グリーン社会の実現に向けた競争政策研究会
（第２回）
議事録

開催概要

日時：令和４年４月21日（木）19:00～21:00
場所：Teamsによるオンライン会議

出席者

＜委員＞（○：座長、五十音順）

上野 貴弘	一般財団法人電力中央研究所 社会経済研究所 研究推進マネージャー（サステナビリティ） 上席研究員
○大橋　弘	東京大学　副学長 同大学大学院経済学研究科　教授
川濵　昇	京都大学大学院法学研究科　教授
高宮　雄介	森・濱田松本法律事務所　弁護士
野田　学	東京八丁堀法律事務所　弁護士
林　秀弥	名古屋大学大学院法学研究科　教授
柳　武史	一橋大学大学院法学研究科　准教授

＜事務局（経済産業省経済産業政策局）＞

蓮井　智哉	大臣官房審議官（経済産業政策局担当）
杉原　光俊	競争環境整備室　室長
門田　裕一郎	競争環境整備室／知的財産政策室　室長補佐
荏畑　龍太郎	競争環境整備室　室長補佐
関野　拓哉	競争環境整備室　係長

＜オブザーバー（経済産業省、公正取引委員会、農林水産省）＞

経済産業省

河原　圭	産業技術環境局エネルギー・環境イノベーション戦略室　室長
折居　直	産業技術環境局環境政策課　課長補佐
吉村　一元	製造産業局素材産業課　課長
須摩　悠史	製造産業局素形材産業室　室長補佐

公正取引委員会

五十嵐　收	経済取引局調整課　課長補佐

農林水産省

松本　賢英	大臣官房政策課技術政策室　室長

※上記の他、事前登録による一般傍聴を実施。

議題

海外有識者からのヒアリング

議事内容

〇大橋座長

定刻となりましたので、ただ今から、グリーン社会の実現に向けた競争政策研究会第２回会合を開催いたします。本日は大変夜遅い時間にも関わらず、御出席くださいまして、ありがとうございます。

それでは、早速議事に入ります。前回会合でお知らせしたとおり、本日と次回は、海外より有識者をお招きしてヒアリングを実施することとしています。本日お招きしている有識者は、クリアリー・ゴットリーブ法律事務所のパートナー弁護士であるマウリッツ・ドールマンス様です。ドールマンス様の御経歴について、資料５として用意しておりますが、私のほうから簡単に御紹介させていただきます。

ドールマンス様は、世界各国に拠点を有するクリアリー・ゴットリーブ法律事務所のパートナー弁護士として、主にロンドンを拠点に御活躍しています。主にイギリスや EU 各国の競争法について、特に知的財産やサステナビリティに関係する領域を御専門とされ、30 年以上にわたり、エネルギー、情報技術、製造業など多岐にわたる企業を支援されてきました。

ドールマンス様は、これまでサステナビリティと競争法に関する数多くの事例に関与されており、多数の論文や書籍を執筆されています。また、OECD や欧州委員会の会議でも専門家として講演されるなど、欧州でのサステナビリティと競争法の議論について、優れた御知見をお持ちの代表的な専門家のお１人です。

ドールマンス様、本日はお忙しいところ、御講演をお引き受けいただきまして、誠にありがとうございます。

それでは、ヒアリングに入ります。ドールマンス様より、資料６に基づき、御講演をいただければと思います。どうぞよろしくお願いします。

〇ドールマンス弁護士

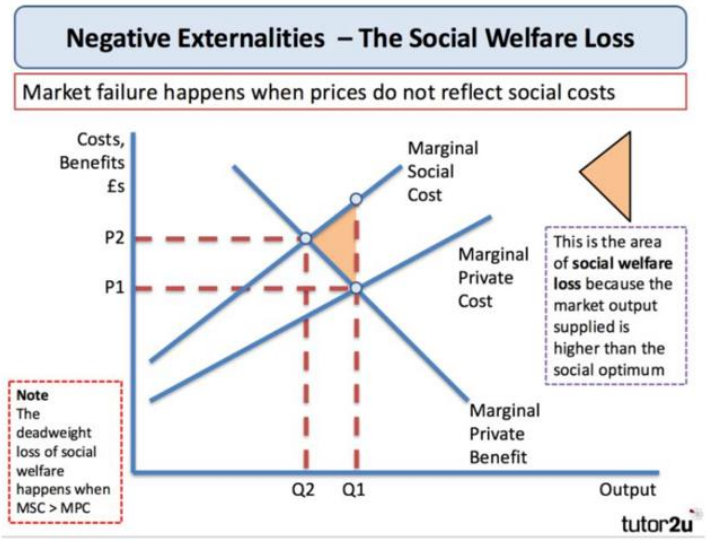
Today, we will discuss three topics: One, are there barriers to decarbonization in competition law? Second, what is the proposed policy of the European Union to change competition law to allow decarbonization agreements? Third, since the climate crisis is a worldwide problem, what could Japan do to adjust its competition policy?

What is the problem?

The problem is market failure in sustainability and environmental economics. The cost of greenhouse

gas emissions and pollution is not included in the price of products and services. This means that demand in the market for unsustainable products is higher than the economically efficient level. You see this reflected in this simple slide.

1.1 We cannot solely rely on markets to solve the climate crisis because of market failures:



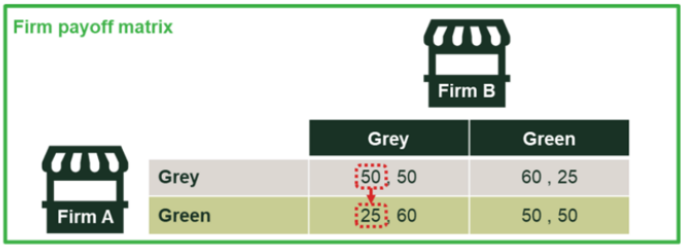
 See John Newman, *"The Output-Welfare Fallacy: A Modern Antitrust Paradox"*

When we include the social cost of pollution and climate change, the price will be P2 and the quantity Q2.The price is P1 and the quantity is Q1 if prices do not include the social cost of pollution and carbon emissions. That means that there is a social welfare loss, associated with pollution and the climate crisis.

This leads to what is called a "collective action problem". Everyone would be better off if we moved to a green economy, but no one wants to be the first to start that move to the green economy. You see this illustrated in this little diagram.

