グリーン社会の実現に向けた競争政策研究会
（第３回）
議事録

開催概要
日時：令和４年６月３日（金）19:00～21:15
場所：Teamsによるオンライン会議

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＜委員＞（○：座長、五十音順）

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井上　峰人	産業技術環境局環境経済室　企画調整官
折居　直	産業技術環境局環境政策課　課長補佐
鈴木　望	製造産業局素材産業課　課長補佐

公正取引委員会

五十嵐　收	経済取引局調整課　課長補佐

※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

それでは、定刻ですので、ただいまからグリーン社会の実現に向けた競争政策研究会第３回の会合を開催いたします。

皆様、夜遅い時間、お忙しいところ御出席いただきまして、ありがとうございます。

それでは、本日の議事ですけれども、前回はクリアリー・ゴットリーフ法律事務所のパートナー弁護士であるドールマンス様より御講演いただいて、その概要は御本人に御確認していただいて、資料５に整理しておりますので、御確認ください。

本日は、前回に引き続いて海外より有識者をお招きして、ヒアリングをするということであります。

本日お招きした有識者は、ユニリーバのディルク・ミデルシュルテ様です。ミデルシュルテ様の御経歴は、資料６として用意しておりますが、私から簡単に御紹介させていただきます。

ミデルシュルテ様は、世界的な消費財メーカーのユニリーバで競争担当のグローバル・ゼネラル・カウンセルを務められており、ブリュッセルを拠点に御活躍されています。ミデルシュルテ様は、ユニリーバへの入社前にも、ドイツ鉄道やダノンの企業内弁護士として競争法のチームを率いて、サステナビリティと競争法に関する多数の事例を担当されてきました。

ミデルシュルテ様は、この分野で多数の論文や書籍を執筆されており、また、各国の競争当局が参画する国際競争ネットワークでも、欧州委員会の非政府アドバイザーを務めるなど、サステナビリティと競争法の議論をリードする企業内弁護士として御活躍されています。

ミデルシュルテ様、本日はお忙しいところ、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。

〇ミデルシュルテ氏

Thank you very much for this very kind invitation and having me today. I'm very pleased to have a chance to present to this illustrious group of experts. I will try to share my experience and perspective on this important topic and look forward to the conversation and Q&A we have. I am aware that this is being translated and we'll make sure that the translator and I do co-operate effectively.

You have already kindly explained my background. If there are any questions in that respect, please do feel free to ask them. I would otherwise move on then, to the substance of my presentation.

I would like to focus today on two topics that the study group asked me to cover: One, are problems within the current EU competition policy with the view to decarbonization of society; and secondly, recommended measures that I would potentially believe could be helpful for the thought process that you're currently going through in Japan.

I should say, if there's anything unclear, please do feel free and intervene. We have time for a Q&A, but I would like to avoid that there are any misunderstandings if I'm not clear on what I'm saying.

Let me start with what I believe are the elements that make collective efforts of companies to decarbonize society important.

We see in Europe and I know also in other markets where Unilever is doing business, that companies are more and more under pressure and expectation to deliver on sustainability and environmental protection, to reduce their carbon footprint, and to contribute to a reduction of climate change.

We see indeed a lot of expectations from nongovernmental organizations, from shareholders and other stakeholders, but also employees of the company, notably younger employees joining the company who are expecting that Unilever – and the same will be true for many other industries and many of our competitors – to deliver on climate change reduction and reduction of carbon emissions.

And when we look at how companies like Unilever and many others respond to these challenges, I think it is important to know that we will always strive for individual solutions because we believe that more sustainable products are valued by our customers and therefore we can win a competitive advantage over our competitors by making our products more environmentally sustainable.

But there are also risks associated with this. In particular, we see that companies that make the biggest investments into more sustainable production and products and product features such as packaging are sometimes facing prohibitive costs that may lead to what we call a first-mover disadvantage. In other words, companies that make the biggest investments will not be rewarded by customers because prices increase and therefore those products are either not introduced into the market in the first place or

withdrawn swiftly.

In addition to this concern, we also see some learnings from behavioral economics that show that customers do very often say that they would be ready to pay more money for more environmentally sustainable products but when they actually show their behavior in front of the shelves in a supermarket, for instance, this is not being reflected because, in reality, customers do not pay as much as they say they would be ready to pay for more sustainable products.

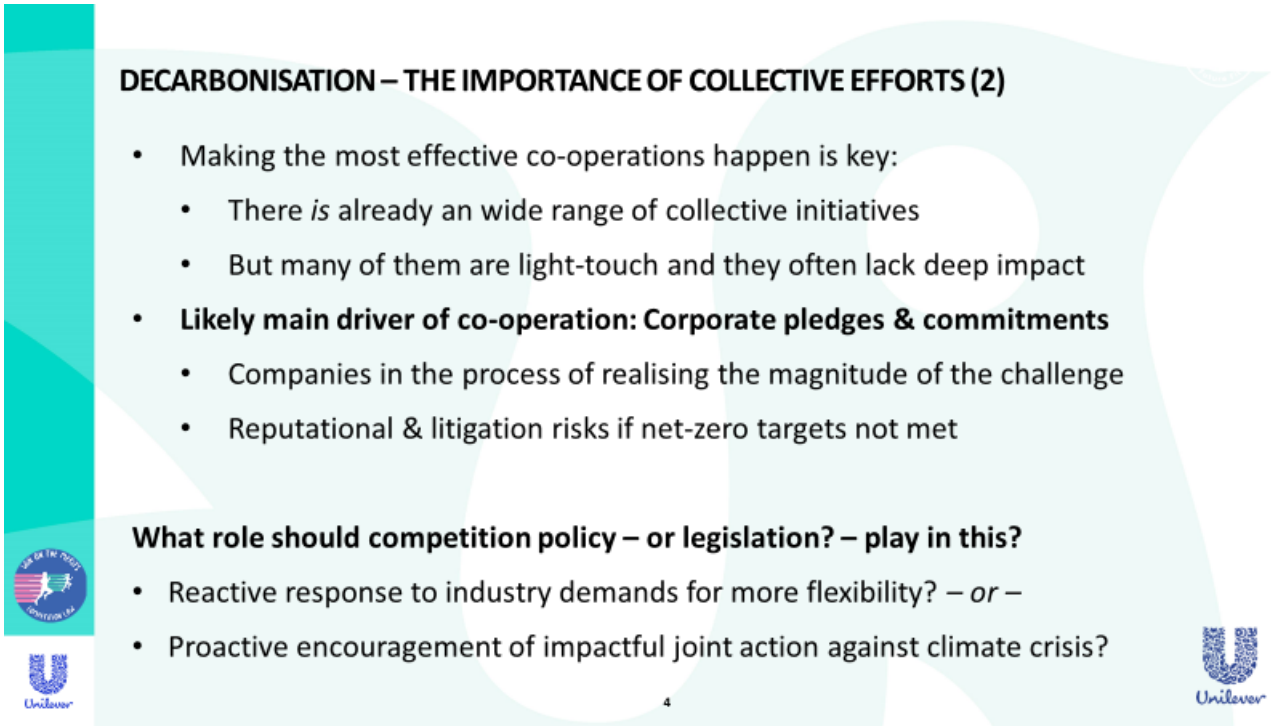
The problem that we see here is that if regulation and collective efforts do not kick in and are not successful, that companies remain incentivized to engage in non-sustainable behavior that will continue to lead to negative externalities like harm to the environment and carbonization while these extra costs that come with such behavior are not being accrued for, neither through taxes nor other means that would incentivize companies economically to abstain from such harmful behavior.

In fact, the European Commission has now recognized this problem in its new draft guidelines for horizontal cooperation between competitors that are currently being consulted on. The Commission adopts the concept of residual market failure, which essentially means that in some instances, neither the market nor regulation deliver desirable results.

I therefore believe, that collective efforts of industry players and of competitors can help fill this gap and respond to this phenomenon of residual market failure.

In addition, we believe that cooperation can be a complementary tool where companies may have to partner in order to achieve requirements imposed on them by regulation and legislation.

A concrete example are plastic taxes that are now being introduced in many European countries. And in order for companies to avoid plastic taxes by reducing the share of recycled plastics in their packaging, they are now in a situation where they consider jointly buying recycled plastics from recyclers given that we currently are already facing a shortage of recycled plastics, and therefore maybe only collective industry efforts can incentivize recyclers sufficiently to make the required quantities available on the market.

