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ANNEX TO THE SUMMARY RECORD OF THE 110th MEETING OF THE COMPETITION COMMITTEE HELD ON 27-28 OCTOBER 2010

-- Draft Summary Record of the Roundtable Discussion on Horizontal Agreements in the Environmental Context --

The attached document is an annex to the summary record of the meeting held on 27-28 October 2010. It is circulated to the delegates FOR INFORMATION.

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SUMMARY OF DISCUSSION

By the Secretariat

1. The Chair invited the delegates to first consider what types of environmental benefits would be cognisable in a competition review of horizontal agreements. Most contributions state that competition authorities can consider only the competition dimension of environmental agreements and can take environmental concerns into account only if they coincide with competition goals; some submissions, however, appeared to express a slightly different view.

2. The Chair then invited the United Kingdom to explain and illustrate the system it had developed to distinguish between different types of environmental benefits that are relevant for competition authorities, differentiating between environmental benefits that are direct and quantifiable efficiencies and therefore can be considered in a competition assessment, and those that have indirect economic benefits or non-economic benefits that are not relevant to the competition assessment.

3. A delegate from the UK explained that there has been very little practical experience with environmental agreements. The UK's roundtable paper resulted from an intensive debate within the OFT, in the context of the review of the Commission's horizontal guidelines; it was aimed at establishing a framework for the extent to which environment benefits should be taken into account, what the principles are, where the boundaries lie and what the grey areas are. As the paper explains, whether to take environmental benefits into account is not an easy decision except when direct economic benefits can be demonstrated.

4. As regards the current review of the UK-specific block exemptions for certain public transport ticketing schemes, the OFT has identified direct economic benefits that justify the application of Art. 101(3) of the EC Treaty and Section 9(1) of the UK Competition Act. There are also potential indirect economic benefits that might flow to consumers who do not necessarily use public transports, for example road users. It appears justified to look a bit broader in terms of the review of that exemption.

5. In the UK regime, which follows the European model, it is necessary to distinguish between direct and indirect economic benefits as well as non-economic benefits; only direct economic benefits would clearly fall within Art. 101(3) or Section 9(3). It can be difficult to decide in which of these three categories the benefits might fit and there are grey areas.

6. The OFT has not yet had to decide a particular case. But if it were faced with examining environmental benefits that could not easily be classified as direct economic benefits, two issues would have to be examined: first, the extent to which the environmental benefit improves the value for money of a product or a service for consumers; second, and perhaps more difficult, the remoteness of the benefit because the more remote the beneficiary the more likely it is that the benefits are to be characterised as indirect benefits, economic or non-economic, rather than direct benefits. This is very important because the more remote the beneficiary the more difficult it is to measure benefits and the less certain they are to arise. There are big issues here in relation to benefits that arise for instance in one sector of consumers, or for consumers in the future as opposed to consumers at the present. On

that basis the OFT likely would reject alleged environmental benefits that are not directly linked with the characteristics of the product or service, which are remote or difficult to quantify, or which are not certain to arise.

7. The UK submission makes clear the extent of the debate that is needed; it will be necessary to look at a series of individual cases and to try to apply the principles and the framework to a variety of different situations.

8. The Chair pointed out that Australia's contribution offers an interesting contrast. Because Australia has a public interest test in its competition law, it may have more leeway to take environmental considerations on board. The Chair asked Australia to explain the extent to which the environmental dimensions of agreements can be taken into account and to compare its views with the more restrictive views described by the UK and other countries.

9. A delegate from Australia explained that the situation in Australia is perhaps a bit different to some other countries as the law permits anticompetitive agreements to be exempt from competition law for a defined period of time if they provide public benefits that outweigh public detriments. This exemption can be granted even to agreements that would otherwise be per se illegal. This net public benefit test applies only where parties apply for the exemption under the authorisation provisions of the Competition Act.

10. The net public benefit test has been broadly interpreted as a modified total welfare test. The Competition Tribunal has decided that whilst the test does not require that efficiencies generated by a merger or set of arrangements necessarily be passed on to consumers, gains that flow through only a limited number of members in the community will carry less weight in some circumstances.

11. The authorisation process allows the ACCC and the Competition Tribunal on review to authorise conduct that corrects market failures such as environmental externalities, public goods or public bads, transactions costs, information failures, or conduct that facilitates the achievement of cost and dynamic efficiencies. Beyond these issues it could also encompass conduct that facilitates compliance with environmental laws even if there is not a strong efficiency argument.

12. This appears to be a much broader test than the one that applies in the UK, which focuses on production efficiencies and benefits to direct consumers. The Australian test, in contracts, covers economy-wide benefits relating to all types of economic efficiencies and to what the UK paper calls non-economic benefits. In addition, it is not necessary to make a quantitative assessment of the costs and benefits. The Australian system differs in respect of the other three conditions listed in the UK contribution: the conduct does not have to be indispensable for achieving the benefits; there is no absolute requirement for consumers to receive a fair share; and the ACCC could potentially authorise the elimination of competition if the public benefits were sufficient to outweigh the detriments.

13. The Chair then turned to cases that deal with waste material collection, recovery, and recycling systems. There are usually two types of competition considerations in these cases. The agreement might limit competition either in recycling or with respect to the primary product that is supposed to be recycled. Alternatively, questions might be asked about the extent of scale efficiencies or barriers to entry. If they are significant then a single waste collection or recycling system should be expected.

14. The Chair noted that Italy’s submission focuses on an industry-wide consortium for the recovery and recycling of used lead batteries, COBAT, in which the battery recyclers’ industry association participated. The consortium was mandated by law. The Italian competition authority

intervened because it was concerned that COBAT would limit competition among its members by protecting historical market shares. The competition authority imposed a fine, but on appeal the court overturned the authority's decision. The Chair asked Italy to explain why the court came to a different conclusion. Was the court worried that more competition would prevent the attainment of the environmental goals that were underlying the agreement?