Market failure and "collective action problem" illustrated:

Figure 1 First-mover disadvantage in green coordination



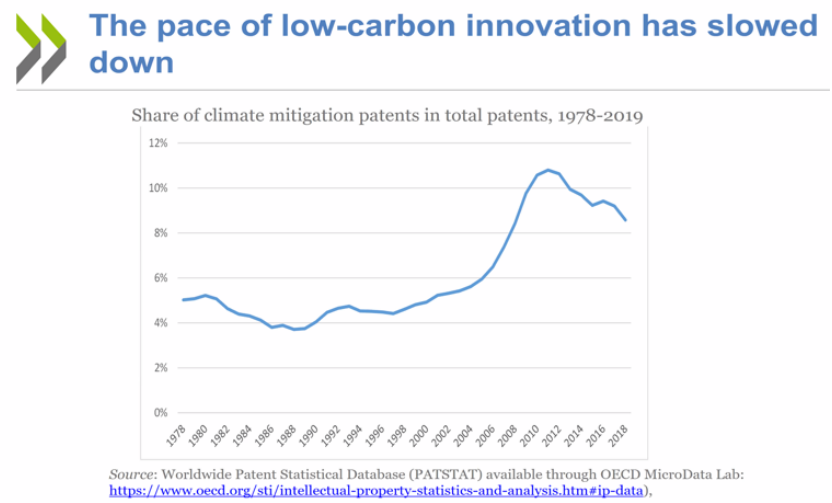
See Jenkins et al (Oxera), "*When to give the green light to green agreements*"

Firm A has a profit of 50, and if it moves to a green production without greenhouse gas emissions, its cost would go up, meaning that its profits go down to 25, and firm B would take its market share and have profits of 60.

So, firm A does not move because it fears a loss of market share and profits. Firm B also does not move because it, too, fears a loss of market share and a loss of profits. The only way to solve this collective action problem is to coordinate and to move together.

Economists and policymakers think that an important solution to the climate crisis is climate innovation, driven by competition – the development of low carbon and low greenhouse gas technologies. Unfortunately, the pace of low carbon innovation is slowing down and many of the technologies that we need either do not yet exist or they do exist but they are not yet scalable – they cannot be increased in volume enough to make a difference in the climate crisis. So innovation is very important to solve the climate crisis, but it is not the sole solution for the time being because the competition does not drive innovation enough.

And we cannot solely rely on market-driven innovation:

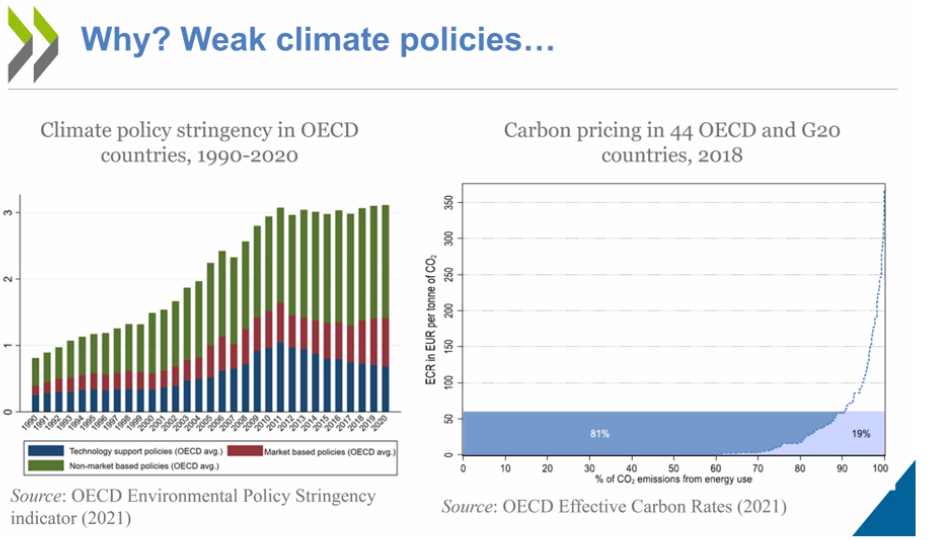


CLEARY GOTTLIEB Dechezlepretre, OECD, presentation, October 14, 2021 6

The market failure and coordination problem that I described earlier is usually solved with regulation, but in practice, regulation is not adequate. In individual countries, there is often not the political will to drive regulation if other countries don't take the same steps and other countries see the same first-mover disadvantage. So just like we see a market failure or a coordination problem in the markets, we also see a regulatory failure or a coordination problem in worldwide regulation.

Some people may think, why should Japan or Europe introduce strict climate regulation when China, for instance, or India continue to use very high-carbon-emitting energy generation?

Market failures are resolved by regulation, but we see policy failure:



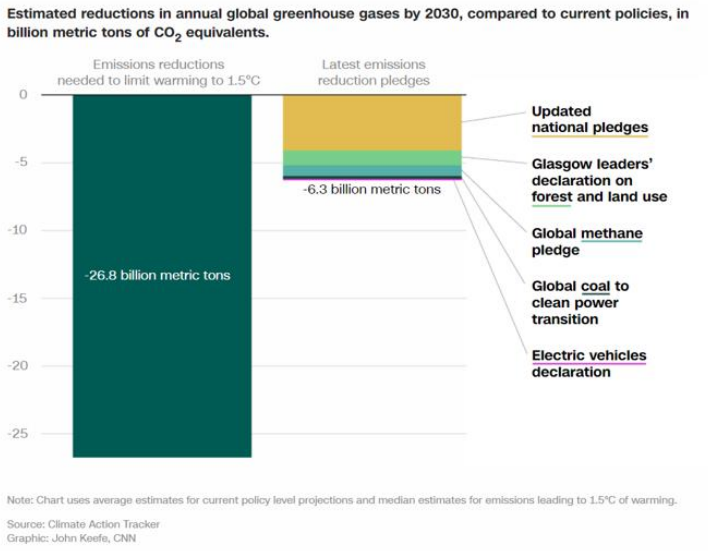
CLEARY GOTTLIEB

Dechezlepretre, OECD, presentation, October 14, 2021
See also World Bank Carbon Pricing Dashboard

7

You see in the left-hand graph that the level of climate regulation has flattened in the last decade. And in the right-hand graph, you can see that carbon taxation and emissions trading rights cover about 20% of the economy, which is not enough. The policy failure is also illustrated by this graph.

Because of policy failure, we need private cooperation as a complement to regulation



CLEARY GOTTLIEB

Regulatory deficit: Promises made at COP26

On the left-hand side, we see the amount of regulation needed to reduce emissions enough to reach the Paris Agreement goals. On the right-hand side, we see the impact of the promises that were made at COP26, showing a very significant shortfall.

So innovation and regulation are both necessary, but not enough to defeat the climate crisis. We also need other forms of coordination and that include private action by companies. Individual action by companies is possible if there is a willingness to pay by consumers, but the willingness to pay often does not exist. Where consumers' willingness to pay is not enough, private action is vulnerable to the coordination problem. No one wants to move if the others don't also move. So the only way for the private sector to move, in markets where consumers are not willing to pay enough for sustainable production, is to work together for decarbonization.

So the solution in situations where there is either a need for economies of scale or scope, or to overcome lack of willingness to pay, is for companies to work together. The problem is that antitrust law prohibits or can prohibit cooperation between companies. I recommend an article by Amelia Miazad called "Prosocial Antitrust". It gives examples of where competition law is discouraging companies from working together to deal with environmental and climate problems.

1.2 Yet competition law is a barrier to decarbonisation (1)

"The stakes are high. The case studies I introduce in my article demonstrate that the **fear of prompting antitrust enforcement is preventing companies from addressing environmental and social crises at a time when we need the private sector's help**. For example, while jurisdictions and companies have made bold commitments to address the plastic waste crisis, antitrust law is preventing the food industry from adopting industry-wide standards that would mandate the use of food-grade recycled plastics. And while apparel companies have attempted to rid their supply chains of forced labor and inhumane working conditions, their efforts to create binding and industry-wide labor standards are scuttled by antitrust scrutiny. While it is true that companies can and do avoid antitrust scrutiny by entering into unilateral and voluntary initiatives, decades of such efforts have produced marginal impacts.

