DECARBONIZATION & COMPETITION POLICY

Presentation to METI study group

Dirk Middelschulte
Global Vice President & General Counsel Competition

AGENDA

1. **Problems with current EU competition policy to decarbonize society**
   - The importance of collective efforts
   - Competition law as a barrier?: Status in Europe
   - Competition law as a barrier?: Scenarios
2. **Recommended measures for Japan to decarbonize society**

DECARBONISATION – THE IMPORTANCE OF COLLECTIVE EFFORTS (1)

- Strong incentives for companies to drive decarbonisation
- Primacy of individual efforts – but risk of prohibitive costs:
  - First mover disadvantages
  - Behavioural aspects: Stated vs. revealed consumer preferences
  - Negative externalities
- "Residual market failure" where individual efforts *and* regulation prove insufficient
  - Now recognized in EU draft horizontal guidelines
- Co-operation *to achieve* legislative requirements (ex. plastics taxes)

DECARBONISATION – THE IMPORTANCE OF COLLECTIVE EFFORTS (2)

- Making the most effective co-operations happen is key:
  - There *is* already an wide range of collective initiatives
  - But many of them are light-touch and they often lack deep impact
- **Likely main driver of co-operation: Corporate pledges & commitments**
  - Companies in the process of realising the magnitude of the challenge
  - Reputational & litigation risks if net-zero targets not met

What role should competition policy – or legislation? – play in this?

- Reactive response to industry demands for more flexibility? – *or* –
- Proactive encouragement of impactful joint action against climate crisis?

EXAMPLES OF IMPACTFUL CO-OPERATION SCENARIOS

1. Airline agreements to accelerate migration to more eco-efficient airplanes
2. Ocean liner co-operation agreements to rapidly replace fossil by green fuels
3. Construction companies to phase-out conventional steel until fixed deadline
4. Agreements between car makers not to produce SUVs above a certain weight
5. Joint development of carbon capture storage facilities with long term supply obligations
6. Joint hydrogen procurement and carbon capture co-operations in petrochemicals
7. Agricultural companies agree to bovine feed additives to reduce methane emissions
8. An agreement between fruit growers to phase out the most harmful pesticides

COMPETITION LAW AS A BARRIER – STATUS: EU MEMBER STATES

Netherlands: Draft guidelines substantially increasing leeway for green co-operation

- *But*: Safe harbour requires conformity with legislative objectives
- *But*: Outside safe harbour "willingness-to-pay" principle applies

Austria: Legislation recognising that sustainability benefits may outweigh price increases

- *But*: EU law may already allow that reading
- *But*: Application to concrete cases remains to be seen

Greece: Staff working paper endorsing benefits of co-operation in principle

- *But*: No concrete guidelines as to application of principles

Germany: Report on competition policy & sustainability

- Rather established reading of competition law principles
- *But*: BKartA recent case practice rather pragmatic

COMPETITION LAW AS A BARRIER – STATUS: DRAFT EU GUIDELINES

"Philosophically" a step towards a "net zero competition policy"

But important questions remain unanswered:

- Treatment of *mandatory* standards
- Compensation requirements for *"collective benefits"*

Key criticisms:

- "Willingness to pay" is unhelpful measure
- Full compensation vs. "fair share" – Dutch position more progressive
- Disregard of collective benefits outside (EU) consumer market
- "Polluter-must-benefit" principle = *compensation for costs of not harming others*
- *Future* consumers not considered

COMPETITION LAW AS A BARRIER – NON-PROBLAMTIC CO-OPERATIONS

1. Joint awareness campaigns
2. Agreements loosely committing competitors
3. Agreements leaving discretion as to means to achieve sustainability goal
4. Voluntary standardization
5. No appreciable effects-cases
6. Agreements creating new markets
7. R&D co-operation within existing EU framework

COMPETITION LAW AS A BARRIER – PROBLAMTIC SCENARIOS

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It remains unclear – and highly questionable – if such co-operations would be admissible under current EU competition policy

AGENDA

1. Problems with current EU competition policy to decarbonize society
2. **Recommended measures for Japan to decarbonize society**
   - **Solutions within existing (EU/Japanese) legal framework**
   - **Public policy exemptions applied by competition enforcer**
   - **Ministerial approval**

SOLUTIONS WITHIN EXISTING (EU/JAPANESE) LEGAL FRAMEWORK

- Explicit recognition of collective benefits as justifying restrictions of competition
  - Regardless of where and when they materialize
  - Irrespective of whether direct consumer is beneficiary
- Potential concerns:
  - How to balance collective benefits against restrictive effects?
  - Consistent with consumer “fair share” requirement?
  - Radical departure from consumer welfare doctrine

PUBLIC POLICY EXEMPTION APPLIED BY COMPETITION ENFORCER

- New **Austrian** legislation – so far no practical experience, guidelines lacking
- **Australia:** companies can seek "authorisation" on public benefits grounds for conduct that would otherwise contravene competition legislation
  - *Battery Stewardship Counsel decision (2020):* Levy of four cents per 24 grams in exclusive scheme to pay rebates that help offset the cost of collecting, sorting and processing expired batteries
  - Levies on consumers approved also regarding greenhouse gas refrigerants and agricultural/veterinary chemicals to fund collection/disposal programs
  - *No full quantification of benefits required:* ACCC consults and obtains submissions from governmental agencies and industry associations

MINISTERIAL APPROVAL: THE GERMAN EXAMPLE (1)

- Specific instrument in § 42 of the Act against Restraints of Competition (GWB):
  - *"The Federal Minister for Economic Affairs and Energy will, upon application, authorise a concentration prohibited by the Bundeskartellamt if, in the individual case, the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest. […] Authorisation may be granted only if the scope of the restraint of competition does not jeopardize the market economy system."*
  - Ministry for Economic Affairs envisions to introduce until 2025 the participation of the Bundestag in the ministerial authorisation procedure.

MINISTERIAL APPROVAL: THE GERMAN EXAMPLE (2)

- Ministerial authorisation is *not* a political decision: The Federal Minister for Economic Affairs acts as a politically neutral cartel authority (at least in theory).
- An opinion of the *Monopolkommission* (monopolies commission), an independent advisory body of economic and legal experts, must be obtained beforehand.
- Approval has been applied 23 times and granted 10 times since 1973.
- "Authorisations have recognised as "common good": securing energy supplies, relieving the burden on public budgets, safeguarding jobs, press diversity but also protecting the climate and environment.
- Broad notion of "common good" invites extraneous political aspects

Better to define clear & narrow scope of ministerial approval, e.g. decarbonisation