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COMPETITION POLICY AND ENVIRONMENT

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris 1996

29288

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FOREWORD

This document comprises proceedings in the original languages of a roundtable on Competition Policy and the Environment which was held by the Committee on Competition Law and Policy in May 1995. It is published as a general distribution document under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is among the first one which will be published in a new OECD series named "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation, dans la langue d'origine dans laquelle elle a été soumise relative à une table ronde sur la politique de la concurrence et l'environnement qui s'est tenue en mai 1995 dans le cadre du Comité du droit et de la politique de la concurrence. Il est mis en diffusion générale sous la responsabilité du Secrétaire général afin de porter à la connaissance d'un large public, les éléments d'information qui ont été réunis à cette occasion.

Cette compilation est l'une des premières qui sera diffusée dans la nouvelle série de l'OCDE intitulée "Les tables rondes sur la politique de la concurrence".

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- **Germany**
- **Hungary**
- **Japan**
- **The Netherlands**
- **Sweden**
- **European Union**

AIDE-MEMOIRE OF DISCUSSION BY THE SECRETARIAT

BACKGROUND NOTE
(by the Secretariat)

Introduction

This note will briefly review various modes of environmental regulation as well as attempt to identify the anticompetition effects which can accompany them. Until now, such effects have not been analysed by the Committee despite concerns that such regulations can be seized upon to gain a competitive advantage.

The common denominator among the various modes of intervention, whether by government (direct regulation and economic instruments), industry or a combination of government and industry, is that the polluter pays[1], that producers and consumers must bear the full social cost of their actions. It implies that when production has harmful effects on the environment, those effects must be reflected in costs, allowing the pricing mechanism to perform its role as an indicator. This principle in itself is consistent with competition policy to the extent that it remedies a market failure, internalising the pollution externality[2].

The remainder of this note is divided into three sections. The next section identifies some generic types of anticompetitive effects of environmental regulation. The following section gives an overview of the categories of environmental intervention. The final section sets forth some suggested issues for discussion for the mini-roundtable.

Potential anticompetitive effect of environmental regulation

When considering the potential effects of an environmental regulation on competition, it may be useful to clarify which market could be affected by the regulation and to keep in mind the principal potential anticompetitive effects which could result in that market.

Market affected

A given environmental regulation could affect one or more relevant markets. In particular, the product market affected could be at the level of primary inputs, intermediate products, final products or distribution. More than one level could be involved. For example, a rule on packaging could affect demand for raw materials (e.g., glass versus plastic, recycled versus virgin), suppliers of packaging, producers of the packaged products and even distributors of those final products. Apart from packaging, the rule could affect competition among producers of final products, for example by setting emission or recycling standards which exclude firms or raise prices disproportionately for certain firms. In addition, one could think in terms of the markets for pollution control services and equipment. The rule could affect competition in the licensing of such technologies or the sale of related equipment. Or, it could affect competition among suppliers of recycling services or among suppliers of production equipment or process technologies. The effect on competition might through an effect on the geographic market. For example, a recycling rule could make it more costly for a distant firm to supply a given locality.

Types of effects

Barriers to entry

Barriers to entry can be erected in a variety of ways. One such effect can be if the regulation increases the capital intensity of the industry, e.g., through the requirement that expensive pollution control technology be added to new or existing plants. This increase in capital intensity can increase the minimum efficient scale in the industry and increase concentration.

The regulation might apply only to new plants, "grandfathering" existing plants (excusing them from compliance). Or, less demanding regulation might be applied to existing plants in comparison with strict regulation of new capacity. Again, such regulations can pose a barrier to entry.

Incumbent firms might complain that a new or existing product, process or material is harmful to the environment, arguing for either its prohibition or the imposition of costly pollution control measures. To the extent that firms can either prohibit, block the entry or increase the cost of substitute products, processes or materials, competition is again restrained. Or, environmental standards might be drafted in such a way as to favour existing products, processes or materials over current or potential rivals.

The time required for the regulatory process itself might operate as a barrier to entry. For example, the time required to obtain environmental clearance for a new shop, plant, product, process or material could be sufficiently long to deter entry. (In the parlance of contestability, lengthy regulatory procedures negate the possibility of "hit and run" entry.)

"Pollution permits" can also be used to erect barriers to entry. In particular, if the permits are auctioned off or traded, a dominant incumbent firm might outbid current and potential rivals given that such permits could be more valuable to a dominant firm than to smaller rivals or potential entrants.

