they may be concluded voluntarily. These agreements may also differ in terms of the parties involved. They can be concluded between firms, or between firms and non-governmental organizations, or between firms and public authorities. More specifically, the agreements between firms can take either horizontal or vertical structure. To put it in another way, as a result of environmental regulations firms operating at the same or at different economic levels may conclude agreements.

Agreements concluded between producers of particular products can be considered to constitute a certain type of horizontal agreements in environmental context. In European Union and in most of the Organization for Economic Cooperation and Development (OECD) countries, certain waste streams are taken under control by specific regulations so as to minimize their negative environmental effects. These regulations in general rely on the principle of (extended) producer responsibility. The producer responsibility principle refers to the extension of the responsibilities of producers to the post-consumer stage of products' life cycles². According to this principle, producers have the responsibility to cover all or part of waste management costs and to realize actual physical waste management operations³. By assigning financial and physical responsibilities in terms of waste management, this principle aims to create an incentive for producers to reduce waste management costs. As the producers are able to interfere in the production processes and produce or design more environment friendly products in terms of waste volume, toxicity and recyclability, they are held as obliged parties⁴. In this regard, the principle of producer responsibility fundamentally aims to find a solution to the waste problem at its source.

¹ In the "Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements" (OJ C 3/2, 6.1.2001) the European Commission refers to these kinds of agreements as "environmental agreements" and defines them as "agreements by which the parties undertake to achieve pollution abatement as defined in environmental law or environmental objectives, in particular, those set out in Article 174 of the Treaty" (paragraph 179).

² OECD 1996, "Pollution Prevention and Control Extended Producer Responsibility in the OECD Area" Phase 1 Report OCDE/GD(96)48. Page 15.

³ ROSSEM, V., N. TOJO, T. LINDHQVIST 2006, "Extended Producer Responsibility: An Examination of its impact on Innovation and Greening Products". Lund, Sweden: International Institute for Industrial Environmental Economics. Pages 2-3.

http://www.foeeurope.org/publications/2006/Extended_Producer_Responsibility.pdf

⁴ OECD 2005, "Working Group on Waste Prevention and Recycling: EPR Policies and Product Design: Economic Theory and Selected Case Studies" ENV/EPOC/WGWPR(2005)9/FINAL. Page 7.

As a response to the environmental regulations based on the producer responsibility principle, in most of the countries individual producers have collectively organized to determine the least costly ways to meet all of their responsibilities with regard to the waste management operations. OECD conceptualizes “the collective entity created and governed by producers to manage collectively their individual responsibilities in relationship to extended producer performance objectives” as a “producer responsibility organization”⁵. These organizations are also recognized by the European Commission as “comprehensive systems” in which all concerned producers participate⁶. Turkish environmental policy is also based on the principle of producer responsibility. Accordingly, in various industries in Turkey, similar entities are also formed and they are defined as “authorized bodies/entities”, under which the concerned producers pool and share their responsibilities with respect to the environmental regulations⁷.

Although the establishment of these organizations is based on the requirements of environmental regulations, both the OECD and European Commission advise that competition authorities be vigilant about the activities and decisions of the producer responsibility organizations. It is argued that these organizations may easily turn into platforms for anti-competitive conduct among the participating firms because they rely on the cooperation between producers which are in fact competitors in the product market. In this regard, the OECD asserts that if firms in an industry cooperate to jointly arrange a producer responsibility organization on their own, there is the potential that they will collude on other things as well⁸. Similarly for European Commission, the cooperation may be abused by the participants to exchange sensitive information or to fix or align prices⁹. Therefore, these organizations, which can be regarded as horizontal agreements between producers,¹⁰ have to be examined critically like other horizontal agreements which may give rise to certain competition concerns.

This contribution aims to introduce the approach of the Turkish Competition Authority (TCA) towards these kinds of horizontal agreements through *Accumulator* decision¹¹ of the Competition Board,

⁵ OECD 1997, “Extended and Shared Producer Responsibility” Phase 2 Framework Report ENV/EPOC/PPC(97)20/REV2. Page 52.

⁶ European Commission, “Concerning Issues of Competition in Waste Management Systems” DG Competition Paper 2005. Page.6, <http://ec.europa.eu/competition/antitrust/others/waste.pdf>.

⁷ These organizations are called authorized bodies since the Ministry of Environment and Forestry officially recognizes them as entities performing duties related to waste management operations on behalf of their member producers. In fact, they are established and managed solely by private sector agents, mainly producers.

⁸ OECD 2005, “Working Group on Waste Prevention and Recycling: EPR Policies and Product Design: Economic Theory and Selected Case Studies” ENV/EPOC/WGWPR(2005)9/FINAL. Page 11.

⁹ European Commission, “Concerning Issues of Competition in Waste Management Systems” DG Competition Paper 2005. Page.14.

¹⁰ OECD conceptualizes the firm-“Duales System Deutschland AG” (DSD)- which was set up to meet the requirements of the German Packaging Ordinance by the producers concerned in Germany as a producer responsibility organization (Working Group on Waste Prevention and Recycling: EPR Policies and Product Design: Economic Theory and Selected Case Studies ENV/EPOC/WGWPR(2005)9/FINAL. Page 33) and European Commission in its *DSD* decision (Commission Decision of 17 September 2001, *DSD*, OJ 2001 L 319/1. Paragraph 80) defines the Constitution of DSD as an agreement between undertakings. In addition to that, from the European Commission statements as: “Comprehensive, industry-wide schemes are set up in many Member States for complying with environmental obligations on take-back or recycling. Such schemes usually comprise a complex set of arrangements, some of which are horizontal, while others are vertical in character.” (Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements. Paragraph.181), it is understood that the agreements concluded between the producers to set up a comprehensive systems can be considered as horizontal agreements.

¹¹ The decision is dated 20.05.2008 and numbered 08-34/456-161

which is the decision making body of the TCA. The *Accumulator* decision is primarily concerned with an authorized body established by the accumulator producers in Turkey. The decision is important both to identify the possible competition concerns that may arise from those kinds of horizontal agreements and to show the TCA's approach towards the agreements concluded to comply with the environmental regulations.

2. The *Accumulator* Decision

The *Accumulator* decision was adopted after an investigation on AKUDER (Accumulator and Recovery Industrialist Association). The case was focused on the markets related to waste accumulators. As is known, issues concerning accumulators and waste accumulators, from production to final disposal, are regulated under the Directive 2006/66/EC¹² in the European Union countries. This Directive repeals and replaces the Directive 91/157/EC¹³ which was the primary Community legislation on waste accumulators.

As a candidate country, Turkey is in the process of harmonizing its legislation with the EU Acquis. Several laws and secondary legislation have been adopted and/or changed in this process. With regard to the field of environment and waste management, many new legal arrangements have been put into force. Particularly after the opening of the chapter on environment to negotiations, under the supervision of the Turkish Ministry of Environment and Forestry, work is underway for the adoption of the remaining ones.

One of the regulations that were introduced during this process is the "Used Batteries and Accumulators Control Regulation" dated 31 August 2004 and numbered 25569 (the Regulation). The Regulation is mainly based on the Directive 91/157/EC¹⁴. Likewise the Directive 91/157/EC, the purpose of the Regulation is to arrange the legal and technical principles to:

- ensure the production of batteries and accumulators according to certain criteria,
- prevent the production, import, export or sale of batteries and accumulators containing harmful substances,
- establish a collecting system for the recovery and disposal of used batteries and accumulators, and to create a management plan.

The Regulation relies on the principle of producer responsibility and thus designates the producers as the responsible parties for compliance. In this regard, the producers are obligated to either develop a general collection and recycling system or to ensure the collection, recovery and disposal of used accumulators by participating in a certain system. An accumulator "producer" is defined as a real or legal person who produces, manufactures accumulators and introduces itself as a producer by putting its name, trademark or distinguishing mark on the product or an importer if the producer is outside Turkey. Under the Regulation, producers must ensure the collection, recovery and disposal of a specified minimum amount of used/waste accumulators each year. This amount is calculated on the basis of the net sales/import figures of the previous year. The minimum requirement is 70% for the first year following the

¹² Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC OJ L 266, 6.9.2006 p.1-14.

¹³ Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances OJ L 78, 26.3.1991, p. 38-41

¹⁴ The studies are going on to harmonize the Regulation with the Directive 2006/66/EC.

effective date of the Regulation, 80% for the second year, and 90% for the third year¹⁵. Due to this responsibility, producers complete and submit documents and information about the type, production and sales quantities of accumulators produced or imported to the Ministry of Environment and Forestry. They also submit documents evidencing that the collection, recovery and disposal targets have been achieved.

According to the Article 29 of the Regulation, producers are allowed to come together under the coordination of the Ministry of Environment and Forestry and to establish a non-profit legal entity to fulfill the obligations for the collection, recovery and disposal of waste accumulators and to cover the incurred costs. In line with this article, two associations were established to comply with the Regulation in Turkey, namely AKUDER which was founded mainly by the accumulator producers in Turkey and TUMAKUDER (Accumulator Importers and Producers Association) which was founded by importers.

2.1 *The System of AKUDER*

AKUDER was established by five accumulator producers and three recovery firms. The producers' market share reaches approximately 90% in the accumulator market. Three of them are the main accumulator producers in Turkey which have almost 80% market share. Two of these producers have recovery facilities as their subsidiaries. These recovery firms are also the members of AKUDER. In addition to founding members, AKUDER has fifty one producers and six recovery firms as members.

The member producers have well-developed distribution and sale chains composed of hundreds of dealers and distributors all over Turkey. Their dealers and distributors provide accumulators to the firms operating vehicle maintenance and repair works. Therefore, the dealers and distributors are in close relationships with the places where the waste accumulators are brought by the final consumers while buying new accumulators. According to the AKUDER's plan, waste accumulators accumulated in these areas are to be transferred to the dealers. In the next step, the distributors take the waste accumulators from the dealers. Finally, AKUDER collects the waste accumulators from distributors through AKUCEV (Waste Accumulator Collection Incorporated) which is a firm that was established by the founding members of AKUDER. AKUCEV organizes and performs the tasks of collecting and delivering the waste accumulators to the recovery firms on behalf of AKUDER's members.

The relationships between AKUDER and distributors/dealers are governed by standard agreements. These agreements require that dealers and distributors are to sell their waste accumulators according to the conditions and prices set by AKUCEV. Not only the prices at which the dealers sell their waste accumulators to the distributors but also the prices at which the distributors sell waste accumulators to AKUCEV are determined by AKUCEV regularly. These agreements also require that the dealers and distributors of the member producers are not to give the waste accumulators to collectors other than AKUCEV.

According to AKUDER's plan, waste accumulators can only be transferred to the member recovery firms. Waste accumulators are distributed among the member recovery firms with respect to their shares in AKUCEV. AKUCEV do not sell the waste accumulators to non-member recovery firms. On the other hand, member recovery firms are not allowed to take waste accumulators from the collectors other than AKUCEV. The price of the waste accumulators at which AKUCEV sell them to the recovery firms is determined by the Board of Directors' decisions of AKUCEV regularly.

As stated previously, to fulfill the requirements of the Regulation, accumulator importers also established an association named TUMAKUDER. To fulfill the obligations of its fifty-five members, TUMAKUDER concludes contracts with collector firms to collect and deliver the waste to the recovery

¹⁵ From the year 2007, the target is 90%.

firms. The contracts provide that the collectors are free to choose the recovery firms to deliver their waste accumulators. Moreover, the sale price of waste accumulators is also determined under free market conditions between collectors and recovery firms. Under TUMAKUDER system, the collectors are only required to supply TUMAKUDER with the documents showing the progress of the waste from collection to the recovery. At the time of the TCA's investigation, nine recovery firms out of thirteen licensed recovery firms were also members of AKUDER and AKUCEV. Since these firms were not allowed to purchase waste accumulators from other collectors, the collectors acting on behalf of TUMAKUDER could only bring their waste to the remaining four recovery firms.

2.2 *The practice of the Turkish Competition Authority with regard to AKUDER*

The TCA took no action against AKUDER as long as it served the purposes of the Regulation. However, a proceeding was initiated against AKUCEV for violating cartel ban on the grounds that the market for waste collection and recovery would be seriously affected.

AKUCEV, by its Board of Directors' decisions, was fixing the prices each and every stage of the transactions of waste accumulators. The quantity of waste accumulators to be sold to the recovery firms was also determined by AKUCEV beforehand. However, a waste accumulator is a product that has a positive market price and thus it is used to be collected and recovered even before the enforcement of the Regulation. Through the recycling treatments, substantial amount of lead is obtained from a waste accumulator. This lead is used as a raw material in the production of new accumulators. In fact, the lead is the main component of an accumulator. Since there are no lead ores in Turkey, importing lead and recycling the waste accumulators are the only alternatives to obtain lead. Thus, collecting waste accumulators and their recovery have already been highly profitable markets in Turkey. In such a context, both the price and the quantities of waste accumulators to be sold or purchased between the concerned actors used to be determined under the market conditions. However under AKUCEV's system, all the concerned actors were prevented from exploiting the waste accumulators commercially themselves. Neither the dealers nor the distributors nor the recovery firms were able to determine or negotiate the prices at which they wished to sell or purchase the waste accumulators. In addition to that, they were also restricted in their relations with third parties. The dealers and distributors were not allowed to sell their waste accumulators to collectors other than AKUCEV despite the fact that under the Regulation's requirements they can deliver the waste accumulators to any licensed collectors or to any licensed recovery firms directly. The member recovery firms were prevented from purchasing waste accumulators from collectors other than AKUCEV (the collectors acting on behalf of TUMAKUDER) although their sole obligation under the Regulation is not to accept waste accumulators brought by unlicensed collectors.

As mentioned before, the biggest accumulator producers have subsidiary firms performing recovery. These recovery firms were also the members of AKUCEV. In this regard, TCA decided that the relevant provisions of agreements concluded with distributors and recovery firms helped the founders of AKUCEV take the flow of waste accumulators under their own control. On the other hand, by determining the price of waste accumulators, these producers were in fact deciding on the price of the inputs used in their own production processes. It is important to note here that the fact that the lead is the main component of an accumulator makes the collection and recovery of waste accumulators much more important markets for accumulator producers in Turkey. From these facts, the TCA reached the conclusion that AKUCEV was used by the founding members as a means to secure the supply of the waste accumulators at the prices determined by themselves.

Regarding the decision taken by AKUCEV which prohibited the member recovery firms from purchasing waste accumulators from other collectors, the TCA concluded that it had the effect of restricting the activities of both collectors and importers at the same time. On the one hand, it impeded the activities of TUMAKUDER's collectors by restricting the number of alternative recovery firms to which

they could sell their waste accumulators. On the other hand, it indirectly restricted the competition in the accumulator market by restricting the activities of TUMAKUDER which was established to perform the tasks assigned by the Regulation. In the case that the collectors with which TUMAKUDER concludes contracts have difficulty in bringing the waste to the recovery firms, TUMAKUDER and, thus, its members may fail to meet the requirements of the Regulation. In such a case, the members of TUMAKUDER have to participate in another authorized body or perform the waste management operations individually since it is mandatory for importers to reach the targets specified in the Regulation. Therefore, TCA concluded that this practice of AKUCEV also had the potential to put the importers at a competitive disadvantage in the accumulator market against the producers.

Having examined all the findings of the investigation, the TCA decided that AKUCEV violated the ban of Article 4 of the Turkish Competition Act¹⁶ by,

- fixing the sale price of the waste accumulators of dealers and distributors,
- preventing the distributors and dealers from selling waste accumulators to other licensed collectors, and
- preventing the recovery firms from purchasing waste accumulators from other licensed collectors.

In the TCA's view, all of the findings clearly indicated that AKUCEV was formulated as a platform where the parties coordinate their behaviors to restrict the competition in the market. Therefore, the TCA arrived at the conclusion that the founding agreement (charter) of AKUCEV and the resulting activities listed below was unlawful which had the object or effect the prevention, restriction or distortion of competition and, prohibited under the Article 4 of the Turkish Competition Act.

Under Article 5 of the Turkish Competition Act, Competition Board may exempt agreements or practices when they;

- a) contribute to new developments and progress or technical or economic improvement in production or distribution of goods and in providing services,
- b) allow consumers to get a share from the resulting benefit and
- c) do not eliminate competition in a substantial part of the relevant market,
- d) do not induce a restraint on competition that is more than essential for the attainment of the objectives set out in paragraphs (a) and (b).

In the exemption analysis, the TCA qualified environmental benefits derived from the agreement in question as a "technical or economical progress" on the grounds that AKUCEV organized a system of collection of waste accumulators on a regular and reliable basis which may not be easily provided by individual accumulator producers. In the view of the TCA, the agreement was made in response to an environmental regulation and therefore served the attainment of environmental protection. Based on the

¹⁶ According to Article 4 of the Turkish Competition Act "Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited".

fact that the protection of environment is beneficial for the society as a whole, the TCA decided that individual consumers had a positive return from the agreement and the agreement allowed a faire share of the resulting benefit.

From the point of the indispensability criterion under subparagraph (d) of Article 5, the agreement was analyzed in terms of the provisions and objectives of the Regulation. The analysis was supported with the explanatory documents and information received from the Ministry of Environment and Forestry about relevant articles in particular as well as the goals of the Regulation in general. The TCA's analysis showed that while the Regulation put some targets for the producers and importers in terms of the management of waste accumulators, it had no provisions regarding the price or business activities of the firms. On this account, the TCA put forward that the activities and decisions of AKUCEV neither emanated from requirements of the Regulation nor served the realization of environmental goals behind the Regulation. For the TCA, the agreement could not be exempted from the prohibition under Article 4, since it eliminated the competition in collection and recovery markets and had the potential to negatively affect the competition in the product market, between the producers and importers.

On the basis of these facts, the TCA called for the termination of the infringement by making necessary amendments in the founding agreement (charter) of AKUCEV or the dissolution of AKUCEV. Accordingly, the TCA asked AKUDER to make necessary amendments in its waste management plan and to notify Competition Board. It also imposed administrative penalties on the founding member firms of AKUCEV.

3. Conclusion

It is accepted as a general principle that horizontal agreements may give rise to certain concerns about competition. On the other hand, they may lead to substantial economic benefits. Therefore, they have to be carefully analyzed in terms of their potential efficiency gains and anti-competitive effects.

Environmental regulations have led to an increasing variety and use of horizontal cooperation. While assessing the horizontal agreements in environmental context, it is important to bear in mind that, in most cases, they are made in response to environmental regulations. That is, they are fundamentally concluded to realize the environmental policy goals. In this regard, the examination of horizontal agreements relating to environmental aims should be conducted in view of the environmental gains. This contribution aims to show the attitude of the TCA towards horizontal agreements relating to environmental objectives through the *Accumulator* decision of the Competition Board.

The *Accumulator* decision shows that the TCA does not take a negative stance on the agreements concluded between the firms operating at the same level of a market to fulfill their responsibilities with respect to environmental regulations. In fact, the TCA decided on no prohibition about AKUDER itself. However, the TCA maintains that the cooperation under environmental regulations may be abused by the participants to restrict the competition in the relevant markets. Therefore, it closely monitors and scrutinizes the operations of such cooperations. In this context, despite the fact that AKUDER was set up in accordance with the Regulation, TCA examined the legality of its activities and decisions under competition rules.

With respect to horizontal agreements in environmental context, the TCA employs an exemption analysis with an environmental dimension. Accordingly, it weighs the restrictions of competition arising out of the agreement against the environmental objectives of the agreement. Accordingly, the restrictive effects of an agreement relating to environmental aims can only be accepted provided that environmental benefits outweigh its negative effects on competition and the restrictive effects are essential to achieving its environmental benefits. Within this framework, improvement of the environment is regarded as a factor

which contributes to improving production or distribution or to promoting economic or technical progress and as a factor which allows consumers to get a share from the resulting benefit¹⁷. The TCA takes the requirements of environmental regulations into account and aims to ensure that goals of environmental policy are achieved without unnecessary restrictions of competition. In this sense, the TCA makes its assessment on a case-by-case basis and approve an agreement as long as the environmental objectives are achieved by the least restrictive ways in terms of competition and as long as the agreement does not eliminate competition in a substantial part of the relevant market.

The TCA stands firm against the agreements that do not truly concern environmental objectives and that involve price fixing. The practice of price fixing is presumed to have negative market effects. In the decision, therefore, the actual effects of the practice of price fixing were not examined. On the other hand, waste accumulators' positive market value was emphasized in the decision as a factor that could contribute to a positive environmental performance in terms of the collection and recovery activities. In fact, a positive market price can create an incentive for firms to collect or to recover the waste in accordance with regulatory requirements. Therefore, this incentive provided by the market mechanism should be left intact as much as possible.

The TCA attempts to determine the most efficient market tools in a context where the environmental policy goals are fully achieved. Therefore, in the *Accumulator* decision, the requirements of the Regulation and the environmental policy goals behind the Regulation were comprehensively taken into consideration. As it was revealed that the operations of the cooperation in question were not due to the requirements of the Regulation or were not helping the realization of environmental policy objectives behind the Regulation, they were terminated so as to provide the competition in the markets. In such a context, not only the environmental gains aimed by the Regulation but also the benefits of competition could be obtained. On the other hand, the practice of the TCA in fact contributed to the environmental policy objectives of the Regulation since the smooth functioning of the collection and recovery markets would also serve the realization of the Regulation's targets.

¹⁷ The TCA's line of reasoning is indeed quite the same with European Commission's approach as the Commission has confirmed in several of its Competition Reports (Commission, XXVth. Competition Report (1995), paragraph 85; XXVIIIth. Competition Report (1998), paragraph 129) and in its decisions (the following decisions can be given as examples: Commission Decision of 18 May 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty, 94/322/EC, IV/ 33.640-*Exxon/Shell*; Commission Decision of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty 94/986/EC, IV/ 34.252-*Philips/Osram*; Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case IV.F.1/36.718. *CECED*, OJ L 187/47).

UNITED KINGDOM

1. Introduction and summary

This paper has been written as the UK response to the OECD roundtable on horizontal agreements in the environmental context. This document does not represent UK policy, nor does it seek to provide guidance on the law.

The OFT has had little case experience of horizontal agreements in an environmental context. However, the OFT has provided advice to government on voluntary agreements made between suppliers regarding the phasing out of energy inefficient light bulbs. In addition environmental issues have been considered by the Competition Commission (CC) in the context of merger and market investigations. The OFT has also looked at environmental issues in a number of research papers. This has included a 'Roundtable discussion on Article 101(3) of the Treaty on the Functioning of the European Union',¹ which covers the issue of non-competition benefits in the context of horizontal agreements more broadly. The consideration of environmental issues can be seen within this broader context of non-competition benefits.. In addition the OFT commissioned a research paper on: 'The competition impact of environmental product standards'.² This submission summarises the UKs main comments and some emerging views on this issue.

Protecting the environment has become increasingly important as a policy goal for governments across the world. As such, the creation of policies that minimise any detrimental impact on the environment is an important goal. These policies may involve primary legislation, enforcement of regulations or education. There has also been an interest in direct action from firms to pursue environmental objectives.

In some cases a firm may have an incentive to pursue such objectives unilaterally the action being in their self-interest. However in other cases, firms that pursue environmental objectives may be put at a disadvantage vis-à-vis their competitors. For example the use of an environmentally better manufacturing method may be more expensive for the firm than the use of a simpler, less environmentally friendly method. In such cases the firm may not have an incentive to undertake the action by itself unless it can increase its income to cover the additional costs through such an action.

Where firms do not have unilateral incentives to pursue environmental goals this may be solved by mandating the action through primary legislation or the introduction of regulations. Pursuit of environmental objectives can also be encouraged through fiscal measures. However an alternative way is to allow firms to form voluntary agreements between themselves to coordinate their actions. For example firms within an industry may agree among themselves not to use environmentally damaging inputs, or agree to minimum standards with regards to the use of recycling.

In the UK there has been a desire to reduce the amount of legislation and regulations that apply to businesses. In this light, agreements between firms may be particularly appealing to policy makers as they

¹ [http://www.offt.gov.uk/news-and-updates/events/roundtable-article101\(3\).](http://www.offt.gov.uk/news-and-updates/events/roundtable-article101(3).)

² See OFT1030 'The competition impact of environmental product standards' A report prepared by Frontier Economics for the OFT. October 2008.

may help achieve policy goals without the requirement of government legislation or explicit regulation. Such agreements have the potential of allowing firms to pursue actions that secure beneficial environmental outcomes in as efficient a way as possible.

However agreements between firms can also be anti-competitive. For example firms that agree to set consumer prices will distort competition and harm consumers. Such agreements may fall foul of competition law. Chapter I of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union (TFEU) (hereafter Article 101) set out similar frameworks for assessing agreements between firms which distort competition. Section 2 of the Competition Act 1998 and Article 101(1) prohibits any agreement between undertakings, decision by associations of undertakings, and any concerted practice which may affect trade in the UK or between Member States (as appropriate) and which has either as its object or effect the prevention, restriction, or distortion of competition.

Even if an agreement falls within section 2 or Article 101(1) it is not necessarily unlawful. Section 9 of the Competition Act 1998 and Article 101(3) makes a 'legal exception' to the prohibition where, broadly, the agreement's anti-competitive effects are outweighed or equalled by benefits. In other words, the net effect on competition is positive or neutral on consumers.³ Section 9 and Article 101(3) employ four cumulative criteria for the purposes of making this assessment.⁴

What does this mean for agreements designed to pursue environmental goals? First, such agreements will not always fall within Article 101(1). As will be discussed, many agreements will not have as their object or effect the prevention, restriction or distortion of competition. Second, even if an agreement between firms to pursue environmental goals does fall within Article 101(1), Article 101(3) raises the possibility that the agreement may be exempt if it fulfils the necessary four cumulative conditions.

However there may remain some agreements that might be good for the environment but not for competition, and hence on balance may not meet the legal criteria for exemption. This paper examines the advantages and disadvantages of the current legal approach to agreements designed to pursue environmental goals. The main issues drawn out within this paper include:

- Environmental benefits can sometimes be classed as direct economic benefits and are therefore covered by Article 101(3). But where they are classed as indirect economic benefits or non-economic benefits they are less likely to be covered.
- The main advantages of including indirect and non-economic environmental benefits in the analysis of horizontal agreements would be that the totality of the benefits of an agreement to all consumers are taken into account. This would reduce the likelihood of competition policy being a block on potentially beneficial government sponsored initiatives, and would ensure consistency with standard cost-benefit analysis.
- The main disadvantage of including wider environmental benefits relates to the difficulty in measuring and quantifying them. These issues are compounded when considering that some environmental benefits will accrue to consumers outside of the relevant affected market or to future generations. Thus the question of how to weigh such benefits is crucial. In addition, balancing non-economic benefits against the direct economic costs of reduced competition may not be a consistent comparison. Unless the environmental costs of an agreement were also

³ Even for agreements that are by object anti-competitive, or that contain hard-core restrictions, Article 101(3) TFEU can apply.

⁴ References to Article 101(1) in the discussion which follows should be taken to refer also to section 2 of the Competition Act 1998, unless the otherwise stated. Similarly, references to Article 101(3) should be taken to refer also to section 9 of the Competition Act 1998, unless otherwise stated.

included, the inclusion of environmental benefits may bias the conclusion. Finally, there is a risk to the independence of the competition authority if it were to take account of more remote environmental issues in which it does not have expertise. One way around this might be for the competition authority to conduct the competition analysis and have another specialist body carry out an assessment of the environmental impact, leaving a higher body within government with the appropriate political accountability to balance the two against each other.

- The appropriate weight attached to environmental benefits may differ subtly depending on the specific type of agreement. Here, it is important to take account of the fact that certain types of agreement are likely to lead to higher economic costs than others. In such cases, the expected benefits arising from the agreement would have to be higher in order to counter-balance the higher economic costs. As such, the environmental benefits would need to be weighed according to the seriousness of the economic harm.

The remainder of this paper is structured as follows: The next section provides some background, putting the question of how environmental issues are looked at in horizontal agreements into the context of UK and EU competition law.

Section three discusses whether indirect or non-economic environmental benefits should be included in the analysis of horizontal agreements. Section four examines the UK's experience of applying environmental benefits to specific types of agreement. The last section concludes.

1.1 Background and context

Any agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition, and which are capable of affecting trade between Member States, fall within Article 101(1). If environmental agreements do not have an impact on significant parameters of competition (such as price, quality, range or service) or on the ability of actual or potential competitors to compete effectively, (for example by foreclosing the market), they may not have as their object or effect the prevention restriction of distortion of competition. Where environmental agreements do impact on such competitive parameters, however, they will fall within Article 101(1) and will need to meet the exception criteria under Article 101(3) to be lawful.

To satisfy Article 101(3), any agreement must satisfy four cumulative, and exhaustive, conditions:

- Agreements must contribute to improving the production or distribution of goods or contribute to technical and economic progress;
- Consumers must receive a fair share of the resulting benefits;
- The restrictions must be indispensable to the attainment of these objectives; and
- The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the product(s) in question.

Whilst there are many interesting questions that may be raised in relation to applying the exemption criteria in an environmental context, this paper concentrates on two main questions that pertain to environmental agreements and how they may be treated within competition law.

First, what types of environmental benefits are encapsulated in the definition of benefits that contribute to improving the production or distribution of goods or contribute to promoting technical and

economic progress? Where the law is not entirely clear, how broadly should environmental benefits arising from the agreement be considered as benefits for the purposes of meeting the exemption criteria?

Second, how are the defined environmental benefits to be weighed given the beneficiaries of the environmental agreements are likely to be widespread across the economy whilst the potential harm may be relatively concentrated in a single market? This question also arises in the context of time – the beneficiaries from environmental agreements are not only today's generation but also future generations.