[…] As industry leaders in Europe have pointed out, they cannot meaningfully address systemic risks unless they collaborate with competitors. There are a variety of reasons for this. First, only through collaboration can companies **create sufficient demand for sustainable products**. Second, companies need to collaborate to **produce sufficient quantities of sustainable goods at scale**, such as by jointly financing recycling infrastructure and facilities for food-contact recycled plastic, which today suffers from a global shortage. Third, companies need to enter into **binding agreements to phase out** unsustainable products. Fourth, companies must share commercially-sensitive pricing information to address sustainability and human rights challenges in their supply chains."

Amelia Miazad, "*Prosocial Antitrust*"

CLEARY GOTTLIEB 9

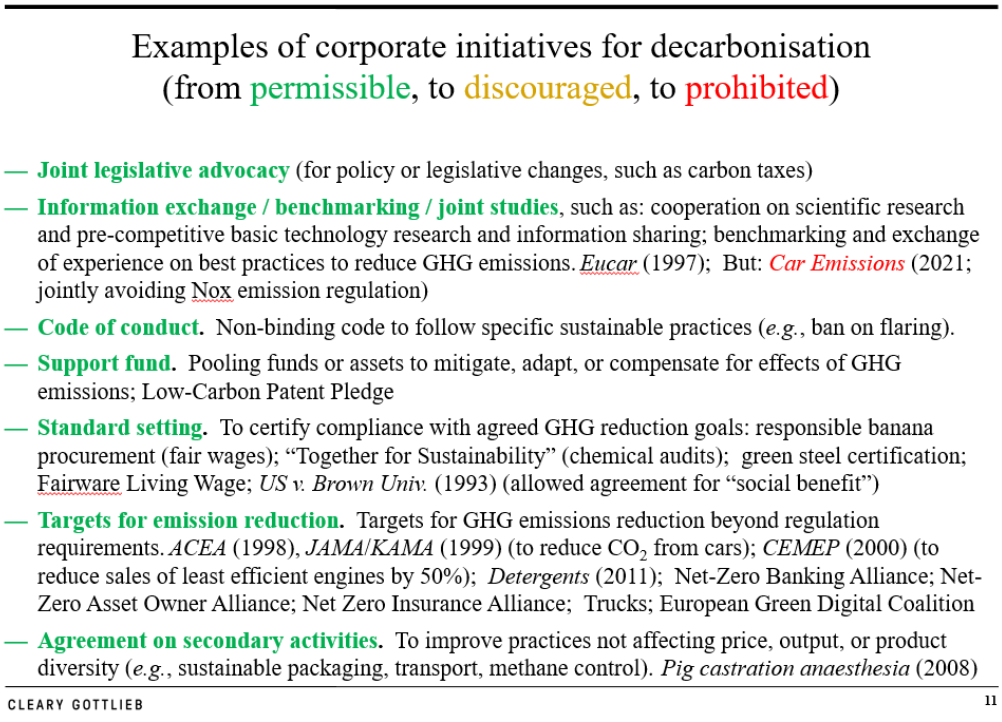
I will now give some examples of agreements that I have seen companies consider and even propose

and even implement. And these examples show two things. First, they show that there are companies that are interested in sustainability cooperation. And second, they show that competition law in certain cases discourages cooperation for sustainability.

The Karr survey found that more than 50% of businesses have walked away from sustainability projects for fear of competition law infringement. Other examples are in this OECD paper and this BIAC note. And if you click on the links, you will see those materials.

There are three types of agreement for decarbonization under those that are permissible clearly, those that are and they are in green; those that are clearly prohibited, they are in red; and those that are in between, they are in Orange – where it is not clear on the current policy whether they are allowed.

These slides give examples of agreements that either I have seen or that are in case law that are permissible under antitrust.



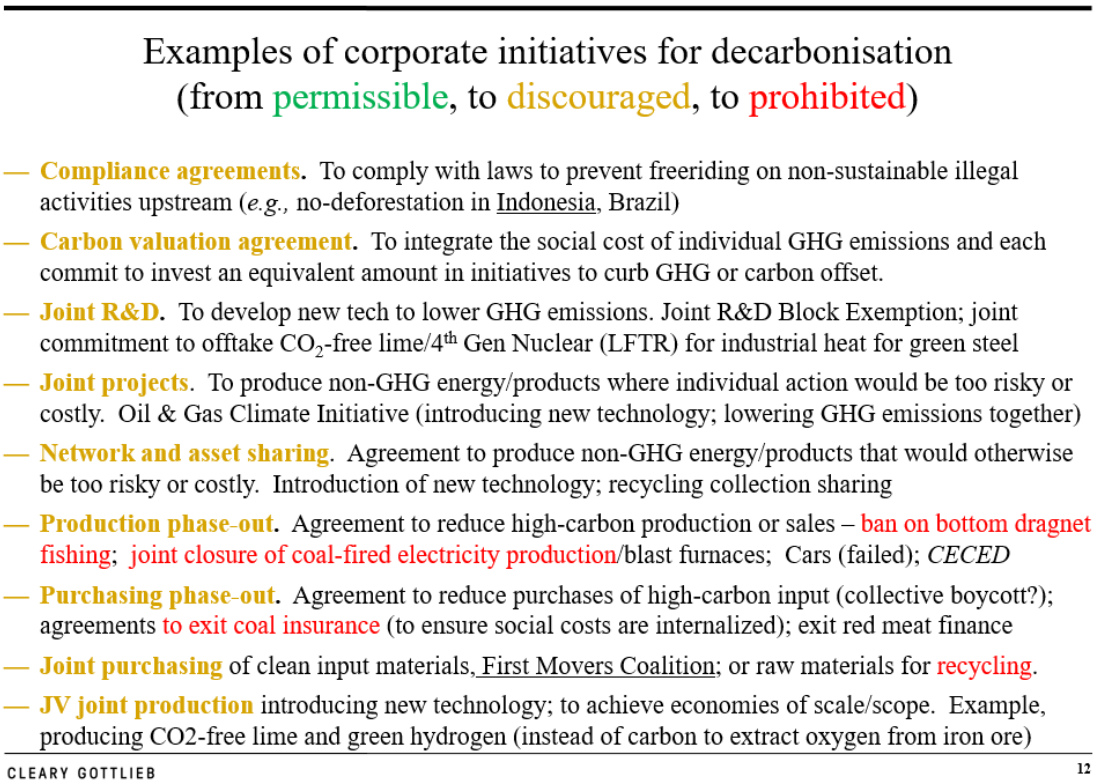
For instance, these can be codes of conduct where, for instance, oil and gas companies promise not to flare off gas in oil and gas exploitation. Another example is standard setting where companies agree, for instance, on what is the definition of green steel or steel made without CO2 and greenhouse gas emissions. Other examples are, for instance, agreements to reduce greenhouse gas emissions by 50%

in 2030 and by 100% by 2050.