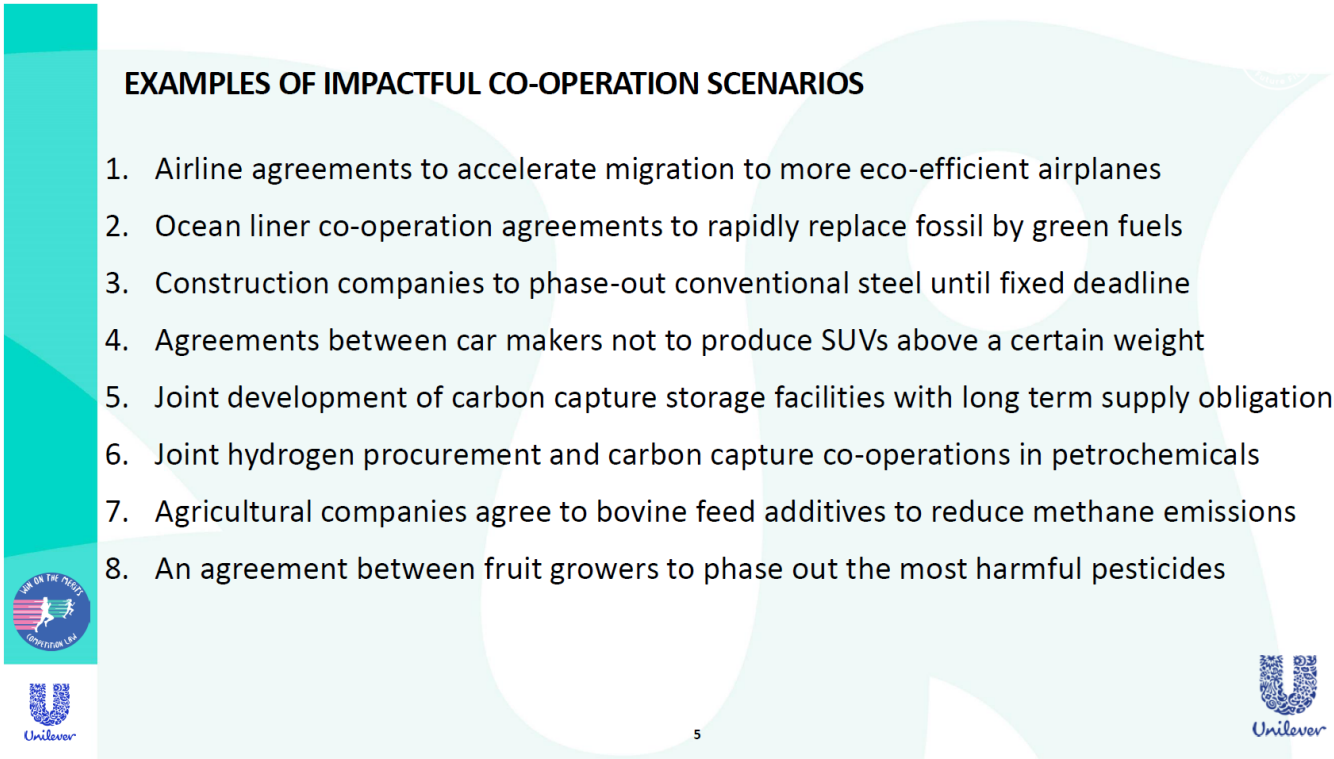


It is important to say that there's already a lot of cooperation going on in different industries. But many of these collective efforts are relatively light-touch and lean, and have, in my view, not always been sufficient to achieve the ambitious targets that companies have defined for themselves.

We feel in particular that a big change is going on in many industries that has evolved over the last two or three years where companies realize that they do not only have to make pledges and commitments vis a vis their various stakeholders, but they also have to meet these pledges and commitments. And the challenge is bigger than many companies were assuming and they also realized that if they do not meet their pledges and commitments, they might not only be facing reputational risks but also litigation risks if they are not meeting the targets, for instance, in the United States by the Securities and Exchange Commission.

The question, therefore, is what role competition policy or legislation should play in this. The more conventional approach would be to say that let's a matter of legislation. If there is a role for competition policy at all, it should wait for companies to put forward cases for approval and assessment and then reactively respond to that. However, given the climate crisis that we are currently facing and the uncertainties that companies have in front of themselves, I would find it beneficial if legislation and enforces would proactively encourage companies to take action jointly and make sure that the legal framework is giving companies the necessary leeway in that respect.

I'm now moving to slide number five. If you have any problems seeing it, please let me know.

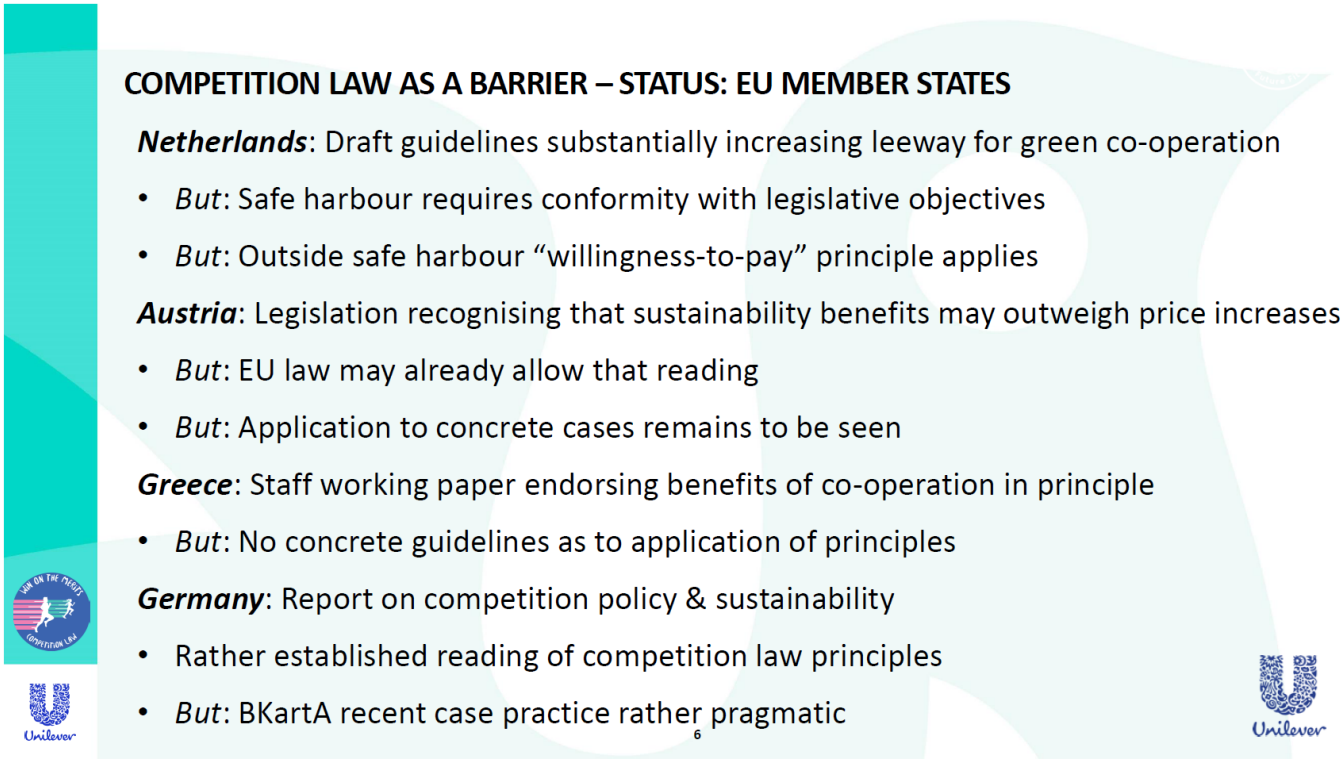


On this slide, you will see a number of examples that I have put together to exemplify where cooperation between competitors in different industries can make a difference in order to achieve environmental sustainability. I will not go through them line by line, but from a competition law perspective they might be challenging, and I will come back to that. Each of them might be difficult to exempt from the prohibition of restrictive practices between competitors under the current legal framework, at least in the European Union.

All the examples have in common that they will probably lead to cost increases and ultimately price increases for consumers. One of the legal questions that may have to be answered is if the benefits that materialize through carbon reductions are sufficient and relevant in order to compensate for the potential price increases for consumers.

I will maybe take two examples. If you take a look at the first one, regarding airlines, if they were to agree to accelerate rapidly the introduction of more efficient airplanes and the migration to green fuels, this might come with very substantial cost increases. Let's say an airline ticket from Brussels to Tokyo in the business class would be €300 or €400 more expensive. The individual consumer, so the purchaser of this ticket, would only have a marginal benefit by reducing his or her own carbon footprint. However, the overall benefit for the planet and for the population of the planet would likely be significant.

I'm now moving on to slide number six. And again, let me know if there are any difficulties in seeing them. We will come back, as I said to the examples at a later point.



So on slide number six, I have summarized where the law and policy stands in 4 European member states.

The Dutch Competition Authority has been the front runner in this case, and they have issued draft guidelines that establish safe harbors for companies under certain conditions for green co-operations that otherwise would not be exempted from the prohibition of restrictive agreements.

I believe, however, that the Dutch guidelines have a few weaknesses, notably the fact that the more lenient treatment is only granted if the objectives of cooperation are in line with legislative objectives, which means that companies would face more difficulties getting approval for co-operations that aim to go beyond what is already provided by legislation and legislative targets.