1.2 When are agreements in an environmental context unlikely to fall within Article 101(1)?

Given the wide variety of scenarios in which 'environmental agreements' could be concluded, it is difficult to identify general rules about whether or not they are likely to raise competition concerns. However, it may be possible to speculate that environmental initiatives may be less likely to have an adverse impact on competition (or, if they do, would be more likely to meet the exception criteria) where they are voluntary and transparent and where they do not increase prices for consumers. The following scenario provides an example of the kind of environmental agreement, which in the OFT's view, may be unlikely to fall within Article 101(1).

The major producers of yogurt in a Member State – as well as manufacturers and distributors in other Member States who sell yogurt into the Member State ('importers') – agree with the major packaging suppliers to develop and implement a voluntary initiative to make yogurt pots from a recyclable plastic. The recyclable plastic is also cheaper to manufacture than the typical materials currently used for yogurt pots. The agreement has been entered into in response to pressure from the Member State's central government to help meet recycling targets. The manufacturers and importers represent 70 per cent of yogurt sales within the Member State. The specifications of the standard have been agreed between yogurt producers, manufacturers and importers in an open and transparent manner after open consultation including the publication of the draft specifications on an industry website prior to adoption. The final specifications adopted are also published on an industry trade association website that is freely accessible to all potential entrants whether or they are members of the trade association.

While the agreement is voluntary, the fact that the parties account for 70 per cent of the market for yogurt in the Member State makes it likely that the recycling initiative will become a de facto industry standard, particularly given that the government in the Member State is encouraging increased use of recyclable materials. This creates a risk that the agreement will give rise to barriers to entry and potential anti-competitive foreclosure effects in the Member State market, in particular for importers of the product in question who may need to use different materials to meet the de facto yogurt pots standard in order to sell in the Member State if the materials used for yogurt pots in other Member States does not meet the standard. Significant barriers to entry and foreclosure are unlikely to occur in practice. This is because the agreement is voluntary, has been agreed with major importers in an open and transparent manner and is accessible to new entrants, importers and all packaging suppliers. In particular, importers will have been aware of potential changes to materials at an early stage and have had the opportunity through the open consultation on the draft standard to put forward their views before the standard was eventually adopted. Also, there is unlikely to be a significant reduction in the scope for yogurt manufacturers to differentiate and compete on their offerings. Any reduction in environmental differentiation between products is likely to be limited and the manufacturers will still be able to compete on price, quality, nutritional content and so forth. Furthermore, the initiative is unlikely to raise production costs or consumer prices in the short term. The agreement therefore may not give rise to appreciable restrictive effects on competition within the meaning of Article 101(1).

1.3 *How are agreements in an environmental context included under Article 101(3)?*

The first condition of Article 101(3) stipulates that 'agreements must contribute to improving the production or distribution of goods or contribute to technical and economic progress.' This raises the question of how widely these contributions should be defined.

The Commission in its Guidelines on Article 81(3) (now 101(3)) (the Guidelines) provides further guidance on what type of efficiencies may be considered under Article 101(3). The Guidelines categorise efficiencies into two broad categories: 'cost efficiencies and efficiencies of a qualitative nature whereby value is created in the form of new or improved products, greater product variety etc.'⁵

Agreements in an environmental context that give rise to direct cost efficiencies are relatively simple to include under Article 101(3). However many environmental benefits may not necessarily give rise to direct cost efficiencies. The benefits may be more widespread and diffuse within the economy. For example the creation of a minimum standard to reduce the extent of pollution in a manufacturing process may well increase the cost of production rather than reduce it. However it is likely to provide benefits to the environment in the wider context of cleaner air.

The Guidelines state that: 'In a number of cases the main efficiency enhancing potential of the agreement is not cost reduction; it is quality improvements and other efficiencies of a qualitative nature.'⁶

The Commission gives three examples of such qualitative efficiencies in the Guidelines: (i) new tyre technology providing benefits relating to safety of the tyres and a reduced need to carry a spare tyre;⁷ (ii) making new global services available more quickly in telecommunications;⁸ and (iii) improved facilities in making cross-border payments in the banking sector.⁹

The OFT considers that both the categories of cost and qualitative efficiencies as described within the Guidelines can be characterised as 'direct economic benefits', that is cost or qualitative efficiencies that accrue to direct or indirect users¹⁰ of the products or services covered by the agreements. Direct economic benefits are those benefits that improve the value for money of a product or service for consumers. These improvements may be around the price, quality, range or service (PQRS) of the firm's offering. Each of these improvements either directly affects price or directly provides additional non-price based value to the consumer. For example, consumers who value greater variety may be attracted to shops with a wider range of shoes. Therefore, if an agreement between retailers led to an increase in the range of shoes stocked then that may be a direct economic benefit.¹¹

⁵ Para 59 of the Guidelines.

⁶ Paragraph 69 of the Guidelines.

⁷ In paragraph 70 of the Guidelines.

⁸ In paragraph 71 of the Guidelines.

⁹ In paragraph 71 of the Guidelines.

¹⁰ The Guidelines refer to indirect users in paragraph 84 as follows: 'The concept of '*consumers*' [Commission emphasis] encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers ...In other words, consumers within the meaning of Article [101](3) are the customers of the parties to the agreement and subsequent purchasers.'

¹¹ Other factors will also be important for the assessment under Article 101(3), including indispensability (that is, whether the agreement was really needed to increase the range of stock in the shops).

In the context of agreements with environmental benefits, possible environmental qualitative efficiencies may arise where extra value is created for consumers. For example a product that is biodegradable may provide extra value to the consumers of the product. As such the biodegradability of the product provides a direct economic benefit to the buyers. However such benefits would only be classed as direct economic benefits if consumers value these factors as part of the quality dimension of the product or service.¹² In other words we have interpreted the Guidelines as not allowing the inclusion of biodegradability unless the consumers value it and it forms part of the quality dimension of the product for the consumer.

Another example of an agreement in an environmental context that might generate direct qualitative efficiencies is an agreement between producers of coffee to agree a standard under which coffee could be defined as 'rainforest friendly' – sourced from farmers which do not use rainforest land in the growing of the coffee beans. This might be viewed as a benefit if consumers placed value on products that are produced in a way that does not use rainforest land.¹³

Whilst 'direct economic' benefits covers a wide variety of benefits it does not cover indirect economic and non-economic benefits.

Indirect economic benefits are defined as cost and qualitative efficiencies around the PQRS dimensions of a product or service that are not in the relevant affected market (the market in which the agreement takes place, or in which there is a direct impact). In this context the Guidelines¹⁴ clearly states that: 'Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.'

For example, fuel efficiency for bus operators, which may be driven by environmental as well as cost objectives, may arise from coordination on timetabling by bus operators. Whilst this will give rise to a number of direct economic benefits, one possible indirect benefit could be reduced traffic congestion for car owners. It is indirect because even though it may be classified as a direct economic benefit, it is not in the relevant affected market.

Two-sided markets may also be covered within indirect benefits. For example, an agreement between newspaper undertakings that has a direct effect on consumers on one side (by, for example, increasing the number of subscribers) may have an indirect effect on the other side (by, for example, making the newspapers more desirable to advertisers).

The examples of indirect benefits given above are all relatively clear cut. However this is not always the case. One of the difficult elements of indirect economic benefits is their degree of remoteness. The more remote the beneficiary, the more likely it is that the benefits are to be characterised as indirect economic benefits rather than direct benefits. As such, there may be some ambiguity between the classification of indirect benefits and direct benefits. For example, the indirect benefit resulting to

¹² For instance, some consumers buy fair trade products because they value certain standards such as 'fairness' or 'environmentally friendly' as part of the quality of the product. An agreement that establishes a voluntary quality standard and trademark (that the consumer values) could thus be seen as a direct economic benefit.

¹³ This would still need to show the agreement was indispensable to attaining that benefit and that the benefits outweighed the costs to competition.

¹⁴ In paragraph 43.

newspaper advertisers from an agreement that reduced the cost of the newspaper, thereby increasing the number of subscribers, is fairly direct. Even though the agreement may not be in the same relevant market as subscribers, the advertisers see readily quantifiable benefits. However if the agreement's cost reductions were achieved through fewer pages, this may also create benefits to local councils, who would need fewer staff to collect and dispose of discarded newspapers. These benefits might be argued still to be indirect (being economic), but the degree of remoteness from the agreement makes them more speculative, and hence more similar to non-economic benefits (discussed below) in their characteristics.¹⁵

The current OFT work on reviewing a UK-specific block exemption for certain public transport ticketing schemes provides a good example of the fact that, in our view, where environmental benefits coincide with, or form an integral part of, economic benefits, they are likely to be capable of meeting the exception criteria. In the public transport ticketing review, we considered that while the ticketing agreements under consideration were likely to create economic benefits for passengers and transport operators (for example, better quality bus services and improved transport networks for the former and increased patronage and greater certainty as to revenue and lower administrative costs for the latter), the wording of section 9(1) of the UK Competition Act 1998 (equivalent in substance to Article 101(3) for material purposes) was wide enough to allow the OFT to take account of benefits for other road users and consumers.

The main thrust of the analysis under section 9(1) relates to the economic efficiencies that are directly or indirectly passed on to consumers and that wider benefits to society would not normally be sufficient on their own for section 9(1) to apply. However, we considered that in addition to the economic efficiencies ticketing schemes can lead to indirect benefits for other consumers, such as road users by, for example, increasing the efficiency of services which results in reduced congestion, noise and air pollution.¹⁶

Finally, certain types of environmental benefits may be classified as non-economic. For the purposes of this paper we define these as benefits that arise from the agreement but are not directly related to the characteristics of the product or service (that is, they cannot be captured by the PQRS bundle and hence are not classified as economic benefits, either direct or non-direct). These benefits are non-pecuniary and are often more subjective in nature than direct or indirect economic benefits.

For example, a reduction in carbon dioxide emissions may lead to consumers experiencing greater enjoyment of the environment or a greater sense of well-being.

Likewise, an agreement that results in greater production may also result in greater employment. This additional employment, and the follow on benefits that greater employment results in across the economy, are classified as a non-economic benefit for the purposes of the paper. Other non-economic benefits may include cultural benefits, environmental benefits (in so far as they are not directly valued by those within the relevant market), financial stability benefits and national interest benefits.

The OFT has not opened any investigations into horizontal agreements involving environmental agreements, although other regulatory bodies within the UK have had some experiences. These are discussed in more detail in section three.

Regarding the Commission's Guidelines, our interpretation is that the Guidelines do not allow the inclusion of indirect economic benefits in the context of Article 101(3). We note however that there have been a number of cases under Article 101 in which the Commission, in its decisions, could be interpreted

¹⁵ See footnote 13

¹⁶ The consultation document is available at <http://www.of.gov.uk/OFTwork/consultations/current/ticketing-schemes-exemption/#named2>

to take into consideration non-economic and indirect benefits arising from agreements. For instance, the Commission could be seen to have had regard to indirect environmental benefits in *Phillips-Osram*¹⁷ and indirect and non-economic benefits in *Assurpol*¹⁸ and *Exxon-Shell*¹⁹. In *Metro (I)*²⁰, and *Ford/Volkswagen*²¹ the Commission also appears to have taken account of indirect employment benefits. However, in *Matra Hachette v Commission*²² an important aspect of the case was that the Commission and the applicant disagreed over whether the Commission should take into account benefits to employment.²³ Social and cultural benefits were also recognised by the Commission in *EPI code of conduct*.²⁴

In the *Matra* judgment, the General Court²⁵ chose not to address whether benefits to employment should be taken into account under Article 101(3). However, benefits to sport were recognised by the General Court in its judgment in *Laurent Piau v Commission*.^{26,27} Whilst this may suggest that some regard is had to non-economic or indirect benefits, almost all of these cases pre-date Modernisation and the devolution of the application of Article 101 (and Article 102 TFEU) to Member States' courts and competition authorities.

Moreover, there are a number of other cases in which the Court of First Instance (now the General Court) found that indirect benefits could be considered as falling within Article 101(3) only in so far as the benefits occurred in the same market as or markets related to the restrictive agreements. These include, for example, *Shaw v Commission*,²⁸ *Compagnie Général Maritime and others v Commission*,²⁹ and *Glaxo Smith Kline*.³⁰

2. Arguments for and against taking account of / incorporating environmental issues in the analysis of horizontal agreements

This section discusses whether one should include indirect or non-economic environmental benefits in the analysis of horizontal agreements. There are three aspects to this. First, what types of environmental benefit should be included in the analysis? Second, how should the defined environmental benefits be weighed given the beneficiaries of the environmental agreements are likely to be widespread across the

¹⁷ OJ [1992] L037/16.

¹⁸ OJ [1994] L378/37.

¹⁹ OJ [1994] L144/20.

²⁰ C-26/76 *Metro (I) v Commission* [1977] ECR 1875.

²¹ OJ [1993] L20/14.

²² T-17/93 [1994] ECR II-595.

²³ The Commission, in its decision, gave regard to the maintenance of employment.

²⁴ OJ [1999] L106/14.

²⁵ Formerly the Court of First Instance.

²⁶ T-193/02, [2005] ECR II-209.

²⁷ However, it has been suggested that in none of these cases were these indirect economic and non-economic benefits deemed by the Commission to be critical for its decision.

²⁸ Case T-131/99 [2002] ECR II-2023

²⁹ Case T-86/95 [2002] ECR II-1011

³⁰ Case T-168/01 [2006] ECR II-2969. This was not altered by the subsequent Court of Justice judgment in this case – Case C-501/06 P etc. *GlaxoSmithKline Services Unlimited v Commission*, judgment of 6 October 2009 – which did not touch on this issue.

economy whilst the potential harm may be relatively concentrated in a single market? Third, how should the benefits be weighed in the context of time given that the beneficiaries from environmental agreements are not only today's generation but also future generations?

As discussed above, environmental issues that can be classed as direct economic costs or benefits are those that directly impact the PQRS offering. Direct economic benefits, even those of an environmental nature, allow for greater objectivity, are more amenable to quantification, and generally fall within a competition authority's area of expertise. As such, the advantage of taking them into account when examining horizontal agreements appears to be non-controversial and to fit it well with standard competition assessment of horizontal agreements under Article 101.

The main focus of this section is therefore on environmental issues that are indirect or non-economic benefits and whether or not they should be included in the analysis of horizontal agreements. What are the arguments for and against including wider environmental benefits arising from an agreement and how broadly should they be defined? Additionally, how should they be weighed given that they may arise in different relevant markets or to different generations of consumer?

Many similar issues were raised by an OFT round table discussion on Article 101(3) held on 12 May 2010.³¹

2.1 Arguments for including indirect economic and non-economic environmental benefits

There are three main benefits to including environmental (and other) issues that result in indirect economic and non-economic benefits in the assessment of horizontal agreements. First, it ensures that the totality of the benefits of an agreement to consumers is taken into account. For example, when environmental benefits are considered, the risk of an agreement which has an overall net benefit to consumers being prohibited is reduced.

In this context, the wish to capture the overall benefits of an agreement might also mean aggregating costs and benefits to consumers across markets directly affected by the agreement. For example, a horizontal agreement that restricts competition between two competing producers of coal-fired power stations might harm consumers of the coal-fired power by increasing their price but might also reduce pollution in the geographic areas surrounding the actual stations. Failing to allow aggregation may rule out such an agreement even when the aggregate benefits vastly outweigh the aggregate harm.

Similarly, over a longer time period, benefits can be inter-generational. Here, the consumers who effectively paid for the benefits do not receive them.³² Instead, future generations of consumers benefit. Many environmental benefits are likely to be longer term and therefore of this nature.

Including longer term intergenerational environmental benefits in the assessment of horizontal agreements ensures that agreements that only realise benefits in the long term can be implemented. It also recognises the generation of future efficiencies from dynamic competition (for example, through R&D innovation).

³¹ The discussion focussed around three main questions: What is the state of play in Article 101(3) – how is it working? Should a broader interpretation be applied to the benefits acceptable under Article 101(3)? Should benefits and costs be aggregated across relevant markets under Article 101(3)? The papers can be found at [http://www.of.gov.uk/news-and-updates/events/roundtable-article101\(3\)](http://www.of.gov.uk/news-and-updates/events/roundtable-article101(3)).

³² In the context of correcting environmental market failures, an alternative way to characterise the issue would be that consumers must pay the full cost for the good that they are consuming, that is, all externalities are included.

Second, including environmental issues in the analysis of horizontal agreements reduces the likelihood of competition policy being a block on potentially beneficial self-regulation initiatives promoted by government³³ and potentially increasing the likelihood of more costly regulation.³⁴

Third, it is consistent with the standard cost-benefit analysis normally used in appraising government policies.³⁵ Taking account of environmental issues under horizontal agreements should increase the probability of achieving an informative and reliable analysis of the overall impact of an agreement.

2.2 *Arguments against including indirect economic and non-economic environmental benefits*

Balanced against this, there are three reasons for not including indirect and non-economic environmental benefits.

First, there are significant issues relating to the need to measure and quantify indirect economic and non-economic environmental benefits. Whilst we acknowledge that many of these issues exist within direct economic benefits, the concerns may be significantly greater in indirect and non-economic benefits due to their greater degree of remoteness. These issues are likely to be widespread and may not be easily overcome. This is especially true in the case of non-economic benefits which are more difficult to identify and quantify than indirect economic benefits. Uncertainty as to whether, when and to what extent the benefits will arise is also likely to be a greater challenge when dealing with non-economic than indirect benefits. Furthermore, as broader environmental benefits may be very large scale, they increase the likelihood of Type II errors occurring.³⁶ These problems are likely to be compounded by the difficulty of determining where to draw the line between those benefits that should be taken into account and those that should not.

The question of quantification is further compounded when thinking about how environmental benefits should be weighed across markets and generations. Aggregating benefits and costs across markets for different sets of consumers raises issues of distributional equity (that is, one set of consumers pays for benefits to another group of consumers). One issue in the context of redistribution is how much greater do net benefits have to be than costs for the agreement to have a possibility of exemption? For example, if benefits to a set of consumers outside the relevant market are 5% higher than the cost to those consumers in the relevant markets, is this sufficient?

³³ As an example, consider a government objective to reduce environmental pollution. The government may pursue this aim partly through encouraging a reduction of plastic bags and containers usage. To achieve this, the government may encourage an agreement between food retailers to charge an agreed amount for the use of plastic bags and containers. This may yield (relatively remote) indirect economic benefits in terms of reductions in cleaning and disposal costs for local councils. However it may also yield significant non-economic benefits in terms of an aesthetically pleasing and less polluted environment (leading to a greater sense of well-being). By blocking the agreement there is a risk that governments would perceive competition law as a block on potentially beneficial policies.

³⁴ The alternative to voluntary agreements is often direct regulation. If non-economic environmental benefits are not taken into account when assessing voluntary agreements but are in the assessment of regulation, this increases the likelihood that regulation will be used to solve problems – potentially in conflict with the government's priority.

³⁵ In *The Green Book – Appraisal and Evaluation in Central Government* by HM Treasury it is recommended that 'relevant benefits to government and society of all options should be valued' and that '[w]ider social and environmental; benefits for which there is no market price also need to be brought into the analysis.' It is further noted that such costs 'will often be more difficult to assess but are often important and should not be ignored simply because they cannot be easily costed.'

³⁶ That is not prohibiting an agreement that is anti-competitive.

Moreover, when thinking about how to weigh environmental benefits across generations, determining the discount rate and time lag to be applied is not straightforward. Furthermore, there is a danger that agreements permitted on the basis of expected future benefits may have an overall anti-competitive effect if these benefits are not realised. Correspondingly it is important to consider the probability that they will be realised.

In thinking about the question of time, the further into the future a benefit accrues, the less we might expect to place substantial value on such benefits. Economists usually account for this by applying an annual discount rate compounded over time.³⁷ The further away in time a benefit accrues, the more important the compounded discount rate becomes in determining the overall value of the benefits. Benefits far into the future will have a much higher discount rate and hence much lower weighting than benefits (or harm) realised today or in the imminent future.

Second, balancing non-economic benefits against the direct economic costs of reduced competition would no longer be comparing like with like. While the indirect economic and non-economic factors would be accounted for on the benefits side, they would not be accounted for on the cost side. This may be a serious disadvantage of including a broader definition of environmental benefits unless a broader definition of environmental cost is included.

Third, competition authorities³⁸ are generally independent bodies with a restricted remit to look at competition (and sometimes consumer) issues. If competition authorities adopt a broader definition of benefits to include more remote environmental issues in their assessment of horizontal agreements, then wider government objectives will also be considered. In some instances, the competition authority would need the support or expertise of other specialist public bodies. This may raise issues.

This problem is exacerbated if the costs are borne by one group of consumers and the benefits enjoyed by another group as this may give rise to accusations of competition generating a lack of objectivity and distributional unfairness.³⁹

In the UK the regulatory authorities' remits are principally to address competition issues. Other issues such as environmental implications are looked at only in the context of competition. As an example, in its BAA Airport Inquiry, the UK's Competition Commission examined competition between airports. Airports in the UK are subject to extensive regulation. Planning and environmental issues are central to much of that regulation and the responsibilities for those fall to other agencies. It was therefore not necessary for the Competition Commission to engage with those issues in detail. However the Competition Commission did take its decisions within the framework of a government White Paper for capacity expansion (since repudiated) which had taken planning environment and other matters into account.

³⁷ The European Commission's 101(3) Guidelines also refer to this in paragraph 88, '...the value of future gains must be discounted. The discount rate applied must reflect the rate of inflation, if any, and lost interest as an indication of the lower value of future gains.'

³⁸ This would also apply to national courts and undertakings that also 'enforce' competition rules.

³⁹ This is likely to be more severe if there is a marked difference in the income distribution of these groups of consumers (that is, if higher income consumers benefit at the expense of lower income consumers). In addition, if a competition authority chooses not to give consideration to benefits arising in other markets which may have distributional effects, there is a risk that it may also be accused of lack of objectivity and distributional unfairness.

Under the Enterprise Act the Competition Commission's task is solely to address: 'whether there are any features of the market that may adversely affect competition. It is not for us to form a view on other non-competition issues, for example the significant environmental issues that can arise from the operation and development of airports, including those which impact on possible new runway and terminal developments at Heathrow and at Stansted.'⁴⁰ Had the Competition Commission found that existing environmental regulation was in itself causing competition problems it would have reported on that, but there was no such finding. Finally although it was open to the Competition Commission to adapt its remedies to preserve relevant customer benefits which could have included environmental benefits, this issue did not arise.

In general, competition authorities may lack the necessary expertise in-house to evaluate such environmental benefits. One way around this may be to procure the services of experts.⁴¹ Another way would be to involve specialist public bodies. However, the involvement by such bodies in the competition assessment may undermine how firms perceive the independence of competition authorities.⁴² Furthermore, the competition authorities would need to form judgements on the value of the non-economic benefits, thus opening themselves more to lobbying and politicisation. There is a question of whether it is legitimate for competition authorities to be making such judgement calls particularly when there are wider social policy questions. Moreover, the more scope there is for different decisions, the more uncertainty generated for business. This would harm deterrence and may increase firm deter beneficial agreements.⁴³ A final way for the appropriate expertise to be brought to bear may be for the competition authority to carry out the competition assessment while a specialist body carries out an assessment of the impact on the environment. It would be for the wider government to balance the costs to competition against the benefits to the environment.

In summary, while the case for including environmental benefits that can be classed as direct economic benefits in the analysis of horizontal agreements appears to be fairly clear cut, the arguments for and against taking account of wider environmental benefits are much more finely balanced. The more remote the environmental benefit, the more difficult it is to measure and the less certain it is to arise. This raises the issue of how the environmental benefit should be weighed. Should the same weight be attached to those consumers outside of the relevant market who make environmental gains from the agreement as those consumers in the relevant market who make losses? What weight should be given to intergenerational environmental benefits to ensure that (a) they reflect the fact that they are not immediate and (b) that they are less certain? Overall, there appears to be less justification for including such remote benefits. However, where to draw the line remains unclear.

3. Application to specific agreements, including oft experience

This section examines the application to specific agreements, including cartels; research and development; mergers/joint ventures; and standards and government sponsored agreements.

⁴⁰ See Competition Commission's BAA airports market investigation, 'A report on the supply of airport services by BAA in the UK', 19 March 2009, page 7.

⁴¹ While a competition authority can procure the services of experts this would nevertheless also consume resources.

⁴² Indeed, many government policies involve societal trade-offs and are better dealt with through an elected government. For example, society's attitudes towards social cohesion and the environment may change over time. It is ministers who answer to the electorate who are best placed to make such decisions at any point in time.

⁴³ By allowing for wider benefits, there is also a danger that firms may self-assess the agreement as being compliant.

The discussion in section two on the arguments for and against including a wide definition of environmental benefits under the assessment of horizontal agreements was in very general terms and the weight attached to them may differ subtly when applied to specific types of agreement.

The aim of assessing the effect of horizontal agreements is to balance the benefits of the agreement against the cost. Certain types of agreement, such as cartels, are likely to lead to higher costs than others. In such cases, the expected benefits arising from the agreement would have to be higher in order to counter-balance the higher costs. This is likely to entail that the benefits must be fairly certain to be realised. For example, as discussed above, when the benefit is only likely to occur in the future, there is less certainty over whether or not it will arise. As such, the environmental benefit should be appropriately discounted so that even a potentially large benefit might only be a small expected benefit.

This section sets out the application of including a wide definition of environmental benefits to cartels, research and development, mergers and joint ventures and government policies and environmental standards.

It should be noted that there have been very few actual UK cases in which environmental issues have been taken into account, either explicitly or implicitly.

3.1 *Cartels*

In the UK, cartels are considered to have as their object the restriction of competition and are very likely to fall within Article 101(1). However, they are not prohibited per se in that they may benefit from an exemption under Article 101(3).

As explained above, environmental benefits that are direct economic benefits can be taken account of as part of the assessment of a cartel under Article 101(3).⁴⁴ However, not all environmental benefits will be benefits for the purposes of Article 101(3). Environmental benefits that are indirect or non-economic benefits will not be considered, nor will environmental benefits that accrue in a different market to the relevant market or to future generations.

Excluding indirect or non-economic environmental benefits from the assessment of cartels might be justified on the grounds that the costs of a cartel are likely to be high (as in general, cartels harm consumers) while the expected gains from more remote environmental benefits are likely to be low (as they are less certain to arise). It also prevents the risk that non-economic objectives become a standard defence in any cartel case.

On the other hand, one reason that we might want to take account of more remote environmental benefits is due to a potential business chilling effect. There may be agreements that would be beneficial to the environment that are not entered into because of the rules on restrictive agreements. For example, in the OFT Roundtable discussion on Article 101(3), it was noted that identifying and quantifying efficiencies can require significant time and resources. Determining which ones are indispensable to the agreement and how much of an additional benefit the restriction provides is even more difficult. This process may put small firms off agreements that may look very positive.

⁴⁴ An agreement that falls within Article 101(1) is not necessarily unlawful. Article 101(3) makes a 'legal exception' to the prohibition where, broadly, the agreement's anti-competitive effects are outweighed or equalled by efficiency benefits. Even for agreements that are by object anti-competitive, or that contain hard-core restrictions, Article 101(3) can apply.

One way of taking broader environmental efficiencies into account would be to widen the definition of benefits under Article 101(3). This would ensure that the anti-competitive effects of a cartel were weighed up against the environmental benefits.

Finally, it is worth noting that even when environmental benefits are included in the assessment of cartels under Article 101(3), there is still the potential for a business chilling effect. It is possible that some beneficial agreements are not entered into simply because it is easier for the company to avoid the cost and uncertainty of an investigation.

The OFT's new Short-form Opinion process may help with this business chilling effect. The Short-form Opinion provides guidance to businesses and their advisers on the application of competition law where there is an interest in issuing clarification for the benefit of a wider audience.⁴⁵ The process is designed to be simple, short and flexible, resulting in a published Short-form Opinion within an envisaged timeframe of two to three months. Under the Short-form Opinion process, the OFT will provide guidance in response to specific questions asked by the requesting parties in order to facilitate their self-assessment of the compatibility of the proposed agreement with the relevant provisions of the Chapter I prohibition in the CA98 and/or Article 101 TFEU.⁴⁶ It may clarify the extent to which existing rules can take account of environmental aspects where this is potentially unclear.

In summary, it is argued that under Article 101(3), direct environmental benefits can be weighed up against the cost of a cartel, but indirect and non-economic environmental benefits cannot be. This may be justified on the grounds that the costs of a cartel are likely to be high while the expected gains from more remote benefits low. On the other hand, not taking into account broader environmental benefits when examining cartels could potentially have a business chilling effect. That said, it should be noted that, generally, cartels harm consumers and, where they sell to businesses, harm competitiveness and the performance of downstream markets. Cartels also lead to inefficiency within the companies involved in the cartel. There is generally little, if any, welfare benefit from cartel behaviour. In these circumstances, concerns about business chilling are likely to be less in relation to cartels.

In practice, there have been no UK cartel cases that have either explicitly or implicitly considered environmental issues as part of their assessment.

3.2 Research and development

Arguments for and against including broader environmental benefits in the analysis of research and development agreements are similar to those made above in cartels. In addition, it should be noted that the discussion of benefits across generations is particularly pertinent. An agreement to coordinate R&D expenditure is an example where benefits relate to greater innovation, which can generate future efficiencies and cost savings that current consumers may not benefit from.

It should be noted that some R&D agreements may give rise to new products for which there are no current consumers (i.e., all consumers would be future consumers). In this case, the restriction and the benefits would apply to future consumers. The consumers who benefit and those who pay would

⁴⁵ Since 2004 businesses have been required to self-assess whether their agreements comply with competition law.

⁴⁶ For further information see <http://www.ofc.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions/>

essentially be the same. However, one area that the Commission's Guidelines could develop is how such cases should be dealt with.⁴⁷

Consider an R&D joint venture between two pharmaceutical companies. They currently compete in market one for the custom of consumer one. The R&D joint venture will lead to a range of potentially life enhancing drugs in markets two to ten. Consumer one is not currently a consumer in markets two to ten, but consumer one may be content to suffer detriment in market one in terms of a small price increase for the potential benefit of having in the future the availability of life saving drugs in markets two to ten.