I have also seen, and I've also seen case law about agreements where it is not clear under competition law currently whether they are allowed, even though they could have good impact on solving the climate crisis.

Some agreements are allowed if they meet, for instance, the requirements of Block Exemption Regulations.

But what, for instance, about an agreement between steel manufacturers to use only lime that is made without CO2 emissions? Such lime exists, but it is not yet on the market. If companies jointly agree to buy it, the economies of scale would allow the price of that CO2-free lime to go down.



And what about an agreement between steel companies, for instance, to use green hydrogen to "reduce" iron oxides in ore to create steel (by taking the oxygen out of iron ore)? Currently coal is used for that – pure coal, called coke – which results in high CO2 emissions.

If they all agreed to move to hydrogen to extract the oxygen, that would be a significant improvement

from a climate perspective. But the problem is that they may not have enough green hydrogen, and therefore would need to invest in creating green hydrogen, which makes their product more expensive. That may discourage steel makers from doing this individually.

A third example is the use of 4th generation nuclear technology to create industrial heat. This 4th generation nuclear technology already exists. For instance, the LFTR technology mentioned here, which allows thorium-based molten salt power generation. This technology exists, but it takes investments and a promise to use it, for it to be able to come to market. Individual steel companies may not wish to promise to use this technology, even though is good for the climate, because it might be too expensive to bring to market, in particular if their competitors do not use it.

These are just three examples in the green steel sector where cooperation could be helpful to reduce emissions from steel production and to create green steel. The first is using CO2-free lime. The second is using hydrogen for reduction of iron ore to create steel. And the third is using 4th generation CO2-free technology to generate industrial heat for steel production. Currently, competition law may discourage that kind of cooperation.

Another example is an agreement to shut down blast furnaces, or in the energy sector, an agreement to shut down coal-fired electricity production.

Such an agreement was prohibited in the Netherlands a few years ago. Electricity producers said they would not individually shut down coal-based power plants if competitors are not going to do the same. So the only way to reduce CO2 emissions from coal-based power generation was to agree that they would all shut down together and all move to clean power generation together.

The Dutch antitrust authority prohibited that agreement, in essence, for two reasons. The first was that they only counted the benefits that occurred in the Netherlands, even though the agreement would have benefits for the worldwide climate. We will discuss later that under the new proposed EU competition policy, the antitrust authority might be willing to count at least Europe-wide benefits and possibly worldwide benefits, and then the outcome could have been different.

The second reason why the agreement was prohibited was because the antitrust authority thought the benefits weren't high enough, because the energy manufacturers were not willing to destroy the carbon emission rights associated with coal-fired electricity production. They wanted to sell those rights. So, the antitrust authority was concerned that the agreement would just move emissions from one industry to another one.

So, to conclude the first section, we have seen efforts by companies to agree on reduction of carbon emissions. And second, we have seen cases where agreements were discouraged or prohibited when they would have been good for the climate crisis and should have been allowed.

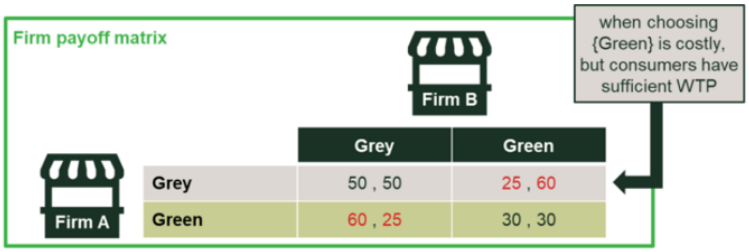
The European Union, and particularly the European Commission, is considering whether to change its competition policy to allow sustainability agreements if they meet certain conditions. Their policy has two pillars.

The first pillar is to take strong action against collusion between companies to undermine regulation or to greenwash. This diagram gives you an example how in certain cases, companies may have an incentive to agree not to clean up their act instead of cleaning up their act.

2.1 EU efforts to define competition policy for decarbonisation – first step was to take action against greenwashing collusion

If partial WTP, parties who focus only on short-term profits may earn more by colluding on grey than going green individually

Figure 3 Incentive to coordinate on grey instead



Note: The first entry in a cell reflects the payoff for Firm A and the second entry represents the payoff for Firm B. In this case, firms would actually choose {Green} under competition (for instance, because costs are not too high and there is sufficient willingness-to-pay), but would under coordination choose {Grey}.
Source: Oxera.

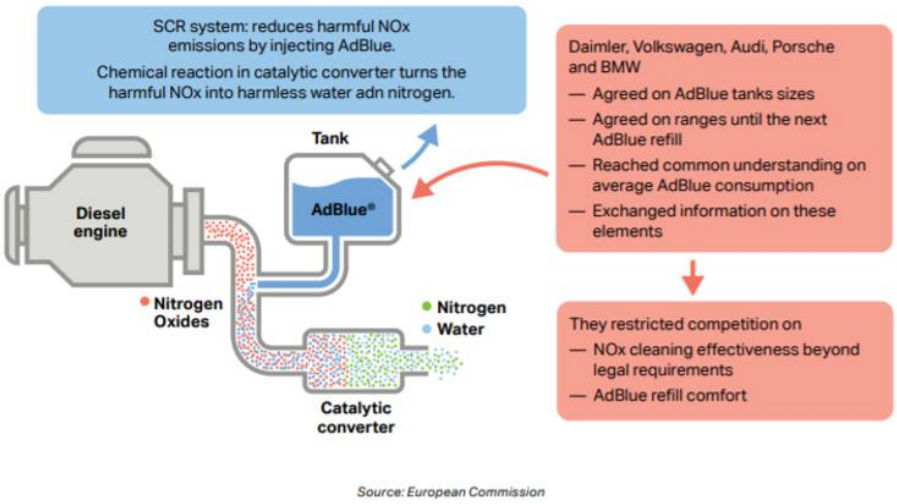
Source: "*When to give the green light to green agreements*" (Jenkins et al, Oxera)

An example is the Adblue cartel. Diesel engines emit polluting nitrogen oxide by running. These polluting nitrogen oxide can be changed into non-polluting nitrogen and water in a catalytic converter. For the catalytic converter to work, it needs a chemical product called AdBlue. To provide enough of this catalyst in a car, the tank must have a certain size -- big enough to provide enough catalyst for a year's use in driving the car. This tank took up space in the luggage area of cars. Carmakers agreed

quietly to reduce the size of the AdBlue tank. That undermined the regulatory objectives of environmental rules.

Example of action against greenwashing collusion: *AdBlue*

Figure 1 - The Commission's Findings In AdBlue Cartel



Source: European Commission

See also "*Colluding Against Environmental Regulation*" (Jorge Ale-Chilet, Cuicui Chen, Jing Li and Mathias Reynaert) TSE Working Paper 1204, April 2021

The European Commission imposed high fines, arguing that this was effectively a cartel between carmakers. This is one example of an antitrust authority taking action against greenwashing and collusion in order to reduce climate or pollution risks. But apart from punishing greenwashing collusion, they also want to help companies work together if there are climate benefits.