Further, the Dutch guidelines are relying on the so-called "willingness to pay" principle, which essentially means that co-operations outside a relatively narrowly defined safe harbor can be regarded favorably under competition law if consumers, according to surveys, in particular, are ready to pay more for more sustainable products.

I believe that "willingness to pay" is not a suitable standard because it leaves it to the consumer's

personal preferences if they cover the costs – or not – of the harm they would otherwise produce if they behaved unsustainably.

And furthermore, under European law - and I suppose similar principles will apply in Japan - if consumers are willing to pay more for a sustainable product, cooperation will often not be required between companies to introduce more sustainable products because companies can already introduce those products in competition to each other, which under European and potentially Japanese competition law means that the cooperation cannot be signed off as admissible because it does not meet the criteria of indispensability.

In other words, the willingness to pay principle is also difficult to integrate into general principles of European and I suppose also Japanese law. If consumers are willing to pay more for sustainable products, it will be difficult to justify cooperation because companies could also individually introduce the more sustainable products so that cooperation will not be required.

Austria has also taken an interesting approach in that they have introduced a legislative exemption under which sustainability benefits like carbon reductions can outweigh price increases and therefore lead to the admissibility of such types of cooperation.

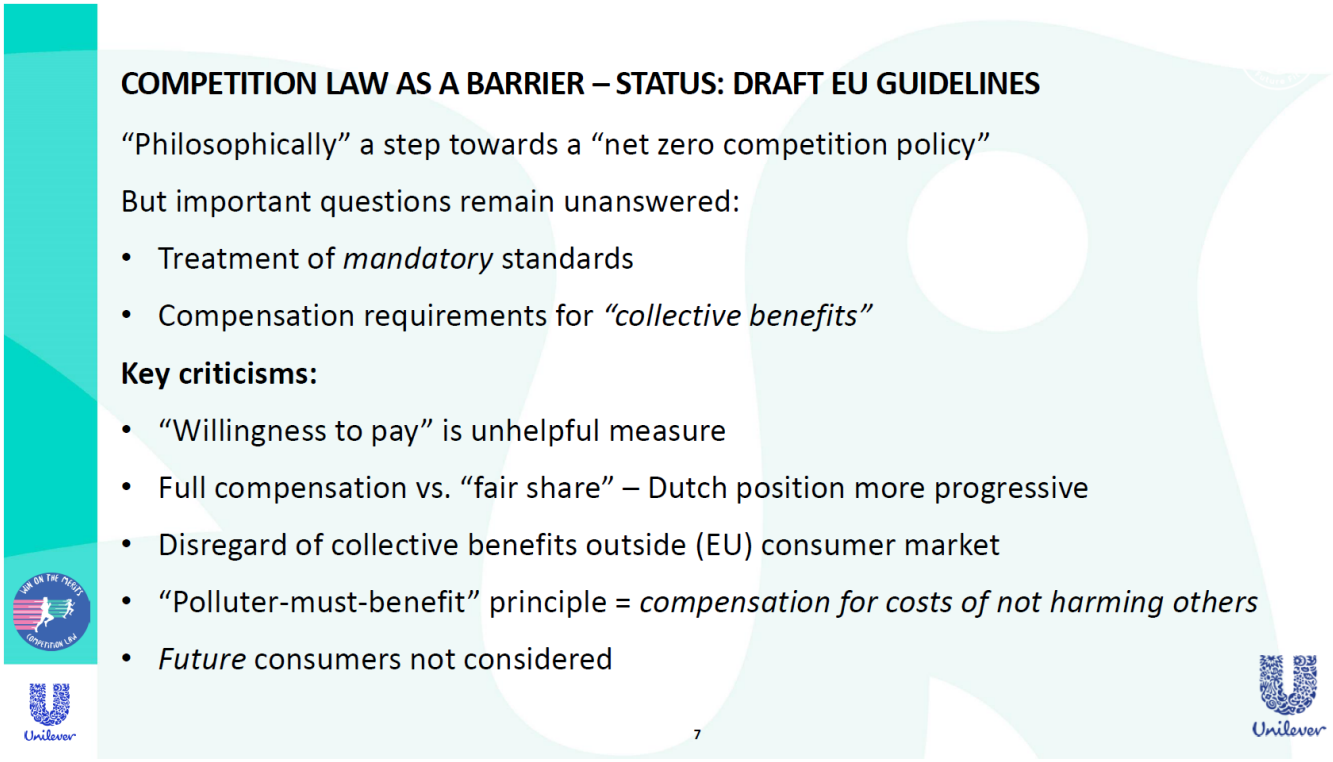
My question here is whether European law would not already allow such reading of the law, which is currently very controversial.

And secondly, we would need to see how this new legislation will be applied to actual cases because it remains relatively broad and vague. The Austrian government has in the course of this week issued guidelines to specify its interpretation of the new law and it will be interesting to see how concrete cases are being dealt with.

The Greek Competition Authority has also been active in this space and issued an interesting staff working paper which very generously endorses co-operations to achieve green targets. However, at this stage, it remains unclear how these principles would be applied in practice.

Germany also has issued a report on competition policy and sustainability co-operations which confirms a rather conservative reading of competition law principles, not giving a lot of leeway for green co-operations. However, in a number of recent cases, the German Competition Authority, the Bundeskartellamt, has been quite pragmatic in making co-operations work if they benefit the environment.

I'm now moving on to slide seven. And again, let me know if there are any problems seeing the slide.



I would like to touch now on the draft guidelines of the European Union on horizontal agreements that include a new chapter on sustainability cooperation. I believe that the new draft guidelines are in principle a very important step towards a competition policy that really embraces and recognizes the objective of a competition policy that helps to respond to the climate crisis. There are, however, a few questions that remain unanswered and need to be addressed in the ongoing legislative process.

Firstly, the draft guidelines suggest that the European Commission will accept also mandatory standard agreements between companies to introduce more environmentally sustainable behavior if the price increase is insignificant, which is a good development. However, the wording needs to be clearer to underline that not only voluntary standards are covered by this safe harbor provision. In particular, it remains unclear how the Commission wants to interpret a new reading of the law under which so-called collective benefits for society can also be reflected in competition policy.

Which leads me to my key criticisms of the draft guidelines.

Firstly, as I mentioned earlier in relation to the Dutch guidelines, the "willingness to pay" principle that the Commission has also applied to certain types of cases is, I believe, not helpful for the reasons I have tried to explain.

Secondly, European Competition law requires that any benefits resulting from restrictive cooperation agreements must deliver benefits that consumers receive a fair share of. However, the draft guidelines seem to assume that consumers must be fully compensated and not only receive a fair share.

This means, for instance, in the airline example that I mentioned earlier, that the compensation must be sufficient to fully compensate the purchase of the more expensive airline ticket for the higher costs incurred for more sustainable air travel.

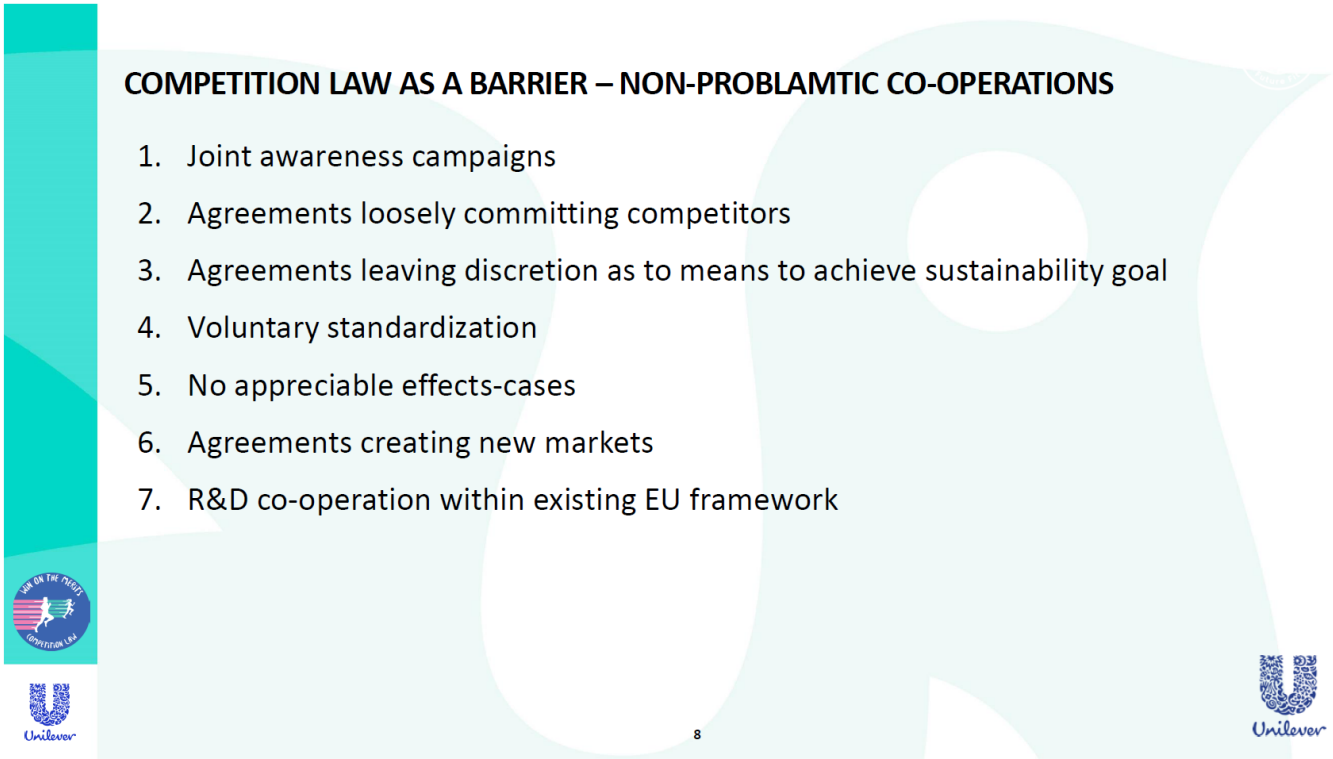
The problem here is that the individual benefit of the purchase of the tickets is probably limited because his or her individual "environmental" benefit is not very significant. However, the collective benefits for the entire planet is substantial while this cannot be taken into account under the current drafting of the guidelines.