15. A delegate from Italy said that the purpose of the consortium was to reduce environmental problems associated with the disposal of used lead batteries, which are very toxic, and to encourage recycling of the material that can then be used by the industry.

16. The Italian competition authority intervened because it received complaints by lead manufacturers that the competition restrictions of the system led to higher lead prices. The Authority objected to two elements of the consortium's rules: first, the consortium had agreed with the recyclers that the quantities collected each year would be assigned to the smelters according to their historical market shares; second, there was a provision that if one of the recycling companies acquired used batteries directly from producers without going through the consortium, it would face a reduction by the same amount in the quantity received by the consortium for that year. The Authority determined that this provision had the effect of maintaining market shares and of repartitioning the market; it would also raise obstacles to the creation of alternative systems of collection which might be possible after the exclusivity initially granted by law to the consortium had expired.

17. The court decision was based more on a formal, technical aspect than on a substantive analysis of whether the system was the best one to achieve environmental goals. The court relied on Article 8(2) of the Italian competition law, which basically reflects Article 106 of EC law and which provides that competition law should not apply to undertakings entrusted with the operation of public interest services insofar as this is necessary to perform the specific tasks assigned to them. The court decided that the restrictions contained in the rules governing the system were indispensable to achieve the environmental goals. The court reasoned that only if COBAT had deviated from the public functions it performed - which in the opinion of the court it had not - could competition law be applied to its conduct. In essence, the court decided that the consortium pursued public interest objectives and that its conduct was mandated by law; while the view of the competition authority was that the conduct of the consortium had gone beyond the mandate of the law. The Authority appealed and the case is now pending before the Council of State.

18. The Chair asked Italy to clarify whether lead that was recycled was then attributed to the smelters on the basis of historic market shares of the smelters. Did the Authority object to this arrangement, and if so, what would have been the alternative?

19. The delegate explained that a recent advocacy report by the Italian competition authority regarding other sectors suggested bidding procedures for the recycled quantities as an alternative. This solution has been implemented recently and apparently successfully in the glass recycling sector which conducted an international, technology-based bidding procedure.

20. The Chair replied that this is a familiar arrangement in other areas. There was a counterargument that a bidding process would increase the price of the recuperated material and would make it less competitive with the primary, non-recycled product. The advantage of the quota system was that the smelters would get lead cheaply. With a bidding procedure, the raw material would be more expensive and the smelters would be less able to compete with the primary product. Was any argument of that kind made before the Authority?

21. The Italian delegate replied that the argument had not been raised. Even in the case of the glass recycling arrangement this concern has apparently not been raised.

22. The Chair next turned to Spain, which described in its submission a case not entirely unrelated to the Italian case, involving glass recycling by a group set up by the industry. It appears that the competition authority's concern focused on the effects on competition in adjacent markets and not in the recycling market itself. The Chair asked Spain to discuss its concerns in the case and the developments that occurred after it adopted a negative decision.

23. A delegate from Spain explained that ECOVIDRIO is a collective system for glass packaging waste that represents all the players operating in the markets related to the management of glass packaging waste, including collection, transport, treatment and recycling. Before 2005 all industry players could be a member of ECOVIDRIO's decision body. Through ECOVIDRIO they were able to co-ordinate their behaviour and to exclude competitors from the affected markets. This affected in particular weaker competitors such as collectors who did not own a treatment plant and thus necessarily had to sell collected glass waste to treatment companies, most of which were associated with ECOVIDRIO. In addition, many treatment companies were vertically integrated and carried out a collection service as well, and therefore were competitors in the market for glass waste collection. This led the Spanish competition authority to impose a fine on ECOVIDRIO in 2003. In addition, the competition authority considered that ECOVIDRIO should have notified the agreements among its members in order to guarantee that they did not interfere with the potential existence of other collective systems for glass packaging waste and with competition in the different markets involved.

24. As a result, ECOVIDRIO presented its revised collective system to the competition authority in 2004 and requested an authorisation. The authorisation was granted in 2005 in light of ECOVIDRIO's commitment to fulfil conditions that guaranteed that the agreements among its members were compatible with competition. These conditions mainly referred to the composition of ECOVIDRIO's decision making bodies, the kind of information these bodies were allowed to handle, and the criteria applicable in competitive bidding procedures for contracts for the collection and treatment of glass waste. These conditions in no way affected the environmental goals of the collective system since they did not limit the amount of glass waste that could be recycled by the system. The proof is that ECOVIDRIO has been increasing the amount of glass waste that it has been recycling in the past seven years.

25. In 2008 the Spanish Competition Authority instituted proceedings against ECOVIDRIO again. The Authority found evidence that ECOVIDRIO had systematically infringed the conditions in the authorisation since 2005 and, thus, that it had abused its dominant position in the market for the management of glass packaging waste. In particular, the Authority found that ECOVIDRIO had faked competitive bids for the collection and treatment services favouring the undertakings affiliated with its collective system and that it had been able to expel at least one competitor from the market for collection of glass packaging waste. In July of 2010 the Authority resolved to levy a fine of €1,000,000 on ECOVIDRIO.

26. The Chair then turned to Turkey, which described in its submission a case in which the industry participants in the accumulator market are recovering and recycling the lead in accumulators. The competition authority thought that the scheme was suppressing price competition in the lead market, possibly because not only the recyclers but also the manufacturers of the accumulators were part of this agreement. The Chair asked Turkey to describe the case and point out similarities with the Italian case.

27. A delegate from Turkey explained that Turkey has a regulation that gives responsibility for recycling and collecting used accumulators to the producers and the importers. The regulation explicitly states that the producers and importers may form their own organisations to fulfil their obligations under the regulation. Used accumulators are valuable materials in Turkey. By recycling used accumulators a substantial amount of lead can be recovered and since there is no lead ore in Turkey, recycling accumulators or importing the lead are the only options to obtain lead. Lead is the main input in the production of accumulators, and accumulator producers in Turkey have their own recycling firms. Even before the regulation was adopted, used accumulators were collected and recycled. The accumulator collection and recycling markets have been profitable in Turkey.