I recommend a paper written by economists Oxera, which is called "When to give the green light to green agreements". They explain that companies have the right incentive, the right encouragement, to clean up their production if they realize that there are positive spillover effects. Positive spillover benefits exist where cleaning production by one firm benefits also other firms, so all firms have the incentive to clean up production.

2.2 Second step: recognize that firms have incentives to *improve* sustainability where there are "sustainability spill-over benefits"

Firms increasingly realize that (a) they benefit in the long term, if (b) their *rivals* eliminate greenhouse gas emissions ("spillover benefits"), and (c) these private benefits align with public benefits. If so, firms have a genuine incentive to pursue efficient sustainability goals, and competition authorities don't need to assume that they are just out to raise short-term profits at the expense of consumers.

> *"where positive spill-overs exist between firms, efforts by one firm also benefit other firms. In this case, the level of sustainability efforts by other firms would actually have a positive effect on a firm achieving its own objectives. Allowing firms to coordinate their sustainability efforts will then lead to higher overall effort levels."*

Examples: reduced existential threat from climate change; genuine social objectives; common cost savings; improved industry reputation; avoiding costly and inefficient regulation

Source: "*When to give the green light to green agreements*" (Jenkins et al, Oxera)

Examples of positive spillover benefits are, for instance, reduced threat to physical assets from climate change. There are more and more companies that realize that if they go on producing high emissions as they currently do, eventually there will be serious problems for the economy, for society, and for their existence. Those firms have an incentive to work together to reduce greenhouse gas emissions.

The European Commission is proposing new guidelines for agreements between competitors, the so-called Horizontal Guidelines. The proposed new guidelines include a chapter on sustainability agreements.

The guidelines first confirm that the Commission will in future take sustainability benefits into account when assessing agreements under competition law. They give examples of sustainability agreements that are permissible under competition law.

New Horizontal Guidelines – Assessment under Article 101(1) TFEU

- Guidelines confirms that sustainability is a EU policy priority;
- Guidelines confirm sustainability agreements may **fall outside the scope of the prohibition** of Article 101 TFEU, if they do not affect any parameters of competition:
  - agreements that do not concern the economic activity of competitors, but their internal corporate conduct;
  - agreements to create database containing information about sustainable suppliers;
  - agreements for organizing industry-wide or consumers' awareness campaigns.
- Guidelines describe "soft safe harbor" for widely defined **sustainability standards agreements – even if mandatory –** if 7 cumulative conditions are met:
  - unlimited participation and transparent process for selecting the standard;
  - no obligation for third parties to comply to the standard; [criticize]
  - participating companies can adopt a higher sustainability standard;
  - no exchange of commercially sensitive information beyond what is necessary;
  - non-discriminatory access to the outcome of the standardization process;
  - no appreciable increase in price nor appreciable reduction in choice; [criticize]
  - monitoring system ensuring compliance.

CLEARY GOTTLIEB 17

The most important example of this is the so-called standard sustainability standards agreement. This type of agreement is broadly defined, more widely than in the past. For instance, they would allow sustainability standards agreements that are mandatory or binding on the participants. Also, the definition of sustainability standards would include also, for instance, agreements to use input or raw materials that are produced without carbon emissions or greenhouse gas emissions. These agreements would be allowed if seven conditions are met, which I will not have time to discuss. The bottom line is that the Commission allows these kind of sustainability standards, even if they are mandatory and even if they are widely defined.

This chapter on sustainability agreement also explains when the Commission will approve agreements even if they restrict competition.

New Horizontal Guidelines – Assessment under Article 101(3) TFEU

- If an agreement restricts competition, it can still be allowed if it leads to **efficiency gains**: quantitative and/or qualitative sustainability benefits;
- Agreement must prove **necessary** to attain the sustainability objective:
  - overcome first mover disadvantage;
  - cure market failures where public policies and regulations fail to do so;
  - achieve economies of scale;
  - nudge consumers' preferences.
- Consumers must receive a **fair share**, deriving from three different kinds of benefits:
  - "individual use value benefits" -- such as better quality of product;
  - "individual non-use value benefits" -- benefits resulting from the consumers' appreciation of the impact of their sustainable consumption on others;
  - "collective benefits" -- positive externalities that benefit society as a whole. [Indert]
    - HG 603: "*where consumers in the relevant market **substantially overlap** with, or are **part of** the beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market occurring outside that market, can be taken into account if they are **significant enough** to compensate consumers in the relevant market for the harm suffered.*"
- Residual competition

CLEARY GOTTLIEB 18

The guidelines discuss four conditions for approval of such agreements, as found in Article 101, Paragraph 3 TFEU. The first condition is that the agreement must lead to an efficiency gain. That could be, for instance, reduced greenhouse gas emissions or reduced CO2 emissions.

Second, the agreement must be necessary to achieve that sustainability objective. An example is, for instance, where they overcome the first-mover disadvantage, the market failure that we discussed at the beginning of this presentation. It is particularly relevant where public policy and regulation is not enough to eliminate market failures. Another example is where cooperation is necessary to achieve minimum efficient economies of scale. This, for instance, could be an agreement, a so-called offtake agreement, where members of an industry all agree that they will buy a particular new clean input material.

The third condition for the approval of agreements that restrict competition is that consumers must receive a fair share of the benefit. The Commission will recognize three different kinds of benefits to consumers. The idea is that the benefits to consumers must be greater than the disadvantages to consumers. The disadvantages, for instance, are price increases or reduced choice. The first benefit they recognize is called "individual use value benefit". This occurs, for instance, if as a result of a sustainability agreement, the quality of a product improves or the price of the product decreases. In

that case, the consumer who buys the product receives an individual value benefit.

In traditional antitrust analysis, individual use value benefits have long been recognized. What is new is that the Commission will also take account of “individual non-use value benefits”. This is a value that a consumer may feel it receives if it buys a clean product and therefore does not pollute, meaning that neighbors are better off, or climate risks are reduced. It's a form of enlightened altruism. There is a growing body of economic evidence showing that consumers are willing to pay for helping others, and helping the climate, and improving the environment. Those values can be quantified with consumer surveys (contingent pricing surveys for hedonic pricing analysis). The Commission is willing to take those values into account as a benefit that helps outweigh the disadvantages that consumers may have as a result of an agreement.

The third category of benefits that the Commission is now willing to consider in the assessment of sustainability agreements are “collective benefits”. These are, for instance, benefits for the climate as a whole, for society as a whole, positive externalities that benefit the entire society.

In Japanese policy, this is perhaps not new because Japanese policy may have an appreciation of benefits to society more than, for instance, European or American policy which focuses more on the individual consumer benefits. The recognition of collective benefits as a possible justification is an important change in European policy.

There is, however, still a question about how to quantify the collective benefits and how much of the collective benefits should count for the justification of an agreement. Until 2001, interestingly, the European Commission counted collective benefits fully. After the modernization of competition law, they abandoned this policy.