Similarly, under the current draft, benefits must materialize in the relevant European consumer market so that benefits that materialize only in other parts of the world would not be taken into consideration.

I think my key criticism here is that the Commission requires the individual user who would otherwise incur significant negative externalities and costs for society must receive full compensation for the costs of not harming others and the planet as a whole.

This is also underlined by the fact that the current draft of the guidelines does not take into consideration future consumers and benefits that accrue to future consumers.

On the next slide, number eight, I would like to look at different kinds of agreements that under the guidelines would probably be admissible.

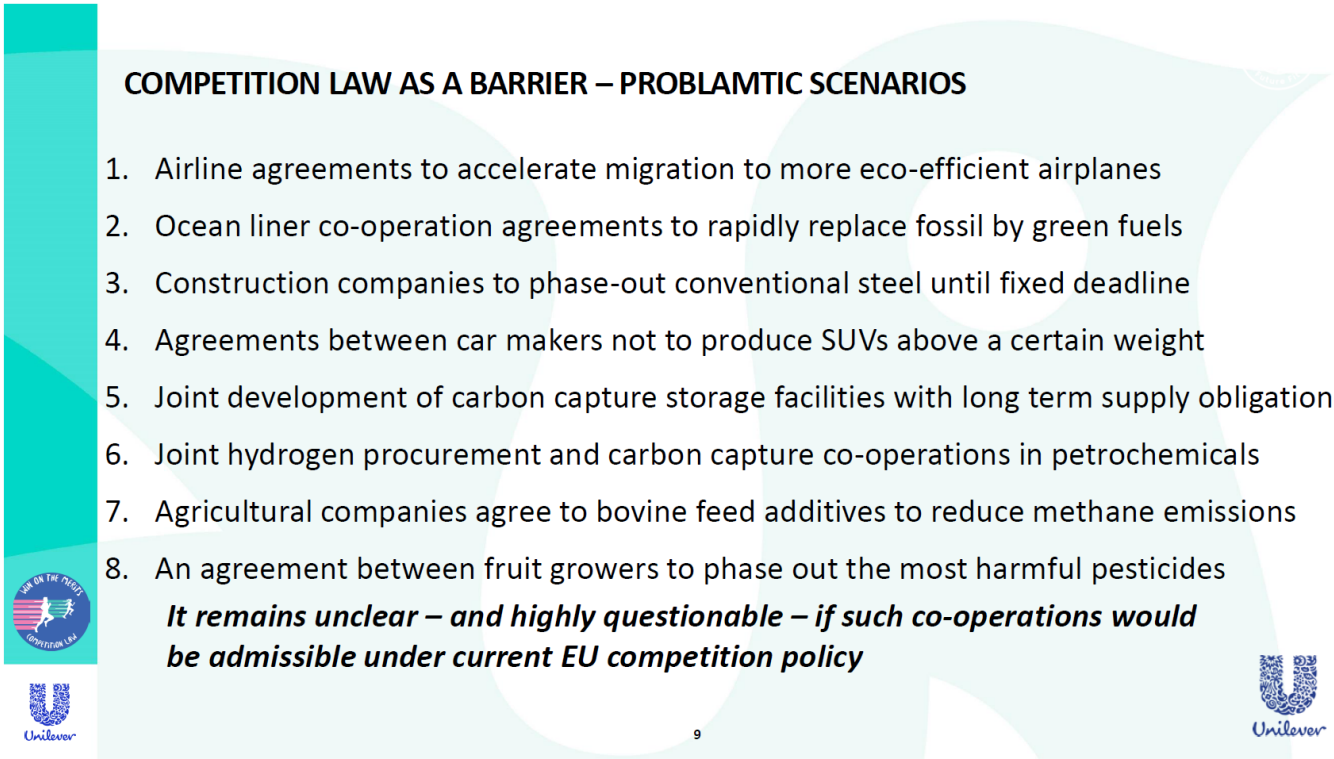


It is indeed important to underline that even according to current competition policy as well as under the new guidelines, a large number of cooperation agreements and types of agreements, types of behavior, would already not fall under the prohibition of restrictive practices.

This is especially true for voluntary standardization agreements, where the companies are free to decide if they want to join and leave the standard, where the standard is available to everybody in a nondiscriminatory manner, and everybody can be part of the standard-setting process.

Also, admissible are co-operations, where the impact, especially on the costs or on the choice of consumers, is not appreciable and therefore not significant enough to constitute a restriction of competition.

I'm now going back on slide nine and the examples that I have presented earlier.



Depending on the cost increases that come with the agreement, it is likely that these types of agreements would cause competition law problems under the new EU guidelines and also under the enforcement practices in most of the European member states.

When you look at example number four, the problem here is not increase of costs and prices, but rather a reduction in consumer choice, and the question would be if the benefits for the planet can be taken into account if SUVs above a certain weight are not produced anymore. Under the current guidelines, that would probably not be the case.

Examples six, seven, and eight very much depend on any cost increases. If you look, for instance, at example number six, which I understand is potentially relevant in Japan, the question would be indeed if the joint procurement would lead to substantial efficiencies in terms of the costs that could – if the procurement alliance restricts competition – justify the joint procurement.
A number of further factors would have to be taken into consideration, especially the market coverage of the companies participating in the procurement alliance.

In the European Union, the approach is principally that a smaller joint market share of the members of the buying alliances is favorable. However, in order for procurement alliances to achieve their environmental targets, it makes sense for them to be as large as possible. So, for instance, if all large petrochemical companies in Japan were to join forces and jointly procure hydrogen and engage in

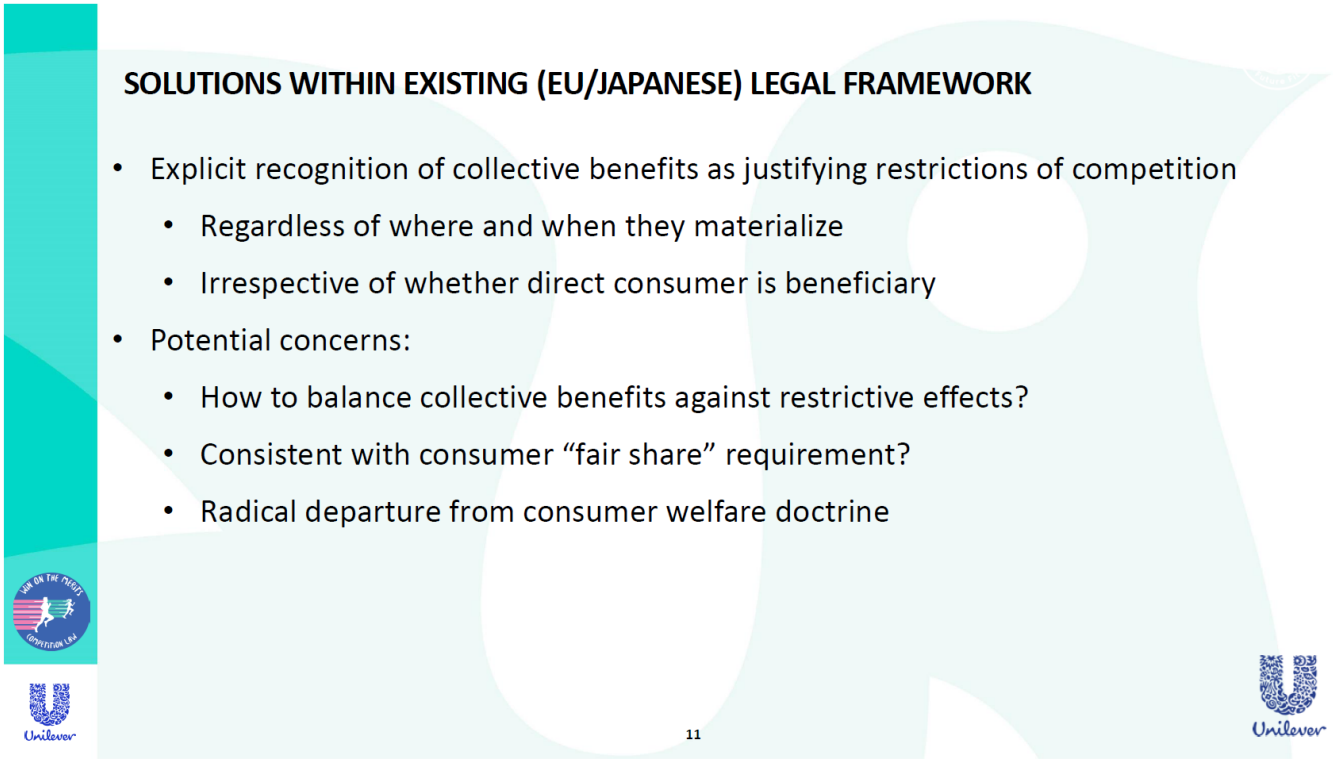
carbon capture co-operations, the question would be if such a large alliance would be justifiable given the positive impact on carbon reductions. This is at least under European law unclear and questionable.