28. After the regulation was adopted, two associations were set up, one by the producers and recycling firms and the other by importers. The competition authority's primary concern was about the producers' association, as the producers' combined market share in the accumulator market is almost 90%. This association established a company to collect used accumulators from distributors and dealers of the member producers. The agreements between the company, dealers and distributors prevented them from selling used accumulators to collectors acting on behalf of the other association set up by the importers. The company by its regular Board of Directors' decisions also set the price at which dealers and distributors had to sell their used accumulators to the company. The used accumulators were then distributed only to the member recycling firms of the association. (The association also has some recycling firm members which were mostly the producers' recycling firms.) Member recycling firms were prohibited from buying used accumulators from collectors acting on behalf of the other association. Again, the company set the purchase and sale prices of these recycling firms.

29. The Turkish competition authority concluded that the company violated the competition law by fixing the prices of the used accumulators and by determining the number of transactions between the market participants. The authority required the termination of the infringement either by amending the agreement establishing the company or by dissolving the company, and imposed an administrative fine on the founding members of the company.

30. The Chair then pointed out that a number of contributions identified cases in which participation in a joint waste management system may have directly restricted competition in the primary market, either by creating greater cost commonality between the producers in the primary market or through an agreement among competitors to pass on the recovery and recycling fees to consumers.

31. The Chair invited the European Union to discuss the VOTOB case, which involved a waste management system set up by tank storage operators that was financed by a fixed fee paid by all members. The Commission found that the arrangement created a cost commonality that reduced competition and therefore could have had spill-over effects in the primary product market. The Chair remarked that those cases presumably arise when the recycling cost is an important part of the cost in the primary market, but he queried where the threshold is for deciding whether there is a competition issue. He asked the European Union to explain this case and identify how to determine the threshold at which competition concerns arise.

32. A delegate from the EU explained that VOTOB was an association of six independent companies that offered tank storage facilities in some cities in the Netherlands. They discussed with the Dutch government how to improve environmental standards and decided to make certain investments to reduce emissions from the tanks. Then they agreed to impose a common supplemental fee on their customers to recover the cost of those investments. This agreement was not approved by the Dutch government; it was a separate agreement among the six companies. The Commission objected because it was considered horizontal price fixing. In addition, in their invoices the companies

presented the fee as a separate charge, as if it were imposed by the public authorities, thus providing misleading information to customers.

33. The agreement's other effect was that the common fee would have created a commonality of costs that could have had a negative spillover effect on the primary market. At the time (early 1990s), there was not much analysis on how important this commonality of costs was. But the Commission is currently working on new horizontal guidelines that will make clear that commonality of costs may result in competition concerns if it could raise prices in the downstream market. Of course one cannot draw a bright line that would indicate from which point there are competition concerns. This analysis will depend on the market and on the nature of competition in each case.

34. The Chair then asked how the EU would assess whether common costs raise concerns in the downstream market. What factors can be used in cases like this to determine whether common costs significantly influence price?

35. The delegate replied that there is no specific percentage that can be used to define what significant means. One has to look at the major components of the downstream price, the abilities of the companies to shift the other components, and the importance of the component that is fixed and common to all.

36. The Chair then noted that the Netherlands' contribution states that obligations imposed on participants to pass on fees to consumers in a system to recover and process waste materials typically cannot be allowed, which is a position that is probably shared by many delegations. But the contribution goes on to describe two cases in which the NMa accepted pass-through obligations. The Chair asked the Netherlands to identify the circumstances under which it allows pass-on fees as well as how one should distinguish the cases in which such fees are prohibited.

37. A delegate from the Netherlands replied that in general the NMa does not allow pass-through obligations. In two cases mentioned in the contribution the NMa did allow pass-through obligations for two different, case-specific reasons. Firstly, in the car wreck recycling case the NMa held that the pass-through obligation did not restrict competition because of the tiny incremental increase that would be added to the cost of the car – about 45 Euros. So the NMa did not look at efficiencies given the small nature of the increase which was not likely to lead to a co-ordination of prices.

38. In the paper recycling case, the NMa authorised a system in which wholesalers could pass on a recycling fee to producers who used the paper to create products like packaging; in this way the costs of recycling paper and cardboard were passed on to the parties who were deemed responsible for creating the rubbish in the first place, which was in accordance with the goals of the government-mandated packaging waste scheme. The NMa authorised the pass-through obligation for three reasons.

- By allowing this pass-through obligation, the cost of the recycling system was deemed to be placed on the most appropriate parties;
- Conversely, the costs were not passed on to the end consumers.
- It was the most efficient way to implement the government-imposed obligation to recycle paper and allocate the associated costs. By passing on the costs to the wholesaler, the administrative costs were minimised because if one had tried to impose it on secondary producers, i.e. the packagers, there would have been a large number of companies that would

be processing these administrative costs and they would have been more likely to be passed-on to consumers.

39. The NMa actually assessed the likelihood of whether these costs would be passed on to consumers but concluded that they would not.

40. In general, however, if efficiencies can be obtained in ways other than by pass-through obligations the NMa would not allow them.

41. The Chair next turned to the United States. He observed that the US contribution is very firm in saying that competitors who argue that an agreement on passing on the cost of complying with new environmental regulations to consumers was necessary are likely to be told that such agreements are a frontal assault on the basic policy of the Sherman Act and therefore are impermissible. He asked the US to comment on the cases presented by the Nma; for example, did the agreement in the case involving a 45 Euros increase in the costs of a car really create a competition problem? Has the US considered the possibility that in some cases the increase in price for the consumers might have a beneficial effect by providing an incentive to consumers not to throw things away, which forces society to incur the costs of recycling and recovering those products? In other words, is it always bad that the cost is passed on to customers?