3.3 *Mergers and joint ventures*

In the UK, mergers and acquisitions are examined under the Enterprise Act 2002 (EA02).⁴⁸ The EA02 enables efficiencies to be taken into account (i) as part of the substantial lessening of competition assessment⁴⁹ or (ii) in the form of relevant customer benefits. These relevant customer benefits are not limited to efficiencies affecting rivalry and arguably cover indirect and non-economic benefits. In addition, the statutory definition enables the OFT to take into account benefits to customers arising in markets other than where the substantial lessening of competition is found, and to future customers. Thus, there is recognition that there may be legitimate benefits in other markets.⁵⁰

This differs from the treatment of efficiencies under Article 101. It could be argued that a more lenient approach to mergers would be justified given the greater synergies and lower transactions costs mergers typically yield compared to agreements such as cartels. However, this will not always be the case. For instance, a merger typically leads to joint setting of prices while many agreements do not. Mergers are generally more difficult to reverse than agreements. Therefore, it is not clear that one structure should be treated more leniently than the other.

In any case, in practice the mergers efficiencies regime does not appear to be more lenient than Article 101(3). Compelling evidence of efficiencies is required. In deciding whether the claimed relevant customer benefits are such as to outweigh the substantial lessening of competition concerned, the OFT has regard to both the magnitude of the efficiencies and the probability of them occurring and sets this against the scale of the identified anti-competitive effects and the probability of them occurring. Given that the benefits must be shown to be specific to the merger, it may be even tougher to show this for many types of environmental benefit than it is for more conventional benefits. Furthermore, the different legal frameworks for mergers and anti-competitive agreements mean that this is perhaps, at present, more of an academic comparison.⁵¹

Finally, it should be noted that whilst a theoretical possibility, the OFT has not used the relevant customer benefits exception to the duty to refer since the Enterprise Act came into force.

⁴⁷ We note that there is the possibility that such agreements would not fall within Article 101(1), as is indicated in the Commission's Guidelines. Where parties cannot introduce the product independently, they are not actual or potential competitors, such that there is no restriction of competition.

⁴⁸ The transfer or pooling of assets or the creation of a joint venture may also give rise to a relevant merger situation.

⁴⁹ Provided that they are 'rivalry enhancing'.

⁵⁰ Although there must be some degree of benefit for consumers in the relevant market

⁵¹ For example, merger control is ex ante, whereas enforcement is ex post.

However, one example where such environmental issues were considered by the UK competition authorities is the Competition Commission's Mid Kent Water/South East Water merger inquiry.⁵² In this case, the Competition Commission found that competition issues did arise from the merger.⁵³ The Competition Commission imposed a behavioural remedy rather than a structural one (such as divestment) in order to preserve the 'water resource' benefits arising from the merger.

These benefits consisted of the merged firm being more easily able to manage the water supply and demand balance between the two contiguous water supply areas affected by the merger. In one of these, water demand exceeded water supply whereas in the other water supply exceeded water demand. The merger enabled Mid Kent Water/South East Water to transfer water to balance demand and supply more easily.

Finally it should be noted that the UK regime does provide for ministers to intervene in mergers which raise specified public interest issues. Environmental concerns are not currently specified but could be added to the list by legislation.⁵⁴

In summary, under the UK merger regime, wider benefits including those across markets and across generations can be taken into account in the analysis of mergers under the exception to the duty to refer. In practice, this has not happened.

3.4 Standards and government sponsored agreements

Competition authorities are well placed to point out potential competition issues so that agreements designed by government and industry (for example, other than through regulation, taxation or legislation⁵⁵) are less likely to have a significant adverse impact on competition or in setting environmental standards such that they are unlikely to have a significant impact on competition. Whilst there is a limit to what can be achieved here, it does allow the competition authority to retain some influence whilst not undermining its independence.

The OFT's advocacy team fulfils this function by raising awareness of competition issues and advising policy makers where wider government policies affect competition and markets. It has a particular role in inputting on such issues through the Government's 'Impact Assessments', the key cost benefit analysis carried out for each proposed government policy.

A good example of where a competition authority might input to government policy is in the setting of environmental standards. The OFT commissioned a paper on environmental standards from Frontier

⁵² Mid-Kent Water/South-East Water Final report, published 01.05.07. http://www.competition-commission.org.uk/rep_pub/reports/2007/525water.htm

⁵³ It should be noted the competition test for water mergers is not whether they give rise to an SLC but whether they prejudice Ofwat's ability to make comparisons between water companies for the purposes of 'yardstick' regulation.

⁵⁴ In mergers raising certain public interest considerations, the Secretary of State for Business, Innovation and Skills may intervene. Such intervention enables the Secretary of State to assume responsibility for determining whether or not to refer a merger to the Competition Commission and to take the ultimate decision in respect of mergers when defined public interest considerations are potentially relevant.

⁵⁵ Another option is for the government to use direct legislation, regulation or taxation to implement beneficial policies. These tools are better suited to achieve the objectives and to facilitating wider consultation, because no agreement between undertakings is required to achieve the goal in question. For example, the government could use primary or secondary legislation to ban plastic bag usage directly or introduce a tax on them.

Economics to provide guidance on the costs and benefits to competition from the implementation of environmental standards.⁵⁶

While the implementation of an environmental standard can be pro-competitive, it can in some cases have a negative impact on competition. The Frontier Economics paper on environmental standards identified five key ways in which different types of product standard may give rise to competition concerns: by having asymmetric cost impacts; by amounting to policymakers picking winners; by encouraging co-ordinated effects associated with voluntary agreements); by having asymmetric product impacts; and by facilitating exclusionary behaviour.⁵⁷

The Frontier Economics paper suggests that in some cases it may simply not be possible to mitigate competition concerns. Policy makers will then have to weigh the reduction in competition against the environmental objectives. However, in other cases it will be possible to mitigate the competition effects. Competition authorities can highlight to government the specific issues that they should consider.⁵⁸

As an example of an actual case in which the OFT input to Government policy, the UK Government wanted to develop a voluntary industry agreement concerning light-bulbs, whereby producers of light-bulbs and retailers would agree not to sell certain types of light-bulbs which were energy-inefficient. While there are benefits to a voluntary approach, such arrangements may also raise competition concerns including a potential increase in the likelihood of coordinated behaviour.

OFT officials learned of the issue informally and decided to pursue it as it aligned with the OFT's prioritisation principles.⁵⁹ The OFT provided informal advice directly to the Department for Environment and Rural Affairs (Defra), which was leading the policy. The OFT was concerned that the process of agreeing voluntary standards could provide the opportunity for or facilitate agreements leading to co-ordinated behaviour. By agreeing to cease producing certain types of products, firms can coordinate on dropping the less profitable products. The agreements may also have entailed the sharing of commercially sensitive information and this could be a further means to coordinate.

In this case, the OFT was concerned that a switch from cheap and easy manufactured lamps to more expensive and more technologically advanced products could raise barriers to entry. It was also concerned that the more technologically advanced and expensive the product, the less likely consumers may be to choose lesser known brands, amplifying the effect on entry. These factors may have increased the incentives and the ability for manufacturers and sellers to reduce competition in this market through coordination.

The OFT's advice to Defra was aimed at reducing the risk of coordination. Specifically, the OFT advised Government officials on the process of brokering voluntary agreements so that at the start of the meetings with industry representatives, statements were made about the importance of not breaching competition rules and competition lawyers would generally be present. Policy officials felt much more

⁵⁶ See OFT1030 'The competition impact of environmental product standards' A report prepared by Frontier Economics for the OFT. October 2008

⁵⁷ This is most likely to occur in markets that are characterized by imperfect competition – small numbers of firms or a few large firms facing a fringe of smaller firms, differentiated products and some degree of entry barriers.

⁵⁸ These might include the time firms are given to comply with the standard, the stage of the product lifecycle, and whether an open standard could achieve the same environmental objectives.

⁵⁹ OFT prioritisation principles are: 1) likely impact on consumer welfare, efficiency and productivity; 2) strategic significance; 3) risks i.e. likelihood of successful outcome; and 4) resource implications.

informed about potential competition impacts as a result, and the advice had a clear impact on the way the meetings were handled.⁶⁰

The OFT followed up the informal advice by publishing a report analysing the potential competition impacts of environmental standards.⁶¹ As part of a wider evaluation of OFT advocacy activity, the OFT estimates that in helping to prevent anti-competitive coordination, its advocacy on UK light bulbs markets resulted in a positive impact of some £7 million. However, this figure is very sensitive to the underlying assumptions.⁶²

Another example of OFT advocacy involved speaking to Government who were looking into the possibility of a policy to reduce the use of single-use carrier bags, possibly by either charging a tax for them or through a voluntary agreement with retailers where they charge for such bags. The OFT provided high level advice on when such an agreement might be caught under Article 101 and to what extent environmental benefits might be taken into account under 101(3). In the event, rather than setting up a voluntary agreement, the Government asked the industry to consider how they could encourage consumers to reduce their use of single-use plastic carrier bags.

4. Conclusions

This paper asked two main questions. First, what types of environmental benefits are encapsulated in the definition of benefits that contribute to improving the production or distribution of goods or contribute to promoting technical and economic progress? Where the law is not entirely clear, how broadly should environmental benefits arising from the agreement?

Second, how are the defined environmental benefits to be weighed given the beneficiaries of the environmental agreements are likely to be widespread across the economy whilst the potential harm may be relatively concentrated in a single market? This question also arises in the context of time – the beneficiaries from environmental agreements are not only today's generation but also future generations.

The paper found that the advantages and disadvantages of taking into account wider environmental benefits are finely balanced. While there may be genuine advantages to taking account of environmental benefits when looking at horizontal agreements, we would be cautious about advocating widening the benefits that can be taken account of under 101(3).

This is because, it may be that other authorities are better placed to assess the nature and magnitude of environmental benefits than competition authorities. Ultimately, it should be recognised that conflicts between competition policy and other policies can and will arise. In such circumstances, it is for elected governments to resolve conflicting priorities. For example, the government or European Commission could adjudicate on environmental benefits by weighing up the arguments put to it by competition and environmental agencies. Simply because the competition authority is not best placed to deal with every policy imperative is not a weakness of competition analysis.

⁶⁰ The intervention helped those driving the policies and discussions understand the requirements of competition legislation. Articles 81(1) and 81(3) (now Articles 101(1) and 101(3) of the Lisbon Treaty) were explained in this context to help policy officials understand how they apply to the policies being considered. Policy was developed with all these inputs in mind. The advice affected the process, particularly the way meetings were organised and handled.

⁶¹ See OFT1030 'The competition impact of environmental product standards' A report prepared by Frontier Economics for the OFT. October 2008

⁶² See OFT866 'Evaluation of OFT Competition Advocacy' Prepared for the Office of Fair Trading by London Economics.

UNITED STATES

1. Introduction

Under U.S. antitrust law, horizontal agreements relating to environmental objectives are treated the same as other horizontal agreements. U.S. antitrust law aims to safeguard the competitive process and therefore focuses on the competitive effects of the particular conduct. In the U.S. system, the task of balancing the public policy goals of competitive marketplaces and environmental preservation belongs to legislators, not antitrust enforcers. Importantly, though, the antitrust laws and the environmental laws can be complementary, as conduct that enhances competition and benefits consumers also can benefit the environment.

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits horizontal agreements that harm competition.¹ Therefore, competitors are free to enter into an agreement designed to promote a cleaner environment—for example, a joint venture among manufacturers to develop a “greener” technology—so long as the net effect of that agreement is not to restrain competition among those competitors or with others in the marketplace. Arguing that particular conduct benefits the environment is not a viable defense to conduct that is otherwise illegal under the antitrust laws.

This submission provides a general discussion of how U.S. antitrust law treats horizontal agreements in the environmental context. First, it describes generally the intersection of antitrust law and environmental regulation in the United States. Second, it offers examples of the application of U.S. antitrust laws to specific horizontal agreements that have an environmental nexus. These examples demonstrate the general rule that antitrust analysis in such cases is identical to that applied in other contexts and that the application of both bodies of laws can be complementary. In addition, the examples illustrate how environmental regulation and concerns may affect market conditions and the factual circumstances upon which antitrust analysis is based. For example, environmental regulation and awareness can increase entry barriers for potential manufacturers of products, or reduce demand for polluting or regulated products. Such market conditions do not alter the antitrust analysis, but are relevant circumstances to be considered when applying standard antitrust analysis.

2. The intersection of U.S. antitrust law and environmental regulation

The United States Congress has enacted a host of laws and regulations designed to protect the environment. Examples include the National Environmental Policy Act, 42 U.S.C. § 4321, which makes it the policy of the federal government to use all practicable means to administer federal programs in the most environmentally sound fashion; the Clean Air Act, 42 U.S.C. § 7401, which regulates air emissions from stationary and mobile sources; the Clean Water Act, 33 U.S.C. § 1251, which establishes the basic structure for regulating the discharge of pollutants into the waters of the United States; and the Comprehensive Environmental Response, Compensation, and Liability Act, 26 U.S.C. § 4611, which creates a “superfund” to clean-up certain hazardous waste sites and accidents. The federal Environmental Protection Agency (EPA) is a central player in U.S. environmental regulation. It promulgates regulations,

¹ Violations of the Sherman Act are also deemed to be violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

enforces environmental statutes and regulations in court or in administrative proceedings, and studies environmental issues, among other activities. State and local governments have enacted similar laws and regulations and have created similar agencies to enforce them.

The U.S. antitrust laws serve the different goal of safeguarding the competitive process. The antitrust laws stand as “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,”² establishing “a regime of competition as the fundamental principle governing commerce in [the United States].”³ A court or an antitrust enforcer “focuses directly on the challenged restraint’s impact on competitive conditions” and “does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason.”⁴

Consequently, U.S. courts almost certainly would not allow parties to a horizontal agreement that restrains competition in violation of the antitrust laws to defend that restraint solely on the ground that it has environmental benefits.⁵ Courts are not well-equipped to balance competitive harms against alleged environmental benefits as the two policies entail different types of consideration. Furthermore, attempting such a calculus on the basis of the antitrust laws arguably would take courts beyond their statutory mandate of safeguarding the competitive process. Accordingly, U.S. courts have held that harm to the environment is not a harm cognizable under the antitrust laws.⁶

It bears emphasis that the goals of a competitive economy and environmental preservation can be complementary. For example, an agreement among competitors *not* to develop an environmentally friendly alternative to a current product would harm both consumers and the environment. Conversely, the development of renewable energy resources has the potential not only to reduce environmental harm, but also to help deconcentrate wholesale-power markets.

The U.S. Department of Justice Antitrust Division (“DOJ”) and Federal Trade Commission (“FTC”) (collectively, “the U.S. antitrust agencies”) play an important role in the process of environmental regulation by helping legislators and policymakers understand the competitive effects of regulations and alerting them to possible unintended consequences of regulation. This allows legislators to make fully informed decisions in balancing potentially competing policy considerations.

3. Application of U.S. antitrust laws to horizontal agreements concerning the environment

The Secretariat’s invitation for submissions defines horizontal agreements to include cartels, joint ventures, and mergers. This section describes how these types of agreements likely would be analyzed under U.S. antitrust law. In each case, the antitrust laws permit competitively benign horizontal agreements

² N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

³ City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 (1978).

⁴ Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 688 (1978).

⁵ Cf. FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 462-63 (1986) (concluding that a group of dentists who agreed not to provide dental x-rays to insurers, and thereby restrained competition with respect to services provided to their customers, could not defend this restraint on the ground that it was necessary to protect the welfare of patients).

⁶ See Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 414 n.9 (3d Cir. 1997) (“[W]hile the environmental quality of energy sources may be a worthwhile concern, it does not appear to be a problem whose solution is found in the Sherman Act.”); In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 236 (9th Cir. 1976) (explaining that the antitrust laws do not provide “a broad license to the court to issue decrees designed to eliminate air pollution”).

that advance environmentally friendly goals, but do not permit competitors to suppress competition under the guise of protecting the environment.

3.1 *Agreements and joint ventures*

Section 1 of the Sherman Act prohibits agreements that restrict competition unreasonably.⁷ U.S. courts and antitrust enforcers analyze most agreements under the rule of reason, which requires an analysis of the agreement's actual effect on competition. The rule of reason entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. However, some types of agreements, for example, horizontal price-fixing agreements, are so likely to harm competition and lack any procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. These agreements are conclusively presumed to harm competition and deemed illegal per se.

Section 1 has been used to prohibit an agreement to suppress the development of environmentally friendly technology. For example, in 1969, the United States brought a civil antitrust action against the major domestic automobile manufacturers, alleging that they had conspired to eliminate competition among themselves in the research, development, and manufacturing of air-pollution control equipment in violation of Section 1. The United States alleged that, among other conduct, the defendants had agreed that efforts to develop air-pollution control equipment should be undertaken on a non-competitive basis and to delay the installation of air-pollution control equipment.⁸ The action was settled by entry of a judicial consent decree enjoining the defendants from engaging in the allegedly illegal conduct.

It is highly unlikely that competitors could defend successfully a Section 1 claim on the ground that their anticompetitive agreement has environmental benefits. In *National Society of Professional Engineers v. United States*,⁹ the U.S. Supreme Court rejected an analogous defense. In that case, the United States brought a civil antitrust action against a trade association for engineers, charging that a provision in the association's code of ethics prohibiting competitive bidding for engineering services violated Section 1. The association defended this provision on the ground that price competition would cause engineers to sacrifice quality of service, thereby endangering public safety. In affirming the lower court's ruling that the provision violated Section 1, the Supreme Court characterized the association's "public-safety defense" as "nothing less than a frontal assault on the basic policy of the Sherman Act" and explained that "the statutory policy precludes inquiry into the question whether competition is good or bad."¹⁰ Considering examples from the invitation for submissions, competitors arguing that output restrictions would benefit the environment by reducing carbon dioxide or that they need to pass on the cost of complying with new environmental regulations to consumers are likely to meet the same legal fate, with a court concluding that it "cannot indirectly protect the public against [environmental] harm by conferring monopoly privileges on the manufacturers."¹¹

Legitimate joint ventures among competitors are analyzed under the rule of reason. The U.S. antitrust agencies recognize that "[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering

⁷ 15 U.S.C. § 1 (2009) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.").

⁸ See Complaint at 5-8, *United States v. Automobile Mfrs. Ass'n, Inc.*, 307 F. Supp. 617 (C.D. Cal. 1970) (No. 69-75-JWC).

⁹ 435 U.S. 679 (1978).

¹⁰ *Id.* at 695.

¹¹ *Id.* at 695-96.

production and other costs” and that these collaborations “often are not only benign but procompetitive.”¹² For example, in analyzing a research-and-development joint venture, the agencies would consider whether the collaboration “may enable participants more quickly or more efficiently to research and develop new or improved goods, services, or production processes” or whether it could “increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants’ individual competitive R&D efforts.”¹³

A joint venture among competitors to develop an environmentally friendly technology that does not harm competition, then, will be consistent with the antitrust laws. For example, in 1994, the DOJ issued a business review letter¹⁴ to the Fuel Cell Commercialization Group (“FCCG”), a cooperative research-and-development venture composed principally of electric and gas utilities. The letter stated that the DOJ had no present intention of challenging FCCG’s plan to promote the development of a clean and reliable alternative source of electrical power. FCCG planned to provide technical assistance to Energy Research Corporation (“ERC”) in support of ERC’s efforts to develop and commercialize a molten carbonate fuel-cell plant, and individual FCCG members pledged to provide financial assistance to ERC. The DOJ concluded that the utilities’ limited cooperation in FCCG would not facilitate collusion in markets for residential or commercial customers, that competition in the research and development of fuel-cell technology would not be affected significantly given that individual FCCG members were free to participate in other research-and-development programs, and that the plan could accelerate the development of more energy efficient power-generation plants.¹⁵

3.2 Mergers

Section 7 of the Clayton Act, 15 U.S.C. § 18 (2009), prohibits mergers that may lessen competition substantially. In analyzing horizontal mergers, the U.S. antitrust agencies ascertain whether the merger in question is likely to create, enhance, or entrench market power or facilitate its exercise. The U.S. antitrust agencies’ analysis accounts for efficiencies stemming directly from the merger, and the U.S. antitrust agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. Such efficiencies potentially could include research-and-development efficiencies that may bring environmentally friendly products or services to market more quickly or more cheaply.¹⁶

An FTC review of a 1999 merger in the lead antiknock compounds industry provides an example of the application of standard antitrust analysis in an environmental context, and also demonstrates how this context can affect market circumstances. Lead antiknock compounds are gasoline additives containing tetraethyl lead used to increase the octane rating of gasoline, thereby eliminating gasoline engines’ knock

¹² Fed. Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors 1 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

¹³ *Id.* at 14.

¹⁴ Persons concerned about the legality under U.S. antitrust law of proposed business conduct may ask the U.S. Department of Justice for a statement of its current enforcement intentions with respect to that conduct, pursuant to the Department’s Business Review Procedure. See 28 C.F.R. § 50.6 (2010). Statements issued pursuant to this procedure are commonly referred to as business review letters.

¹⁵ See Letter from Anne K. Bingaman, Assistant Attorney Gen., U.S. Dep’t of Justice, to Stephen M. Soble, Esq. (Apr. 20, 1994), available at <http://www.justice.gov/atr/public/busreview/211835.htm>.

¹⁶ See generally U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

during the combustion cycle and improving fuel efficiency. Worldwide use of lead antiknock compounds has been significantly declining since the 1970s, due to environmental regulation and concerns.

The proposed merger was between Associated Octel Company Ltd. (“Octel”) and Oboadler Company (“Oboadler”), two of the world’s three largest manufacturers of tetraethyl lead.¹⁷ Under the acquisition agreement, Octel was required to supply lead antiknock compounds to Oboadler’s U.S. distributor, Allchem Industries, Inc. (“Allchem”) for resale in the U.S. After reviewing the proposed transaction, the FTC filed an administrative complaint, alleging that the acquisition would substantially lessen competition in the relevant market by (i) eliminating direct actual competition between Octel and Oboadler; (ii) increasing the likelihood of coordinated interaction between the remaining competitors in the market; and (iii) increasing the likelihood that consumers of lead antiknock compounds will be forced to pay higher prices. The complaint further alleged that market entry would not have been timely, likely and sufficient to deter or counteract the adverse competitive effects of the proposed acquisition. The length of entry was due, in part, to environmental regulations pertaining to manufacturing that uses lead, the ongoing decline in worldwide demand for lead antiknock compounds, and the cost of environmental remediation at the manufacturing site when, due to decline in demand, production would no longer be commercially practicable.¹⁸

Applying standard antitrust analysis, the FTC approved the acquisition subject to a consent order that required Octel to enter into a long term supply agreement with Allchem. The agreement obliged Octel to provide Allchem with unlimited quantities of lead antiknock compounds for resale to U.S. customers, and gave Allchem sole right to choose the U.S. customers to whom to sell, as well as the terms and conditions of such resale. The consent order was thus designed to protect U.S. consumers of lead antiknock compounds from the exercise of market power resulting from the proposed acquisition. Since the order ensured competitive lower consumer prices for an environmentally hazardous product this case is, perhaps, an example of an antitrust enforcement action that was not complementary with environmental goals.

3.3 *Antitrust enforcement in a regulatory context*

The existence of applicable regulations – environmental or otherwise – can affect antitrust analysis in some circumstances. Conduct undertaken pursuant to state laws or regulations may be immune from the antitrust laws in certain circumstances.¹⁹ Likewise, conduct intended to influence legislative or administrative processes may be immune from the antitrust laws in certain circumstances.²⁰ Furthermore, federal laws or regulations sometimes permit conduct that otherwise would violate the antitrust laws. U.S. antitrust enforcers are careful, however, to make sure that parties stay within the boundaries of any such immunities. In addition, the U.S. antitrust agencies have cautioned against undue expansion of antitrust immunities, as such expansion may harm consumers.²¹

¹⁷ See *In matter of The Associated Octel Company Ltd.*, File No. 991 0288, Docket No. C-3913, of December 22, 1999. All related documents available at <http://www.ftc.gov/os/caselist/c3913.shtm>.

¹⁸ See FTC Complaint, available at <http://www.ftc.gov/os/1999/12/associatedoctelcmp.htm>, ¶11.

¹⁹ See generally *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

²⁰ See generally *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

²¹ See e.g., *An Overview of Federal Trade Commission Antitrust Activities (Prepared Statement of the FTC before the Committee on the Judiciary, Antitrust Task Force, U.S. House of Representatives, July 24, 2003)* available at <http://www.ftc.gov/os/2003/07/antitrustoversighttest.htm>; *Antitrust Immunities (Assistant Attorney General Christine A. Varney Remarks as Prepared for the American Antitrust Institute’s 11th*

For example, in 1994, the DOJ issued a business review letter to the Portable Power Equipment Manufacturers Association (“PPEMA”), a trade association representing manufacturers of chain saws, string trimmers, blowers, and similar equipment. The letter stated that the DOJ had no current intention to challenge PPEMA’s participation in a rule-making proceeding conducted by the Environmental Protection Agency. PPEMA planned to serve on a committee established by EPA to develop emissions regulations for small engines. PPEMA stated that, in accordance with EPA protocols, it would not disclose its members’ confidential business information and its members would not enter into any agreements having anticompetitive effects apart from any effects of the regulations. The DOJ concluded that these steps reduced the risk that actions by PPEMA members outside the regulatory process would violate the antitrust laws or that their participation in the process would have anticompetitive effects that are not incidental to petitioning the government.²²

Similarly, in 2000, the DOJ issued a favorable business review letter to the Akutan Catcher Vessel Association (“ACVA”), a group of owners of Alaskan fishing vessels with processing capabilities. For environmental and economic reasons, the U.S. government set an annual quota for Alaskan pollock harvested from certain waters, and ACVA members were licensed to harvest a portion of this quota. Previously, ACVA members had harvested their collective allotment under an “Olympic” system, which allowed each participant to harvest as much of the allotment as it could and thus incentivized them to harvest as fast as they could. ACVA members proposed to replace this system with a suballocation of the quota amongst themselves, arguing that the new system would permit them to maximize the value of product obtained from pollock and reduce the amount of incidental by-catch of other fish species. The DOJ determined that the proposed system did not appear to have any incremental anticompetitive effect in this regulated setting and could increase processing efficiency.²³ It explained that the elimination of a race to gather an input whose output is fixed by regulation seemed unlikely to reduce output or increase price and that the elimination of the race could increase processing efficiency and reduce the inadvertent catching of other fish species (species whose preservation also is a matter regulatory concern).

4. Conclusion

U.S. antitrust law focuses on the competitive effects of challenged conduct. The task of balancing the public policy goals of competitive markets and preservation of the environment belongs to legislators, not courts or antitrust enforcers. Thus, horizontal agreements relating to environmental objectives are treated the same as other horizontal agreements for purposes of antitrust analysis.

Annual Conference, Washington, D.C., June 24, 2010) available at <http://www.justice.gov/atr/public/speeches/262745.htm>.

²² See Letter from Anne K. Bingaman, Assistant Attorney Gen., U.S. Dep’t of Justice, to Mac S. Dunway (July 5, 1994), available at <http://www.justice.gov/atr/public/busreview/211886.htm>.

²³ See Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep’t of Justice, to Bruce M. Hull, Esq. (Feb. 29, 2000), available at <http://www.justice.gov/atr/public/busreview/4241.htm>.

EUROPEAN UNION

1. Competition and environment policies as part of the Europe 2020 Strategy

European Union law provides that environmental considerations must be integrated into the definition and implementation of the Union policies and activities.¹ This applies also to EU competition policy which is based on economic criteria. It means for EU Member States and the industry in turn that they have to respect competition law in putting in place environmental initiatives. They should not establish forms of collaboration, rules or practices that would constitute unjustified obstacles to competition.²

The Europe 2020 strategy mentions sustainable growth, promoting a low carbon, resource efficient and competitive economy as one of the priorities. For competition policy and environment policy the strategy closely continues the Lisbon strategy of 2000 which set the upturn in growth as the central policy objective, striving to improve the competitiveness of the European model while maintaining prosperity, employment, cohesion and environmental protection.

The Europe 2020 strategy recognises that sustainable growth should be achieved by an efficient use of resources with low carbon emissions and at the same time a competitive economy. The efficient use of resources and low carbon emissions contributes to a healthy environment which is essential to long term prosperity and quality of live. Competitiveness can best be achieved by strong competition, encouraged and protected by EU competition policy.

Therefore, the European Commission aims to ensure that competition takes place within a framework that maintains high levels of environmental protection. This is also true when horizontal agreements in the environmental context are scrutinized under EU competition rules.

2. Commission's practice with respect to the specific issues raised by the OECD

2.1 *The legal framework*

In the EU horizontal agreements in the environment context may be either covered by Article 101 of the Treaty on the Functioning of the European Union (TFEU) or, for instance in the case of a full function joint venture, Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Merger Regulation").

Article 101 (1) TFEU provides that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market shall be prohibited. This does not apply according to Article 101 (3) TFEU if four cumulative conditions are fulfilled: a) the agreement must contribute to improving the production or distribution of goods or

¹ See Article 11 of the Treaty on the Functioning of the European Union (TFEU).

² See for reference Articles 4 (3) of the Treaty of the European Union, Articles 101-106 TFEU and Council Regulation Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p. 1-22.

contribute to promoting technical or economic progress, b) consumers must receive a fair share of the resulting benefits, c) the restrictions must be indispensable to the attainment of these objectives, and d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the common market.

The Merger Regulation provides in Article 2 (3) that a concentration shall be declared incompatible with the internal market if it significantly impedes effective competition in the common market or a substantial part of it, in particular by creating or strengthening a dominant position.

Both Article 101 TFEU and the Merger Regulation foresee a general test for the assessment of agreements or concentrations. Neither Article 101 TFEU nor the Merger Regulation includes rules which are specific to the assessment of environmental agreements or concentrations.³

This results from the general principle that EU competition law does not provide for sector-specific rules. The existing framework allows taking into account the specificities of each sector concerned and protect competition to the benefit of the consumer.