Let me move on then to the second part of my presentation on page 10.

I'm, however, very happy to take any questions that you may have here at this point before we move on to the possible measures that Japan may want to consider to decarbonize society.

If there are no questions at this point, I leave this to the Q&A and would now then give you an overview of different solutions that I could think of within the existing legal framework by introducing public policy exemptions for the Competition Authority, or lastly through a ministerial approval solution.

On slide eleven, I have explained how solutions could look like within the European legal framework.



One approach would be that in Europe, for instance, the European Commission recognizes collective benefits as justifying restrictions of competition by clarifying that they count and are relevant regardless of whether they materialize in Europe or elsewhere, and regardless of whether the direct user or consumer of the product is the beneficiary of the carbon reduction.

It is, however, important to recognize that there are some remaining open issues, in particular, the question how such collective benefits, like decarbonization, can be balanced against restrictive effects like cost increases. How this would look like in practice is difficult to determine.

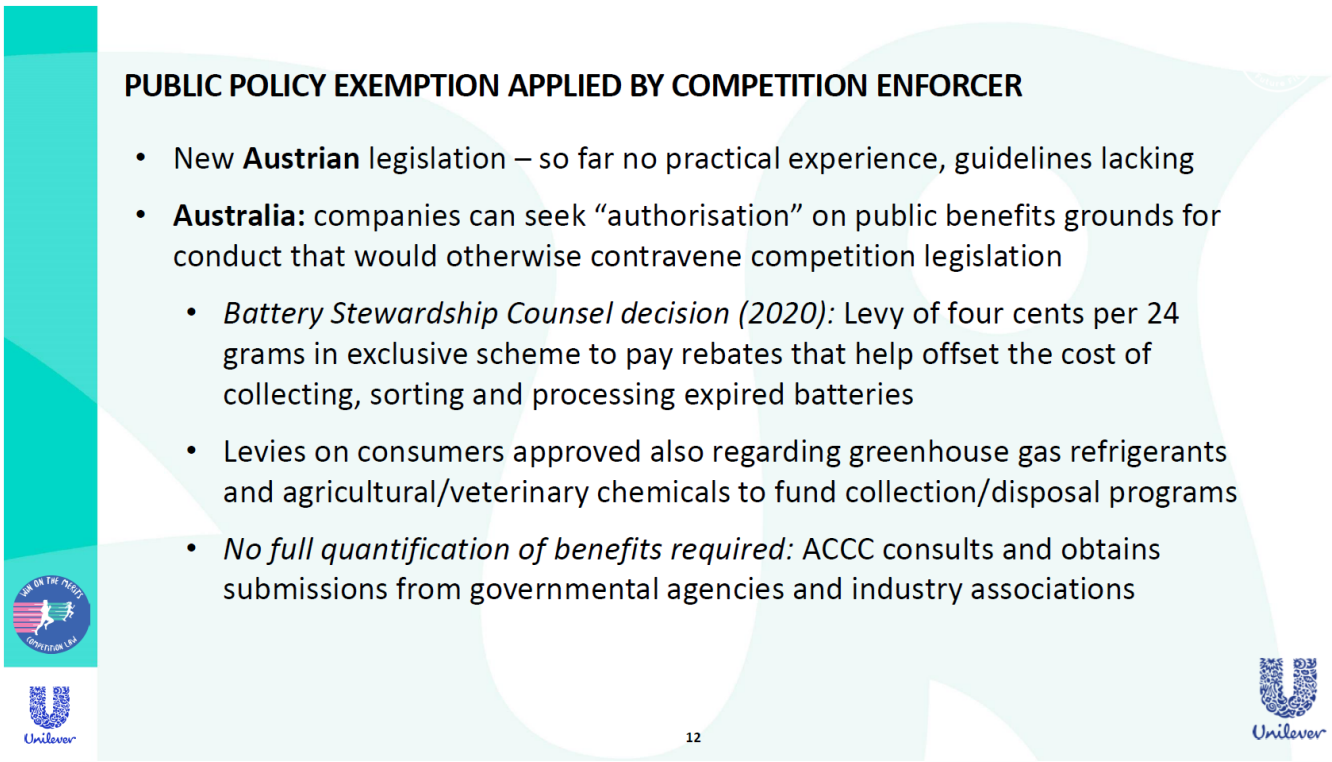
The second concern comes from the fact that in European law, the direct consumers or buyers of the product must receive as I explained a fair share of any benefits. In other words, here the carbon reduction benefits if, for instance, a benefit only materializes outside Europe.

Let's take the example of an improvement of biodiversity in African producer countries. How can this be reconciled with the fair share requirements since European consumers would not be the direct beneficiary of the biodiversity improvement?

Another concern could be that such a reading of the European legislative provisions would mean a radical departure from the consumer welfare doctrine, under which the benefits that accrue to consumers are understood in a relatively restricted fashion, and there would be no room to take

collective benefits into account.

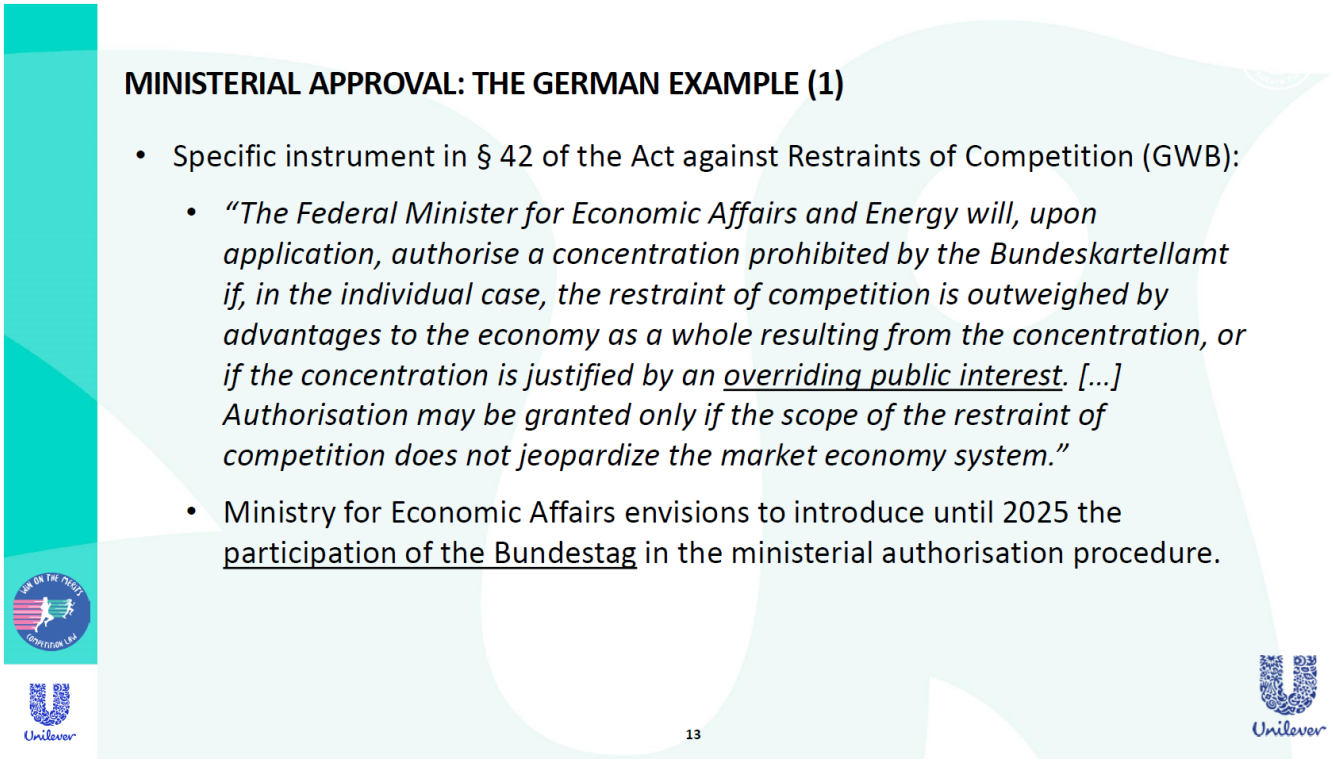
On the next slide, number twelve, I would like to present two approaches that have been taken in Austria and Australia where the legislator introduced solutions to address the issue – in the Austrian case, by broader interpretation of benefits that can be taken into account; in Australia, by the introduction of an authorization of co-operations by the competition enforcer that meet requirements in order to achieve certain public benefits.