42. A delegate from the US replied that the short answer under US antitrust law is that in the absence of some finding by Congress that a particular segment of the economy or a particular regulatory structure is entitled to special treatment under the antitrust laws, the focus is entirely on the competitive process and on the presence or absence of competitive effects. That is the basis for the observation that it would be difficult to defend an agreement to pass on to consumers the cost of complying with the regulation of the type that was just discussed by the Netherlands, unless Congress had directed that those effects be given special weight - which could happen. Nevertheless, the discussion in the Netherlands' paper of the respective roles of antitrust and environmental authorities is largely consistent with the situation in the US. If there is an overriding policy consideration that has been established by Congress, then to some degree that can displace the standard antitrust analysis.

43. It is difficult to predict how a particular agreement would be analysed under US antitrust law without a detailed description of the agreement and the surrounding circumstances, but a few observations are:

44. Collaboration among competitors is not inherently suspect under US antitrust law and a joint venture with a legitimate purpose, for example a joint venture for disposing of car wrecks in an environmentally friendly manner, would not necessarily violate US antitrust law so long as the net effect of the agreement was not to restrain competition.

45. A US court almost certainly would not accept the argument that even though the agreement to pass on disposal fees restrains competition, it is legal because it enables the parties to dispose of car wrecks in an environmentally friendly manner. US antitrust law does not permit private parties, the antitrust agency, or the courts to weigh environmental benefits or any social goods against competitive harms. Again, that assumes Congress has not established a different policy. For the same reason it would not be a defence that the agreement to pass on disposal fees results in only a small price increase. That would be deemed to be an anticompetitive effect.

46. One can imagine circumstances where that might not be the result. Suppose you change the hypothetical a bit: the competitors form a joint venture to recycle car wrecks but it is not necessarily

clear that they had to agree on the price they would charge for doing that. If that service did not previously exist and the introduction of that service was done in a way that did not eliminate competition in a meaningful sense, the agreement would not necessarily violate antitrust laws. It would be necessary to show that the agreement on price advanced a pro-competitive objective and that would be a very difficult thing to show without action by Congress.

47. The Chair asked Germany to speak about its packaging waste recovery system, which stands apart on one issue that is not always explicit in the other contributions: There is the idea that for waste collection and recycling there is a natural tendency to have fairly concentrated markets because there are huge economies of scale. Germany offers an interesting, contrasting case as the market changed from a monopoly to quite a bit of competition. The Chair asked Germany to explain what led to more competition and whether the environmental benefit was just as great or greater with competition. Could the German situation be understood as suggesting that the argument that there are significant economies of scale in this kind of activity is not necessarily true?

48. A delegate from Germany gave a brief history of the recycling scheme. In the 1980s there was a political goal in Germany to reduce the volume of waste stemming from packaging materials and more material should be recycled. The focus was only on waste from packaging, which cannot be explained anymore today. A collection and recycling system for sales packaging was designed jointly by the government and the industry, in a procedure which could have raised doubts. The system came into effect in 1991 with the establishment of one single company which is called Duales System Deutschland (DSD). This company was set up as a monopoly covering all of Germany and was responsible for ensuring that sales packaging was collected and recycled to a very high degree. DSD shareholders were the manufacturing industry, the retailers and the waste management companies; so in fact it was not only a monopoly, it was also a cartel covering all the companies involved in the recycling of waste and recycling. DSD, which was a non-profit company, was responsible only for running the recycling system, while actual operations were to be contracted out to waste management companies.

49. It took several investigations and proceedings, not only by the Bundeskartellamt but also by the European Commission, to break up this monopoly and cartel. For example the European Commission established that DSD must not impose exclusivity obligations on the operative waste management companies, and must use tender procedures for all operative waste management services. The Bundeskartellamt made sure that the cartelised structure of stakeholders of DSD was dissolved. It also initiated fines proceedings against a bidding cartel that colluded to the detriment of DSD when DSD for the first time held a public tender for waste management services. In addition, it initiated proceedings against calls to boycott potential competitors of DSD; and the Bundeskartellamt established that the waste management company selected by DSD must conclude comparable contracts with DSD's competitors.

50. Today it is difficult to say whether the monopoly was required from the start to establish such a system. The DSD was not only a monopoly, but also a cartel, and the costs of the monopoly and cartel were born by consumers. The Bundeskartellamt tolerated this scheme initially because it was based on legislation and there was an inclination in Germany to have this kind of scheme. Establishing DSD as a monopoly and cartel was the easiest way for the government and industry to establish such a system at that time. Today it is considered that it was not really necessary to have this kind of cartel.

51. Furthermore, DSD was broken up not only by competition proceedings but also by competition advocacy. For example dissolving the structure of the shareholders of the DSD was not

the result of competition enforcement, but of competition advocacy. In the end we succeeded to break up DSD because the shareholders wanted the conflict with the Bundeskartellamt resolved.

52. Initially, we had costs for the management of package waste of about 2 billion Euros per year; nowadays with competition in that area - there are a couple of small DSDs - the costs are around 1 billion Euros per year. The shareholders of DSD are no longer the waste management sector and the producers; today the main shareholder is KKR, Kohlberg Kravis Roberts, an investment company.

53. The collection and recycling scheme was started under completely different conditions and we ended up with a scheme that is not perfect but that enabled competition and excellent results. It has been a successful case, but the Bundeskartellamt had to deal with it for about 20 years.

54. The Chair then asked Poland to discuss a case that also raised questions about the standard argument concerning scale efficiencies in the recycling sector. Poland blocked a merger between two waste recycling companies collecting batteries. This was a two to one merger, but the parties claimed that it would lead to efficiencies and allow them to invest more in innovation. The competition authority, however, was unconvinced. What explains the result?