2.2 Guidance on application of competition rules to environmental agreements

In areas that involve environment issues the European Commission is actively enforcing the EU competition rules as regards horizontal agreements. The current European Commission guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements ("Horizontal Guidelines")⁴ include a separate chapter on environmental agreements.

The Horizontal Guidelines define environmental agreements as agreements by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular those set out in Article 174 of the Treaty [now Article 191 TFEU]. The target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations. Agreements that trigger pollution abatement as a by-product of other measures are not included in this definition.

Environmental agreements can be distinguished into various subcategories. Environmental agreements may set out standards on the environmental performance of products (inputs or outputs) or production processes. Parties may also provide for the common attainment of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency. Furthermore, in many Member States comprehensive, industry-wide schemes are set up for complying with environmental obligations on take-back or recycling.

The Horizontal Guidelines explain then in general terms which agreements may fall or do not fall under Article 101 (1) TFEU and which agreements could fulfil the conditions under Article 101 (3) TFEU. The only example in the environment chapter deals with standard-setting in the environment sector.

The European Commission considers that standard setting should be addressed in a wider and more comprehensive way including standard setting in the environment sector. Therefore, the new regime for the assessment of horizontal cooperation agreements under EU antitrust rules ("The Draft Horizontal

³ See Case C-225/91 *Matra v Commission*, [1993] ECR I-3203, paragraph 45 confirming that the Commission can base its competition decisions on an economic analysis of the facts.

⁴ Commission guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements, OJ C3, 6.1.2001, p.2.

Guidelines")⁵ foresees that standardisation in the environment sector is dealt with in the standardisation chapter and the current environmental chapter can be removed.

It must be emphasized that the removal of the chapter does not imply any downgrading for the assessment of environmental agreements. On the contrary, instead of having a chapter addressing a narrow aspect of environmental standards, the Commission clarifies that environmental agreements are to be assessed under the relevant chapters of the Draft Horizontal Guidelines, be it in standardisation, research & development (R&D), production or commercialisation.

The following example illustrates how environmental standards should be assessed in the framework of Article 101 TFEU.

Situation: Almost all producers of washing machines agree, with the encouragement of a public body, to no longer manufacture products which do not comply with certain environmental criteria (e.g., energy efficiency). Together, the parties hold 90% of the market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced with more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (e.g., electric utilities, suppliers of components incorporated in the products phased out).

Analysis: The agreement grants the parties control of individual production and concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Product variety, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) TFEU. The involvement of the public authority is irrelevant for this assessment. However, newer, more environmentally friendly products are more technically advanced, offering qualitative efficiencies in the form of more washing machine programmes which can be used by consumers. Furthermore, there are cost efficiencies for the purchasers of the washing machines resulting from lower running costs in the form of reduced consumption of water, electricity and soap. These cost efficiencies are realised on markets which are different from the relevant market of the agreement. Nevertheless, these efficiencies may be taken into account as the markets on which the restrictive effects on competition and the efficiency gains arise are related and the group of consumers affected by the restriction and the efficiency gains is substantially the same. The efficiency gains outweigh the restrictive effects on competition in the form of increased costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Various technical means are economically available to the parties in order to manufacture washing machines which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the criteria of Article 101(3) TFEU are fulfilled.

Furthermore, R&D co-operation could have an impact on dynamic product and technology markets and the environment. The assessment under Article 101 TFEU may be illustrated with the following example:

Situation: Two engineering companies that produce vehicle components agree to set up a JV to combine their R&D efforts to improve the production and performance of an existing component. The production of this component would also have a positive effect on the environment. Vehicles would consume less fuel and therefore emit less CO₂. The companies pool their existing technology licensing businesses in this area, but will continue to manufacture and sell the components separately. The two companies have market shares in Europe of 15% and 20% on the Original Equipment Manufacturer

⁵ <http://ec.europa.eu/competition/antitrust/legislation/horizontal.html> .

("OEM") product market. There are two other major competitors together with several in-house research programmes by large vehicle manufacturers. On the world-wide market for the licensing of technology for these products the parties have shares of 20% and 25%, measured in terms of revenue generated, and there are two other major technologies. The product life cycle for the component is typically two to three years. In each of the last five years one of the major companies has introduced a new version or upgrade.

Analysis: Since neither company's R&D effort is aimed at a completely new product, the markets to consider are those for the existing components and for the licensing of relevant technology. The parties' combined market share on both the OEM market (35%) and, in particular, on the technology market (45%) are quite high. However, the parties will continue to manufacture and sell the components separately. In addition, there are several competing technologies which are regularly improved. Moreover, the vehicle manufacturers, who do not currently licence their technology, are also potential entrants on the technology market and thus constrain the ability of the parties to profitably raise price. To the extent that the JV restricts competition within the meaning of Article 101(1) TFEU, which appears to be unlikely, it is likely that it would, in any event, fulfil the criteria of Article 101(3) TFEU. For the assessment of Article 101 (3) TFEU it would be necessary to take into account that consumers will benefit from a lower consumption of fuel.

The two examples show that environmental aspects (e.g. reduced consumption of water, electricity and soap; reduced consumption of fuel leading to less emissions of CO₂) can be taken into account for the analysis of agreements under Article 101 TFEU, if they can be subsumed under one or more of the criteria which are set out in Article 101 (3) TFEU. This allows preserving competition in a market which is influenced by environmental goals and targets.

2.3 *Waste management*

New markets for waste management and recycling have emerged following environment policy initiatives at the EU level. The EU adopted Directives for the areas of packaging waste ("Packaging Directive")⁶ and electrical and electronic waste ("WEEE Directive")⁷ and end-of life vehicles ("ELV Directive")⁸ and batteries⁹.

The Packaging and ELV Directives stipulate that EU Member States shall ensure that collection systems are set up to fulfil the environmental obligations. As a result for example in the packaging waste management in a number of Member States the obliged companies cooperate in systems of some form in order to establish a system for the management of packaging waste and discharge their individual packaging waste management obligations. Most of these systems are non-profit legal entities. Shareholders are often the obliged companies. In the case of ELV similar cooperation systems may arise. Also the WEEE Directive provides that EEE producers may, inter alia, set up systems on a collective basis to fulfil their collection treatment, and recovery obligations. These types of cooperation arrangements may give rise

⁶ European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365/10, 31.12.1994. This Directive was amended by the Directive 2004/12/EC of the European Parliament and Council of 11 February 2004, OJ 2004 L 47/26.

⁷ Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment, OJ 2003 L 37/24.

⁸ Directive 2002/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles, OJ 2000 L 269/34.

⁹ Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, OJ L 266/1, 26.9.2006.

to competition concerns. It is important to note in this respect that the fact that the Packaging, EVL and WEEE Directives envisage the possibility of systems, including collective systems, does not in itself prejudice their legality under the EU competition rules. Collective and comprehensive systems will have to be analyzed under the EU competition rules, in particular Articles 101 and 102 TFEU.

Collection/recycling agreements may relate to and have effects on two markets: (i) the markets for collection services potentially covering the good in question (effects of bundling demand and foreclosure) and (ii) the market on which the parties are active as producers or distributors (spill over effects).

In the markets for collection services, competition concerns may arise due to bundling of demand for collection and sorting services leading to foreclosure effects. As a general principle, competition between several waste management systems should be possible. If collective systems are created, it is essential to ensure that they do not lead to unjustified restrictions of competition in the markets concerned. The bundling of demand limits the choice of collection/sorting and recycling companies to enter into a contract with a collective system. In case of a *de facto* or *de iure* monopoly of the system the producers have only a single system with which they can enter into an agreement to get discharged from the obligation from their packaging waste management obligation.

The Commission addressed the negative effects which could arise from bundling of demand in the *DSD*¹⁰ and *ARA*¹¹ cases. In these decisions the Commission found that contracts between a collective system and the collectors should be of limited duration and there should be a transparent, objective and non-discriminatory tender procedure ("competition for the market"). The line taken in these cases is that duration of no more than three years for household packaging waste collected for a dominant system is reasonable and economically justified. In addition both *DSD* and *ARA* also undertook not to impose exclusivity clauses on their collectors.

One of the particularities of the markets for collection and sorting of packaging waste at households is that duplication of the existing collection infrastructure can be difficult in practice. It would be inconvenient for households to use different bins for different collection systems for the same material. Therefore, the Commission imposed in the *DSD* and *ARA* decisions as a condition that *DSD* and *ARA* could not prevent their collectors from opening their facilities for competitors of *DSD* or *ARA*.

The obliged companies may be competitors in the market for the packaged products or car manufacturing/car imports or manufacturing and sales of electrical and electronic equipment. The cooperation to fulfil the obligations under the respective waste management directives may therefore have spill over effects in the market for those products. The cooperation may lead to commonality of costs as regards the products through uniform costs of collection and recovery. The Commission found in the *VOTOB*¹² case that a waste management agreement by six tank storage operators that was financed by a fixed fee constituted a restriction of competition since the fixed fee harmonised the costs and thus excluded competition on an important price component. In the case of packaging, the cost of the collection and recovery normally represents only a small part of the total costs of the products. However, there are variations depending on the competition in the market and therefore the issue needs to be assessed on a case-by-case basis.

To the extent that the cooperation on waste management would be used by the participants to exchange sensitive information or to fix or align prices of the packaged products, Article 101 TFEU would

¹⁰ Commission decision of 17 September 2001, *DSD*, OJ 2001 L 319/1.

¹¹ Commission decision of 16 October 2003, *ARA*, *ARGEV*, *ARO*, OJ 2004 L 75/59.

¹² *VOTOB*, see the 22nd Commission Report on Competition Policy [1992], at paragraphs 177 et seq.

be violated. It would not seem justified that a hard core cartel should benefit from a more lenient treatment only because it relates to environment. The same argument could be made for other policy areas as e.g. social policy or culture. This would inevitably lead to an erosion of the prohibition of cartels which is a central element to protect competition for the benefits of the consumers.

2.4 Mergers

Merger control is applicable to a horizontal agreement in the environment context if it constitutes a concentration and falls within the scope of the Merger Regulation. The Commission has to examine as for any other concentration notified under the Merger Regulation whether the concentration leads to a significant impediment of effective competition, in particular by creating or strengthening a dominant position in the internal market. The Merger Regulation does not foresee an analysis on non-competition grounds.

As the same test is applied for concentrations with and without environment context, the decision making practice does not show specificities. This can be seen for instance in the merger case COMP/M.5575 ORBEO/PARTS OF ONECARBON which concerned consultancy and assistance services to greenhouse gas emission reduction project developers and trading emission reduction credits issued by greenhouse gas emission reduction projects. The concentration was cleared under the simplified procedure as it did not lead to a significant impediment of effective competition and therefore did not raise competition concerns.

3. Conclusion

The Commission acknowledges the need to set environmental targets and maintain a high level of environmental protection. This does not relieve the Commission from the task to enforce competition in those markets which are shaped or influenced by the environmental context. For the competition analysis environmental factors are taken into account to the extent that they can be subsumed under the existing criteria of the EU competition rules. There is not need to adapt these legal standards for agreements in the environment context.

PAKISTAN

The general problem: When they are made for the sake of the environment, when do horizontal agreements, including joint ventures, other competitor collaborations, cartels, and mergers, cross the line and become unlawful for the sake of competition? What factors should competition authorities take into account when analysing such agreements? Some possibilities include cost savings, innovation, market power, and risk diversification. But should the factors include environmental policy objectives, too, such as cleaner air? Why or why not?

Before coming to the questions, it is pertinent to discuss the environmental regime in Pakistan. The country is signatory to various Multilateral Environmental Agreements (MEA)¹. The Government of Pakistan has enacted a comprehensive and permanent legislation on environment in the form of Pakistan Environmental Protection Act, 1997. The National Environmental Quality Standards (NEQs) approved in 1993, for liquid solids and Gaseous emissions were reviewed and revised in late 1990s in consultation with the industrialists, environmental experts and other stakeholders to facilitate implementation of NEQs in Pakistan. Although the government is committed to play a proactive role to ensure protection of regional and global environment and cooperate with the international community in pursuing environmental goals, however, the practical tools to achieve such goals are insufficient.

The environmental laws in Pakistan are generally confined to carrying out impact assessments, issuing standards, prosecuting violations by means of fines and cease-and-desist orders. The regulatory apparatus is not complete as the environment appeal tribunals are not fully functional.

There are no known instances where undertakings have used environmental reasons to coordinate their business activities to reduce costs, risks, curtail production, and manage prices. Such coordination is unlikely given the unimportance and unawareness of environmental issues among business undertakings in Pakistan. However, if such instances arise, the conduct will be subject to the competition laws of the country without exception.

While policies on environment and competition should go hand in hand, competition agencies will need to be careful when dealing with agreements which have negative competition effects but, at the same time, provide some environmental benefit. If a benefit is identifiable, tangible, and has been established elsewhere in similar circumstances, there may be a good case for exempting the agreement. Obviously there would be many more concerns such as the scope of the anti-competitive effects on the relevant market. Factors such as economic and technological advancement are recognised criteria for exemption in many competition jurisdictions, including Pakistan. In short, such agreements must be scrutinised in the same way as any other horizontal agreement.

The objective of the Competition Act is to enhance economic efficiency and protect consumers. The relevant provisions of law that govern such conduct in Pakistan are Sections 4, 5 and 9 of the Competition Act, 2010 (the "Act").

¹ The term "Multilateral Environmental Agreement" or MEA is a broad term that relates to any legally binding international instruments through which national governments commit to achieving specific environmental goals.

Section 4 of the Act prohibits agreements in respect of the production, supply, distribution, acquisition or control of goods or provision of services which have the object of effect of preventing, restricting or reducing competition within the relevant market unless exempted under Section 5 of the Act. Whereas Section 9 of the Act explicitly lays down the criteria for granting such exemptions, which takes into account the following factors.

- Improving production or distribution;
- Promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits; or
- The benefits of that clearly outweigh the adverse effect of absence or lessening of competition.

Undertakings who wish to coordinate their business activities will have to file an exemption application under Section 5 of the Act. The Commission will have to assess such conduct on case to case basis and accordingly develop an opinion as to whether the efficiencies and pro-competitive benefits of the suggested conduct warrant the granting of exemption.

Section 5 of the Act does not provide a list or categories of agreements or mention explicitly agreements made for the sake of environment. The Commission has not assessed an agreement which promotes environment but restricts competition to date. However, improving the environment can be regarded as an element that contributes to improving production or distribution or to promoting economic or technical progress. Therefore, the above-mentioned criteria of economic analysis will need to be applied to restrictive environmental agreements also.

As far as an agreement for cleaner air is concerned, the Commission has in one of its decisions held that while ensuring cleaner air is a public interest, ensuring competitive markets is also in public interest, which the direct mandate of the Commission. Relevant portion for the opinion is quoted below.

Ensuring competitive markets is in the public interest. On the other hand, ensuring provision of “clean air” to the public is also in the public interest. Consider for example that a giant multinational enterprise (“MNE”) installed a technologically advanced brick making factory which produces zero emissions in the air, thus contributing to environment by not polluting it. However, under the guise to ensure cleaner air, the MNE decides to engage in predatory pricing so as to push all traditional brick kilns, which emit a lot of smoke in the air and thus pollute the environment and reduce the quality of air available to public, out of business. The practice of predatory pricing while reducing competition will also result in ensuring clean air to the public. Should the Commission not initiate any proceedings against the MNE since the practice of predatory pricing was promoting a certain “public interest”? I would reply in the negative. It is an established rule of statutory interpretation that “where a word is used in an Act which is capable of various shades of meaning, the particular meaning to be attached must be arrived at by reference to the scheme of the Act.” Lord Cave, in *Brown v. National Provident Institution* held:

[I]n choosing between two competing constructions, each of them possible, it is not irrelevant to consider that one of them is consistent with the obvious purpose of the Act, while the other would render the statute capricious or abortive.

The words “public interest” when read with the obvious purpose of the Competition Ordinance would mean nothing else but ensuring competitive markets (footnotes omitted).²

² <http://www.cc.gov.pk/images/Downloads/KSE%20Order%2018March.pdf>

Dealing with pressure to relax the rules against cartels. How should agencies handle pressure from other parts of the government to take a light-handed approach toward environment-related conduct? For example, cartels are ordinarily illegal per se, but what if not only companies but other government ministries argue in favour of allowing a cartel, claiming that close cooperation and/or output reduction will benefit the environment in a particular case (such as the carbon dioxide reduction example given in the text of the letter)? Should the per se rule against cartels be abandoned in the environmental context? If so, why and under what circumstances? Furthermore, to what extent should it be relaxed? If the per se rule should not be abandoned, then how can agencies persuasively make the case that cartel-induced output reduction is always a net social harm – even when the cartel is formed to advance environmental objectives?

There is a growing recognition that many arrangements that appear anti-competitive could have the potential to enhance consumer welfare. Pro-environmental agreements may also have the potential to restrain trade to some extent. While such conduct may appear anti-competitive and may even reduce output in some cases, it may also have the potential to serve conservation goals and thereby enhance total welfare. A rigid application of the *per se* rule to condemn such co-operative conduct among undertakings may obliterate the benefits arising from it. The Commission will tend to take a closer look at the potential economic benefits of co-operative behaviour and rule of reason has been applied even in cases of naked restraint. As explained above the Commission would apply standards of assessment comparable to those used to justify exceptions to the free competition.

Like with other competition matters, regulatory pressure must be handled in a manner to ensure that while genuine concerns are taken into consideration, the agreements must still be vetted against the established criteria. As mentioned, the decision to grant an exemption must only be made after a careful analysis of all the factors involved, including the tangible benefits that consumers or the society derive, the innovation achieved, the technological advancement made etc. It must also be seen how the agreement will affect the behaviour of the signatories in other aspects of their business dealing with each other.

Similar questions with respect to joint ventures, other competitor collaborations, and mergers. The same kinds of questions apply to the issue of relaxing the rules for analysing environmentally-motivated joint ventures, competitor collaborations and mergers. For example, suppose that the major players in an industry want to collaborate to set pro-environment standards among themselves. Should the competition authorities apply less scrutiny to such arrangements? Why or why not? If so, under what conditions is a lower level of scrutiny warranted?

Logically, the Commission would adopt the same approach to analyse restrictive environmental agreements explained above as it would in the case of joint ventures, collaborations and mergers. Section 11 of the Act provides criteria to allow a merger transaction which lessens competition by creating or strengthening a dominant position. Major factors taken into consideration are as follows:

- It contributes substantially to the efficiency of the production or distribution of goods or the provision of services;
- Such efficiency could not reasonably have been achieved by a less restrictive means of competition;
- The benefits of such efficiency clearly outweigh the adverse effect of the absence or lessening of competition.

Administrative guidance. Is it appropriate for competition agencies to intervene when they believe that another government agency's administrative guidance on environmental regulations could inadvertently lead to a cartel? If so, under what circumstances?

In addition to its enforcement powers, the Commission has also been entrusted with the role of advocacy. Section 29 of the Act requires the Commission to promote competition through advocacy. If another government agency's administrative guidance on environmental regulations inadvertently leads to a cartel, the Commission has powers under Section 29 to issue a policy note to the concerned government agency explaining that arrangement could lead to anti-competitive effects, which will therefore be prohibited under the Competition Act.

Currently, there is no law in Pakistan which mandates coordination and cooperation between commercial undertakings on environmental issues. The environmental laws apply to individual undertakings. Also, undertakings tend to focus on environmental issues as a part of their corporate social responsibility programs but these are generally individual initiatives.

Agency experience. Please describe cases from your jurisdiction in which relevant issues have arisen. Examples of relevant cases include, for instance, agreements related to the collection of used refrigerants, e.g. Freon. From an environmental perspective, society wants an exhaustive collection system. However, if a competitive system is in place then the players will have lower margins and may cut corners in order to save costs, leading to arguments that allowing them to collude or simply granting monopolies would raise margins and quality assurance. Of course, that would mean that society would have to pay more, as well. Have you come across any cases in which competition has led to a better outcome for the environment?

The Commission has not yet come across any case where a relevant issue has arisen i.e., in which competition has led to a better outcome for the environment.

BIAC

1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its Roundtable on Horizontal Agreements in the Environmental Context. Influenced by the economic crisis and initiatives to stimulate “green growth,” the role of national competition agencies in protecting the environment has become both topical and urgent.

BIAC is highly supportive of the Green Growth Strategy and recognizes that environmental and economic growth challenges should be addressed in a mutually reinforcing manner. BIAC is of the opinion that sustainable, long-term economic growth is of fundamental importance for raising the necessary resources for addressing environmental challenges. In this respect, BIAC believes that green growth policies should not be confined to “green” sectors, but should aim at “greening” across sectors and economies. This requires supporting innovation, entrepreneurship and green growth across all sectors, focusing on where improvements that are both economically efficient and environmentally effective can best be achieved.

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

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

Nowadays, agreements among industry participants relating to environmental objectives occur frequently. They may, for example, relate to environmental quality standards, the establishment of product-specific standards (such as emission standards), or the use of process or technical standards that require the use of a particular technology or practice in carrying out specific commercial activities. One example is an agreement among competing manufacturers to jointly develop, produce and sell an environmentally-

superior product that the contracting parties would otherwise not have been able to develop. Competing market participants may also agree on ways to reduce the energy consumption of their products, to reduce environmentally unfriendly emissions, or to collectively organise the take-back and recycling of their products and to pass the associated costs on to their customers. While these agreements may be made on a purely voluntary basis, many are made in response to environmental regulations or are encouraged by central or local public institutions.

However, the increased scope for self-regulation and the accompanying need for cooperation among (potential) competitors in the environmental and other areas increasingly raises intricate questions regarding the (dis)application of competition law and the reconciliation of competition law concerns with environmental objectives. For instance, fishery conservation efforts by fishermen in the form of catch limitations may help to combat resource depletion, but antitrust law may be an obstacle to those efforts.¹

Some commentators argue for a complete disapplication of competition rules to environmental protection schemes because application of those rules would hamper the attainment of the objectives pursued by those initiatives. BIAC does not take such an extreme position and believes that competition law, if properly tuned towards environmental effects, has a valuable role to play in limiting anti-competitive conduct. However, it does take the position that there should be sufficient room for companies to collaborate in the pursuit of environmental objectives and that the internal business community must have clear guidance on the way environmental benefits are factored into the analysis of agreements that might otherwise be considered anti-competitive. This implies that antitrust law is made more hospitable to private initiatives that pursue environmental objectives. Indeed, currently, competition agencies integrate environmental efficiencies in their analysis of horizontal agreements among competitors in varying degrees. The lack of a coherent, transparent framework of analysis that may in addition differ among jurisdictions may create inefficiencies and prevent valuable industry initiatives from prospering.

Antitrust law should not inhibit horizontal agreements relating to environmental objectives where the net effect of those agreements is sufficiently likely to be positive for society. However, BIAC acknowledges that the conclusion whether or not such an agreement is found contrary to antitrust law critically depends on two factors: (i) the underlying welfare concept and (ii) the way in which competition agencies take account of, and balance, the competition and environmental interests. It is precisely in these areas where national competition agencies do not seem to adopt similar methodologies. Therefore, BIAC believes it would be highly appropriate for competition agencies to engage in a fundamental discussion that clarifies the limits to the way competition agencies can take account of environmental efficiencies and to develop a framework for balancing environmental and competition interests. In BIAC's view, this necessarily entails a (re)assessment of the welfare concept that underlies competition law regimes.

2. The ways in which competition law regimes may integrate environmental issues: general observations

Competition agencies and legislators may, depending on their legislative mandate and within the boundaries set by relevant case law, resort to various means to accommodate environmental concerns. First, certain sectors or economic activities may be explicitly granted immunity from antitrust liability, or may have implied immunity through pervasive regulation. For instance, in the US, the Capper-Volstead Act grants immunity to activities of agriculture producer co-operatives, including price-setting, while the Fishermen's Collective Marketing Act grants immunity to fishing co-operatives. It seems that these general exemptions may, in a limited number of cases, be helpful for companies to engage in agreements that

¹ See for instance Adler, Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation, 61 Wash & Lee L. Rev. 3 (2004).

further environmental objectives, but that also involve restraints on competition. However, for the broader economy, such blanket exemptions from competition laws does not seem feasible, or appropriate.

In the absence of antitrust immunity, in the US, courts must determine whether to apply the *per se* rule or the rule of reason standard of analysis to horizontal restraints. While a firm body of case law has been established that horizontal restraints that support a pro-competitive benefit will be analysed under the rule of reason standard,² case law indicates that environmental concerns do not factor in the courts' antitrust analysis.³ Moreover, it seems that there exists significant uncertainty that horizontal agreements that seek to conserve scarce public resources should be considered a pro-competitive benefit and thus be subject to the rule of reason analysis, as opposed to the *per se* test.⁴ These uncertainties provide a significant disincentive for US companies to self-regulate in the interest of environmental conservation.

Outside the courts, competition agencies can play an important role in decreasing the uncertainty surrounding potentially environmentally beneficial horizontal restraints through *ex ante* opinions on proposed collaborations. In the US, the DOJ and FTC have sought to add certainty through a joint publication of Antitrust Guidelines for Collaboration Among Competitors (April 2000), which provides safe harbors for certain horizontal agreements or joint R&D ventures that provide pro-competitive benefits.⁵ Under these Guidelines, companies who wish to enter into a horizontal arrangement can request the DOJ provide a "business review letter" regarding the legality of the proposed arrangement. While this process has been repeatedly utilized by US companies for traditional efficiency-enhancing arrangements,⁶ the DOJ has yet to offer an opinion as to whether it views the mitigation of environmental concerns as a potential pro-competitive benefit.

The integration of environmental benefits into the analysis under European competition law of horizontal agreements among competitors is equally problematic, albeit for different reasons. First, while the European Court of Justice has ruled that certain types of agreements that may restrict the commercial conduct of companies do not violate Article 101(1) TFEU if, because of their objectives and context, these agreements are necessary and proportionate for the realization of non-

² See in particular *Broadcast Music v. CBS*, 441 U.S. 1 (1979), *NCAA v. Board of Regents*, 468 U.S. 85 (1984) and *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

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

⁴ Cases involving horizontal agreements to limit fishing production apply the *per se* rule in the absence of statutory immunity, despite the conservation of limited resources being an arguable pro-competitive benefit. See *Gulf Coast Shrimpers & Oystermans Ass'n v. United States*, 236 F.3d 658 (5th Cir. 1956); *Local 36 of Int'l Fishermenn & Allied Workers of Am. v. United States*, 177 F.3d 320 (9th Cir. 1949); *Manaka v. Monterey Sardine Indus., Inc.*, 41 F. Supp. 531 (N.D. Cal. 1941); *Columbia Rivers Packers Ass'n v. Hinton*, 34 F. Supp. 970 (D. Or. 1939)..

⁵ The guidelines provide a safety zone for horizontal collaborations that make up less than 20% of the relevant product market and joint R&D ventures that leave at least three independent R&D ventures remaining in a relevant "innovation market".

⁶ See <http://www.justice.gov/atr/public/busreview/letters.htm> (last accessed October 11, 2010) (containing index of DOJ business review letters since 1992).

competition interests,⁷ the case law does not specifically relate to environmental protection and is, as a result, not conclusive on whether, and if so under which conditions, environmental benefits associated with an horizontal agreement between competitors may take the agreement outside the scope of that provision.

Second, the European Commission has adopted several policy documents that provide guidance to national competition agencies on how to apply the European competition rules and conduct relevant economic analysis.⁸ In these guidelines the Commission states that, in principle, the NCAs should not balance economic, competition-related arguments with other public policy arguments, such as the protection of public health. but rather that non-competition interests should only “be taken into account to the extent they can be *subsumed* under the four conditions of Article 101(3) TFEU (ex Art. 81(3) EC)”.⁹ In its recently published draft revised guidelines on horizontal agreements the Commission has signaled that it will maintain this strict enforcement approach.¹⁰

In practice, the Commission has been willing, albeit extremely cautiously, to intergrate environmental and other non-economic interests in its exemption decisions under Article 101(3) TFEU to the extent that those interests could be subsumed under the conditions of that provision, particularly the condition that the agreement at hand must “contribute to improving the production or distribution of goods or advance technological and economic progress.” In general, however, the Commission only used non-competition interests, such as environmental benefits, as complementary arguments to substantiate that the economic conditions of Article 101(3) TFEU had been met.¹¹ This approach has been condoned by the European Court of Justice.¹²

Only very exceptionally, particularly in the CECED case, did the Commission appear to come close to treating environmental interests as a core argument for granting an exemption for a restrictive agreement.¹³ Following the CECED case, it has been suggested that with regard to the protection of the environment, the Commission is willing to adopt a broad welfare approach that allows for the translation of environmental benefits into economic values that are important for consumers and that can, like productive efficiencies, be directly balanced as independent factors against the restriction of competition.¹⁴ Despite these developments, it remains unclear whether and to what extent environmental protection can play a separate role in applying Article 101(3) TFEU.

⁷ *Wouters* (C-309/99) [2002] E.C.R. I-1577 at [97] and *Meca Medina* (C-519/04P) [2006] E.C.R. I-6991 at [42]. See G. Davies, “Article 86 EC, The EC’s Economic Approach to Competition Law and the General Interest”, (2009) 5 *European Competition Journal* 567.

⁸ See Commission notice, Guidelines on the applicability of Article 81 EC to horizontal co-operation agreements, OJ 2001C 3/2 and Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97.

⁹ Guidelines on the application of Article 81(3) of the Treaty, par. 42.

¹⁰ European Commission, Draft Communication from the Commission, Guidelines on the Applicability of 101 TFEU to horizontal co-operation agreements, available at http://ec.europa.eu/competition/consultations/2010_horizontals/index.html

¹¹ See Lavrijssen, What role for National Competition Authorities in protecting non-competition interests after Lisbon?, *European Law Review* (2010) (upcoming).