Facilitating Collusion

The creation or implementation of environmental regulations might facilitate collusion in a variety of ways. The sharing of information on technology or costs, for example, could simplify co-ordination among rivals. Or, the close co-operation required for the operation of the pollution control scheme could spill over into competitive activities. Collusion could also be facilitated by environmental regulations which limit the number of competitors, either in the pollution control market itself or in the downstream market. Finally, collusion should be more stable to the extent that competitors succeed in raising barriers to entry or expansion through environmental regulation.

Types of environmental interventions

Government regulation

Direct regulation

Direct regulation, initially favoured by Member countries, reflects a normative approach based on coercive measures such as permits, zoning, standards, etc. It is formulated by the authorities on the basis of information at their disposal; compliance is compulsory, and there are sanctions for violations.

The limits of detailed government regulation, even with regard to the environment[3] are now well known. These limitations include, *inter alia*, enforcement costs and restraint on innovation because direct regulation may freeze existing market conditions, thereby impeding technological advances[4].

But direct regulation also poses serious threats to competition in that it may be manipulated by incumbent firms to erect barriers to entry, serve the interests of some firms while driving others out of the market. This can arise from the dependence of regulations authorities on information provided by industry. If this happens, regulatory may benefit large incumbent firms and prove detrimental to small and medium-sized enterprises, which lack the resources to form effective lobbies, or potential entrants.

Likewise, public opinion, which can effect the issuance of authorisation agreements, can be more easily influenced by large incumbent firms than by their smaller and less well organised competitors.

Despite these drawbacks, direct regulation is unlikely to be abandoned, because it is an approach the authorities are familiar with and a policy that, from an environmental standpoint, is likely to be effective. Industry may also prefer direct regulation to economic instruments, since they may have more influence over regulations than over the level of charges.

It would therefore seem likely that the regulatory approach will continue albeit increasingly combined with other forms of government intervention, namely economic instruments and voluntary agreements. Moreover, economic instruments and direct regulation are often used in tandem, just as economic instruments sometimes precede amendments to existing regulations or the entry into force of new ones[5].

Economic instruments[6]

The use of economic instruments such as taxes and charges has become considerably more widespread in OECD Member countries. It is now acknowledged that they make an essential contribution to sustainable development and enable economic and environmental processes to be effectively combined, enhancing the effectiveness of environmental policies. They are also widely credited with offering greater flexibility to seek satisfactory solutions, in particular because the market can process a huge amount of information, which should translate into a better allocation of resources. The choice of any one economic instrument or of a combination of instruments is generally made according to a number of criteria, and particularly[7]:

i) environmental effectiveness, i.e. the extent to which an instrument succeeds in reducing harmful effects on the environment, given government objectives;

ii) economic efficiency, i.e. the extent to which an instrument leads to an optimal allocation of resources (capital, labour, raw materials and energy)[8];

iii) acceptability, i.e. the extent to which an instrument can be satisfactorily implemented and complied with without clashing with existing regulations, principles or policies and without meeting group opposition because of allegations that the burden is apportioned unfairly.

From the standpoint of waste management policy, there are several economic instruments that can be deployed, depending on whether the objective is reduction at source, re-use of products, recycling of materials, recovery of energy or management of final residuals:

i) Product charges promote reduction at source, re-use and recycling alike. They constitute a tax on output which adds to a product's price; they are accompanied by major cost factors such as capital expenditure and system management costs. Products made entirely from recycled materials might be exempt, and products made partly therefrom could face a lower charge, provided that re-use and recycling are favourable options. Alternatively, in the case of packaging waste, a virgin materials tax could be imposed; this is a tax on raw materials used to produce packaging, and its aim is to reduce their use and encourage the substitution of recycled materials.

ii) Waste charges are levied on either the collection or the disposal of waste. They are essentially charges for services rendered, the proceeds of which are used to finance collection or disposal. In the case of packaging, end-of-the-chain disposal charges add to the cost of final waste disposal[9].

iii) Deposit-refund systems require that a sufficiently high volume of products be subject to the deposit, that the products lend themselves to standardisation (e.g. packaging, batteries, automobile tyres) and that the collection system be easy to set up (in particular, the impact of transport should be taken into account). They result in high costs for capital investment and system management, including launch costs, which in some cases can be prohibitive.

iv) Tradeable permits are also an option for systems that impose set percentages of waste recycling and under which permits may be traded between firms.