55. A delegate from Poland explained that the case concerned two recyclers of used batteries, the only two firms active in this market in Poland. Even though there were no technical obstacles to transporting batteries outside Poland, exports were severely restricted and virtually nonexistent. So the relevant market was limited to Poland.

56. There were at least two reasons why the competition authority was not convinced by the efficiencies allegations. First, those arguments did not go beyond general assertions that life would be better after the merger; that the parties would slash costs; that they would realise synergy effects; and that they would be able to invest more in the network of collecting batteries. These claimed efficiencies were not well-substantiated, so they would not have been very convincing even if the market had been different. But the most important aspect was the specific nature of the market. Because owners of used batteries were required by law to hand them over to recyclers, the supply curve was virtually inelastic. With two parties remaining in the market they could compete by offering better terms to suppliers; after the merger the incentives to give better terms would be virtually gone. So even if there were huge efficiencies the parties would not have had any incentives to pass them on to suppliers because the suppliers would be forced to bring the batteries to them. This was the point that made it difficult to accept any kind of efficiency argument.

57. The Chair asked the delegate whether the merger would not have been good from the point of view of competition in the downstream market, if the merger had allowed the recycling company to offer less favourable terms to the suppliers who have to bring their waste, and therefore allowed the recycling to be more competitive with the primary product.

58. The delegate replied that the downstream market was actually quite competitive. The market for lead production was at least Europe-wide, and there was no need to increase competition there. One would have to weigh any advantages downstream against a severe restriction of competition in the upstream market.

59. A delegate from Israel then asked the Bundeskartellamt a question. She explained that in Israel the Knesset would soon vote on legislation regarding the recycling of packaging waste. The delegate asked Germany whether it had analysed the efficiencies that were created by DSD, or if it is possible to say that through the years one can presume that the costs of operations would have been lower had a monopoly not been created through the DSD mechanism.

60. The delegate from Germany replied that the Bundeskartellamt had not looked explicitly at efficiencies, but that it had looked at the costs of the system. When DSD started, as a cartel and as a monopoly, the costs for all companies involved and for consumers were about 2 billion Euros per year. Today a number of companies are responsible for collecting and recycling packaging waste and the costs are about 1 billion Euros per year. That illustrates well how the DSD was managed at the start, and what effects competition can have in this area. The Bundeskartellamt has always been confronted with the argument that waste management and recycling works only if the system is set up as a monopoly. It has become obvious that this is not true; the system can operate in a competitive environment and it is much more effective that way.

61. The Chair moved on to competition problems related to industry sponsored schemes, standard setting, and certification systems. Several contributions mention the fact that competition authorities have been analysing such industry initiatives and that they have sometimes been dubious of the benefits; other contributions recognise that such initiatives at least create risks as well as potential benefits.

62. The Chair asked Switzerland to discuss the 'climate cent scheme' covered in its contribution. This was a case where in the fuel transportation industry all participants would make a voluntary payment to a foundation of 1.5 cents per litre of fuel transported; the foundation would then undertake environmentally friendly activities. The competition authority decided that this arrangement was anticompetitive, but the government ultimately exempted the arrangement from the competition law. Why did this happen? Was it the fact that the competition authority could not take the environmental benefit of the arrangement into account? Or was it that the government got lobbied to exempt this from the competition law but there was no redeeming value?

63. A delegate from Switzerland explained that the framework of the law on the environment encouraged private initiatives to achieve environmental goals. The initiative of the petrol industry took place within this framework. The Swiss competition authority investigated the proposed 1.5 cent climate fee upon request by the Swiss government; it did not consider the case a priority in its enforcement agenda. But once it was asked to assess the arrangement, it concluded that the arrangement was incompatible with Swiss competition law because there was no link between the projects for which the money was used and a reduction in the use of petrol or the creation of an incentive to consume less petrol. The foundation was simply pursuing environmental goals in Switzerland and abroad. One presumed that this arrangement was not lawful, but the government took a positive view because it expected an incentive for consumers to use less petrol. But because the arrangement was the result of a private initiative and not that of a law it was necessary to create an authorisation in the public interest. For that reason the Parliament is currently considering whether the initiative should be introduced by way of law in order to exempt it from the scope of competition law. The dilemma was that even if everyone supports the idea of the climate fee, the arrangement had to be considered unlawful because it was based on a private initiative.

64. The Chair then asked the Swiss delegate why the climate fee was considered anticompetitive. As this was a fee that all petrol transport companies had agreed to pay, where was the restriction of competition? Plus, although there was no connection between the fee and the incentive for consumers to reduce the consumption of petrol, did the price increase, even though it was very moderate, provide an incentive to consume less?

65. The delegate from Switzerland confirmed that the fee was recuperated through a higher price of the end product and therefore increased the petrol price. The uniformity of the climate fee created the competition problem.

66. The Chair observed that the increased price should reduce the petrol consumption. Should this arrangement be envisaged by the law and therefore exempted from competition law?

67. Yes, replied the delegate, and this should be clarified through a legislative instrument to avoid the current difficulties.

68. The Chair next turned to Japan's contribution, which discusses an industry-wide effort, encouraged by the government, to reduce the use of plastic bags in stores. This issue is familiar to many member countries. The Chair asked Japan to explain what persuaded the JFTC not to object to an agreement among retailers to introduce a fee for plastic bags – unlike the case of Switzerland. Was the fee differentiated or was it a uniform fee? If it was a uniform fee, why wasn't the agreement considered to violate the antimonopoly law?