¹² See in particular *Métropole* (T-528/93) [1996] E.C.R. II-649.

¹³ Commission, Decision 24 January 1999, [2000] OJ L 187/47, CECED.

¹⁴ See Lavrijssen, note 11 above.

BIAC submits that the state of affairs as set out above is unsatisfactory as it may discourage companies from entering into horizontal environmental agreements that may, on balance, enhance consumer welfare.

3. The importance of the underlying welfare concept

Legal doctrine on competition policy usually draws a sharp distinction between economic and non-economic interests. Non-economic interests can loosely be defined as those which are relevant across sectors and for all citizens, such as the protection of the environment, the protection against consumer fraud, public health, culture, sport and education. While these interests have economic consequences, they are not of a predominantly economic nature. In contrast, it is uncommon for economists to strictly distinguish between economic and non-economic (public) interests. Instead, economists tend to apply a broad welfare concept¹⁵ that allows for the translation of environmental protection and other non-economic interest measures into economic terms in that consumers derive benefits from the public or private measures at hand. This concept is wider than the more narrow welfare concept that concentrates on output, prices, innovation, choice and quality. While it may be difficult to measure, compare and balance the economic value of non-competition interests and their contribution to societal welfare, a broader welfare concept that (quantifies and) internalises the value that consumers derive from private environmental initiatives offers the potential for a more rational framework than the current methods of evaluation that do not- or only partly integrate environmental efficiencies associated with agreements between competitors.

BIAC submits that it is preferable to explore ways and means to translate environmental benefits into economic efficiencies and internalise those benefits in the overall economic analysis, rather than to apply an overly narrow framework of analysis that does not allow those benefits to be factored in. The latter approach may lead national competition agencies to either discard valuable environmental efficiencies entirely, or may give rise to diverging, non-structured, ill-articulated and motivated (informal) decisions by national competition agencies that may want to take environmental benefits on board, but lack the means to do so in a predictable and transparent manner. This outcome would not be in the interest of the business community or consumers.

4. How to balance

BIAC believes it is important to clarify the limits to the way competition agencies can take environmental interests into account and to develop a framework for balancing those interests. It would be useful to formulate which economic factors competition agencies must consider—for instance, the elimination of free riding in the use of scarce public resources—to ensure that interests are balanced in a fair and transparent manner. The OECD Competition Committee can play an important and pioneering role in this respect.

In connection with the previous point, it would be appropriate for national competition agencies to define, to the extent possible, the methods used to quantify the economic value of the claimed environmental efficiencies. Such an attempt would in BIAC's view entail the recognition that (static and dynamic) efficiencies may also be realised on markets separate from the market on which negative consequences are felt and may affect other groups of consumers. While intangible environmental benefits such as resource conservation or the reduction of pollution are not as easily valued as traditional price or output effects, BIAC submits that the development of a framework for the valuation of such intangibles should be attempted by the agencies in coordination with each other. Such a framework, if applied on a

¹⁵ For a discussion of the concept of welfare from the perspective of welfare economics, see for instance L. Kaplow and S. Shavell, *Fairness vs Welfare* (Harvard University Press, 2006), pp. 18-38. Often the notion of well-being is used to describe a broad welfare concept.

consistent and transparent basis, would greatly assist the business community in considering whether to engage in a particular horizontal arrangement.

When balancing the environmental and competition interests, it is important to avoid placing an excessively difficult burden of proof on companies to demonstrate environmental efficiencies. While it seems appropriate to require that the participating companies demonstrate that alternatives to the environmental agreement at hand are less certain and cost-effective in delivering the same result, a stringent requirement that goes beyond the companies' good faith intentions and assessment of the environment benefits would run the risk of chilling potentially beneficial arrangements. This applies in particular to dynamic efficiencies. While agencies should make their own objective assessments regarding the weight given to competing interests, agencies should provide businesses with the opportunity to request this assessment *ex ante*, as with the US business review process, in the interest of avoiding chilling *ex post* litigation.

5. The need for clearly defined safe harbours

In addition to the need for a general framework that is more hospitable to environmental benefits, BIAC encourages national competition agencies to consider the use of safe harbours for business ventures that are most likely to generate environmental efficiencies. Of particular importance in this respect are safe harbours for R&D joint ventures. For instance, it would be appropriate for the EC Commission to consider to widen the scope of the proposed draft block exemption on R&D for joint ventures between competitors to transactions that involve combined market shares in excess of 25% and to loosen the conditions for the application of the future block exemption.¹⁶ U.S. agencies should also consider widening the scope of its safe harbors beyond the 20% or three remaining competitor threshold for R&D joint ventures. A broadening of these safe harbors appears to be an appropriate response to the essential role innovation will play in fostering green growth.

In addition, BIAC suggests that national competition agencies should consider to issue specific safe harbours for "green" joint ventures (as opposed to traditional joint ventures) in light of the positive externalities that may counteract the creation of market power in the traditional meaning of the term. Because the benefits of such "green" joint ventures go beyond traditional cost and output effects, a separate analysis that takes into account the value of these externalities is necessary to foster the optimal level of investment in the business community. Because spillover effects create a disincentive for individual firms to invest, a more permissive joint venture analysis for "green" projects will result in incremental investment that would not otherwise be undertaken.

6. Conclusions and recommendations

The above discussion provides BIAC's assessment of the unnecessarily diverging approaches that competition agencies have taken to the incorporation of environmental interests into competition enforcement. The US, in particular, appears to have rejected the environmental interests as a consideration in its analysis. While the EU and its members have made efforts to take environmental concerns into account, the approach has been *ad hoc* and has resulted in diverging outcomes with no clear framework. In light of this, BIAC strongly recommends that agencies works towards a transparent and consistent approach that expands the welfare model to include environmental interests, which are essential components for the sustainable growth of the world economy and the ultimate welfare of all consumers.

¹⁶ See in particular Axel Gutermuth, Revision of the EU Competition Rules on Cooperation in Research and Development: Scope for Improvement, available at <https://www.competitionpolicyinternational.com/sep-10/>.

The most significant change to competition enforcement that can be implemented across jurisdictions is the recognition that horizontal arrangements supporting an environmental interest should be governed not by the per se test, but the rule of reason. This recognition is most important the United States, which has a robust and strict enforcement against horizontal restraints through both the agencies and private class actions, because application of the rule of reason significantly reduces the threat of litigation. Given the Supreme Court's repeated recognition that ancillary horizontal restraints can serve pro-competitive interests,¹⁷ extension of the rule of reason to agreements that serve environmental interests would be only a minor, but important, change in the law. In this respect, the DOJ and FTC has the ability influence the development of the law through a public comment on, or revisions to, its 2000 Antitrust Guidelines for Collaboration Among Competitors.

Once it is accepted that environmentally beneficial horizontal agreements should not be considered naked restraints, the next step in enforcement is for the agencies to establish better and more tools for guidance on the types of agreements that enhance overall welfare. At a minimum, the agencies should collaborate on a consistent and transparent process to allow business to submit their proposed arrangement for an *ex ante* legal opinion. While the methods of substantive analysis are admittedly a more difficult issue, BIAC submits that progress can be achieved by invoking the combined resources of the competition agencies, environmental economists, and business community, with the goal of reaching some consensus on how environmental benefits should be measured and weighed against competitive costs.

A prerequisite to this approach is the explicit recognition by the competition agencies that green benefits are economic efficiencies. The foundation of environmental economics is the recognition of and policy prescriptions for significant market failures such as externalities, free riding, hold-up problems and information spillovers. Competition agencies must broaden their approach to these considerations, beyond price and output, if they are to harmonize their objectives with those of the green growth movement.

¹⁷See footnote 2, *supra*.

SUMMARY OF DISCUSSION

By the Secretariat

The Chair invited the delegates to first consider what types of environmental benefits would be cognisable in a competition review of horizontal agreements. Most contributions state that competition authorities can consider only the competition dimension of environmental agreements and can take environmental concerns into account only if they coincide with competition goals; some submissions, however, appeared to express a slightly different view.

The Chair then invited the United Kingdom to explain and illustrate the system it had developed to distinguish between different types of environmental benefits that are relevant for competition authorities, differentiating between environmental benefits that are direct and quantifiable efficiencies and therefore can be considered in a competition assessment, and those that have indirect economic benefits or non-economic benefits that are not relevant to the competition assessment.

A delegate from the UK explained that there has been very little practical experience with environmental agreements. The UK's roundtable paper resulted from an intensive debate within the OFT, in the context of the review of the Commission's horizontal guidelines; it was aimed at establishing a framework for the extent to which environment benefits should be taken into account, what the principles are, where the boundaries lie and what the grey areas are. As the paper explains, whether to take environmental benefits into account is not an easy decision except when direct economic benefits can be demonstrated.

As regards the current review of the UK-specific block exemptions for certain public transport ticketing schemes, the OFT has identified direct economic benefits that justify the application of Art. 101(3) of the EC Treaty and Section 9(1) of the UK Competition Act. There are also potential indirect economic benefits that might flow to consumers who do not necessarily use public transports, for example road users. It appears justified to look a bit broader in terms of the review of that exemption.

In the UK regime, which follows the European model, it is necessary to distinguish between direct and indirect economic benefits as well as non-economic benefits; only direct economic benefits would clearly fall within Art. 101(3) or Section 9(3). It can be difficult to decide in which of these three categories the benefits might fit and there are grey areas.

The OFT has not yet had to decide a particular case. But if it were faced with examining environmental benefits that could not easily be classified as direct economic benefits, two issues would have to be examined: first, the extent to which the environmental benefit improves the value for money of a product or a service for consumers; second, and perhaps more difficult, the remoteness of the benefit because the more remote the beneficiary the more likely it is that the benefits are to be characterised as indirect benefits, economic or non-economic, rather than direct benefits. This is very important because the more remote the beneficiary the more difficult it is to measure benefits and the less certain they are to arise. There are big issues here in relation to benefits that arise for instance in one sector of consumers, or for consumers in the future as opposed to consumers at the present. On that basis the OFT likely would reject alleged environmental benefits that are not directly linked with

the characteristics of the product or service, which are remote or difficult to quantify, or which are not certain to arise.

The UK submission makes clear the extent of the debate that is needed; it will be necessary to look at a series of individual cases and to try to apply the principles and the framework to a variety of different situations.

The Chair pointed out that Australia's contribution offers an interesting contrast. Because Australia has a public interest test in its competition law, it may have more leeway to take environmental considerations on board. The Chair asked Australia to explain the extent to which the environmental dimensions of agreements can be taken into account and to compare its views with the more restrictive views described by the UK and other countries.

A delegate from Australia explained that the situation in Australia is perhaps a bit different to some other countries as the law permits anticompetitive agreements to be exempt from competition law for a defined period of time if they provide public benefits that outweigh public detriments. This exemption can be granted even to agreements that would otherwise be per se illegal. This net public benefit test applies only where parties apply for the exemption under the authorisation provisions of the Competition Act.

The net public benefit test has been broadly interpreted as a modified total welfare test. The Competition Tribunal has decided that whilst the test does not require that efficiencies generated by a merger or set of arrangements necessarily be passed on to consumers, gains that flow through only a limited number of members in the community will carry less weight in some circumstances.

The authorisation process allows the ACCC and the Competition Tribunal on review to authorise conduct that corrects market failures such as environmental externalities, public goods or public bads, transactions costs, information failures, or conduct that facilitates the achievement of cost and dynamic efficiencies. Beyond these issues it could also encompass conduct that facilitates compliance with environmental laws even if there is not a strong efficiency argument.

This appears to be a much broader test than the one that applies in the UK, which focuses on production efficiencies and benefits to direct consumers. The Australian test, in contracts, covers economy-wide benefits relating to all types of economic efficiencies and to what the UK paper calls non-economic benefits. In addition, it is not necessary to make a quantitative assessment of the costs and benefits. The Australian system differs in respect of the other three conditions listed in the UK contribution: the conduct does not have to be indispensable for achieving the benefits; there is no absolute requirement for consumers to receive a fair share; and the ACCC could potentially authorise the elimination of competition if the public benefits were sufficient to outweigh the detriments.

The Chair then turned to cases that deal with waste material collection, recovery, and recycling systems. There are usually two types of competition considerations in these cases. The agreement might limit competition either in recycling or with respect to the primary product that is supposed to be recycled. Alternatively, questions might be asked about the extent of scale efficiencies or barriers to entry. If they are significant then a single waste collection or recycling system should be expected.

The Chair noted that Italy's submission focuses on an industry-wide consortium for the recovery and recycling of used lead batteries, COBAT, in which the battery recyclers' industry association participated. The consortium was mandated by law. The Italian competition authority intervened because it was concerned that COBAT would limit competition among its members by protecting historical market shares. The competition authority imposed a fine, but on appeal the court overturned the

authority's decision. The Chair asked Italy to explain why the court came to a different conclusion. Was the court worried that more competition would prevent the attainment of the environmental goals that were underlying the agreement?

A delegate from Italy said that the purpose of the consortium was to reduce environmental problems associated with the disposal of used lead batteries, which are very toxic, and to encourage recycling of the material that can then be used by the industry.

The Italian competition authority intervened because it received complaints by lead manufacturers that the competition restrictions of the system led to higher lead prices. The Authority objected to two elements of the consortium's rules: first, the consortium had agreed with the recyclers that the quantities collected each year would be assigned to the smelters according to their historical market shares; second, there was a provision that if one of the recycling companies acquired used batteries directly from producers without going through the consortium, it would face a reduction by the same amount in the quantity received by the consortium for that year. The Authority determined that this provision had the effect of maintaining market shares and of repartitioning the market; it would also raise obstacles to the creation of alternative systems of collection which might be possible after the exclusivity initially granted by law to the consortium had expired.

The court decision was based more on a formal, technical aspect than on a substantive analysis of whether the system was the best one to achieve environmental goals. The court relied on Article 8(2) of the Italian competition law, which basically reflects Article 106 of EC law and which provides that competition law should not apply to undertakings entrusted with the operation of public interest services insofar as this is necessary to perform the specific tasks assigned to them. The court decided that the restrictions contained in the rules governing the system were indispensable to achieve the environmental goals. The court reasoned that only if COBAT had deviated from the public functions it performed - which in the opinion of the court it had not - could competition law be applied to its conduct. In essence, the court decided that the consortium pursued public interest objectives and that its conduct was mandated by law; while the view of the competition authority was that the conduct of the consortium had gone beyond the mandate of the law. The Authority appealed and the case is now pending before the Council of State.

The Chair asked Italy to clarify whether lead that was recycled was then attributed to the smelters on the basis of historic market shares of the smelters. Did the Authority object to this arrangement, and if so, what would have been the alternative?

The delegate explained that a recent advocacy report by the Italian competition authority regarding other sectors suggested bidding procedures for the recycled quantities as an alternative. This solution has been implemented recently and apparently successfully in the glass recycling sector which conducted an international, technology-based bidding procedure.

The Chair replied that this is a familiar arrangement in other areas. There was a counterargument that a bidding process would increase the price of the recuperated material and would make it less competitive with the primary, non-recycled product. The advantage of the quota system was that the smelters would get lead cheaply. With a bidding procedure, the raw material would be more expensive and the smelters would be less able to compete with the primary product. Was any argument of that kind made before the Authority?

The Italian delegate replied that the argument had not been raised. Even in the case of the glass recycling arrangement this concern has apparently not been raised.

The Chair next turned to Spain, which described in its submission a case not entirely unrelated to the Italian case, involving glass recycling by a group set up by the industry. It appears that the competition authority's concern focused on the effects on competition in adjacent markets and not in the recycling market itself. The Chair asked Spain to discuss its concerns in the case and the developments that occurred after it adopted a negative decision.

A delegate from Spain explained that ECOVIDRIO is a collective system for glass packaging waste that represents all the players operating in the markets related to the management of glass packaging waste, including collection, transport, treatment and recycling. Before 2005 all industry players could be a member of ECOVIDRIO's decision body. Through ECOVIDRIO they were able to co-ordinate their behaviour and to exclude competitors from the affected markets. This affected in particular weaker competitors such as collectors who did not own a treatment plant and thus necessarily had to sell collected glass waste to treatment companies, most of which were associated with ECOVIDRIO. In addition, many treatment companies were vertically integrated and carried out a collection service as well, and therefore were competitors in the market for glass waste collection. This led the Spanish competition authority to impose a fine on ECOVIDRIO in 2003. In addition, the competition authority considered that ECOVIDRIO should have notified the agreements among its members in order to guarantee that they did not interfere with the potential existence of other collective systems for glass packaging waste and with competition in the different markets involved.

As a result, ECOVIDRIO presented its revised collective system to the competition authority in 2004 and requested an authorisation. The authorisation was granted in 2005 in light of ECOVIDRIO's commitment to fulfil conditions that guaranteed that the agreements among its members were compatible with competition. These conditions mainly referred to the composition of ECOVIDRIO's decision making bodies, the kind of information these bodies were allowed to handle, and the criteria applicable in competitive bidding procedures for contracts for the collection and treatment of glass waste. These conditions in no way affected the environmental goals of the collective system since they did not limit the amount of glass waste that could be recycled by the system. The proof is that ECOVIDRIO has been increasing the amount of glass waste that it has been recycling in the past seven years.

In 2008 the Spanish Competition Authority instituted proceedings against ECOVIDRIO again. The Authority found evidence that ECOVIDRIO had systematically infringed the conditions in the authorisation since 2005 and, thus, that it had abused its dominant position in the market for the management of glass packaging waste. In particular, the Authority found that ECOVIDRIO had faked competitive bids for the collection and treatment services favouring the undertakings affiliated with its collective system and that it had been able to expel at least one competitor from the market for collection of glass packaging waste. In July of 2010 the Authority resolved to levy a fine of €1,000,000 on ECOVIDRIO.

The Chair then turned to Turkey, which described in its submission a case in which the industry participants in the accumulator market are recovering and recycling the lead in accumulators. The competition authority thought that the scheme was suppressing price competition in the lead market, possibly because not only the recyclers but also the manufacturers of the accumulators were part of this agreement. The Chair asked Turkey to describe the case and point out similarities with the Italian case.

A delegate from Turkey explained that Turkey has a regulation that gives responsibility for recycling and collecting used accumulators to the producers and the importers. The regulation explicitly states that the producers and importers may form their own organisations to fulfil their obligations under the regulation. Used accumulators are valuable materials in Turkey. By recycling used accumulators a substantial amount of lead can be recovered and since there is no lead ore in Turkey, recycling accumulators or importing the lead are the only options to obtain lead. Lead is the

main input in the production of accumulators, and accumulator producers in Turkey have their own recycling firms. Even before the regulation was adopted, used accumulators were collected and recycled. The accumulator collection and recycling markets have been profitable in Turkey.

After the regulation was adopted, two associations were set up, one by the producers and recycling firms and the other by importers. The competition authority's primary concern was about the producers' association, as the producers' combined market share in the accumulator market is almost 90%. This association established a company to collect used accumulators from distributors and dealers of the member producers. The agreements between the company, dealers and distributors prevented them from selling used accumulators to collectors acting on behalf of the other association set up by the importers. The company by its regular Board of Directors' decisions also set the price at which dealers and distributors had to sell their used accumulators to the company. The used accumulators were then distributed only to the member recycling firms of the association. (The association also has some recycling firm members which were mostly the producers' recycling firms.) Member recycling firms were prohibited from buying used accumulators from collectors acting on behalf of the other association. Again, the company set the purchase and sale prices of these recycling firms.

The Turkish competition authority concluded that the company violated the competition law by fixing the prices of the used accumulators and by determining the number of transactions between the market participants. The authority required the termination of the infringement either by amending the agreement establishing the company or by dissolving the company, and imposed an administrative fine on the founding members of the company.

The Chair then pointed out that a number of contributions identified cases in which participation in a joint waste management system may have directly restricted competition in the primary market, either by creating greater cost commonality between the producers in the primary market or through an agreement among competitors to pass on the recovery and recycling fees to consumers.

The Chair invited the European Union to discuss the VOTOB case, which involved a waste management system set up by tank storage operators that was financed by a fixed fee paid by all members. The Commission found that the arrangement created a cost commonality that reduced competition and therefore could have had spill-over effects in the primary product market. The Chair remarked that those cases presumably arise when the recycling cost is an important part of the cost in the primary market, but he queried where the threshold is for deciding whether there is a competition issue. He asked the European Union to explain this case and identify how to determine the threshold at which competition concerns arise.

A delegate from the EU explained that VOTOB was an association of six independent companies that offered tank storage facilities in some cities in the Netherlands. They discussed with the Dutch government how to improve environmental standards and decided to make certain investments to reduce emissions from the tanks. Then they agreed to impose a common supplemental fee on their customers to recover the cost of those investments. This agreement was not approved by the Dutch government; it was a separate agreement among the six companies. The Commission objected because it was considered horizontal price fixing. In addition, in their invoices the companies presented the fee as a separate charge, as if it were imposed by the public authorities, thus providing misleading information to customers.

The agreement's other effect was that the common fee would have created a commonality of costs that could have had a negative spillover effect on the primary market. At the time (early 1990s), there was not much analysis on how important this commonality of costs was. But the Commission is

currently working on new horizontal guidelines that will make clear that commonality of costs may result in competition concerns if it could raise prices in the downstream market. Of course one cannot draw a bright line that would indicate from which point there are competition concerns. This analysis will depend on the market and on the nature of competition in each case.

The Chair then asked how the EU would assess whether common costs raise concerns in the downstream market. What factors can be used in cases like this to determine whether common costs significantly influence price?

The delegate replied that there is no specific percentage that can be used to define what significant means. One has to look at the major components of the downstream price, the abilities of the companies to shift the other components, and the importance of the component that is fixed and common to all.

The Chair then noted that the Netherlands' contribution states that obligations imposed on participants to pass on fees to consumers in a system to recover and process waste materials typically cannot be allowed, which is a position that is probably shared by many delegations. But the contribution goes on to describe two cases in which the NMa accepted pass-through obligations. The Chair asked the Netherlands to identify the circumstances under which it allows pass-on fees as well as how one should distinguish the cases in which such fees are prohibited.

A delegate from the Netherlands replied that in general the NMa does not allow pass-through obligations. In two cases mentioned in the contribution the NMa did allow pass-through obligations for two different, case-specific reasons. Firstly, in the car wreck recycling case the NMa held that the pass-through obligation did not restrict competition because of the tiny incremental increase that would be added to the cost of the car – about 45 Euros. So the NMa did not look at efficiencies given the small nature of the increase which was not likely to lead to a co-ordination of prices.

In the paper recycling case, the NMa authorised a system in which wholesalers could pass on a recycling fee to producers who used the paper to create products like packaging; in this way the costs of recycling paper and cardboard were passed on to the parties who were deemed responsible for creating the rubbish in the first place, which was in accordance with the goals of the government-mandated packaging waste scheme. The NMa authorised the pass-through obligation for three reasons.

- By allowing this pass-through obligation, the cost of the recycling system was deemed to be placed on the most appropriate parties;
- Conversely, the costs were not passed on to the end consumers.
- It was the most efficient way to implement the government-imposed obligation to recycle paper and allocate the associated costs. By passing on the costs to the wholesaler, the administrative costs were minimised because if one had tried to impose it on secondary producers, i.e. the packagers, there would have been a large number of companies that would be processing these administrative costs and they would have been more likely to be passed-on to consumers.

The NMa actually assessed the likelihood of whether these costs would be passed on to consumers but concluded that they would not.

In general, however, if efficiencies can be obtained in ways other than by pass-through obligations the NMa would not allow them.

The Chair next turned to the United States. He observed that the US contribution is very firm in saying that competitors who argue that an agreement on passing on the cost of complying with new environmental regulations to consumers was necessary are likely to be told that such agreements are a frontal assault on the basic policy of the Sherman Act and therefore are impermissible. He asked the US to comment on the cases presented by the Nma; for example, did the agreement in the case involving a 45 Euros increase in the costs of a car really create a competition problem? Has the US considered the possibility that in some cases the increase in price for the consumers might have a beneficial effect by providing an incentive to consumers not to throw things away, which forces society to incur the costs of recycling and recovering those products? In other words, is it always bad that the cost is passed on to customers?

A delegate from the US replied that the short answer under US antitrust law is that in the absence of some finding by Congress that a particular segment of the economy or a particular regulatory structure is entitled to special treatment under the antitrust laws, the focus is entirely on the competitive process and on the presence or absence of competitive effects. That is the basis for the observation that it would be difficult to defend an agreement to pass on to consumers the cost of complying with the regulation of the type that was just discussed by the Netherlands, unless Congress had directed that those effects be given special weight - which could happen. Nevertheless, the discussion in the Netherlands' paper of the respective roles of antitrust and environmental authorities is largely consistent with the situation in the US. If there is an overriding policy consideration that has been established by Congress, then to some degree that can displace the standard antitrust analysis.

It is difficult to predict how a particular agreement would be analysed under US antitrust law without a detailed description of the agreement and the surrounding circumstances, but a few observations are:

Collaboration among competitors is not inherently suspect under US antitrust law and a joint venture with a legitimate purpose, for example a joint venture for disposing of car wrecks in an environmentally friendly manner, would not necessarily violate US antitrust law so long as the net effect of the agreement was not to restrain competition.

A US court almost certainly would not accept the argument that even though the agreement to pass on disposal fees restrains competition, it is legal because it enables the parties to dispose of car wrecks in an environmentally friendly manner. US antitrust law does not permit private parties, the antitrust agency, or the courts to weigh environmental benefits or any social goods against competitive harms. Again, that assumes Congress has not established a different policy. For the same reason it would not be a defence that the agreement to pass on disposal fees results in only a small price increase. That would be deemed to be an anticompetitive effect.

One can imagine circumstances where that might not be the result. Suppose you change the hypothetical a bit: the competitors form a joint venture to recycle car wrecks but it is not necessarily clear that they had to agree on the price they would charge for doing that. If that service did not previously exist and the introduction of that service was done in a way that did not eliminate competition in a meaningful sense, the agreement would not necessarily violate antitrust laws. It would be necessary to show that the agreement on price advanced a pro-competitive objective and that would be a very difficult thing to show without action by Congress.

The Chair asked Germany to speak about its packaging waste recovery system, which stands apart on one issue that is not always explicit in the other contributions: There is the idea that for waste collection and recycling there is a natural tendency to have fairly concentrated markets because there are huge economies of scale. Germany offers an interesting, contrasting case as the market changed from a monopoly to quite a bit of competition. The Chair asked Germany to explain what led to more competition and whether the environmental benefit was just as great or greater with competition. Could the German situation be understood as suggesting that the argument that there are significant economies of scale in this kind of activity is not necessarily true?

A delegate from Germany gave a brief history of the recycling scheme. In the 1980s there was a political goal in Germany to reduce the volume of waste stemming from packaging materials and more material should be recycled. The focus was only on waste from packaging, which cannot be explained anymore today. A collection and recycling system for sales packaging was designed jointly by the government and the industry, in a procedure which could have raised doubts. The system came into effect in 1991 with the establishment of one single company which is called Duales System Deutschland (DSD). This company was set up as a monopoly covering all of Germany and was responsible for ensuring that sales packaging was collected and recycled to a very high degree. DSD shareholders were the manufacturing industry, the retailers and the waste management companies; so in fact it was not only a monopoly, it was also a cartel covering all the companies involved in the recycling of waste and recycling. DSD, which was a non-profit company, was responsible only for running the recycling system, while actual operations were to be contracted out to waste management companies.

It took several investigations and proceedings, not only by the Bundeskartellamt but also by the European Commission, to break up this monopoly and cartel. For example the European Commission established that DSD must not impose exclusivity obligations on the operative waste management companies, and must use tender procedures for all operative waste management services. The Bundeskartellamt made sure that the cartelised structure of stakeholders of DSD was dissolved. It also initiated fines proceedings against a bidding cartel that colluded to the detriment of DSD when DSD for the first time held a public tender for waste management services. In addition, it initiated proceedings against calls to boycott potential competitors of DSD; and the Bundeskartellamt established that the waste management company selected by DSD must conclude comparable contracts with DSD's competitors.

Today it is difficult to say whether the monopoly was required from the start to establish such a system. The DSD was not only a monopoly, but also a cartel, and the costs of the monopoly and cartel were born by consumers. The Bundeskartellamt tolerated this scheme initially because it was based on legislation and there was an inclination in Germany to have this kind of scheme. Establishing DSD as a monopoly and cartel was the easiest way for the government and industry to establish such a system at that time. Today it is considered that it was not really necessary to have this kind of cartel.

Furthermore, DSD was broken up not only by competition proceedings but also by competition advocacy. For example dissolving the structure of the shareholders of the DSD was not the result of competition enforcement, but of competition advocacy. In the end we succeeded to break up DSD because the shareholders wanted the conflict with the Bundeskartellamt resolved.

Initially, we had costs for the management of package waste of about 2 billion Euros per year; nowadays with competition in that area - there are a couple of small DSDs - the costs are around 1 billion Euros per year. The shareholders of DSD are no longer the waste management sector and the producers; today the main shareholder is KKR, Kohlberg Kravis Roberts, an investment company.

The collection and recycling scheme was started under completely different conditions and we ended up with a scheme that is not perfect but that enabled competition and excellent results. It has been a successful case, but the Bundeskartellamt had to deal with it for about 20 years.

The Chair then asked Poland to discuss a case that also raised questions about the standard argument concerning scale efficiencies in the recycling sector. Poland blocked a merger between two waste recycling companies collecting batteries. This was a two to one merger, but the parties claimed that it would lead to efficiencies and allow them to invest more in innovation. The competition authority, however, was unconvinced. What explains the result?

A delegate from Poland explained that the case concerned two recyclers of used batteries, the only two firms active in this market in Poland. Even though there were no technical obstacles to transporting batteries outside Poland, exports were severely restricted and virtually nonexistent. So the relevant market was limited to Poland.