We have already taken a look at the Austrian provision. In Australia, the "authorization" regime was established already a long time ago before the sustainability discussion started to affect competition policy.

Among the relevant cases are a few instances where the Australian Competition and Consumer Commission endorsed schemes under which companies agreed to introduce levies on their customers in order to finance schemes to achieve more environmentally sustainable solutions, for instance for batteries or greenhouse gas refrigerants. The "authorization" regime has been introduced expressly in order to give room for public policy considerations that go beyond a narrowly understood consumer welfare standard like in the EU. It has not been required that the benefits that would materialize, for instance for the environment, have to be quantified, but submissions and inputs in other forms from governmental agencies etc. is being reflected in order to weigh the advantages of the cooperation against the potential downsides.

Let me then now move on to slide number 13, where I am explaining an approach that has been taken in Germany in relation to merger control but might potentially serve as inspiration for a solution you would want to develop in Japan.



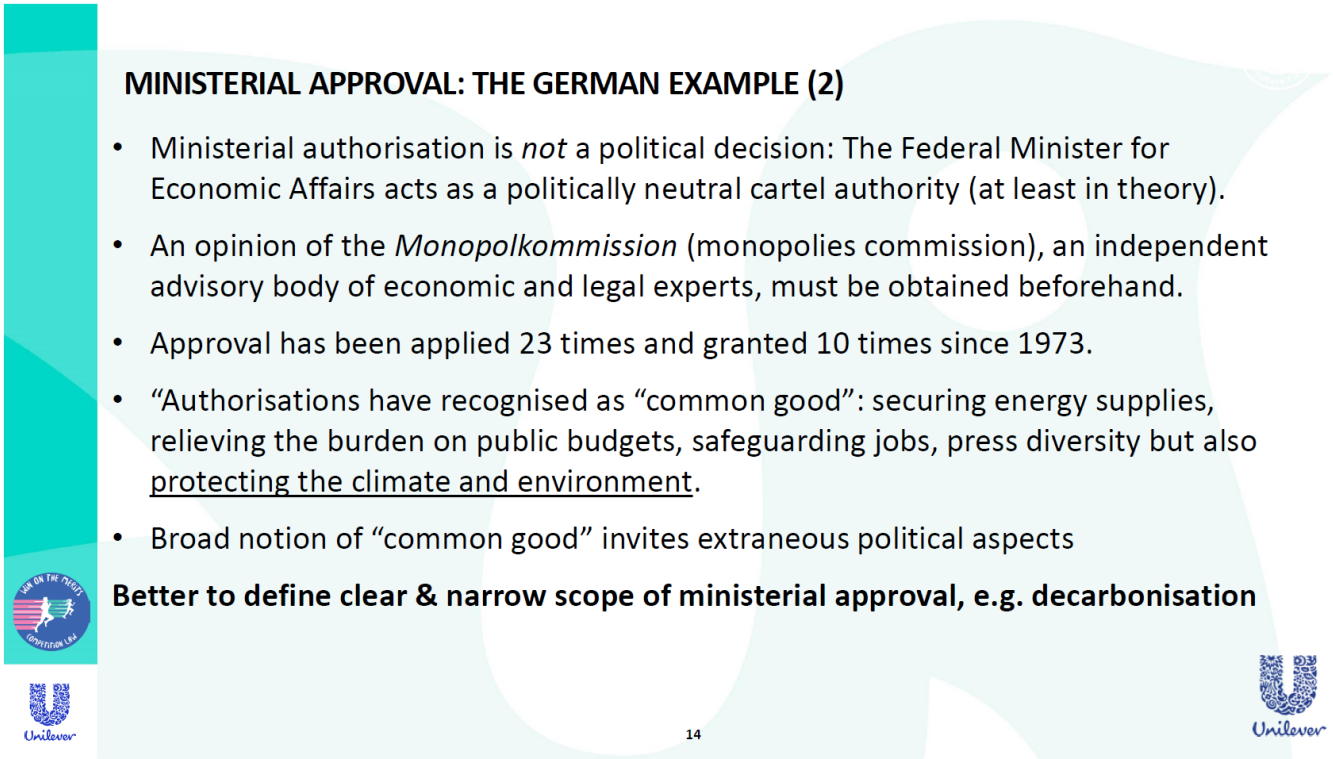
As I said, this rule applies specifically to concentrations of undertakings that are being assessed under the German merger control regime and not to co-operations. But the principal approach can easily be adopted also in relation to restrictive agreements between companies.

As the quote from the relevant provision in Section 42 of the Act against Restraints of Competition shows, the solution found in German Merger Control Law is very similar to the authorization regime in Australia in that overriding public interests can outweigh restrictions of competition.

But while in substance the two approaches seem similar, the key difference is that while in Australia, the Competition Authority takes the decision if they're our overriding public interests, in Germany, the Federal Ministry of Economic Affairs and Energy is in charge.

I would like to flag here that the new German government that came into power at the end of last year is considering to revise the law and introduce a participation of the Bundestag, the Federal German Parliament, in the authorization procedure.

I'm moving on now to the last slide number 14 to take a look at some of the key elements of the ministerial approval provision in Germany.



Conceptually, the administrative authorization is not a political decision in that the Federal Minister for Economic Affairs acts as a politically neutral authority. However, in reality, it is a decision that so far has often been influenced by political consideration.

The Minister of Economics is obliged to consult the Monopolies Commission, an independent advisory board of economic and legal experts. However, in the past, the Minister of Economics has repeatedly not followed the guidance of the Monopolies Commission. The ministerial approval provision is now in place since almost 15 years, has been applied 23 times and approval was granted 10 times. In my view, I think this shows that overall it has not been excessively used and been limited to the most controversial cases.

When looking at Section 42 of the law, it is important to stress that public interest or common good has been interpreted very broadly, covering very different considerations from the security of energy supplies to the reduction of the burden on public budgets to safeguarding jobs, press diversity, and also notably, protection of climate and the environment.

The broad concept of public interest or common good has triggered a lot of criticism around the political aspects that have been factored into the decision making over the past decades. My personal view is that a ministerial approval solution can effectively address a political desire to account for decarbonization targets in competition policy.

However, looking at the German experience, my recommendation would be to define a clear and narrow scope of the approval procedure and the powers of the relevant Minister. In that sense, the provision would be specific and clear, and a focus of a ministerial approval procedure on carbonization would probably be an appropriate solution.

And this closes my presentation. Thank you very much for your attention and interest, and I'm very much looking forward to your questions, comments, and the discussion.

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、挙手ボタンを押していただいたら指名をさせていただきます。逐次通訳が入りますので、１人２、３分でお話しいただいて、今から１時間ありますので、ぜひ１人ずつ発言いただけたらと思います。

それでは、林委員、お願いします。

〇林委員

ミデルシュルテさん、大変興味深いプレゼンテーションありがとうございます。いろいろお聞きしたい点があるのですけれども、１点に絞って質問させていただきたいと思います。

スライド11についてですけれども、行為の競争レビューに当たって、集団的な消費者利益を考慮するという点についてお聞きしたいと思います。その点について私も賛成ですけれども、いつどこで実現するか分からない集団的な利益を認めることについては、ちょっと疑問を持っています。ある種のスペキュレーティブな便益、すなわち遠い将来の、そもそも実現するかどうか、現時点では必ずしも明らかでないような便益が協定の認定に当たって考慮されることになるのではないかと思います。

もし、期待された便益が結果的に実現しなかった場合には、その協定を認めたことによって制限的効果、すなわち本来競争法を執行していれば保護できたはずの消費者利益が損なわれるおそれがあるのではないかと思います。いわゆるグリーンウォッシュを防ぐためにも、仮に集団的利益を考慮するにしても、その集団的利益というのはタンジブルで、スペキュレーティブでない、言い換えれば、データエビデンスで裏打ちされた、ある程度アイデンティフィアブルな便益であることが必要ではないかと思います。

まとめますと、考慮される集団的利益に関する、時間的、場所的な範囲の確定問題が必要になると思うのです。この確定というのは、実務的には難しいのではないかと思ったのですけれども、この点、補足してお教えいただければ幸いです。

以上です。

〇ミデルシュルテ氏

Yes. Thank you for this very pertinent question.