69. A delegate from Japan explained that the case was brought to the JFTC through a voluntary consultation by retailers in City A. In April 2007, the government adopted a revised act that recommended the introduction of fee-based plastic bags as one of the actions retailers could take to reduce the use of plastic bags. A committee was then set up in which resident groups and retailers in the city discussed how to reduce the use of plastic bags. Although participation in the committee was voluntary, almost all retailers in the city decided to join. The resident groups and participating retailers concluded an agreement that customers should pay for the plastic bags at the uniform price of 5 yen per bag if they use plastic bags provided by retailers.

70. The retailers then asked the JFTC whether such an agreement would constitute a problem under the Antimonopoly Act. For a number of reasons, the JFTC did not consider the agreement to be a violation of the Antimonopoly Act even though it was an agreement of retailers to introduce fee-based plastic bags at a uniform price:

- The agreement does not restrict competition for selling goods by retailers. Providing plastic bags to customers is regarded an ancillary service and plastic bags are not indispensable for customers when they shop at retailers as they can bring their own bags.

- Social awareness of the necessity of reducing the use of plastic bags has been increasing, which justified this initiative. The agreement was concluded not only among retailers but under the transparent initiative of city administrators inviting the resident groups as representatives of the consumers.

- Although retailers had introduced other methods to reduce the use of plastic bags, they produced only limited effects. Introducing fee-based plastic bags can be considered more effective than other methods, but in the past only a fraction of retailers introduced fee-based plastic bags because many of them were concerned that they might lose customers to competitors that did not charge for plastic bags.

- If the unit price of the bag is not fixed, a lower unit price would result. If the unit price is too low, it might fail to achieve the goal of reducing the use of plastic bags.

- The 5 yen unit price cannot be considered as a burden for the customers to achieve the objective; the residents group joined the initiative and agreed with the unit price. If the unit price is too low it might fail to reach the goal of reducing the use of plastic bags.

71. The Chair followed up with a comment about the case: The last reason is reminiscent of what the EU and the Netherlands said - the 5 yen fee was not enough to make a big difference in

competition, particularly given the fact that people could bring their own bags. There is a notion of a threshold, and if it had been a 400 yen fee the outcome might have been different.

72. The Chair then moved to the topic of environmental standards. The UK's contribution discusses standard setting through a voluntary industry agreement on the introduction of energy efficient light bulbs. It was an initiative encouraged and led by the Government. The OFT got involved and expressed some competition concerns and suggested some remedies. He asked the UK to discuss the concerns and how the remedies were effective against them.

73. A delegate from the UK explained that the OFT became aware that there was a potential industry agreement on voluntary standards for energy efficient light bulbs. The question was whether this would fit within the OFT's prioritisation principles. It was decided that it did.

74. The OFT engaged with the department of government that was primarily engaged on this initiative but also with the business department. One of the positive things that came out that we were able to persuade the business department to produce some guidelines for civil servants who are interacting with business on policy issues so that they were more fully aware than they had been about the competition law constraints.

75. The OFT's concern was that it was very unclear precisely what the agreement was going to cover, but it was clear that the government and the industry were getting together. There was a risk of co-ordinated effects and of longer term collusion and barriers to entry, particularly for small and new suppliers.

76. The procedural safeguards put in place were focused on reducing the risks of co-ordination and collusion. The OFT made it clear that both the government and the industry participants should be fully aware of the potential application of the competition rules and make sure that they safeguarded their own interests, including by having independent legal advice. The organisation, the scoping and handling of these meetings also were suitably constrained and limited to the specific needs of the issue at hand.

77. The safeguards were successful in making sure that the discussions and the resulting voluntary agreement did not go further than necessary to achieve the objective that the government was trying to achieve.

78. It is worth noting that the OFT subsequently looked at the potential benefits that this informal intervention had brought to consumers. Whilst the assumptions are debatable, the OFT estimates that the benefits to consumers were in the region of 7 million pounds.

79. The UK delegate added a comment on the question the Chair asked Germany regarding whether the situation in Germany suggests that competition authorities should be more suspicious of industry-wide recovery and recycling systems. The answer to that question is definitely yes, the delegate said. If you look at Germany now there is much more innovation in recycling methods and systems and technologies, which would not have developed but for the fact that competition authorities became much more rigorous in the last five to ten years in looking at these systems.

80. The Chair turned then to the European Union, whose contribution discusses a hypothetical case on environmental standard setting, based on an actual Commission decision. The case concerns an agreement among European washing machine producers and importers to eliminate the lowest efficiency washing machines. How did the EU identify its concerns? Does the EU agree with the UK that one should be suspicious of such industry-wide standard setting efforts, even if they have environmental benefits? What is the role of the Commission in such cases?

81. A delegate of the EU replied that it appears that the OFT had been concerned mostly about the process that could lead to these standards and how this process could be misused to co-ordinate the industry. Those concerns are legitimate and they were very well addressed. In the CEDEC case, however, the Commission was not so much focused on the process, but instead on the outcome: by eliminating the environmentally less efficient machines there was a reduction of output, a reduction of diversity, and because these machines were the cheapest ones this could have led to a price increase. The Commission thought that this concern was compensated by the benefit in terms of environment, though (specifically in terms of reduction of other costs like electricity and water). Therefore, the initiative was approved.

82. Regarding whether competition authorities should care when there is a pure industry initiative, or whether the government is involved or not, the EU delegate explained that in this case there was some encouragement by the government and the initiative was not purely industry driven. But should we care? One should not make such a distinction because at the end what counts is whether there is a restrictive effect, whether there are the benefits, and how they can be compared. Even if a government was sponsoring a deal that would lead to a restriction of competition that is not compensated by positive effects, that should not prevent us from intervening, the delegate noted.

83. A delegate from Israel raised a question for the UK delegation regarding mandatory collection and recycling of packages: Perhaps such an arrangement in the form of a cartel is reasonable during the launching of such a system but should then be limited by time. Or is that totally unnecessary and competition should be introduced in the first phase with such legislation?