When (and how much) do collective benefits count? (1)

- Until 2001, EC applied ***CECED*** (1999) precedent
  - *"Individual economic benefits … savings on electricity bills allow recouping of increased costs of upgraded, more expensive machines within nine to 40 months"*
  - *"Collective environmental benefits … the benefits to society … appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers"*
- After that, collective benefits did not count. Until ***Mastercard*** (2014), para 234:
  - "*appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for competition [Consten & Grundig]*".
  - As the Dutch ACM explains

    "this statement by the Court therefore does not determine whether full compensation of negatively affected consumers is necessary or whether these advantages should be in or out of market. …MasterCard clarifies the case law … as follows:

    (i) out of market benefits are counted towards compensation of the consumers negatively affected, in particular if they affect substantially the same group;

    (ii) out of market efficiencies benefiting other consumers can also be counted toward a fair share for consumers overall; and

    (iii) full compensation of the negatively affected consumers is not required, just conferral of appreciable objective advantages. "

CLEARY GOTTLIEB 19

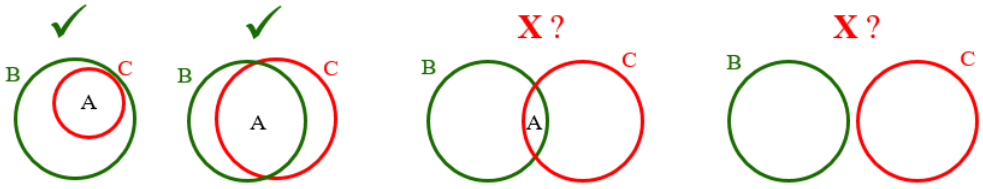
An example is the CECED case from 1999. This concerned an agreement between washing machine manufacturers to produce efficient washing machines and to phase out the most inefficient models. The efficient washing machines were more expensive, but the consumers saved more on electricity and water and washing powder than the price increase for the machines. These are, of course, examples of individual use based benefits. But the Commission went on to say that even if these individual benefits did not exist, it would still count the benefits to society from cleaner production. That suggested that it would also count collective benefits.

After 2001, the Commission dropped the recognition of collective benefits. That decision related to very specific European enforcement considerations (the elimination of the Commission's monopoly on exemption decisions) not relevant for Japan.

But 15 years later, the European Court of Justice ruled in the Mastercard case. This case laid the foundation for the recognition of collective benefits like climate change reduction or reduction of pollution in the assessment of agreements that restrict competition.

When (and how much) do collective benefits count? (2)

Question 1: Can collective benefits justify restriction only where *"consumers in the relevant market substantially overlap with, or are part of the beneficiaries"* (as EC proposes in HG para 602-605)?



Consumers (C) paying for clean fuel are also Beneficiaries (B) from clean air (or substantially overlap)

Consumers (C) buying sustainable wood mostly grown abroad: bio-diversity benefits (B) don't count at all?

Consumers (C) buying sustainable cotton made abroad: collective benefits (B) don't count at all?

Question 2: What share of the benefits are counted to balance against competitive harm – All benefits (B)? Or only those experienced by consumers who pay (A), as the EC proposes (that's indiv. use value benefit). This leads to bad results – Example of 1st class fliers asked to pay for sustainable fuel – Agreement not allowed because A is less than the extra price they pay, even it could avoid high social costs (B)?

Proposed answer: "Fair share" analysis should be in two steps

- Step 1: *before* assessment of the benefit to consumers, social cost ("externalities") should be internalized to calculate "true price" (as required in "polluter pays" principle Art 191(2) TFEU).
- Step 2: *After* step 1, if agreement price > "true price", check if agreement confers "*appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for competition*" (Mastercard)
  - Compensation need not be full, but must be "fair"; damage costs instead of abatement costs

CLEARY GOTTLIEB 20

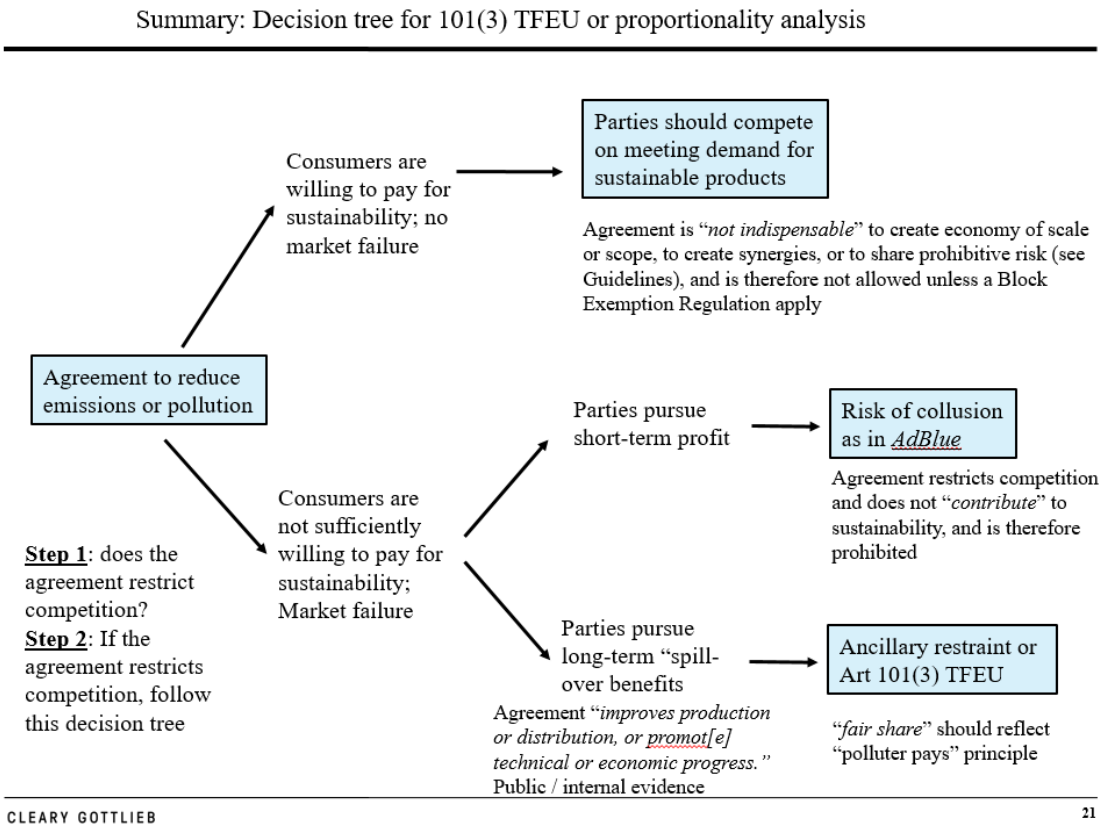
The European proposed guidelines are not perfect. They count collective benefits only if the consumers who pay for the benefits are all beneficiaries of the benefits. That's this first Venn diagram here. They also count collective benefits if there is a substantial overlap between the beneficiaries (the green circle in the second Venn diagram) and the customers who pay for the benefits (the red circle). But they would not count collective benefits if there is almost no overlap between the beneficiaries and the customers who pay for it, or if there is no overlap at all (the third and fourth Venn diagrams).