There were at least two reasons why the competition authority was not convinced by the efficiencies allegations. First, those arguments did not go beyond general assertions that life would be better after the merger; that the parties would slash costs; that they would realise synergy effects; and that they would be able to invest more in the network of collecting batteries. These claimed efficiencies were not well-substantiated, so they would not have been very convincing even if the market had been different. But the most important aspect was the specific nature of the market. Because owners of used batteries were required by law to hand them over to recyclers, the supply curve was virtually inelastic. With two parties remaining in the market they could compete by offering better terms to suppliers; after the merger the incentives to give better terms would be virtually gone. So even if there were huge efficiencies the parties would not have had any incentives to pass them on to suppliers because the suppliers would be forced to bring the batteries to them. This was the point that made it difficult to accept any kind of efficiency argument.

The Chair asked the delegate whether the merger would not have been good from the point of view of competition in the downstream market, if the merger had allowed the recycling company to offer less favourable terms to the suppliers who have to bring their waste, and therefore allowed the recycling to be more competitive with the primary product.

The delegate replied that the downstream market was actually quite competitive. The market for lead production was at least Europe-wide, and there was no need to increase competition there. One would have to weigh any advantages downstream against a severe restriction of competition in the upstream market.

A delegate from Israel then asked the Bundeskartellamt a question. She explained that in Israel the Knesset would soon vote on legislation regarding the recycling of packaging waste. The delegate asked Germany whether it had analysed the efficiencies that were created by DSD, or if it is possible to say that through the years one can presume that the costs of operations would have been lower had a monopoly not been created through the DSD mechanism.

The delegate from Germany replied that the Bundeskartellamt had not looked explicitly at efficiencies, but that it had looked at the costs of the system. When DSD started, as a cartel and as a monopoly, the costs for all companies involved and for consumers were about 2 billion Euros per year. Today a number of companies are responsible for collecting and recycling packaging waste and the costs are about 1 billion Euros per year. That illustrates well how the DSD was managed at the start, and what effects competition can have in this area. The Bundeskartellamt has always been confronted with the argument that waste management and recycling works only if the system is set up

as a monopoly. It has become obvious that this is not true; the system can operate in a competitive environment and it is much more effective that way.

The Chair moved on to competition problems related to industry sponsored schemes, standard setting, and certification systems. Several contributions mention the fact that competition authorities have been analysing such industry initiatives and that they have sometimes been dubious of the benefits; other contributions recognise that such initiatives at least create risks as well as potential benefits.

The Chair asked Switzerland to discuss the 'climate cent scheme' covered in its contribution. This was a case where in the fuel transportation industry all participants would make a voluntary payment to a foundation of 1.5 cents per litre of fuel transported; the foundation would then undertake environmentally friendly activities. The competition authority decided that this arrangement was anticompetitive, but the government ultimately exempted the arrangement from the competition law. Why did this happen? Was it the fact that the competition authority could not take the environmental benefit of the arrangement into account? Or was it that the government got lobbied to exempt this from the competition law but there was no redeeming value?

A delegate from Switzerland explained that the framework of the law on the environment encouraged private initiatives to achieve environmental goals. The initiative of the petrol industry took place within this framework. The Swiss competition authority investigated the proposed 1.5 cent climate fee upon request by the Swiss government; it did not consider the case a priority in its enforcement agenda. But once it was asked to assess the arrangement, it concluded that the arrangement was incompatible with Swiss competition law because there was no link between the projects for which the money was used and a reduction in the use of petrol or the creation of an incentive to consume less petrol. The foundation was simply pursuing environmental goals in Switzerland and abroad. One presumed that this arrangement was not lawful, but the government took a positive view because it expected an incentive for consumers to use less petrol. But because the arrangement was the result of a private initiative and not that of a law it was necessary to create an authorisation in the public interest. For that reason the Parliament is currently considering whether the initiative should be introduced by way of law in order to exempt it from the scope of competition law. The dilemma was that even if everyone supports the idea of the climate fee, the arrangement had to be considered unlawful because it was based on a private initiative.

The Chair then asked the Swiss delegate why the climate fee was considered anticompetitive. As this was a fee that all petrol transport companies had agreed to pay, where was the restriction of competition? Plus, although there was no connection between the fee and the incentive for consumers to reduce the consumption of petrol, did the price increase, even though it was very moderate, provide an incentive to consume less?

The delegate from Switzerland confirmed that the fee was recuperated through a higher price of the end product and therefore increased the petrol price. The uniformity of the climate fee created the competition problem.

The Chair observed that the increased price should reduce the petrol consumption. Should this arrangement be envisaged by the law and therefore exempted from competition law?

Yes, replied the delegate, and this should be clarified through a legislative instrument to avoid the current difficulties.

The Chair next turned to Japan's contribution, which discusses an industry-wide effort, encouraged by the government, to reduce the use of plastic bags in stores. This issue is familiar to many member countries. The Chair asked Japan to explain what persuaded the JFTC not to object to an agreement among retailers to introduce a fee for plastic bags – unlike the case of Switzerland. Was the fee differentiated or was it a uniform fee? If it was a uniform fee, why wasn't the agreement considered to violate the antimonopoly law?

A delegate from Japan explained that the case was brought to the JFTC through a voluntary consultation by retailers in City A. In April 2007, the government adopted a revised act that recommended the introduction of fee-based plastic bags as one of the actions retailers could take to reduce the use of plastic bags. A committee was then set up in which resident groups and retailers in the city discussed how to reduce the use of plastic bags. Although participation in the committee was voluntary, almost all retailers in the city decided to join. The resident groups and participating retailers concluded an agreement that customers should pay for the plastic bags at the uniform price of 5 yen per bag if they use plastic bags provided by retailers.

The retailers then asked the JFTC whether such an agreement would constitute a problem under the Antimonopoly Act. For a number of reasons, the JFTC did not consider the agreement to be a violation of the Antimonopoly Act even though it was an agreement of retailers to introduce fee-based plastic bags at a uniform price:

- The agreement does not restrict competition for selling goods by retailers. Providing plastic bags to customers is regarded an ancillary service and plastic bags are not indispensable for customers when they shop at retailers as they can bring their own bags.
- Social awareness of the necessity of reducing the use of plastic bags has been increasing, which justified this initiative. The agreement was concluded not only among retailers but under the transparent initiative of city administrators inviting the resident groups as representatives of the consumers.
- Although retailers had introduced other methods to reduce the use of plastic bags, they produced only limited effects. Introducing fee-based plastic bags can be considered more effective than other methods, but in the past only a fraction of retailers introduced fee-based plastic bags because many of them were concerned that they might lose customers to competitors that did not charge for plastic bags.
- If the unit price of the bag is not fixed, a lower unit price would result. If the unit price is too low, it might fail to achieve the goal of reducing the use of plastic bags.
- The 5 yen unit price cannot be considered as a burden for the customers to achieve the objective; the residents group joined the initiative and agreed with the unit price. If the unit price is too low it might fail to reach the goal of reducing the use of plastic bags.

The Chair followed up with a comment about the case: The last reason is reminiscent of what the EU and the Netherlands said - the 5 yen fee was not enough to make a big difference in competition, particularly given the fact that people could bring their own bags. There is a notion of a threshold, and if it had been a 400 yen fee the outcome might have been different.

The Chair then moved to the topic of environmental standards. The UK's contribution discusses standard setting through a voluntary industry agreement on the introduction of energy efficient light bulbs. It was an initiative encouraged and led by the Government. The OFT got involved and expressed

some competition concerns and suggested some remedies. He asked the UK to discuss the concerns and how the remedies were effective against them.

A delegate from the UK explained that the OFT became aware that there was a potential industry agreement on voluntary standards for energy efficient light bulbs. The question was whether this would fit within the OFT's prioritisation principles. It was decided that it did.

The OFT engaged with the department of government that was primarily engaged on this initiative but also with the business department. One of the positive things that came out that we were able to persuade the business department to produce some guidelines for civil servants who are interacting with business on policy issues so that they were more fully aware than they had been about the competition law constraints.

The OFT's concern was that it was very unclear precisely what the agreement was going to cover, but it was clear that the government and the industry were getting together. There was a risk of co-ordinated effects and of longer term collusion and barriers to entry, particularly for small and new suppliers.

The procedural safeguards put in place were focused on reducing the risks of co-ordination and collusion. The OFT made it clear that both the government and the industry participants should be fully aware of the potential application of the competition rules and make sure that they safeguarded their own interests, including by having independent legal advice. The organisation, the scoping and handling of these meetings also were suitably constrained and limited to the specific needs of the issue at hand.

The safeguards were successful in making sure that the discussions and the resulting voluntary agreement did not go further than necessary to achieve the objective that the government was trying to achieve.

It is worth noting that the OFT subsequently looked at the potential benefits that this informal intervention had brought to consumers. Whilst the assumptions are debatable, the OFT estimates that the benefits to consumers were in the region of 7 million pounds.

The UK delegate added a comment on the question the Chair asked Germany regarding whether the situation in Germany suggests that competition authorities should be more suspicious of industry-wide recovery and recycling systems. The answer to that question is definitely yes, the delegate said. If you look at Germany now there is much more innovation in recycling methods and systems and technologies, which would not have developed but for the fact that competition authorities became much more rigorous in the last five to ten years in looking at these systems.

The Chair turned then to the European Union, whose contribution discusses a hypothetical case on environmental standard setting, based on an actual Commission decision. The case concerns an agreement among European washing machine producers and importers to eliminate the lowest efficiency washing machines. How did the EU identify its concerns? Does the EU agree with the UK that one should be suspicious of such industry-wide standard setting efforts, even if they have environmental benefits? What is the role of the Commission in such cases?

A delegate of the EU replied that it appears that the OFT had been concerned mostly about the process that could lead to these standards and how this process could be misused to co-ordinate the industry. Those concerns are legitimate and they were very well addressed. In the CEDEC case, however, the Commission was not so much focused on the process, but instead on the outcome: by eliminating the environmentally less efficient machines there was a reduction of output, a reduction of

diversity, and because these machines were the cheapest ones this could have led to a price increase. The Commission thought that this concern was compensated by the benefit in terms of environment, though (specifically in terms of reduction of other costs like electricity and water). Therefore, the initiative was approved.

Regarding whether competition authorities should care when there is a pure industry initiative, or whether the government is involved or not, the EU delegate explained that in this case there was some encouragement by the government and the initiative was not purely industry driven. But should we care? One should not make such a distinction because at the end what counts is whether there is a restrictive effect, whether there are the benefits, and how they can be compared. Even if a government was sponsoring a deal that would lead to a restriction of competition that is not compensated by positive effects, that should not prevent us from intervening, the delegate noted.

A delegate from Israel raised a question for the UK delegation regarding mandatory collection and recycling of packages: Perhaps such an arrangement in the form of a cartel is reasonable during the launching of such a system but should then be limited by time. Or is that totally unnecessary and competition should be introduced in the first phase with such legislation?

A delegate from the UK replied that the answer depends on the nature of the market and the products concerned. One can envisage in some highly specialised kinds of systems that there might be a need to have a monopoly in the first instance. Radioactive product might be an example, or certain types of wastes from hospitals. But one needs to be much more suspicious now than one was in the 1990s when the argument was always that monopolisation was necessary for the long term. The starting principle that we try to follow is that in the vast majority of cases one should seek a situation where there is a competitive market, unless there are particular circumstances pertaining to the nature of the waste concerned.

The Chair next invited Iceland to contribute to the discussion on behalf of the Nordic countries with a short presentation on environmental certification, an area in which the joint Nordic Report identifies potential competition problems.

A delegate from Iceland explained that the Report did not include cases involving anti-competitive certification procedures, but that it identified this area more generally as a potential cause for concern. He then gave a brief summary of the economics of certification. Certification can convey information about the characteristics of a product that differentiate it from similar products, but that are invisible and usually very difficult to detect. To reinforce the credibility of certification, the certification process is usually handled by an independent third party that provides an unbiased assessment. Consumers must have confidence in this control system; otherwise the certification process will not be effective.

Certification serves a useful purpose in light of information asymmetries, as the sellers know more about the products than the buyers. It provides important information about a product that saves consumers the cost of gathering the information. It therefore enhances efficiency in the market. Certification can also reduce transaction costs considerably and thereby increase mobility. This should reinforce competition, which in turn makes it easier to achieve environmental goals. Products that otherwise would not be provided may be supplied only when certification is introduced: This has to do with the fact that producers can begin to manufacture goods of high quality with credence qualities that are difficult to detect. Without the certification, people might not perceive any difference between certified products and others and it therefore might not be profitable to make the products. For instance, in the case of organic food, people may not notice any difference between organically and non-organically grown potatoes.

But there are also certain competition problems associated with certification, the delegate continued. Great success with differentiation may reduce price competition in a market in favour of competition over product attributes. This may lead to market power. In the case of agricultural commodities, market power might not be created because there are many producers offering organic products. Instead, the market may become segmented into conventional and certified products.

Market power is the key to understanding problems that may accompany certification. If the company offering the certified products has substantial market power it can apply strategies that raise its rivals' cost, including exclusive supply contracts, and it can lobby for statutory provisions, regulations, or standards that hurt rivals. It also can begin marketing and R&D wars to hurt the rivals who are presumably much smaller. The Report provides examples of strategies to raise rivals' costs by attempting to influence certification programmes. This can include (i) attempts to define certification criteria that disfavour competitors or to disadvantage raw materials that are used to a greater degree in the rivals' products; (ii) efforts to lobby for certification criteria that make competition from foreign producers very difficult, for example criteria that limit how long a product may be in transport, which may hurt international competitors; and (iii) efforts to lobby for the inclusion of expensive equipment requirements for testing.

To sum up, certification programmes should be carefully designed so that they are not discriminatory. Competition authorities must, when necessary, point out when the design of the certification process might distort or hamper competition unnecessarily.

One observation in the Report concerns organic food products. In the grocery business, retailers are usually very powerful. At the same time organic food producers are often numerous and therefore exposed to intense competition. As a result, the premium associated with certified organic products is often passed on from producers to retailers. A potential implication for competition authorities could be that they might try to encourage players in the supply chain to be equally strong.

The Chair next invited BIAC to contribute to the discussion. He explained that BIAC's contribution raised concerns about "the unnecessarily diverging approaches that competition agencies have taken to the incorporation of environmental interests into competition enforcement" and for failing to explicitly recognise that "green benefits are economic efficiencies." So far there is a fairly consistent view that there are many practices that may restrict competition; no one has objected to the outcomes of the cases that were discussed. There is a feeling, the Chair said, that even in countries where the law does not allow competition authorities to take non-economic benefits into account there is a willingness to apply a kind of proportionality test. If the restriction to competition is not so severe and if the benefits to the environment are substantial, demonstrable, and direct, then competition authorities tend to take them into account. Differences may exist, but they exist because there are differences in law. The Chair asked whether BIAC shares this reassuring view of the world.

A delegate from BIAC said that even though competition authorities seem to arrive at the right solutions, it would be helpful for the international business community to know how they come to these results and which precise analytical framework applies. BIAC had hoped that there would be more information on horizontal environmental agreements such as those on environmental quality standards as in the CEDEC case, joint development agreements between competitors to come up with an innovative environmentally superior product, and perhaps quota systems. BIAC's submission mentions a quota systems that aimed to preserve natural resources and obliged fishermen to catch less fish; that was a problematic scheme in light of section 1 of the Sherman Act.

In the future, companies will be much more inclined to think about collaboration a) to develop and perhaps jointly market greener technologies, and b) to find solutions for technologies and

production assets which have become obsolete. The question would be whether the agreement could be objectionable, even if it brings a lot of benefits to consumers. BIAC is very much in favour of room for companies to come up with these schemes, in which environmental efficiencies are explicitly recognised. It would be helpful if competition authorities would apply a uniform system, though.

In the US, environmental efficiencies are not easily recognised; there are even some doubts whether the agreements are subject to the rule of reason. This creates a disincentive for companies to enter into potentially efficiency-enhancing environmental agreements. In the EU, there are some doubts as to the extent to which environmental efficiencies can be accommodated under Article 101(3). Other countries take a different approach. BIAC advocates a more uniform analytical framework of analysis, and it would be helpful if the framework reflected the underlying welfare concept. For example, it would be preferable to measure and quantify environmental efficiencies in a manner similar to how normal efficiencies are measured and quantified. A second point is to think about safe harbours for companies that would like to work together to pursue an environmental objective.

The Chair agreed with BIAC's point about the importance of trying to take environmental benefits more fully into consideration, to the extent the law allows it. Differences between the approaches taken by competition authorities, however, can be observed in relation to any topic addressed in the Committee roundtables because laws are different. Members can try to have a common understanding at least of the economic issues, but in some cases the law prevents them from reaching the same outcomes.

The Chair moved on to advocacy issues. Canada's submission discusses a checklist aimed at ensuring that legislation designed to achieve broader public policy goals is consistent with competition policy. He asked Canada to introduce the checklist and to state whether it is widely used in Canada and whether it has been helpful in ensuring greater consistency at the level of domestic legislation.

A delegate from Canada explained that the contribution refers to a set of guiding principles that govern the regulation-making process. Because these are not unique to the Canadian context and they are set out in detail in the paper, the delegate went directly to the sixth item, which requires that any regulation passed in Canada to promote open and competitive markets. There has been a flurry of initiatives in recent years, most notably in regulating waste material, e.g. how to recycle, reuse, and reduce. The framework for introducing this sort of regulation was established in 2009 through the endorsement of the Canada-wide action plan for extended producer responsibility (EPR). EPR shifts the historical public sector tax-supported responsibility for waste to the individual brand owner, manufacturer, or first importer. EPR also encourages producers and importers to collaborate in collection, transportation, and processing of waste, as well as in setting the recycling fees charged to consumers to finance these programmes. The Bureau played an active role advising regulators and the bodies responsible for the operations of designated waste programmes on how to craft and implement regulatory models that meet the environmental objectives while minimising effects on competition and keeping within the six principles outlined in the submission. One example is the Bureau's ongoing dialogue with policymakers and stakeholders in Ontario, which recently prompted changes to a quota system for collecting and processing discarded electronic products. The quota system had unintentionally discouraged market participants from competing with one another for access to these products, to the detriment of the more efficient processors. They agreed to changes that allowed processors to seek their own supply of electrical products directly from waste generators and allocated programme collective material based on one year contracts via bids.

The Chair then referred next Israel's contribution, which presents an advocacy case related to an industry-wide joint venture by the major beverage companies for the collection of beverage containers.

The contribution suggests that the IAA was concerned about the scheme not so much because it found a competition problem but because it was not effective enough in reaching environmental goals. So the IAA offered some suggestions to make it more effective as a collecting system. The Chair asked whether the IAA can be concerned with the effectiveness of such schemes even if there is no competition problem, or if there was a competition problem and the advocacy efforts were part of the competition concern.

A delegate from Israel explained that the contribution covered two different cases: one was an enforcement case before the Antitrust Tribunal, where the parties sought approval for their co-operation and the antitrust authority objected on competition grounds. In a second request to approve the extension of the arrangement the antitrust authority asked the Tribunal to consider the effectiveness of the scheme, as well. The failure of the venture to reach the thresholds envisaged in the legislation was used as an opportunity to ask the Tribunal to impose remedies that would increase the effectiveness of their venture, assuming that the Tribunal were to approve it; these would have been remedies that only the Tribunal, not the Director General, could impose.

In addition, the IAA is working with the Ministry of the Environment on new legislation for packaging waste. It is trying to convince the Ministry, which is working closely with the manufacturers' association, to create legislation that would leave the door open for future competition even though the manufacturers currently seek the right to establish a single co-operation scheme. The IAA would prefer the possibility of future competition for those manufacturers who would not be satisfied with the activity of the co-operation in light of the problems of market power that are created by a monopoly. Furthermore, problems associated with the cartel-type arrangement that we would have to address through remedies could be solved through competition that can be introduced when the market is mature enough and alternative co-operation schemes for the handling of packaging waste could be established.

A delegate from Greece requested the floor to report about a recent decision by the Greek authority on the role of government and regulation in the area of environmental policy. In connection with legislation regarding planning restrictions imposed for environmental reasons in central Athens, the question emerged whether the public authority responsible for planning permits was an undertaking and therefore subject to competition law. The authority decided that competition law could not be enforced in this case for very specific reasons; but it decided at the same time that the principle of free competition can be considered a constitutional principle and therefore can be included in a public interest test. This should be a way to resolve conflicts and to enforce both policies without going against one policy or creating a hierarchy between them.

The Chair then summarised the main issues that had emerged. The extent to which environmental benefits can be taken into account depends on legislation rather than on the policy of the competition authority. If legislation allows the consideration of environmental benefits, then there is a second question concerning the extent to which the benefits can be taken into account. There have been useful suggestions about how one might be better able to assess the monetary value of those benefits. Those benefits have to be weighed against the anticompetitive risks that are hidden in those agreements. There has been discussion of a significant number of cases, particularly concerning recycling schemes, where agreements setting up a scheme could lead to severe competition problems, intentionally or unintentionally.

Competition problems could emerge also in the context of standard setting, certification, and public procurement. There are concerns that deserve to be looked at under competition law. There should be some kind of balancing of positive and restrictive effects, but the restriction of competition has to be sufficiently light for any balancing to be undertaken.

An interesting case from Germany taught us that some of the arguments about substantial economies of scale that justify anticompetitive agreements for the benefit of getting environmental benefits have to be viewed sceptically. There are cases in which evidence of scale efficiencies was not convincing or in which over time competition can in fact lead to a more efficient attainment of environmental goals.

It became clear that competition authorities do not intend to make a difference between purely voluntary agreements and government-sponsored agreements; they just look at agreements on the basis of the benefits for the environment and costs to competition. This should reassure BIAC that there will be neutrality on the part of competition authorities and a rigorous, scientific approach more than a political approach.

It was interesting to see that there was a core of cases around recycling schemes, but that there were also many other different types of situations in which environmental agreements could create competition concerns.

There is room for advocacy. However, it is also up to the competition authorities to decide if they want to advocate on those issues. It is probably because the environmental considerations are so important that it is worthwhile to invest resources and develop some skills in this area.

COMPTE RENDU DE LA DISCUSSION

par le Secrétariat

Le Président invite les délégués à examiner d'abord les avantages environnementaux qui seraient avérés dans un examen des accords horizontaux du point de vue de la concurrence. La plupart des contributions rappellent que les autorités de la concurrence peuvent ne s'intéresser qu'à la dimension « concurrence » des accords environnementaux et ne prendre en considération les préoccupations environnementales que si elles concordent avec les objectifs visés au plan de la concurrence ; certaines contributions expriment toutefois un point de vue légèrement différent.

Le Président invite ensuite le Royaume-Uni à expliquer, exemples à l'appui, le système qu'il a mis au point pour faire la part entre les différents types d'avantages environnementaux qui présentent un intérêt pour les autorités de la concurrence. Ce système établit une distinction entre les avantages environnementaux qui représentent des gains d'efficacité directs et quantifiables et peuvent donc être pris en compte dans une évaluation de la concurrence, et ceux qui entraînent des avantages économiques indirects ou des avantages autres qu'économiques qui ne sont pas utiles à l'évaluation.

Un délégué du Royaume-Uni explique que l'expérience pratique des accords environnementaux est très limitée. La contribution du Royaume-Uni à la table ronde est l'aboutissement d'un vif débat au sein de l'autorité britannique de la concurrence (OFT) dans le cadre de l'examen des lignes directrices de la Commission européenne sur les accords de coopération horizontale ; ces débats visaient à établir un cadre délimitant le degré de prise en compte des avantages environnementaux ; les principes ; les frontières ; et les zones d'ombre. Comme l'indique la contribution, il est difficile de décider s'il faut prendre en compte les avantages environnementaux, sauf lorsque l'existence d'avantages économiques directs peut être démontrée.

S'agissant de l'examen en cours des exemptions par catégories spécifiques au Royaume-Uni, pour certains systèmes de billetterie dans les transports publics, l'OFT a mis en évidence des avantages économiques directs qui justifient l'application de l'article 101.3 du traité CE et de l'article 9.1 de la loi britannique sur la concurrence (*Competition Act*). L'OFT a aussi relevé des avantages économiques indirects dont pourraient bénéficier des consommateurs qui n'utilisent pas forcément les transports publics, par exemple les usagers de la route. Il semble opportun d'aborder l'examen de ces exemptions dans une perspective plus large.

Dans le système britannique, qui s'inspire du modèle européen, il faut distinguer les avantages économiques directs et indirects et les avantages autres qu'économiques ; seuls les avantages économiques directs relèveraient clairement des articles 101.3 ou 9.3 déjà cités. Il est parfois difficile de déterminer à laquelle de ces trois catégories se rattachent les avantages et il y a des zones d'ombre.

L'OFT n'a pas encore eu l'occasion de se prononcer dans une affaire spécifique. Cependant, si elle devait examiner des avantages environnementaux difficilement assimilables à des avantages économiques directs, il lui faudrait cerner deux aspects : premièrement, jusqu'à quel point l'avantage environnemental améliore la valeur d'un produit ou d'un service pour les consommateurs ; deuxièmement, ce qui est sans doute plus difficile, le caractère indirect de l'avantage, sachant que plus le bénéficiaire est lointain, plus les avantages sont susceptibles de relever de la catégorie des

avantages indirects, économiques ou autres qu'économiques plutôt que des avantages directs. Cela est très important parce que plus le bénéficiaire est lointain, plus les avantages sont difficiles à mesurer, et moins ils sont susceptibles de se manifester. L'évaluation des avantages qui se présentent par exemple dans un secteur de consommation, ou des avantages dont jouiront les consommateurs futurs et non les consommateurs actuels soulève des problèmes considérables. En se fondant sur ces considérations, l'OFT rejetterait sans doute les avantages environnementaux allégués qui ne sont pas directement liés aux caractéristiques du produit ou du service ; qui sont lointains ou difficilement quantifiables ; ou qui sont incertains.

La contribution du Royaume-Uni délimite clairement le champ de la discussion à mener ; il faudra examiner une série d'affaires particulières et tenter d'appliquer les principes et le cadre à des situations diverses.

Le Président souligne que la contribution de l'Australie offre un contraste intéressant. Comme le droit australien de la concurrence prévoit l'application d'un critère d'intérêt public, l'Australie dispose peut-être d'une plus grande marge de manœuvre pour prendre en compte des considérations environnementales. Le Président demande à l'Australie d'expliquer jusqu'à quel point les dimensions environnementales des accords peuvent être prises en compte et de comparer le point de vue de l'Australie avec celui, plus restrictif, exposé par le Royaume-Uni et les autres pays.

Un délégué de l'Australie explique que la situation dans ce pays est sans doute légèrement différente de celle qui prévaut dans certains autres pays parce que la législation autorise que des accords anticoncurrentiels soient exemptés de l'application du droit de la concurrence pendant une période définie si les avantages de ces accords pour l'intérêt public l'emportent sur leurs inconvénients. Une exemption peut même être accordée pour des accords qui seraient autrement illicites en soi. Le critère de l'avantage net au regard de l'intérêt public s'applique seulement lorsque les parties demandent l'exemption en vertu des dispositions relatives aux autorisations contenues dans la Loi sur la concurrence.

Le critère de l'avantage net pour le public a été interprété largement comme un critère du bien-être total modifié. Le tribunal de la concurrence a décidé que même si, d'après ce critère, les gains d'efficacité découlant d'une fusion ou d'un ensemble d'accords ne doivent pas forcément se répercuter sur les consommateurs, ceux qui profiteront à un nombre limité de membres de la collectivité seulement auront moins de poids.

Dans le cadre de la procédure d'autorisation, l'ACCC et le tribunal de la concurrence, lors d'un examen, peuvent autoriser un comportement qui a pour effet de corriger des défaillances du marché liées par exemple aux externalités environnementales, aux biens et maux publics, aux coûts de transaction et aux défauts d'information, ou encore un comportement qui favorise l'efficacité des coûts et l'efficacité dynamique. Par-delà ces questions, la procédure d'autorisation pourrait également englober un comportement qui facilite le respect du droit de l'environnement, même si l'argument d'efficacité n'est pas solide.

Ce critère paraît beaucoup plus vaste que celui du Royaume-Uni, qui s'en tient aux efficacités de production et aux avantages procurés aux consommateurs directs. Le critère utilisé par l'Australie englobe au contraire les avantages attendus pour l'ensemble de l'économie et se rapportant à tous les types d'efficacités économiques, désignés « avantages autres qu'économiques » dans la contribution du Royaume-Uni. En outre, l'Australie n'exige pas d'évaluation quantitative des coûts et des avantages. Enfin, le système australien n'impose pas les trois autres conditions énumérées dans la contribution du Royaume-Uni : il n'exige pas que le comportement soit indispensable à l'obtention des avantages ; il ne pose pas comme condition absolue que les consommateurs reçoivent une juste

part des avantages ; et l'ACCC peut autoriser l'élimination de la concurrence si les avantages publics sont suffisants pour l'emporter sur les inconvénients.

Le Président aborde ensuite les affaires concernant les systèmes de collecte, de récupération et de recyclage des déchets de matériaux, qui appellent habituellement deux types de considérations concernant la concurrence. Premièrement, l'accord risque-t-il de limiter la concurrence au niveau du recyclage ou du produit de base qui doit être recyclé ? Deuxièmement, quelle est l'importance des efficacités d'échelle ou des barrières à l'entrée ? Si celles-ci sont importantes, il devrait y avoir un seul système de collecte ou de recyclage des déchets.

Le Président note que la présentation de l'Italie porte principalement sur un consortium (COBAT) formé par tous les acteurs d'un secteur pour procéder à la récupération et au recyclage des piles contenant du plomb, et dont faisait partie l'association des recycleurs de piles. Le consortium avait été créé en vertu de la législation. L'autorité italienne de la concurrence est intervenue parce qu'elle craignait que COBAT restreigne la concurrence entre ses membres en protégeant des parts de marché détenues de longue date. L'autorité de la concurrence a imposé une amende mais sa décision a été annulée en appel. Le Président demande à l'Italie d'expliquer la décision du tribunal d'appel. Craignait-il qu'une concurrence accrue empêche la réalisation des objectifs environnementaux qui sous-tendaient l'accord ?