84. A delegate from the UK replied that the answer depends on the nature of the market and the products concerned. One can envisage in some highly specialised kinds of systems that there might be a need to have a monopoly in the first instance. Radioactive product might be an example, or certain types of wastes from hospitals. But one needs to be much more suspicious now than one was in the 1990s when the argument was always that monopolisation was necessary for the long term. The starting principle that we try to follow is that in the vast majority of cases one should seek a situation where there is a competitive market, unless there are particular circumstances pertaining to the nature of the waste concerned.

85. The Chair next invited Iceland to contribute to the discussion on behalf of the Nordic countries with a short presentation on environmental certification, an area in which the joint Nordic Report identifies potential competition problems.

86. A delegate from Iceland explained that the Report did not include cases involving anti-competitive certification procedures, but that it identified this area more generally as a potential cause for concern. He then gave a brief summary of the economics of certification. Certification can convey information about the characteristics of a product that differentiate it from similar products, but that are invisible and usually very difficult to detect. To reinforce the credibility of certification, the certification process is usually handled by an independent third party that provides an unbiased assessment. Consumers must have confidence in this control system; otherwise the certification process will not be effective.

87. Certification serves a useful purpose in light of information asymmetries, as the sellers know more about the products than the buyers. It provides important information about a product that saves consumers the cost of gathering the information. It therefore enhances efficiency in the market. Certification can also reduce transaction costs considerably and thereby increase mobility. This should reinforce competition, which in turn makes it easier to achieve environmental goals. Products that otherwise would not be provided may be supplied only when certification is introduced: This has

to do with the fact that producers can begin to manufacture goods of high quality with credence qualities that are difficult to detect. Without the certification, people might not perceive any difference between certified products and others and it therefore might not be profitable to make the products. For instance, in the case of organic food, people may not notice any difference between organically and non-organically grown potatoes.

88. But there are also certain competition problems associated with certification, the delegate continued. Great success with differentiation may reduce price competition in a market in favour of competition over product attributes. This may lead to market power. In the case of agricultural commodities, market power might not be created because there are many producers offering organic products. Instead, the market may become segmented into conventional and certified products.

89. Market power is the key to understanding problems that may accompany certification. If the company offering the certified products has substantial market power it can apply strategies that raise its rivals' cost, including exclusive supply contracts, and it can lobby for statutory provisions, regulations, or standards that hurt rivals. It also can begin marketing and R&D wars to hurt the rivals who are presumably much smaller. The Report provides examples of strategies to raise rivals' costs by attempting to influence certification programmes. This can include (i) attempts to define certification criteria that disfavour competitors or to disadvantage raw materials that are used to a greater degree in the rivals' products; (ii) efforts to lobby for certification criteria that make competition from foreign producers very difficult, for example criteria that limit how long a product may be in transport, which may hurt international competitors; and (iii) efforts to lobby for the inclusion of expensive equipment requirements for testing.

90. To sum up, certification programmes should be carefully designed so that they are not discriminatory. Competition authorities must, when necessary, point out when the design of the certification process might distort or hamper competition unnecessarily.

91. One observation in the Report concerns organic food products. In the grocery business, retailers are usually very powerful. At the same time organic food producers are often numerous and therefore exposed to intense competition. As a result, the premium associated with certified organic products is often passed on from producers to retailers. A potential implication for competition authorities could be that they might try to encourage players in the supply chain to be equally strong.

92. The Chair next invited BIAC to contribute to the discussion. He explained that BIAC's contribution raised concerns about "the unnecessarily diverging approaches that competition agencies have taken to the incorporation of environmental interests into competition enforcement" and for failing to explicitly recognise that "green benefits are economic efficiencies." So far there is a fairly consistent view that there are many practices that may restrict competition; no one has objected to the outcomes of the cases that were discussed. There is a feeling, the Chair said, that even in countries where the law does not allow competition authorities to take non-economic benefits into account there is a willingness to apply a kind of proportionality test. If the restriction to competition is not so severe and if the benefits to the environment are substantial, demonstrable, and direct, then competition authorities tend to take them into account. Differences may exist, but they exist because there are differences in law. The Chair asked whether BIAC shares this reassuring view of the world.

93. A delegate from BIAC said that even though competition authorities seem to arrive at the right solutions, it would be helpful for the international business community to know how they come to these results and which precise analytical framework applies. BIAC had hoped that there would be more information on horizontal environmental agreements such as those on environmental quality standards as in the CEDEC case, joint development agreements between competitors to come up with an innovative

environmentally superior product, and perhaps quota systems. BIAC's submission mentions a quota systems that aimed to preserve natural resources and obliged fishermen to catch less fish; that was a problematic scheme in light of section 1 of the Sherman Act.

94. In the future, companies will be much more inclined to think about collaboration a) to develop and perhaps jointly market greener technologies, and b) to find solutions for technologies and production assets which have become obsolete. The question would be whether the agreement could be objectionable, even if it brings a lot of benefits to consumers. BIAC is very much in favour of room for companies to come up with these schemes, in which environmental efficiencies are explicitly recognised. It would be helpful if competition authorities would apply a uniform system, though.

95. In the US, environmental efficiencies are not easily recognised; there are even some doubts whether the agreements are subject to the rule of reason. This creates a disincentive for companies to enter into potentially efficiency-enhancing environmental agreements. In the EU, there are some doubts as to the extent to which environmental efficiencies can be accommodated under Article 101(3). Other countries take a different approach. BIAC advocates a more uniform analytical framework of analysis, and it would be helpful if the framework reflected the underlying welfare concept. For example, it would be preferable to measure and quantify environmental efficiencies in a manner similar to how normal efficiencies are measured and quantified. A second point is to think about safe harbours for companies that would like to work together to pursue an environmental objective.