Let's give an example of the third Venn diagram. Consider an agreement between furniture makers to use only sustainable grown wood. Most of that wood happens to be grown in tropical countries. The beneficiaries would be people in tropical countries whose biodiversity and climate emissions are improved, but the customers who would pay for it are European, and there is very little overlap. Such an agreement would be prohibited even under the new policy. I think that that is wrong.

Another example is an agreement on clean cotton production. This would involve cotton grown without chemicals and without too much water, completely outside of Europe, and the customers in Europe would pay for this. Such an agreement would also be prohibited because the consumers are not direct beneficiaries.

In my view, this is in violation of the general principle in European law that is called the 'polluter pays' principle. Whoever is responsible for polluting production or polluting consumption should pay for the costs social costs of that pollution.

A flowchart summarizes the analysis of the new guidelines.



Step 1 is, "does the agreement restrict competition?" If not, it is allowed, like the standard agreement we discussed.

The second step is, if the agreement restricts competition but is intended to reduce greenhouse gas emissions or reduce pollution, then we follow this flow chart.

If there is no market failure, for instance, because consumers are willing to pay for green products, then cooperation is generally not allowed. Companies should compete on being cleaner and greener than their competitors. The traditional analysis would apply, including the block exemption regulation for joint research and development, or specialization agreements.

If there is a market failure or a collective action problem, for instance, insufficient willingness to pay, then approval depends on whether the parties pursue short term profit benefits or long term spillover benefits. If the parties really pursue long term spillover benefits like climate change improvement or pollution reduction, then the agreement is allowed if the conditions of Article 101(3) TFEU are met, including that consumers get a fair share of the benefit.

To conclude, there are some suggestions that might be usefully considered in Japanese competition policy. I would recommend to include sustainability goals in competition policy and to count collective benefits – at least for agreements to limit climate change, protect biodiversity, and avoid large-scale pollution.

3. Need for more than guidelines.

- Recommendation to integrate sustainability in competition policy, and to count collective benefits – at least for agreement to limit climate change, protect biodiversity, and avoid large scale pollution
- Guidelines are necessary but not sufficient:
  - continued legal uncertainty and threat of future proceedings
- At the very least we could add also: individual guidance to companies which have entered into – or intend to enter into – a sustainability agreement.
- Better: Create legislative basis for exemption, as in Austrian law.
  - "*Consumers receive a fair share when the benefits derived from improving the production or distribution of goods or promoting technical or economic progress contributes appreciably to an ecologically sustainable or climate-neutral economy.*"
- Best: Block exemption for sustainability agreements

CLEARY GOTTLIEB 23

Guidelines are necessary, but they're not sufficient because there is still lack of legal certainty and the possibility of future proceedings which could discourage companies from agreeing on sustainability agreements.

Three things are recommended.

First, there should be a possibility for companies who are thinking about a sustainability agreement but are worried that the agreement is not enough, to obtain individual guidance from the antitrust authorities. They should be allowed to come and see the antitrust authority and ask for guidance.

Second, one could consider a legislative change, as was done, for instance, in Austrian law, to create a legal basis for justification of sustainability agreements. In Austrian law, for instance, the law now provides that such agreements can be exempted if they contribute appreciably to an ecologically sustainable or climate-neutral economy.

The best solution, I think, is to develop a block exemption for sustainability agreement -- an automatic group justification for sustainability agreements. Even in the European Union, this has now been done for sustainability agreements in agricultural sector.

This is the text that was introduced a few months ago in the regulation on trade in agricultural products.

Even the EC recognizes legislative change is needed (CAP Regulation) -- Block Exemption would be appropriate for legal certainty

Regulation 1308/2013 on a common organisation of the markets in agricultural products (Article 201a)

Vertical and horizontal initiatives for sustainability

Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices […] that aim to apply a sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard.

Paragraph 1 applies to agreements, decisions and concerted practices […] to which several producers are party or to which one or more producers and one or more operators at different levels of the production, processing, and trade in the […] supply chain, including distribution, are party.

For the purposes of paragraph 1, "sustainability standard" means a standard which aims to contribute to […] environmental objectives, including climate change mitigation and adaptation, the sustainable use and protection of landscapes, water and soil, the transition to a circular economy, including the reduction of food waste, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems […]

Agreements, decisions and concerted practices that fulfil the conditions referred to in this Article shall not be prohibited, no prior decision to that effect being required.

It says that agreements are allowed automatically if they meet a number of conditions.

First, they must aim to achieve a sustainability standard that is higher than is required by law.

Second, the agreement must not be more restrictive than is necessary to achieve that sustainability standard.

There could be additional conditions, for instance, a market share ceiling that agreements must not cover more than a certain market share, let's say, 30%.

In sum, I recommend that the Japanese antitrust authority might consider: guidelines, individual guidance, a legislative basis for exemption, and a block exemption for sustainability agreements.

Thank you for your patience.

〇大橋座長

それでは、質疑に移りたいと思います。御質問のある方は、お手元の挙手ボタンを押していただきましたら、こちらで指名させていただきますので、カメラとマイクをオンにして御発言いただければと思います。

逐次通訳が入りますので、お一人２～３分以内のイメージで御質問ということでお願いできればと思います。早速手を挙げていただいてありがとうございます。それでは、林委員からお願いします。

〇林委員

たいへん有益なプレゼンテーションをしていただきまして、ありがとうございました。スライド 23 頁で、「３．脱炭素化に向けた日本の競争政策への期待」として、その後、「ガイドラインを超えるものが必要」であるとして、「一括適用除外が適切である」とされている点についておうかがいしたいと存じます。

そもそも EU 自身、オーストリア競争法のように、サステナビリティ協定について包括的にターゲットにした競争法の一括的適用除外規定は設けられていないと承知しており、またその可能性も低いのではないかというのが質問の１点目です。

質問の２点目は、仮に日本においてサステナブル協定の一括適用除外を設けたとしても、企業が、個々の行為についての一括適用除外の要件該当性に関する自らの検討を完全にスキップすることまではできないので、ガイドラインと比べて、飛躍的に企業の取引コストを下げたり、あるいは予見可能性を飛躍的に高めたりするとは必ずしもいえないのではないか。むしろ、一括適用除外規定を競争法の中に設けることによる負の側面、いわゆる「ネガティブイフェクト」はないか。このあたりいかがでしょうか。

〇ドールマンス弁護士

Thank you.

Your first question is whether the EU is proposing to adopt a block exemption. The answer to that question is that the EU have done it effectively for the agricultural sector, but they think they cannot do it for legal reasons for the rest of the economy. Personally, I disagree with that, but it is a consideration which is probably not relevant for Japan because it relates to peculiarity of EU treaty law.

As to your second question, it is true that a block exemption regulation would include a number of criteria. For instance, a block exemption regulation might provide that the market share of participants to the agreement must not be greater than 30%. Second, the aim of the agreement must be to apply a standard that is higher than required by regulation. Third, the agreement must be indispensable for that purpose in the sense that there is no less restrictive and equally efficient alternative.

But these criteria are easier to apply than the market effects analysis that would otherwise be required.