Un délégué de l'Italie répond que le consortium avait pour objet d'atténuer les problèmes environnementaux associés à l'élimination des piles usagées contenant du plomb, qui sont très toxiques, et d'encourager le recyclage des matériaux qui peuvent ensuite être réutilisés par le secteur.

L'autorité italienne de la concurrence est intervenue parce que certains fabricants de plomb se sont plaints auprès d'elle que les restrictions à la concurrence induites par le système faisaient monter les prix du plomb. L'autorité s'est opposée à deux éléments contenus dans les règles du consortium : premièrement, le consortium avait décidé avec les recycleurs que les quantités collectées chaque année seraient attribuées aux fonderies en fonction de leurs parts de marché passées ; deuxièmement, il était prévu qu'une entreprise de recyclage qui achèterait des piles directement auprès des producteurs sans passer par le consortium verrait diminuer d'autant la quantité qui lui serait fournie par ce dernier pour l'année considérée. L'autorité de la concurrence a estimé que cette disposition entraînait le maintien des parts de marché et le partage du marché, et empêchait la création d'autres systèmes de collecte, qui aurait peut-être été possible à l'expiration de la période d'exclusivité accordée à l'origine au consortium par la législation.

La décision du tribunal reposait davantage sur un aspect formel et technique que sur une analyse sur le fond visant à déterminer si le système en cause était le mieux indiqué pour réaliser des objectifs environnementaux. Le tribunal s'est fondé sur l'article 8.2 de la loi italienne sur la concurrence, qui s'inspire à la base de l'article 106 CE, aux termes duquel les entreprises chargées de la gestion de services d'intérêt économique général sont soumises aux règles de concurrence dans les limites où l'application de ces règles ne fait pas échec à l'accomplissement de la mission particulière qui leur a été impartie. Le tribunal a jugé que les restrictions contenues dans les règles régissant le système étaient essentielles à la réalisation des objectifs environnementaux. Il a aussi expliqué que le droit de la concurrence se serait appliqué à l'égard de COBAT seulement si ce consortium avait omis de remplir ses obligations dans l'exercice de sa mission publique – ce qui n'était pas le cas, selon le tribunal. En substance, le tribunal a décidé que le consortium cherchait à atteindre des objectifs présentant un intérêt public et que sa conduite était conforme aux prescriptions de la législation ; l'autorité de la concurrence estimait toutefois que la conduite du consortium allait au-delà de ce qui avait été prescrit par la législation et a fait appel de la décision. L'affaire est en cours d'étude par le Conseil d'État.

Le Président demande à l'Italie de préciser si le plomb, une fois recyclé, était attribué aux fonderies sur la base de leurs parts de marché passées. L'autorité de la concurrence s'opposait-elle à cet accord et dans l'affirmative, quelle aurait pu être la solution de remplacement ?

Le délégué explique que dans un document de sensibilisation récent concernant d'autres secteurs, l'autorité italienne de la concurrence a proposé une autre solution consistant à recourir à des procédures d'appels d'offres pour les quantités recyclées. Cette solution a dernièrement été mise en œuvre avec succès, semble-t-il, dans le secteur du recyclage du verre, qui a lancé une procédure d'appels d'offres internationale fondée sur des critères technologiques.

Le Président répond que les accords de ce type sont courants dans d'autres domaines. Il existe un argument contraire selon lequel une procédure d'appel d'offres ferait augmenter le prix du matériau récupéré et le rendrait moins concurrentiel que le produit de base non recyclé. Le système de quotas présentait l'avantage de permettre aux fonderies de se procurer du plomb à bas prix. Le recours à une procédure d'appels d'offres aurait supposé que le matériau brut soit plus cher et les fonderies auraient été moins en mesure de concurrencer les fabricants du produit de base. Ce type d'argument a-t-il été soumis à l'autorité de la concurrence ?

Le délégué italien répond que cet argument n'a pas été formulé. Il semble même que cette préoccupation n'ait pas été mentionnée dans le cas de l'accord sur le recyclage du verre.

Le Président passe ensuite à l'Espagne, qui décrit dans sa contribution une affaire pouvant rappeler celle examinée par l'Italie. Cette affaire concerne le recyclage du verre par un groupe créé par les acteurs du secteur. L'autorité de la concurrence s'est préoccupée principalement des effets de l'accord sur la concurrence sur les marchés voisins, et non sur le marché du recyclage proprement dit. Le Président demande à l'Espagne d'exposer les préoccupations suscitées par cette affaire et les faits survenus après qu'elle a rendu une décision négative.

Un délégué de l'Espagne explique qu'ECOVIDRIO est un système collectif de gestion des déchets d'emballage de verre qui regroupe tous les acteurs exerçant leurs activités sur les marchés associés à la gestion des déchets d'emballage de verre, notamment la collecte, le transport, le traitement et le recyclage. Jusqu'en 2005, tous les acteurs du secteur pouvaient être membres de l'organe de décision d'ECOVIDRIO. Par son entremise, ils pouvaient se livrer à des pratiques coordonnées et exclure les concurrents des marchés affectés. Cela a notamment nui aux concurrents plus faibles comme les récupérateurs, qui ne possédaient pas d'usine de traitement et devaient forcément vendre les déchets de verre récupérés aux sociétés de traitement, qui étaient pour la plupart associées à ECOVIDRIO. De plus, de nombreuses entreprises de traitement des déchets étaient intégrées verticalement et exploitaient également un service de collecte, ce qui en faisait des concurrentes sur le marché de la collecte des déchets de verre. En 2003, l'autorité espagnole de la concurrence a donc infligé une amende à ECOVIDRIO. Elle a également estimé qu'ECOVIDRIO aurait dû signaler les accords conclus par ses membres afin de s'assurer que ces derniers ne fassent pas obstacle à d'éventuels autres systèmes collectifs de gestion des déchets d'emballage de verre et ne nuisent pas à la concurrence sur les différents marchés concernés.

En 2004, ECOVIDRIO a donc soumis son système révisé de gestion collective à l'autorité de la concurrence et demandé une autorisation. Cette autorisation a été accordée en 2005 eu égard à l'engagement pris par ECOVIDRIO de satisfaire les conditions garantissant que les accords entre ses membres seraient compatibles avec la concurrence. Ces conditions concernaient principalement la composition des organes de prise de décision d'ECOVIDRIO, le type d'informations que ces organes étaient autorisés à traiter et les critères applicables dans le cadre des procédures d'appels d'offres pour des marchés de collecte et de traitement des déchets de verre. Ces conditions n'affectaient en rien les objectifs

environnementaux du système de gestion collective, étant donné qu'elles ne limitaient pas la quantité de déchets de verre pouvant être recyclée par le système. À preuve, au cours des sept dernières années, ECOVIDRIO recyclé davantage de déchets de verre.

En 2008, l'autorité espagnole de la concurrence a de nouveau engagé des poursuites à l'encontre d'ECOVIDRIO. L'autorité a constaté que depuis 2005, ce dernier avait systématiquement enfreint les conditions énoncées dans l'autorisation qui lui avait été accordée et avait en conséquence abusé de sa position dominante sur le marché de la gestion des déchets de verre. En particulier, l'autorité de la concurrence a jugé qu'ECOVIDRIO s'était livré à des pratiques de collusion lors d'une adjudication de marchés de collecte et de traitement afin de favoriser des entreprises affiliées au système collectif et qu'il avait réussi à évincer au moins un concurrent du marché de la collecte de déchets de verre d'emballage. En juillet 2010, l'autorité de la concurrence a infligé une amende de 1 000 000 EUR à ECOVIDRIO.

Le Président se tourne ensuite vers la Turquie, qui relate dans sa contribution une affaire concernant les acteurs du marché des accumulateurs, qui récupèrent et recyclent le plomb contenu dans les accumulateurs. L'autorité de la concurrence estimait que ce système éliminait la concurrence par les prix sur le marché du plomb, sans doute parce que les recycleurs et les fabricants d'accumulateurs étaient partie à l'accord en cause. Le Président demande à la Turquie de décrire cette affaire et de signaler les similitudes qu'elle présente avec l'affaire examinée en Italie.

Un délégué de la Turquie explique que la réglementation turque charge les producteurs et les importateurs de recycler et de collecter les accumulateurs usagés. La réglementation dispose expressément que les producteurs et les importateurs peuvent former leur propre organisation pour s'acquitter de leurs obligations aux termes de la réglementation. En Turquie, les accumulateurs usagés sont des matériaux prisés. Le recyclage des accumulateurs usagés permet de récupérer une quantité appréciable de plomb et comme il n'y a pas de minerai de plomb en Turquie, les seuls moyens de s'en procurer sont le recyclage d'accumulateurs ou l'importation. Le plomb est le principal intrant utilisé dans la fabrication d'accumulateurs et en Turquie, les fabricants d'accumulateurs possèdent leur propre entreprise de recyclage. Avant même l'adoption de la réglementation, les accumulateurs usagés étaient collectés et recyclés. La collecte et le recyclage d'accumulateurs ont toujours été des activités rentables en Turquie.

Après l'adoption de la réglementation, deux associations ont été créées, l'une par les producteurs et les entreprises de recyclage, et l'autre par les importateurs. La principale préoccupation de l'autorité de la concurrence concernait l'association des producteurs, étant donné que ceux-ci détiennent une part de marché combinée de près de 90 %. Cette association a créé une entreprise chargée de la collecte d'accumulateurs usagés auprès des distributeurs et des vendeurs avec lesquels traitent les producteurs membres. Les accords entre cette entreprise, les vendeurs et les distributeurs empêchaient la vente d'accumulateurs usagés aux récupérateurs agissant pour le compte de l'autre association, formée par les importateurs. En outre, le conseil d'administration de l'entreprise avait fixé le prix auquel vendeurs et distributeurs devaient lui vendre les accumulateurs usagés. Ceux-ci étaient ensuite distribués aux seules entreprises de recyclage membres de l'association. (La plupart de ces entreprises appartenaient aux producteurs.) Elles avaient interdiction d'acheter des accumulateurs auprès des récupérateurs agissant pour le compte de l'autre association. Dans ce cas aussi, l'entreprise fixait les prix d'achat et de vente des entreprises de recyclage.

L'autorité turque de la concurrence a décidé que l'entreprise violait le droit de la concurrence en fixant les prix des accumulateurs usagés et le nombre de transactions intervenant entre les acteurs du marché. Elle a exigé la cessation des pratiques, soit par modification de l'accord relatif à la création de l'entreprise, soit par dissolution de cette dernière, et a imposé une amende administrative à ses membres fondateurs.

Le Président fait ensuite observer que de nombreuses contributions recensent des affaires dans lesquelles l'adhésion à un système collectif de gestion des déchets a pu restreindre directement la concurrence sur le marché de base, que ce soit en raison de la mise en commun accrue des coûts pratiqués par les fabricants sur le marché de base ou d'un accord passé entre les concurrents pour répercuter les frais de récupération et de recyclage sur les consommateurs.

Le Président invite l'Union européenne à exposer l'affaire VOTOB, qui concerne un système de gestion des déchets mis en place par des exploitants de réservoirs de stockage. Ce système était financé au moyen d'une redevance fixe payée par l'ensemble des membres. La Commission a estimé que l'accord engendrait une mise en commun accrue des coûts qui réduisait la concurrence et que cela pouvait entraîner des conséquences sur le marché du produit de base. Le Président fait observer que ces affaires surviennent sans doute lorsque le coût du recyclage représente une part importante du coût sur le marché de base mais se demande quel est le seuil à partir duquel il faut se demander s'il existe un problème de concurrence. Le Président demande à l'Union européenne d'expliquer cette affaire et d'indiquer comment il faut procéder pour décider du seuil à partir duquel se pose un problème de concurrence.

Un délégué de l'UE explique que VOTOB était une association formée par six entreprises indépendantes qui proposaient des services de réservoirs de stockage dans certaines villes des Pays-Bas. Cette association a examiné avec les pouvoirs publics néerlandais la manière d'améliorer les normes environnementales et décidé de réaliser certains investissements pour réduire les émissions des réservoirs. Les membres de l'association ont ensuite décidé d'imposer une redevance supplémentaire commune aux clients afin de récupérer le coût de ces investissements. Cet accord conclu séparément par les six entreprises n'a pas été approuvé par les autorités néerlandaises. La Commission s'y est opposée parce qu'elle a estimé qu'il s'agissait d'un accord horizontal ayant pour objet la fixation des prix. De plus, dans leurs factures, les sociétés présentaient la redevance séparément comme si elle avait été imposée par les autorités publiques, et donnaient donc des informations trompeuses aux clients.

Cet accord avait pour autre effet que la mise en commun des coûts engendrée par la redevance uniforme aurait pu à son tour entraîner des effets défavorables sur le marché de base. À l'époque (c'est-à-dire au début des années 90), peu d'études avaient été consacrées à l'importance de la mise en commun des coûts. La Commission prépare toutefois de nouvelles lignes directrices concernant les accords horizontaux qui établiront clairement que la mise en commun des coûts peut soulever des problèmes de concurrence si elle risque d'augmenter les prix sur le marché en aval. Bien sûr, on ne peut délimiter clairement le seuil à partir duquel il existe des problèmes de concurrence. Cela est fonction du marché et du type de concurrence concernée dans chaque affaire.

Le Président demande ensuite comment l'UE déterminerait si la mise en commun des coûts soulève des préoccupations sur le marché en aval. Dans les affaires comme celle-ci, quels facteurs peuvent permettre de déterminer si la mise en commun des coûts influe sensiblement sur le prix ?

Le délégué répond qu'on ne peut pas utiliser de pourcentage précis pour définir ce que serait une influence sensible. Il faut examiner les principales composantes du prix en aval, les possibilités qu'ont les entreprises de modifier les autres composantes et, enfin, l'importance de la composante qui est fixe et commune.

Le Président note ensuite que selon la contribution des Pays-Bas, il est habituellement interdit d'obliger les entreprises qui participent à un système de récupération et de traitement des déchets à répercuter les redevances sur les consommateurs, et que cette position est sans doute partagée par de nombreuses délégations. Les Pays-Bas décrivent cependant deux affaires à l'occasion desquelles

l'autorité néerlandaise de la concurrence (la NMa) a autorisé l'obligation de répercussion des redevances. Le Président demande aux Pays-Bas de recenser les situations dans lesquelles ils autorisent la répercussion des redevances et d'indiquer sur quels critères doit se fonder la décision d'interdire l'imposition de redevances.

Un délégué des Pays-Bas répond qu'en général, la NMa n'autorise pas l'obligation de répercussion. Dans les deux affaires mentionnées par les Pays-Bas, la NMa a autorisé l'obligation de répercussion pour des raisons différentes. Dans la première affaire, qui portait sur le recyclage d'épaves de voitures, la NMa a estimé que l'obligation de répercussion ne restreignait pas la concurrence parce qu'elle entraînait une augmentation supplémentaire négligeable, d'environ 45 EUR, du coût de la voiture. La NMa n'a donc pas examiné les gains d'efficacité étant donné que cette faible augmentation ne risquait pas d'entraîner à une coordination des prix.

Dans la seconde affaire, qui concernait des activités de recyclage de papier, la NMa a autorisé un système dans lequel des grossistes pouvaient répercuter une redevance de recyclage sur les producteurs qui utilisaient le papier pour fabriquer des produits tels que de l'emballage ; les coûts de recyclage du papier et du carton étaient de la sorte répercutés sur des parties considérées comme responsables au départ de la production des déchets, ce qui concordait avec les objectifs du plan de gestion des déchets d'emballage imposé par les pouvoirs publics. La NMa a autorisé l'obligation de répercussion pour trois raisons :

- Il paraissait plus logique de faire assumer le coût du système de recyclage par les producteurs ;
- De plus, les coûts n'étaient pas répercutés sur les consommateurs finals.
- Il s'agissait du moyen le plus efficace de mettre en œuvre l'obligation de recyclage du papier décidée par les pouvoirs publics et de répartir les coûts y afférents. Les coûts administratifs s'en trouvaient limités parce que si on avait tenté de les imposer à des producteurs secondaires, c'est-à-dire à des fabricants d'emballage, de nombreuses entreprises auraient été concernées, et les coûts auraient sans doute été plus susceptibles d'être répercutés sur les consommateurs.

La NMa a de fait évalué la possibilité que ces coûts soient répercutés sur les consommateurs mais a jugé que tel ne serait pas le cas.

En général, toutefois, si des gains d'efficacité peuvent être obtenus autrement que par l'imposition d'obligations de répercussion, la NMa n'autoriserait pas cette pratique.

Le Président se tourne ensuite vers les États-Unis. Il note que dans leur contribution, ceux-ci affirment avec vigueur que si des entreprises concurrentes font valoir qu'un accord prévoyant de répercuter sur les consommateurs les coûts de conformité à de nouvelles règles environnementales était nécessaire, il leur sera probablement répondu que l'accord constitue une violation directe du principe fondamental de la Loi Sherman et qu'en conséquence, il ne peut pas être autorisé. Le Président demande aux États-Unis de formuler des observations sur les affaires exposées par la NMa ; par exemple, l'accord qui entraînait une augmentation de 45 EUR du coût d'une voiture soulevait-il vraiment un problème de concurrence ? Les États-Unis ont-ils pris en compte la possibilité que dans certains cas, l'augmentation du prix assumé par les consommateurs pourrait avoir un effet bénéfique en fournissant à ces derniers une incitation à ne pas jeter leurs biens, ce qui oblige la société à assumer les coûts du recyclage et de la récupération de ces produits ? En d'autres termes, est-ce toujours une mauvaise chose que le coût soit répercuté sur les consommateurs ?

Un délégué des États-Unis répond qu'en résumé, le droit américain de la concurrence dispose que si le Congrès n'a pas conclu qu'un segment de l'économie ou un dispositif réglementaire commandent un traitement particulier au regard du droit de la concurrence, l'attention est entièrement centrée sur le processus concurrentiel et la présence ou l'absence d'effets sur la concurrence. Il serait en conséquence difficile de justifier un accord ayant pour objet de répercuter sur les consommateurs le coût de la conformité à la réglementation, comme celui qui vient d'être mentionné par les Pays-Bas, sauf si le Congrès a demandé d'accorder une importance particulière aux effets d'un tel accord sur la concurrence – ce qui n'est pas impossible. Cela dit, l'examen des rôles respectifs des autorités de la concurrence et des autorités compétentes en matière d'environnement présenté dans la contribution des Pays-Bas dépeint largement la situation qui prévaut aux États-Unis. Lorsque le Congrès a établi que d'autres considérations de principe l'emportent, celles-ci peuvent jusqu'à un certain degré se substituer à l'analyse classique au regard du droit de la concurrence.

En l'absence de description détaillée d'un accord et des conditions dans lesquelles il est conclu, on peut difficilement prédire comment serait effectuée l'analyse au regard du droit américain de la concurrence. On peut toutefois formuler quelques observations :

La coopération entre entreprises concurrentes n'est pas suspecte en soi au regard du droit américain de la concurrence et une entreprise commune ayant un objectif légitime, par exemple une entreprise commune d'élimination d'épaves de voitures d'une manière respectueuse de l'environnement, ne violerait pas forcément le droit de la concurrence, à condition que l'accord n'ait pas eu pour effet net de restreindre la concurrence.

Il est presque certain qu'un tribunal américain rejeterait l'argument selon lequel un accord ayant pour objet de répercuter des redevances d'élimination des déchets sur les consommateurs et qui restreint la concurrence est légitime parce qu'il permet aux parties d'éliminer des épaves de voitures sans porter atteinte à l'environnement. Le droit américain de la concurrence n'autorise pas les parties privées, les tribunaux ou l'autorité de la concurrence à apprécier les avantages pour l'environnement ou les éventuels bienfaits sociaux au regard des effets anticoncurrentiels. Là encore, cela est vrai pour autant que le Congrès n'ait pas établi un principe différent. De même, un accord ayant pour objet de répercuter les redevances d'élimination des déchets sur les consommateurs ne saurait être justifié au motif qu'il n'a entraîné qu'une faible augmentation du prix. L'augmentation du prix serait considérée comme un effet anticoncurrentiel.

On peut imaginer des situations dans lesquelles la répercussion n'entraînerait pas d'augmentation du prix. Modifions légèrement l'hypothèse de départ : des entreprises concurrentes forment une entreprise commune de recyclage d'épaves de voitures mais on ne sait pas forcément si elles sont convenues du prix qu'elles demanderaient. Si le service n'existait pas auparavant et que son mode d'introduction n'a pas eu pour effet d'affecter fortement la concurrence, l'accord ne violerait pas forcément le droit de la concurrence. Il faudrait démontrer que l'accord sur les prix avait un objet pro concurrentiel, ce qui serait très difficile en l'absence de dispositions prises par le Congrès.

Le Président demande à l'Allemagne de présenter son système de récupération des déchets d'emballage, qui se distingue des autres systèmes sur un point qui n'est pas toujours clairement abordé dans les autres contributions, à savoir que dans le domaine de la collecte et du recyclage des déchets, il existe une tendance naturelle à créer des marchés plutôt concentrés parce que les économies d'échelle sont très importantes. L'Allemagne constitue un cas intéressant et différent étant donné que ce marché est passé d'une situation de monopole à celle d'une concurrence assez vive. Le Président demande à l'Allemagne d'indiquer ce qui a permis une concurrence accrue et si les avantages environnementaux sont maintenant aussi importants, ou plus importants qu'auparavant. La situation

observée en Allemagne permet-elle de penser que l'argument selon lequel il existe d'importantes économies d'échelle dans ce type d'activité n'est pas forcément exact ?

Un délégué de l'Allemagne fait un bref historique du plan de recyclage. Dans les années 80, l'Allemagne avait pour objectif politique de réduire le volume de déchets d'emballage et d'accroître la quantité de matériaux recyclés. L'attention était centrée sur les seuls déchets d'emballage, ce qui ne s'expliquerait pas aujourd'hui. Les pouvoirs publics et le secteur ont conçu ensemble un système de collecte et de recyclage des emballages de vente, suivant une méthode qui aurait dû susciter des doutes. Le système est entré en vigueur en 1991 lors de la création de l'entreprise Duales System Deutschland (DSD). DSD, qui exerçait son monopole dans toute l'Allemagne, était chargée de la collecte et du recyclage très poussé des emballages de vente. Ses actionnaires étaient l'industrie manufacturière, les détaillants et les entreprises de gestion des déchets, de sorte qu'en réalité, l'entreprise constituait un monopole mais aussi un cartel formé par la totalité des entreprises de recyclage des déchets. DSD, une entreprise à but non lucratif, était chargée uniquement de la gestion du système de recyclage, les activités proprement dites devant être sous-traitées à des entreprises de gestion des déchets.

L'Office fédéral des ententes, mais aussi la Commission européenne, ont dû engager plusieurs enquêtes et procédures pour démanteler le monopole et le cartel. Par exemple, la Commission européenne a établi que DSD ne devait pas imposer d'obligations d'exclusivité aux entreprises de gestion des déchets en service et devaient lancer des procédures d'appels d'offres pour tous les services de gestion des déchets. L'Office fédéral des ententes a veillé à ce que l'organisation cartellisée des parties prenantes de DSD soit dissoute. Il a engagé des procédures d'amendes à l'encontre d'un cartel qui, dans le cadre d'un appel d'offres, s'était livré à des pratiques de collusion au détriment de DSD lorsque celle-ci a lancé sa première procédure d'adjudication publique pour des services de gestion des déchets. L'Office a aussi lancé des procédures pour appels au boycott d'éventuels concurrents de DSD ; enfin, il a décidé que l'entreprise de collecte choisie par DSD devait conclure des contrats similaires avec des entreprises qui concurrencent cette dernière.

On peut difficilement dire aujourd'hui si le monopole était nécessaire au début pour mettre en place un tel système. DSD était un monopole doublé d'un cartel dont les coûts étaient assumés par les consommateurs. À l'origine, l'Office fédéral des ententes a toléré ce plan parce qu'il était prescrit par la législation et qu'il y avait en Allemagne un fort mouvement en faveur d'initiatives de ce type. La création de DSD, à la fois cartel et monopole, était alors la solution la plus simple qui s'offrait aux pouvoirs publics et au secteur pour instaurer ce système. On sait maintenant que le cartel n'était pas vraiment nécessaire.

Ajoutons que DSD a été démantelé du fait des poursuites engagées par l'autorité de la concurrence mais aussi des initiatives de sensibilisation à la concurrence. Par exemple, la dissolution de la structure d'actionnariat de DSD ne découle pas de l'application du droit de la concurrence mais de la sensibilisation à la concurrence. Au bout du compte, le démantèlement de DSD a été possible parce que les actionnaires voulaient régler le différend qui les opposait à l'Office fédéral des ententes.

À l'origine, les coûts annuels de gestion des déchets d'emballage s'élevaient à quelque 2 milliards EUR ; depuis que la concurrence existe dans ce domaine – il y existe deux entreprises DSD de petite taille – ils se situent à quelque 1 milliard EUR. Le secteur de la gestion des déchets et les producteurs ne sont plus actionnaires de DSD, dont l'actionnaire principal est KKR, Kohlberg Kravis Roberts, une société d'investissement.

Le plan de collecte et de recyclage des déchets a été mis en œuvre dans des conditions qui n'ont absolument rien à voir avec celles qui prévalent maintenant. L'actuel plan n'est pas parfait mais laisse

place à la concurrence et donne d'excellents résultats. Dans cette affaire, l'Office fédéral des ententes a eu gain de cause mais a mis une vingtaine d'années pour y parvenir.

Le Président demande ensuite à la Pologne de relater une affaire qui a également suscité des questions sur l'argument classique concernant les efficacités d'échelle dans le secteur du recyclage. La Pologne a bloqué la fusion de deux entreprises de recyclage qui récupéraient des piles usagées. Les deux entreprises devaient se réunir pour n'en former qu'une, mais les parties assuraient que cela leur permettrait de réaliser des gains d'efficacité et d'investir davantage dans l'innovation. L'autorité de la concurrence n'était toutefois pas convaincue. Comment expliquer ce résultat ?

Un délégué de la Pologne explique que l'affaire concernait les deux seules entreprises de recyclage de piles usagées présentes sur ce marché en Pologne. Il n'y avait pas d'obstacles techniques au transport de piles hors de Pologne, mais les exportations étaient rigoureusement restreintes et quasiment inexistantes. Le marché en cause se limitait donc à la Pologne.

L'autorité de la concurrence avait au moins deux raisons de douter des gains d'efficacité censés résulter de la fusion. Premièrement, les arguments avancés n'allaient pas au-delà des affirmations générales : la fusion aurait des effets bénéfiques ; les parties tailleraient dans les coûts ; elles créeraient des effets synergiques ; enfin, elles seraient en mesure d'investir davantage dans le réseau de collecte de piles. Les prétendus gains d'efficacité n'étaient pas prouvés et n'auraient pas été très convaincants même s'il s'était agi d'un autre marché. Cependant, l'aspect le plus important était la nature particulière du marché. Du fait que les propriétaires de piles usagées étaient tenus par la législation de remettre les piles aux recycleurs, la courbe de l'offre était presque inélastique. Le maintien des deux parties sur le marché leur permettrait de se faire concurrence en offrant de meilleures conditions aux fournisseurs ; leur fusion ferait pratiquement disparaître les incitations à proposer de meilleures conditions aux fournisseurs. En conséquence, même si la fusion aurait entraîné des gains d'efficacité considérables, les parties n'auraient plus eu d'intérêt à répercuter ces gains sur des fournisseurs forcés de leur remettre les piles. Cela rendait difficilement recevable les arguments concernant les gains d'efficacité.

Le Président demande au délégué si la fusion aurait pu favoriser la concurrence sur le marché en aval si elle avait permis à l'entreprise de recyclage d'offrir des conditions moins avantageuses aux fournisseurs tenus d'apporter leurs déchets et, partant, avait fait en sorte que le recyclage concurrence plus fortement le produit de base.

Le délégué répond que le marché en aval était de fait plutôt concurrentiel. Le marché de la production de plomb était développé à l'échelle de l'Europe au moins et il n'était pas nécessaire d'y accroître la concurrence. Il fallait évaluer les avantages en aval au regard d'une grave restriction de la concurrence sur le marché en amont.

Une déléguée d'Israël pose ensuite une question à l'Office fédéral des ententes (*Bundeskartellamt*). Elle explique qu'en Israël, la Knesset s'apprête à voter une loi sur le recyclage des déchets d'emballage. Elle demande à l'Allemagne si les gains d'efficacité réalisés par DSD ont fait l'objet d'une étude ou s'il est possible de dire qu'au cours des années, les coûts d'exploitation auraient sans doute été moindres si un monopole n'avait pas été créé par l'entremise du dispositif de DSD.

Le délégué de l'Allemagne répond que l'Office fédéral des ententes n'a pas examiné expressément les gains d'efficacité mais qu'il s'est penché sur les coûts du système. Lorsque DSD a commencé ses activités de cartel et de monopole, les coûts annuels assumés par les entreprises et les consommateurs s'élevaient à quelque 2 milliards EUR. Maintenant que de nombreuses entreprises assurent la récupération et le recyclage des déchets d'emballage, les coûts se situent à environ

1 milliard EUR par an. Cela illustre bien comment DSD était administrée au départ et l'effet de la concurrence dans ce domaine. L'Office fédéral des ententes a toujours dû faire face à l'argument selon lequel la gestion et le recyclage des déchets ne fonctionnent que dans un système monopolistique. Aujourd'hui, il est clair que cet argument est inexact ; le système peut fonctionner beaucoup plus efficacement dans un cadre concurrentiel.

Le Président aborde ensuite les problèmes de concurrence liés aux plans de recyclage, à la fixation de normes et aux systèmes de certification dus à l'initiative d'une branche d'activité. Plusieurs pays mentionnent dans leur contribution que les autorités de la concurrence ont étudié ces initiatives et doutent parfois de leurs avantages ; d'autres pays reconnaissent qu'elles comportent tout au moins des risques et de possibles avantages.