96. The Chair agreed with BIAC's point about the importance of trying to take environmental benefits more fully into consideration, to the extent the law allows it. Differences between the approaches taken by competition authorities, however, can be observed in relation to any topic addressed in the Committee roundtables because laws are different. Members can try to have a common understanding at least of the economic issues, but in some cases the law prevents them from reaching the same outcomes.

97. The Chair moved on to advocacy issues. Canada's submission discusses a checklist aimed at ensuring that legislation designed to achieve broader public policy goals is consistent with competition policy. He asked Canada to introduce the checklist and to state whether it is widely used in Canada and whether it has been helpful in ensuring greater consistency at the level of domestic legislation.

98. A delegate from Canada explained that the contribution refers to a set of guiding principles that govern the regulation-making process. Because these are not unique to the Canadian context and they are set out in detail in the paper, the delegate went directly to the sixth item, which requires that any regulation passed in Canada to promote open and competitive markets. There has been a flurry of initiatives in recent years, most notably in regulating waste material, e.g. how to recycle, reuse, and reduce. The framework for introducing this sort of regulation was established in 2009 through the endorsement of the Canada-wide action plan for extended producer responsibility (EPR). EPR shifts the historical public sector tax-supported responsibility for waste to the individual brand owner, manufacturer, or first importer. EPR also encourages producers and importers to collaborate in collection, transportation, and processing of waste, as well as in setting the recycling fees charged to consumers to finance these programmes. The Bureau played an active role advising regulators and the bodies responsible for the operations of designated waste programmes on how to craft and implement regulatory models that meet the environmental objectives while minimising effects on competition and keeping within the six principles outlined in the submission. One example is the Bureau's ongoing dialogue with policymakers and stakeholders in Ontario, which recently prompted changes to a quota system for collecting and processing discarded electronic products. The quota system had unintentionally discouraged market participants from competing with one another

for access to these products, to the detriment of the more efficient processors. They agreed to changes that allowed processors to seek their own supply of electrical products directly from waste generators and allocated programme collective material based on one year contracts via bids.

99. The Chair then referred next Israel's contribution, which presents an advocacy case related to an industry-wide joint venture by the major beverage companies for the collection of beverage containers. The contribution suggests that the IAA was concerned about the scheme not so much because it found a competition problem but because it was not effective enough in reaching environmental goals. So the IAA offered some suggestions to make it more effective as a collecting system. The Chair asked whether the IAA can be concerned with the effectiveness of such schemes even if there is no competition problem, or if there was a competition problem and the advocacy efforts were part of the competition concern.

100. A delegate from Israel explained that the contribution covered two different cases: one was an enforcement case before the Antitrust Tribunal, where the parties sought approval for their co-operation and the antitrust authority objected on competition grounds. In a second request to approve the extension of the arrangement the antitrust authority asked the Tribunal to consider the effectiveness of the scheme, as well. The failure of the venture to reach the thresholds envisaged in the legislation was used as an opportunity to ask the Tribunal to impose remedies that would increase the effectiveness of their venture, assuming that the Tribunal were to approve it; these would have been remedies that only the Tribunal, not the Director General, could impose.

101. In addition, the IAA is working with the Ministry of the Environment on new legislation for packaging waste. It is trying to convince the Ministry, which is working closely with the manufacturers' association, to create legislation that would leave the door open for future competition even though the manufacturers currently seek the right to establish a single co-operation scheme. The IAA would prefer the possibility of future competition for those manufacturers who would not be satisfied with the activity of the co-operation in light of the problems of market power that are created by a monopoly. Furthermore, problems associated with the cartel-type arrangement that we would have to address through remedies could be solved through competition that can be introduced when the market is mature enough and alternative co-operation schemes for the handling of packaging waste could be established.

102. A delegate from Greece requested the floor to report about a recent decision by the Greek authority on the role of government and regulation in the area of environmental policy. In connection with legislation regarding planning restrictions imposed for environmental reasons in central Athens, the question emerged whether the public authority responsible for planning permits was an undertaking and therefore subject to competition law. The authority decided that competition law could not be enforced in this case for very specific reasons; but it decided at the same time that the principle of free competition can be considered a constitutional principle and therefore can be included in a public interest test. This should be a way to resolve conflicts and to enforce both policies without going against one policy or creating a hierarchy between them.

103. The Chair then summarised the main issues that had emerged. The extent to which environmental benefits can be taken into account depends on legislation rather than on the policy of the competition authority. If legislation allows the consideration of environmental benefits, then there is a second question concerning the extent to which the benefits can be taken into account. There have been useful suggestions about how one might be better able to assess the monetary value of those benefits. Those benefits have to be weighed against the anticompetitive risks that are hidden in those agreements. There has been discussion of a significant number of cases, particularly concerning recycling schemes, where agreements setting up a scheme could lead to severe competition problems, intentionally or unintentionally.

104. Competition problems could emerge also in the context of standard setting, certification, and public procurement. There are concerns that deserve to be looked at under competition law. There should be some kind of balancing of positive and restrictive effects, but the restriction of competition has to be sufficiently light for any balancing to be undertaken.

105. An interesting case from Germany taught us that some of the arguments about substantial economies of scale that justify anticompetitive agreements for the benefit of getting environmental benefits have to be viewed sceptically. There are cases in which evidence of scale efficiencies was not convincing or in which over time competition can in fact lead to a more efficient attainment of environmental goals.

106. It became clear that competition authorities do not intend to make a difference between purely voluntary agreements and government-sponsored agreements; they just look at agreements on the basis of the benefits for the environment and costs to competition. This should reassure BIAC that there will be neutrality on the part of competition authorities and a rigorous, scientific approach more than a political approach.

107. It was interesting to see that there was a core of cases around recycling schemes, but that there were also many other different types of situations in which environmental agreements could create competition concerns.

108. There is room for advocacy. However, it is also up to the competition authorities to decide if they want to advocate on those issues. It is probably because the environmental considerations are so important that it is worthwhile to invest resources and develop some skills in this area.