I think that I probably very largely agree with you that benefits may not just be speculative but must be demonstrated. And to be sure, I certainly don't want to compromise on the evidentiary requirements of competition law. And I think it's very important to maintain a high standard of legal certainty, and also in particular vigorous enforcement against any practices that use environmental objectives as a cover.

We have seen, especially in Europe in recent years, that there have been a number of investigations where companies, when new environmental regulations entered into force, colluded in order not to compete too aggressively on more environmental solutions than legally required.

So it will be important for competition practitioners to clearly draw the line between admissible and inadmissible conduct, which is particularly difficult in this field. And as I have highlighted in my presentation, I recognize that the qualification and quantification of the collective benefits may be an obstacle, but my understanding is that there are already valuation methods available that can help overcome these difficulties.

I think that at the end of the day, this will have to be a case-by-case assessment. And economists will hopefully be able to provide data and quantification methodologies that help develop an assessment framework that is effective and practical.

And I hope this answers your questions.

〇大橋座長

引き続き、上野委員、お願いします。

〇上野委員

大変分かりやすいプレゼンテーション、どうもありがとうございました。私はこの研究会に競争政策の専門家ではなく、気候変動対策の専門家として参加していまして、その観点から質問します。

スライド３を御覧いただければと思います。このスライドの中に、“Residual market failure”という概念があります。そもそも気候変動自体が市場の失敗であることに加えて、その失敗に政策だけで完全に対処できるものでもなく、したがって、“Residual market failure”が存在するという点は、気候変動の専門家として全く御指摘のとおりだと思いま

す。
そこで質問です。実は“Residual market failure”という用語を聞いたのは今回初めてだったのですけれども、ヨーロッパの中でこの概念がどれくらい広く共有されているのでしょうか。それに加えて、“Residual market failure”への対応方法として、企業間のコレクティブエフォートが有効というのも確立されている理解なのでしょうか。宜しくお願い致します。

〇ミデルシュルテ氏
Thank you. Those are very inspiring questions, and I'm glad that there are also experts from outside the competition law world present in this conversation today.
On your first question, I am familiar with the concept of residual market failure only in competition policy, where it has been in the past evoked in relation to state aid, i.e. state subsidies being granted to companies. In State aid law, the European Commission has acknowledged that in some instances, markets may not deliver solutions and regulations can be insufficient to address certain market failures, so that state subsidies may be required to compensate where appropriate.
So the underlying idea here is that state subsidies incentivize behavior that would then help fill the gap and contribute to a resolution of the market failure. In antitrust policy, as far as I know, the concept has only been introduced with the new draft guidelines. I have actually, in a publication that I understand you have also received, encouraged the Commission to transfer the concept from state aid law to antitrust law, and it is now, indeed, also reflected in general terms in the draft horizontal guidelines.

However, the documents that the Commission has issued in relation to residual market failure or where this concept is being addressed do not go into any further detail so that, unfortunately, I have no further information as to how specifically the concept would be applied in concrete cases.

On your second point, if cooperation has been accepted and established as an effective response to a market failure, I think my answer is that this is controversial. I think the competition policy debate in Europe revolves around the question if regulation should be the only means to address market failure, while other voices, including myself, argue that regulation will be insufficient to address the types of market failure that we have been seeing.
Regulation is certainly very important to respond effectively to the climate crisis. And many undertakings, such as Unilever, are strongly in favor of the right kind of regulation to improve environmental protection and combat the climate crisis effectively.
In Europe and I suppose you have certainly similar initiatives in Japan, the European Commission is driving very vehemently and vigorously the Green Deal agenda to introduce legislation that effectively targets harmful behavior and improves the chances that the EU achieves its net carbon and other targets

that it has set over the last few years.
At the same time, experience shows that regulation is often nonexistent, insufficient, or it only represents a political compromise that is insufficient to achieve the targets so that other measures must be taken in order to achieve ambitions if they want to be attained.

Furthermore, I think that it should principally also be possible for companies to go beyond legislative requirements and jointly be even more ambitious in driving environmental protection and fighting climate change.

And lastly, governments may not always want to micromanage the economy, but leave the regulation of certain behavior to the self-regulation of corporate entities.
Thank you.

〇大橋座長
　ありがとうございます。次は、高宮委員、お願いします。

〇高宮委員
　ありがとうございます。とても参考になるプレゼンテーションでした。私からは２つ質問させていただきます。
　まず、スライドの４ページ目についてです。下部に「競争政策や法制度はこの分野でどのような役割を果たすべきか」という部分がございます。この点に関して、先ほどのプレゼンテーションの際の口頭のご説明の中で、競争政策においてはこういった局面での対応として２つの選択肢がある。１つが、企業が事業における柔軟性を求めるために競争当局にアプローチしてくるのを待つというアプローチ。他方は、競争政策の側において共同行為を積極的に推奨するというアプローチ。つまり、競争政策側が待つか、積極的に対応するかという競争政策のスタンスに関する２つのアプローチについてご説明いただきました。この点に関して、私としては、必ずしも競争政策の枠内で対応しなければならないというように考える必要もないのではないかという気もしております。
　つまり、積極的に共同行為を緩和するという対応を競争政策なり競争法によってとるべきということであるとは限らず、環境政策とか税制度で解決すべきと思われるところもあるのではないかという問題意識となります。先ほどの議論とも関わりますが、脱炭素化といった目標のために競争政策によって対応すべき場面とはどのような場面とお考えになるかという点を教えていただきたいというのが１つ目です。
　２つ目は、より短い質問です。スライドの６ページ目のご説明の中で、ドイツに関して、最近の連邦カルテル庁の事例はむしろ実用的であると御紹介いただきました。他方で、競争法の原則の解釈を確認した報告書を当局が出したというご説明も頂きました。原則を確認しながら実用的な事例が出ているというのはどういうことなのか、実用的な事例

が出ているということは実際には解釈にかかる基準を変えたということなのか、もしそうだとすればその背景にどういった事情があるのかという点を教えて頂ければ幸いです。

〇ミデルシュルテ氏

Thanks very much. I think those are very relevant questions. And I think in terms of your first question, you're absolutely right. There are many other policies and probably even more important policies than competition policy to address climate change effectively. So I think competition policy has a complementary role to play in cases of residual market failure. This is probably how I would define it.

There should be generally a priority of regulation where it is indeed effective and indeed, the market will also itself deliver solutions.
We have seen, for instance, Tesla being very successful in introducing not only battery-powered cars but also a charging infrastructure without being forced by regulation and without cooperation, an example that shows that individual efforts can be very impactful.

Precisely where competition policy would make a difference and could play a particularly important role is a very good question and I'm afraid I probably don't have a very clear answer. But what I believe I can say is that competition policy or cooperation between competitors and consequently competition policy will play a role where legislative efforts have failed in particular because there was a lack of political compromise, and maybe also interested groups that have been having a powerful voice in legislative debates.

And secondly, I think cooperation will also be particularly important where international standards do not exist.

As a matter of fact, environmental regulation is very often national or in the EU on the European level but not global, while companies often operate globally so that cooperation solutions can be more effective than regulation in the absence of transnational solutions.

And the third element that I think needs to be taken into account is in fact the first-mover disadvantage of companies who are discouraged and disincentivized from taking unilateral action because of the risks of prohibitive costs, making individual competitive action impossible. Also because negative externalities are not being taken into account, for instance by tax regulations or other environmental provisions.

On your second question, the German Competition Authority has recently dealt with two or three cases. Two of them were more related to social sustainability and animal welfare standards.

In both cases, there were agreements to increase living wages or wages of farmers and animal welfare standards respectively, which would come with certain financial investments and therefore cost increases ultimately for consumers.

Under a conventional reading of competition law, the German Competition Authority would probably have struggled to consider the potential benefits of these initiatives in its competition law assessment.

In its competition assessment, however, the Authority made use of its discretion to investigate cases or not and decided to abstain from entering into a thorough investigation of those behaviors, saying that it appears the expected possible harm to competition would not warrant the opening of an investigation.

So, in other words, the authority made use of its discretion not to open an investigation because it didn't expect harmful effects on the economy, which in my view shows a pragmatic approach.
Thank you for your question.