Le Président demande à la Suisse de présenter la mesure appelée « centime climatique » qu'elle aborde dans sa contribution. Dans cette affaire, tous les acteurs du secteur du transport de carburant devaient verser à une fondation un paiement volontaire de 1.5 centime le litre de carburant transporté ; la fondation devait ensuite entreprendre des activités respectueuses de l'environnement. L'autorité de la concurrence a décidé que cet accord était anticoncurrentiel mais en dernier ressort, les pouvoirs publics l'ont exempté de l'application du droit de la concurrence. Comment expliquer cette décision ? Est-ce parce que l'autorité de la concurrence ne pouvait pas prendre en compte les avantages environnementaux de l'accord ? Des groupes d'intérêts ont-ils exercé des pressions sur les pouvoirs publics pour que l'accord soit exempté de l'application du droit de la concurrence, mais sans aucune contrepartie ?

Un délégué de la Suisse explique que le droit de l'environnement encourage les initiatives privées visant à réaliser des objectifs en matière d'environnement. C'est dans ce cadre que s'inscrivait l'initiative du secteur des carburants. À la demande des pouvoirs publics suisses, l'autorité suisse de la concurrence a enquêté sur le projet de redevance sous forme de centime climatique ; cette affaire ne figurait pas parmi les priorités de son programme de mise en œuvre. Cependant, après avoir évalué l'accord, elle a décidé qu'il n'était pas compatible avec le droit suisse de la concurrence en raison de l'absence de lien entre les projets auxquels était affectées les redevances et la réduction de l'utilisation de carburant ou la création d'une incitation à en consommer moins. La fondation poursuivait simplement des objectifs environnementaux en Suisse et à l'étranger. Certains supposaient que cet accord n'était pas légitime mais les pouvoirs publics l'ont considéré sous un angle favorable, pensant qu'il inciterait les consommateurs à diminuer leur consommation. Cependant, comme l'accord découlait d'une initiative privée et non des dispositions d'un texte de loi, il devait faire l'objet d'une autorisation dans l'intérêt public. C'est pourquoi le Parlement examine actuellement l'opportunité d'introduire cette initiative en légiférant afin de l'exempter de l'application du droit de la concurrence. Le problème était que même si l'idée d'une redevance climatique suscite un appui unanime, il fallait considérer que l'accord était illégitime parce qu'il était dû à une initiative privée.

Le Président demande ensuite au délégué de la Suisse d'expliquer pourquoi la redevance climatique a été considérée comme anticoncurrentielle. Puisque tous les transporteurs de carburants avaient accepté de payer la redevance, pourquoi celle-ci restreignait-elle la concurrence ? De plus, même s'il n'y avait pas de lien entre la redevance et l'incitation donnée aux consommateurs à réduire leur consommation de carburant, l'augmentation du prix, même si elle était très modérée, incitait-elle à réduire la consommation ?

Le délégué de la Suisse confirme que la redevance était perçue par le biais du relèvement du prix du produit fini et avait donc pour effet d'augmenter le prix du carburant. C'est l'uniformité de la redevance climatique qui a créé le problème de concurrence.

Le Président note que l'augmentation du prix du carburant devrait réduire la consommation. Cet accord devrait-il être prescrit par la législation et, partant, exempté de l'application du droit de la concurrence ?

Le délégué répond par l'affirmative et ajoute que cela devrait être clarifié par un texte de loi afin d'aplanir les difficultés actuelles.

Le Président passe ensuite à la contribution du Japon, qui examine une initiative sectorielle encouragée par les pouvoirs publics afin de réduire l'utilisation des sacs en plastique dans les magasins. Cette question est bien connue de nombreux pays membres. Le Président demande au Japon d'expliquer pourquoi la JFTC ne s'est pas opposée – contrairement à la Suisse -- à un accord entre détaillants en vue d'introduire une redevance pour l'utilisation de sacs en plastique. La redevance était-elle différenciée ou uniforme ? S'il s'agissait d'une redevance uniforme, pourquoi n'a-t-on pas jugé que l'accord violait le droit de la concurrence ?

Un délégué du Japon explique que l'affaire a été portée devant la JFTC dans le cadre d'une consultation effectuée sur une base volontaire par les détaillants de la ville de A. En avril 2007, le gouvernement a adopté une loi révisée qui rangeait l'introduction d'une redevance pour les sacs plastiques parmi l'une des initiatives recommandées aux détaillants afin de réduire l'utilisation des sacs en plastique. Un comité a été mis sur pied puis des groupes de résidents et de détaillants de la ville ont réfléchi à des moyens de réduire l'utilisation des sacs en plastique. L'adhésion au comité avait un caractère volontaire, mais la quasi-totalité des détaillants de la ville ont participé à ses activités. Les groupes de résidents et les détaillants participants ont conclu un accord en vertu duquel les clients devaient payer un prix uniforme de 5 JPY le sac s'ils utilisaient les sacs en plastique fournis par les détaillants.

Les détaillants ont ensuite demandé à la JFTC si cet accord poserait un problème au regard du droit de la concurrence. Pour de nombreuses raisons, la JFTC a répondu par la négative, et ce même s'il s'agissait d'un accord conclu entre des détaillants en vue d'introduire une redevance uniforme sur les sacs plastiques :

- L'accord ne restreint pas la concurrence en matière de vente de marchandises par des détaillants. La fourniture de sacs en plastique aux clients est considérée comme un service complémentaire, et les clients qui font des achats chez les détaillants concernés peuvent se passer des sacs puisqu'ils peuvent se munir des leurs.
- La société est mieux sensibilisée à la nécessité de réduire l'utilisation des sacs en plastique, ce qui justifiait cette initiative. L'accord a été conclu entre les détaillants, mais aussi dans le cadre d'une initiative transparente des administrateurs municipaux, qui ont invité des groupes de résidents à représenter les consommateurs.
- Les détaillants ont fait appel à d'autres moyens pour réduire l'utilisation des sacs en plastique, mais sans grands résultats. L'introduction d'une redevance pour les sacs en plastique semble être un moyen plus efficace que les autres, mais peu de détaillants y ont eu recours par le passé, la plupart craignant de perdre des clients au profit des concurrents qui ne faisaient pas payer les sacs.
- Si le prix unitaire du sac n'est pas fixe, il risque de baisser. Un prix unitaire trop bas risque de compromettre l'objectif de réduction de l'utilisation des sacs en plastique

- Le prix unitaire de 5 JPY ne peut être considéré comme un fardeau imposé aux clients pour atteindre l'objectif de réduction de la consommation ; le groupe de résidents s'est associé à l'initiative et a approuvé le prix unitaire.

Le Président enchaîne avec un commentaire sur cette affaire : il fait un rapprochement entre la dernière raison mentionnée et les observations formulées par l'UE et les Pays-Bas : la redevance de 5 JPY n'était pas suffisante pour modifier sensiblement la situation de la concurrence, surtout que les consommateurs pouvaient apporter leurs propres sacs. Il existe une notion de seuil et si la redevance s'était élevée à 400 JPY, le résultat aurait été différent.

Le Président aborde ensuite la question des normes environnementales. Dans sa contribution, le Royaume-Uni examine la fixation de normes dans le cadre d'un accord sectoriel de caractère volontaire sur l'introduction d'ampoules à basse consommation. Cette initiative était encouragée et conduite par les pouvoirs publics. L'autorité de la concurrence (l'OFT), qui est intervenue dans cette affaire, a exprimé certaines préoccupations concernant la concurrence et proposé des mesures correctrices. Le Président demande au Royaume-Uni d'exposer ces préoccupations et d'expliquer comment les mesures correctrices sont parvenues à les dissiper.

Un délégué du Royaume-Uni explique que l'OFT a été informée d'un possible accord sectoriel relatif à la fixation de normes à caractère volontaire sur les ampoules à basse consommation. La question soulevée portait sur le point de savoir si cet accord concorderait avec les principes de hiérarchisation des priorités de l'OFT. Il a été décidé que tel serait le cas.

L'OFT a travaillé de concert avec le ministère principalement chargé de mener à bien cette initiative, mais aussi avec le ministère des Entreprises. Entre autres effets positifs, cette affaire a permis à l'OFT de convaincre le ministère des Entreprises de donner des orientations aux fonctionnaires qui sont en contact avec les entreprises afin qu'ils soient mieux sensibilisés aux contraintes du droit de la concurrence.

Les préoccupations de l'OFT tenaient au fait que la portée de l'accord était très imprécise, si l'on excepte le fait que les pouvoirs publics et le secteur concerné travaillaient de concert. L'accord risquait de donner lieu à des pratiques coordonnées et de collusion à long terme et de créer des obstacles à l'entrée, en particulier pour les fournisseurs nouveaux et de petite taille.

Les protections procédurales en place portaient essentiellement sur la réduction des risques de coordination et de collusion. L'OFT a affirmé clairement que les pouvoirs publics et les acteurs sectoriels devaient être dûment informés de l'application possible des règles de concurrence et veiller à protéger leurs propres intérêts, notamment en demandant l'avis d'experts juridiques indépendants. En outre, l'organisation, le cadrage et le déroulement des réunions étaient bien définis et se limitaient à la problématique en question.

Les protections ont permis de s'assurer que les discussions et l'accord de caractère volontaire auquel elles ont abouti ne dépassent pas inutilement l'objectif fixé par les pouvoirs publics.

Notons que l'OFT a par la suite examiné les avantages possibles de cette intervention informelle pour les consommateurs. L'hypothèse est peut-être discutable, mais l'OFT estime que les avantages retirés par les consommateurs se situent autour de 7 millions GBP.

Le délégué du Royaume-Uni ajoute une observation sur la question posée à l'Allemagne par le Président, sur le point de savoir si la situation dans ce pays devrait conduire l'autorité de la concurrence à se montrer plus circonspecte à l'égard des plans sectoriels de récupération et de

recyclage. La réponse est affirmative : en Allemagne, les méthodes, systèmes et techniques de recyclage sont beaucoup plus innovants qu'avant et cela n'aurait pas été possible si l'autorité de la concurrence n'avait pas examiné les systèmes de manière beaucoup plus rigoureuse au cours des cinq à dix dernières années.

Le Président passe ensuite la parole à l'Union européenne, dont la contribution examine une affaire hypothétique de fixation de norme environnementale, à partir d'une décision réelle de la Commission. L'affaire concerne un accord conclu par des fabricants et des importateurs européens de lave-linge afin d'éliminer les appareils les moins efficaces. Comment l'UE a-t-elle défini ses préoccupations ? L'UE partage-t-elle l'avis du Royaume-Uni, selon lequel il faut adopter une attitude circonspecte à l'égard des initiatives sectorielles de fixation de normes même lorsqu'elles comportent des avantages environnementaux ? Quel rôle joue la Commission dans ce type d'affaires ?

Un délégué de l'UE répond qu'apparemment, les préoccupations de l'OFT concernaient surtout le processus menant à l'adoption de ces normes et l'utilisation abusive dudit processus dans le but de mener des pratiques coordonnées dans le secteur. Ces préoccupations sont légitimes et ont été traitées très efficacement. Cependant, dans l'affaire du CEDEC, la Commission ne s'est pas tant intéressée au processus qu'au résultat. En effet, l'élimination des appareils moins efficaces du point de vue de l'environnement a fait diminuer la production et la diversité, et comme les appareils en cause étaient les moins chers, cela aurait pu provoquer une hausse des prix. La Commission a toutefois estimé que ce problème était compensé par l'avantage environnemental de l'initiative (en particulier parce que celle-ci a fait diminuer d'autres coûts, comme ceux en eau et en électricité), laquelle a donc été approuvée.

En ce qui concerne le fait de savoir si l'autorité de la concurrence doit s'intéresser aux initiatives purement sectorielles ou se demander si les pouvoirs publics y sont associés, le délégué de l'UE explique que dans l'affaire examinée, les pouvoirs publics ont d'une certaine manière encouragé l'initiative et que celle-ci n'était donc pas purement sectorielle. Ces affaires méritent-elles que l'on s'y intéresse ? Il ne faut pas faire ce type de distinction parce que ce qui importe en dernier ressort est de savoir s'il y a des restrictions ou des avantages du point de vue de la concurrence et comment les mettre en balance. Le délégué note qu'il ne faut pas s'abstenir d'intervenir même lorsque ce sont les pouvoirs publics qui prennent l'initiative d'un accord qui pourrait porter atteinte à la concurrence sans que cela soit compensé par des effets positifs.

Un délégué d'Israël pose une question à la délégation du Royaume-Uni sur la collecte et le recyclage obligatoires des emballages : peut-on considérer que les accords de type cartel sont légitimes au début mais qu'il faut en limiter la durée ou, au contraire, que cela est-il totalement inutile et qu'il faut introduire la concurrence au premier stade de l'application de la législation ?

Un délégué du Royaume-Uni répond que cela dépend du type de marché et de produits. On peut envisager, s'agissant de systèmes très spécialisés conçus par exemple pour les produits radioactifs ou certains types de déchets médicaux hospitaliers, que la mise en place d'un monopole soit nécessaire au début. Il faudrait toutefois aborder ces questions avec plus de circonspection aujourd'hui que dans les années 90, époque où l'on invoquait toujours l'argument selon lequel la monopolisation était nécessaire à long terme. Le principe de base est qu'il faut dans la grande majorité des cas privilégier la recherche d'un marché concurrentiel, sauf si la nature particulière des déchets ne le permet pas.

Le Président invite ensuite l'Islande à participer à la discussion au nom des pays nordiques en faisant un bref exposé sur la certification environnementale, domaine dans lequel le rapport commun des pays nordiques relève de possibles problèmes de concurrence.

Un délégué de l'Islande explique que le rapport des pays nordiques ne traite pas d'affaires concernant des procédures de certification anticoncurrentielles, mais qu'il relève que ce domaine pourrait soulever des préoccupations sur un plan plus général. Il résume ensuite brièvement les aspects économiques de la certification. La certification peut donner des informations sur les caractéristiques qui différencient un produit de produits similaires, mais qui sont invisibles et habituellement très difficiles à détecter. Pour renforcer la crédibilité de la certification, la procédure de certification est habituellement assurée par une tierce partie indépendante qui réalise une évaluation impartiale. Il faut que les consommateurs aient confiance dans ce système de contrôle, sans quoi la certification n'est pas efficace.

La certification est utile eu égard aux asymétries d'information étant donné que les vendeurs connaissent mieux leurs produits que les acheteurs. Elle communique des informations utiles sur un produit, ce qui réduit les coûts d'information assumés par les consommateurs. Elle améliore par conséquent l'efficacité du marché. La certification peut également réduire considérablement les coûts de transaction et, partant, accroître la mobilité. Cela devrait renforcer la concurrence puis faciliter la réalisation des objectifs environnementaux. La certification permet de proposer certains produits qui autrement ne seraient pas offerts : les producteurs peuvent en effet se lancer dans la fabrication de produits de grande qualité dont les aspects positifs sont difficiles à détecter. Sans certification, les consommateurs ne seraient peut-être pas en mesure de percevoir la différence entre les produits certifiés et les autres produits et il ne serait peut-être pas rentable de fabriquer certains produits. Par exemple, dans le domaine de l'agriculture biologique, les consommateurs ne voient pas forcément la différence entre des pommes de terre biologiques et non biologiques.

Le délégué ajoute que la certification peut toutefois créer certains problèmes de concurrence. Une différenciation très réussie risque de réduire la concurrence sur les prix sur un marché et de la remplacer par une concurrence sur la qualité des produits. Il se peut alors qu'il existe un pouvoir de marché. Dans le domaine des produits agricoles, la certification n'entraîne pas forcément de pouvoir de marché parce que de nombreux producteurs offrent des produits biologiques. Elle risque plutôt de segmenter le marché en produits ordinaires et en produits certifiés.

Le pouvoir de marché est la principale explication aux problèmes parfois associés à la certification. Lorsque l'entreprise qui offre des produits certifiés détient un pouvoir de marché important, elle peut mettre en œuvre des stratégies qui font augmenter les coûts de ses concurrents, notamment des contrats de fourniture exclusive, et exercer des pressions en faveur de l'adoption de dispositions, de règles ou de normes nuisibles pour ses concurrents. Elle peut aussi s'engager dans des guerres de marketing et de R-D pour mettre en difficulté des concurrents de moindre envergure. Le rapport des pays nordiques donne des exemples de stratégies utilisées pour faire monter les coûts des concurrents en tentant d'influer sur la teneur des programmes de certification. Ces stratégies consistent notamment à (i) tenter de définir des critères de certification qui nuisent aux concurrents ou sont défavorables aux principales matières premières entrant dans la fabrication de leurs produits ; (ii) exercer des pressions en faveur de critères de certification qui affecteront considérablement la capacité de concurrencer des producteurs étrangers, en limitant par exemple la durée de transport d'un produit ; et (iii) exercer des pressions afin qu'il soit préconisé d'utiliser de l'équipement onéreux pour mener des essais.

En résumé, les programmes de certification devraient être conçus attentivement de manière à éviter qu'ils soient discriminatoires. Les autorités de la concurrence doivent au besoin signaler que la conception d'une procédure de certification donnée risque de fausser ou d'entraver inutilement la concurrence.

Le rapport des pays nordiques contient une observation sur les aliments issus de l'agriculture biologique. Les détaillants de l'alimentaire sont en général très puissants. De leur côté, les acteurs de l'agriculture biologique sont souvent nombreux, et exposés de ce fait à une concurrence intense. En conséquence, ce sont souvent les détaillants et non les producteurs qui bénéficient de la prime associée aux produits biologiques certifiés. Les autorités de la concurrence pourraient donc être appelées déployer des efforts pour encourager les acteurs de la chaîne d'approvisionnement à jouer à force égale.

Le Président invite ensuite le BIAC à prendre part à la discussion. Il explique que dans sa contribution, le BIAC soulève des questions concernant les « approches inutilement divergentes que les organismes de la concurrence ont adoptées pour intégrer les intérêts environnementaux à la mise en œuvre du droit de la concurrence » et le fait qu'ils n'ont pas reconnu explicitement que « les avantages écologiques sont des gains d'efficacité économique ». Jusqu'à présent, on s'accorde généralement à dire que de nombreuses pratiques pourraient restreindre la concurrence ; nul ne s'est opposé aux décisions concernant les affaires examinées. D'aucuns pensent, ajoute le Président, que même dans les pays où la législation n'autorise pas l'autorité de la concurrence à prendre en compte les avantages autres qu'économiques, il existe une volonté d'appliquer ce qui se rapproche d'un critère de proportionnalité. Lorsque la restriction de concurrence est sans grande gravité et que les avantages environnementaux sont importants, démontrables et directs, les autorités de la concurrence ont tendance à prendre ces avantages en compte. Il peut exister des différences, mais celles-ci tiennent aux différences entre législations. Le Président demande au BIAC s'il partage cette vision rassurante des choses.

Un délégué du BIAC affirme que même si les autorités de la concurrence semblent trouver des solutions valables, il serait utile que les milieux d'affaires internationaux sachent comment elles procèdent et à quel cadre d'analyse précis elles ont recours. Le BIAC avait espéré qu'il y aurait davantage d'informations sur les accords horizontaux relatifs à l'environnement, comme les accords sur les normes de qualité environnementale, dans l'affaire du CEDEC ; les accords de développement conjoint entre concurrents afin de mettre au point un produit innovant et supérieur du point de vue de l'environnement ; et, peut-être, les systèmes de quotas. Dans sa contribution, le BIAC mentionne un système de quotas destiné à protéger les ressources naturelles qui obligeait des pêcheurs à limiter leurs prises ; ce plan a soulevé des problèmes au regard de l'article premier de la Loi Sherman.

À l'avenir, les entreprises seront beaucoup plus disposées à envisager de travailler en coopération pour a) mettre au point et éventuellement commercialiser ensemble des technologies plus écologiques ; et b) trouver des solutions de remplacement pour les technologies et les biens de production devenus obsolètes. Il faudrait se demander si un accord donné risquerait d'être critiquable même s'il apporte de nombreux avantages aux consommateurs. Le BIAC est très favorable à l'idée de laisser une marge de manœuvre aux entreprises pour qu'elles proposent des plans prenant en compte explicitement l'amélioration de l'efficacité pour l'environnement. Il serait toutefois utile que les autorités de la concurrence appliquent un système uniforme.

Aux États-Unis, les gains d'efficacité en termes d'environnement ne sont pas facilement reconnus ; il y a même des doutes quant à savoir si les accords sont soumis à la règle de raison. Cela dissuade les sociétés de conclure des accords environnementaux susceptibles d'améliorer l'efficacité. Dans l'UE, on ne sait pas au juste dans quelle mesure les gains d'efficacité en termes d'environnement peuvent être pris en compte au regard de l'article 101.3. D'autres pays adoptent une approche différente. Le BIAC préconise un cadre d'analyse plus uniforme, qui prenne en compte le concept sous-jacent de bien-être. Par exemple, il serait préférable d'utiliser, pour mesurer et quantifier l'amélioration de l'efficacité environnementale, une méthode similaire à celle qui sert pour les gains

d'efficience ordinaires. Il faut également penser aux régimes de protection des entreprises qui aimeraient travailler en coopération à la réalisation d'un objectif environnemental.

Le Président convient avec le BIAC de l'importance d'une plus grande prise en compte des avantages environnementaux, pour autant que la législation l'autorise. Les sujets abordés à l'occasion des tables rondes du Comité laissent toutefois percevoir des différences entre les approches retenues par les autorités nationales de la concurrence, et que l'on peut expliquer par les différences entre les législations. Les membres peuvent tenter de dégager une compréhension commune des questions économiques, tout au moins, mais dans certains cas, la législation les empêche de parvenir aux mêmes résultats.

Le Président aborde les questions de sensibilisation. Dans sa contribution, le Canada examine une liste visant à s'assurer que la législation conçue pour atteindre des objectifs d'action étendus soit cohérente avec la politique de la concurrence. Le Président demande au Canada de présenter cette liste, puis de préciser si son usage est largement répandu au Canada et si elle a permis d'assurer une meilleure cohérence au niveau de la législation nationale.

Un délégué du Canada explique que la contribution de ce pays renvoie à un ensemble de principes directeurs qui régissent le processus d'élaboration de la réglementation. Comme ces principes n'existent pas seulement au Canada et qu'ils sont décrits de façon détaillée dans le document, le délégué passe directement au sixième point de la liste, qui demande que la réglementation adoptée au Canada encourage les marchés ouverts et concurrentiels. Au cours des dernières années, de nombreuses initiatives ont été prises, notamment dans le domaine de la réglementation des déchets – méthodes de recyclage, de réutilisation et de réduction des déchets. Le cadre d'introduction de ce type de réglementation a été mis en place en 2009 lors de l'approbation du Plan d'action pancanadien pour la responsabilité élargie des producteurs. Ce plan d'action transfère la responsabilité de la gestion des déchets – autrefois assumée par le secteur public et financée par les impôts – vers le propriétaire de marque, le fabricant ou le premier importateur. Il encourage également les producteurs et les importateurs à coopérer à la collecte, au transport et au traitement des déchets et à fixer les redevances de recyclage nécessaires au financement des programmes perçues auprès des consommateurs. Le Bureau de la concurrence a joué un rôle actif dans la prestation de conseils aux responsables de la réglementation et aux organismes chargés de l'exécution des programmes de gestion des déchets désignés. Ces conseils ont porté sur la conception et la mise en œuvre de modèles de réglementation qui répondent aux objectifs environnementaux tout en réduisant au minimum les effets sur la concurrence et en respectant les six principes énumérés dans la contribution. Par exemple, le Bureau entretient un dialogue permanent avec les décideurs et les parties prenantes de l'Ontario, province qui a récemment amorcé un changement en faveur d'un système de quotas pour la collecte et le traitement des déchets électroniques. Le système de quotas a involontairement découragé les acteurs du marché de se faire concurrence pour avoir accès à ces produits, au détriment des opérateurs plus efficaces. Les acteurs ont accepté des modifications qui ont permis aux opérateurs de se procurer leurs produits directement auprès des producteurs de déchets et attribué les matériaux collectifs visés par le programme aux termes de contrats d'un an par voie de soumissions.

Le Président mentionne ensuite la contribution d'Israël, qui présente une affaire de sensibilisation concernant une entreprise commune formée par les grands fabricants du secteur des boissons en vue de la collecte de contenants de boissons. D'après la contribution, ce plan a préoccupé l'autorité de la concurrence (IAA) non parce qu'il soulevait un problème de concurrence mais parce qu'il ne permettait pas de réaliser efficacement les objectifs environnementaux. L'IAA a donc fait certaines suggestions afin d'améliorer l'efficacité du système de collecte. Le Président demande si l'IAA peut être préoccupée par l'efficacité de ce type de plan même en l'absence de problème de concurrence, ou s'il y avait un problème de concurrence en partie lié aux initiatives de sensibilisation.

Un délégué d'Israël explique que la contribution de son pays porte sur deux affaires distinctes. Dans la première affaire, qui a été portée devant le tribunal de la concurrence, les parties demandaient l'autorisation de travailler en coopération, ce à quoi s'opposait l'autorité de la concurrence au motif que cela créerait des problèmes de concurrence. La seconde affaire concernait une demande de prorogation d'accord et l'autorité de la concurrence a demandé au tribunal d'examiner également l'efficacité du plan. Comme l'entreprise n'avait pas atteint les seuils prescrits dans la législation, l'autorité de la concurrence a demandé au tribunal, à supposer qu'il accorderait l'autorisation de prorogation, d'imposer des mesures correctrices afin d'augmenter l'efficacité de l'initiative ; seul le tribunal (et non le directeur général) pouvait autoriser ces mesures.

L'IAA prépare aussi, avec le ministère de l'Environnement, une nouvelle législation sur les déchets d'emballage. L'autorité de la concurrence tente de convaincre le ministère, qui travaille en étroite collaboration avec l'association des fabricants, de veiller à ce que la législation permette la concurrence à l'avenir, même si les fabricants cherchent actuellement à obtenir le droit de créer un seul système de coopération. Eu égard aux problèmes de pouvoir de marché qui sont créés par un monopole, l'IAA préférerait que la concurrence soit possible à l'avenir pour les fabricants qui ne seraient pas satisfaits de la coopération. De plus, les problèmes associés à un accord de type cartel, qu'il faudrait traiter en imposant des mesures correctrices, pourraient être résolus par l'introduction de la concurrence lorsque le marché aurait atteint une maturité suffisante, et d'autres systèmes de coopération en matière de traitement des déchets d'emballage pourraient être mis en place.

Un délégué de la Grèce demande la parole et signale une décision récente de l'autorité grecque de la concurrence concernant le rôle des pouvoirs publics et de la réglementation dans le domaine de la politique de l'environnement. Dans le cadre de la législation relative aux restrictions en matière d'aménagement du territoire imposées dans le centre d'Athènes pour des raisons environnementales, la question s'est posée de savoir si l'autorité publique chargée des autorisations dans ce domaine était une entreprise et, de ce fait, assujettie au droit de la concurrence. Dans cette affaire, l'autorité de la concurrence a décidé que le droit de la concurrence ne pouvait pas s'appliquer pour des raisons très précises ; elle a toutefois estimé dans le même temps que le principe de la libre concurrence peut être considéré comme étant reconnu par la Constitution et peut donc être pris en compte dans une évaluation fondée sur le critère de l'intérêt public. Cela devrait permettre de régler les différends et de mettre en œuvre les deux politiques sans déroger à l'une d'entre elles ni établir une hiérarchie entre elles.

Le Président résume ensuite les principales questions qui ont été abordées. Le degré de prise en compte des avantages environnementaux est fonction de la législation plutôt que de la politique de l'autorité de la concurrence. Lorsque la législation permet de prendre en compte les avantages environnementaux, une seconde question se pose, qui consiste à savoir jusqu'à quel point ces avantages peuvent être pris en compte. Des suggestions utiles ont été faites sur les moyens d'évaluer plus efficacement la valeur monétaire de ces avantages. Ces avantages doivent être mis en balance avec les risques d'effets anticoncurrentiels que pourraient présenter les accords en cause. La discussion a permis d'aborder de nombreuses affaires, concernant en particulier des accords relatifs à la mise en œuvre de plans de recyclage qui risquaient de causer, volontairement ou non, de graves problèmes de concurrence.

La fixation de normes, la certification et les marchés publics peuvent aussi créer des problèmes de concurrence. Certaines préoccupations doivent être examinées dans le cadre de la législation sur la concurrence. Il faudrait en quelque sorte mettre en balance les effets favorables et défavorables à la concurrence, à condition toutefois que les effets défavorables soient sans grande gravité.

L'Allemagne a relaté une affaire intéressante qui illustre la nécessité de mettre en doute certains arguments selon lesquels des économies d'échelle importantes justifient les accords anticoncurrentiels qui procurent des avantages environnementaux. Dans certaines affaires, les économies d'échelle n'étaient pas

démontrées de manière convaincante et par ailleurs, la concurrence permet avec le temps d'atteindre plus efficacement les objectifs environnementaux.

Il est devenu clair que les autorités nationales de la concurrence n'envisagent pas de faire une distinction entre les accords purement volontaires et les accords dus à l'initiative des pouvoirs publics ; elles se contentent d'examiner les accords en fonction des avantages environnementaux et des effets néfastes pour la concurrence. Le BIAC devrait donc être assuré de la neutralité des autorités de la concurrence et de leur approche rigoureuse et scientifique plus que politique.

On note que de nombreuses affaires concernent des programmes de recyclage, mais aussi que dans de nombreuses autres situations, des accords environnementaux auraient pu soulever des problèmes de concurrence.

Il y aurait lieu de mener des activités de sensibilisation. La décision à cet égard appartient aux autorités de la concurrence. Les considérations environnementales sont si importantes qu'il est justifié d'investir des ressources et de développer des compétences dans ce domaine.