The experience – certainly in the EU, for instance, with block exemptions for joint research and development agreements or for licensing agreements or for distribution agreements – shows that they can be more easily applied than in the absence of these regulations. That suggests that a block exemption would improve predictability. I should add that European block exemptions include a safeguard clause, an ability for the Commission to withdraw the block exemption if they think that on balance the agreement is not good for sustainability, and that is something that requires action by the Commission.

In summary, experience in Europe suggests that block exemptions can be good for predictability and therefore encourage pro-competitive agreements. The so-called escape clause or safeguard clause in block exemptions allow the Commission to withdraw the benefit of the block exemption if the Commission thinks that in a particular case, the block exemption is being abused. That allows the Commission to draw an adequate balance between predictability on the one hand and effective enforcement on the other. I hope that answers your question, Professor Hayashi.

〇林委員

大変よく分かりました。

〇大橋座長

ありがとうございました。続いて、柳委員、お願いします。

○柳委員

ドールマンス先生、とても示唆に富んだプレゼンテーションをありがとうございました。

最後のスライドですけれども、御説明はありませんでしたが、オランダの事例のうち、グリッドオペレーターズ（grid operators）の取組は、いわゆる環境被害合意（environmental-damage agreements）の考え方を用いたと理解しています。この事案の非公式意見においては、消費者の集団は合意から利益を享受する集団とかなりの程度、オーバーラップしていると認定されています。そうすると、欧州委員会のガイドライン改定案の集合的利益（collective benefits）の考え方でも、同じ適法との結論を導くことができるのでしょうか。それとも、スライドの 20 ページにあるように、どの程度の割合の利益が考慮されるのかというところで結論が変わり得るのでしょうか。

○ドールマンス弁護士

Yes, thank you, Professor Yanagi. Am I right to think you refer to the agreement between electricity producers to phase out coal coal-based production of electricity in the Netherlands?

○柳委員

違います。最後のスライドのグリッドオペレーターズの非公式意見です。

○ドールマンス弁護士

I will have to research that that particular agreement. Under the new guidelines, the Commission would count benefits to consumers if the consumers either overlap with the beneficiaries, so if they are part of the beneficiaries, or if there's a substantial overlap between the customers who pay and the customers who are beneficiaries.

In electricity production, indeed, there is indeed a substantial overlap between the consumers who pay for electricity because everybody uses electricity, and the beneficiaries of electricity production because they include the entire society. So, there's a substantial overlap between beneficiaries and customers. Such an agreement could benefit under the new guidelines.

There leaves a remaining question of how much of the benefit is actually counted when balancing benefits and costs.

If the benefits of the agreement are worldwide, do we only count that portion of the benefits that go to

European consumers? Or do we count all of the benefits to all beneficiaries worldwide, which is very important for climate agreements for instance?

I don't have the percentage precise, but imagine that European consumers are 20% of worldwide beneficiaries, do we count only 20% of the benefits and weigh that against the cost that European consumers pay? I think that the answer is that all of the benefits should be counted and not just 20% for two reasons.

First, the criterion under EU law is that a “fair share” of benefits should go to consumers. Under the ‘polluter pays’ principle, European consumers should first pay for the social costs of emissions of greenhouse gasses before they are entitled to a share of the benefit. This is step one on Slide 20. This ‘polluter pays’ principles part of European Constitutional Law, Article 191, Paragraph 2 of the Treaty on the Functioning of the EU. I do not know whether such a principle exists in the Japanese law, but it makes very good common sense to apply that principle.

The second step would be to check whether the customers who pay for the cleaner energy get an appreciable objective advantage, in accordance with the judgment in the Mastercard case. Having a cleaner environment or a more stable climate should qualify as an appreciable objective advantage.

In sum, I do not know more about the case that is mentioned by the Dutch Antitrust Authority in their informal opinion. But I think this is what the Dutch Antitrust Authority tried to explain and I hope, Professor Yanagi, that this answers your question.

〇柳委員
とても勉強になりました。ありがとうございました。

〇大橋座長
　あと５分少々で終えますので、ごく手短に言っていただければと思います。時間厳守なので、そこの辺りをお願いします。　そうすると、上野さんで終わりということになりますが、よろしいですか。

〇上野委員
　時間が限られているなかで、私の質問で申し訳ございません。
　御説明どうもありがとうございました。私は競争政策の専門家ではなくて、環境政策の専門家でありまして、その観点から質問いたします。質問したいのは、気候変動対策に関するコストベネフィットアナリシスにおけるベネフィットについてです。

先生のプレゼンテーションのスライド 20 に挙げられているソーシャルコストは、将来発生する温暖化の影響を回避するという将来の便益です。他方、柳先生が指摘されていた最後のスライドのオランダのグリッドオペレーターの事例では、現在払うコストを下げるという便益になっています。便益を考えるときに、将来の便益と現在の便益、どちらを使うのが競争政策の観点からは適切と考えられるのか、御意見を聞かせていただくと大変ありがたいです。　以上になります。

〇ドールマンス弁護士

This is a very important question. The answer is, and I believe the Commission agrees, that we should count both present and the future benefits. Now, to calculate the future benefits, it is necessary to quantify them and calculate a net present value in order to do a proper balance against current costs. This can be done by calculating future damage and discounting that damage to the net present value.

There is a very interesting economic study by the Dutch and the Greek Antitrust Authority about the quantification of social costs to be used for the balancing of costs and benefits of sustainability agreements. I do not mention it in the slides, but I should have. If you wish, I can send it to you, but you can find it on the website of the Dutch and the Greek Antitrust Authority. It goes into significant detail on economic analysis and the calculation of shadow prices and various other techniques to calculate the net present value of future benefits. I hope this answers the question.

〇上野委員

ありがとうございます。

〇大橋座長

申し訳ございません。終了時間が近づいてきてしまったので、挙手している方がいらっしゃるのですけれども、時間の関係上、質疑はここまでとさせていただきたいと思います。

ドールマンス様、本日は大変丁寧に御対応いただきまして、ありがとうございます。

〇ドールマンス弁護士

Now, if it is useful to send me questions by email, if I have the chance to do it, I would be happy to look at those questions.

〇大橋座長

それでは、事務局を通じてそのようにさせていただきたいと思います。大変ありがたいお申出、ありがとうございます。それでは、本日、本当にありがとうございました。以上とします。

〇ドールマンス弁護士
Thank you.

〇大橋座長
本日は大変丁寧にドールマンス様にお話しいただいて、欧州の議論も皆さんさらに理解されたことかなと思いますし、また、日本への期待も率直にお伺いできたのかなと思います。

本日は大変夜遅い時間で、また高宮先生と川濵先生は手を挙げていらっしゃったのに本当に申し訳なかったですが、ほかの先生方も含めて御質問があれば、先ほどのとおり事務局を通じて言っていただければと思います。後ほど事務局からいつまでにというメールを差し上げたいと思います。

次回の会合は６月３日となっていて、また海外の有識者からのヒアリングと伺っています。そういうことで、９時までお付き合いいただいてありがとうございます。本日の検討会はここまでとさせていただきます。引き続きどうぞよろしくお願いします。ありがとうございました。

お問合せ先
経済産業政策局 競争環境整備室
電話：03-3501-1550