〇大橋座長
お時間があと30分を切ってしまったのですけれども、そこの点を気にしながら、次に、野田委員、お願いします。

〇野田委員
今日は大変貴重なお話をありがとうございました。
先ほど既に質問が出ましたけれども、私も集団的利益を考慮するという点で、どのように明確化していくかというところに非常に関心がありました。そちらの御回答の中で、バリュエーションの手法は開発されてきているというのがあったと思います。これについて、具体的にはどういった方法が出てきているのか。先ほど少し議論になりましたけれども、将来における利益まで取り込むような方法が出てきているのか、そういったところを少し補足していただけるところがあれば教えていただければと思います。
そのことと関連するかもしれませんが、競争当局としてその集団的利益を適切に判断できるのか。言ってみれば、競争の番人としての役割を超えることにはならないのかという辺りについてもお考えをお聞かせいただければ幸いです。

〇ミデルシュルテ氏
Yes. Thank you for your question.
On the evaluation methodologies, the Dutch and the Greek competition authorities have worked on that and prepared a paper that assesses evaluation methodologies that can be applied in computational analysis. Otherwise, my knowledge is predominantly from the newspaper The Economist where

frequently valuation methodologies are being discussed. I'm unfortunately not an economist and not in a position to give you the specific references. But I do understand that these methodologies are suitable to quantify the economic impact, for instance of greenhouse gas emissions.

My understanding is also that future benefits can be calculated in that reductions of pesticides, for instance, do materialize, for instance, in higher fertility of agricultural soil or soil that's being used agriculturally. Also, the avoidance of costs that come with deforestation or erosion of soil can be quantified.
Again, I'm probably not the best-qualified person to elaborate on this. If the study group would like to meet economists who have been working on this topic, I'm very happy to make a connection.

And in relation to your second question, I think one of the most difficult questions is if competition authorities should be and are in a position to assess collective benefits and whether they outweigh restrictions of competition. In the absence of other legislative solutions, however, I believe that the environmental and other broader collective benefits cannot remain unaccounted for so that competition and forces should take them into consideration in the assessment of co-operations.
I recognize the difficulties that may exist in relation to quantification, but I think it is very important to note that economically speaking, we are looking at the reduction of negative externalities when we are talking about collective benefits and ignoring these economic effects would be inappropriate for competition policy.

So while in the past competition policy has left negative externalities outside its assessment of co-operations, I think this has been shortsighted. Given the debate and the challenges around the climate crisis, it is more than timely to expand competition analysis into the calculation of negative externalities and their avoidance.
But I appreciate that an alternative solution might be viable in introducing a legislative exemption whereby, for instance, a Ministry would be making the judgment call and take any decisions as to whether collective benefits do outweigh restrictions of competition, as is the case in merger control in the German example.

In that case, you would be in a position to delegate the decision-making responsibility to an appropriate body, for instance in the Ministry of Economics, that is equipped with the appropriate resources and experts that have a holistic view at competition policy and its environmental implications.

〇大橋座長

次に、川濵先生、お願いします。

○川濵委員

本日は、非常に有益なプレゼン、ありがとうございました。今回の御報告に対して多くの質問があるのですけれども、端的に２点に絞って質問させていただきます。

まず、環境のために協力行為が非常に重要であり、必要だということに関して全く同意いたします。しかし、少し気になったのは、従来からも多くの環境のための協力行為は容認されてきたと理解しています。今回問題になったのは、明確な反競争効果が存在するような共同行為が、なおかつ容認されるべき場合はどんな場合かということだと理解しております。

そのような問題を考えるときに、まずそのような状況がどれぐらい多いのかによって、必要とされる法的レジームも変わってくるだろうと考えております。極端にそういったケースが多いと考えておられる方の中には、一括適用除外のような制度を導入するべきだと考えておられる方も多いようです。

しかし、私が考えるところ、このようなことが起きる件数はかなり少ないのではないかと。特に、例えば最近の企業が環境にフレンドリーな考え方をすると先ほど強調されていましたけれども、これは実際にそうで、特に消費者の選好が環境を優先している場合には、むしろ競争がグリーンのイノベーションを加速させるというのも一般に主張されていることだと思われます。

要するに、ファーストムーバーのディスアドバンテージがどれぐらい広いかとか、大きいかとか、そういった諸条件によって直面する問題の大きさが決定されるのだろうということです。次に、その限られた極端な場合に関する比較衡量の問題に関して言いますと、日本の独占禁止法は基本的にアメリカバーションであって、ＥＵバージョンのものではないということです。ただ、アメリカと異なっている点が１点だけあり、それはパブリックインタレストに関する考慮要件が入っているのです。パブリックインタレストという概念自身は非常に曖昧な概念で、恐らく集団的利益、その他の内容とも変わらない問題なのだろうと考えております。

そして、我々が直面する問題は、極端な場合に関する集団的利益を精緻化することにあり、先ほどの議論に出てくるように、これに対する計量的手法があるかないかといった問題とともに取り組んでいくべき問題だと考えます。

具体的な例で言いますと、スライドの５番目と９番目に出ている一連の例です。これらのケースは、これらと全く同じではないけれども、類似した想定例というのは我々もよく議論しております。日本法のコンテクストで申し上げますと、日本法ではバイオブジェクティブの違反がございません。そして、先ほども言いましたとおり、公共の利益要件があることから、社会、公共のときに必要かどうかどうかということも意識しながら、反競争効果の具体的分析を行います。そのため、これらの例の中にも、目に見えて大きな悪影響とそうでないものがあり、それぞれに関してケース・バイ・ケースの判断をしなければいけないことは確かだと思います。

ケース１とケース６に言及がありましたが、これらの場合も、さらに細かな協力行為の形態やメカニズムによって結論が変わってくるのではないかと考えております。したがって、これらに関してはかなり詳細な探求が必要なものであり、適用除外という形で単純な解決を望むよりも、ケース・バイ・ケースの比較衡量をする必要があるのではないかと考えております。これらのタイプで反競争効果の可能性が高ければ高いほど、グリーンウォッシュの危険性もあるために、グリーンウォッシュが起きる場合とそうでない場合を比較する上でも、そのような考慮が必要なのではないかと考えています。

もう一点に関しては簡単な質問でして、ドイツの経済大臣の適用除外に関する制度ですが、２月21日のプレスリリースを読むと、それらに関して法的に規律するようなメカニズムを考えているとあったのですが、日本ではまだ詳しく分かっていないので、何か情報があれば教えていただけないでしょうか。

〇ミデルシュルテ氏

Thanks very much. I think you have touched on a lot of important points, and I try to be concise in my answer.

First, I fully agree that the scenarios that I've shared all require case-by-case analysis. They may suggest that cooperation could require a different reading of competition law, but that may not always be the case. And similarly, not always will the benefits be strong enough to justify cost increases, depending again on the specific case.

And this alone, I think, already demonstrates that block exemptions would currently not be a good solution because the authorities would first need to gather experience with cases before they can think about possible, more generalized solutions like block exemptions that at this stage I think would not be feasible.

And indeed, as you said, we do not know at this point how many cases will actually have to be handled by the authorities. As things stand today, it is difficult to predict how relevant cooperation will be as a complement to regulatory and competitive efforts.

As far as competitive solutions are concerned, I believe that, yes, consumers are more and more environmentally conscious. But as, for instance, the recent developments following the commodity price inflation show, consumer willingness to pay even more for more sustainable products may not be the key priority in terms of inflation.

And there are, of course, also difficult social questions to address in terms of how can we ensure that the socially more vulnerable consumers are being compensated for higher costs of more environmentally sustainable products.

As to your question where we believe the first-mover disadvantage may materialize, I think that could be in many areas, but particularly where the investment required by companies to introduce the most game-changing technologies and production methodologies and to give up the least sustainable packaging, production methodologies, etc. Those are the scenarios where I think the first-mover disadvantage obviously comes into play, especially in the absence of regulation.

It's, of course, interesting for me to hear that Japanese law already provides significant discretion for authorities, for the competition authority, to factor environmental considerations into its decision making.

But I am aware that still, the definition of the criteria will be difficult given the relatively broad notion that is established in the law.
On your question as to the German legislative efforts regarding the ministerial approval procedure, the only possible revision that I'm aware of is the introduction of a parliamentary approval under which the decision would be delegated to the federal Parliament.

I think the underlying assumption is to sort of embrace the fact that the ministerial approval is a highly politicized instrument so that in a democratic society, the decision should be taken by the Parliament and not by the Ministry. However, realistically as the ministers are being typically nominated by the parliamentary majority, the ultimate decisions may not be fundamentally different.

Thank you.

〇大橋座長
　ありがとうございます。お時間が来てしまったので、取りあえずここで質疑を終わりたいと思います。ディルクさんにぜひ温かい拍手を送ってください。

〇ミデルシュルテ氏
Yeah. Arigato, thank you very much for your keen interest and your very inspiring questions. I really enjoyed this, and I'm very thankful that you made time at such a late hour at the beginning of your weekend. And I'd be very happy to continue this discussion and remain available for any questions that you may have going forward.

〇大橋座長
　次回の会合は、後ほど事務局より御連絡させていただきますので、以上で本日第３回目の会合を閉会といたします。大変遅い時間までお付き合いいただきまして、ありがとうございました。

お問合せ先
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