These systems have some advantages when compared to the direct regulation approach. For example, tradeable permits are thought to be more conducive to growth than direct regulation. Moreover, such instruments can sometimes be less vulnerable to manipulation and undue influence from established interests. In addition, economic instruments such as charges that offer an incentive can also encourage technological innovation with the creation of new markets and new products.

But economic instruments generally increase producer costs and therefore affect prices. In the short term, producers may face substantial outlays which can jeopardise the future of their business. Such instruments can also constitute barriers to entry, e.g. if a dominant firm bought up tradeable permits or if a deposit-refund scheme increased capital intensity.[10]

Self regulation

Under self-regulation, industry unilaterally commits itself to improving its performance in the area of environmental protection. This mode of intervention, which originated in Canada and has developed in the United States and the United Kingdom, has not been used in the waste sector proper, but only in the chemical industry. Nevertheless, it is useful to include it among the modes of intervention described herein, because self-regulation involves obvious risks from the standpoint of competition, e.g. through the use of this process as a vehicle for collusion or to disadvantage rivals, e.g. by creating standards difficult or impossible for rivals to meet and which acquire force either by adoption into local codes or through consumer demand.

Combined intervention by the authorities and industry

A third approach is to combine government intervention with that of industry. This "flexible governance" approach responds to an increasing involvement and motivation of the business community and a tendency to reduce state intervention and promote deregulation.

Voluntary agreements

Voluntary agreements[11], which are formal, bilateral commitments between the authorities and industry (trade associations, industry organisations or coalitions of firms), set forth environmental objectives and the means to achieve them. Their use is on the rise in OECD Member countries, and particularly in northern Europe, where there is a long-standing tradition of such co-operation between the state or local authorities and trade organisations. There are no formal sanctions for failing to meet those commitments but an implicit threat of regulation[12].

Voluntary agreements can cover either the objectives or methods of pollution control. Firms whose pollution abatement costs are low could press for an ambitious objective that would disadvantage their competitors. Firms will vie for methods that would shift the burden to its competitors. Such negotiations can also provide the forum to facilitate collusion or the plan can be designed in a way which would disadvantage new entrants.

Such plan may also involve a "product policy" based on the principle of integrated life cycles, which begin with the choice of raw materials used to manufacture a product and end with final disposal or recycling. Collusion can again be facilitated to the extent that firms can thus exchange information on future product planning. Also it is likely that substantial resources would be needed to analyse integrated product cycles and that small and medium-sized enterprises might lack the financial resources to do so. By the same token, it would seem that large firms are in a better position than small ones to introduce their own environmental management systems, such as environment-related plans, procedures and controls (e.g. environmental diagnoses).

Intercompany cooperation

In this approach, firms organise among themselves to achieve environmental objectives set by law. While this sort of inter-company co-operation offers advantages for the implementation of environmental policy, it also involves inherent risks for competition.

For example, a private firm created jointly by the packaging industry, retailers, fillers and raw materials suppliers aims at eliminating, reducing and reprocessing packaging waste from households. The aim of this organisation is that all primary packaging should be returned by consumers for recycling. Recycling enterprises guarantee that this waste will be recycled in accordance with goals set by the regulation. To finance the collection from end users (as opposed to the commercial or industrial sectors) and the sorting of this packaging, participating manufacturing firms pay fees which entitle them to put green dots on their products.

This mode of intervention, the effectiveness of which is enhanced if the participating firms are few in number, well organised and preferably already accustomed to working together, involves inherent risks which should not be underestimated:

i) That such systems work better with fewer participants biases the system against smaller firms and new entrants.

ii) To the extent that retailers buy and sell only those products that bear the label (i.e. the distinctive mark of the collection system "green dot"), there is a danger that non-participating firms will be forced out of the market or unable to enter.

iii) Approved recycling firms might set quotas or fix the prices they charge producers; similarly, they might collude in their capacity as resellers to merchants of recycled products.

iv) The co-operation for environmental purposes may spill over into a wider cartel to further the industrial and commercial strategies of its member firms.

Issues for discussion

Each case study that is presented during the mini round table discussion could give rise to a brief analysis that would try to pin-point the risks to competition. In particular, the discussion of each case could focus on the following questions.

-- Which market(s) were affected by the regulation?

-- What were the principal anticompetitive effects?

-- Were there other means of achieving the environmental objective with fewer restraints on competition?

-- If there is a trade-off between competition and environmental protection objectives (for example, reducing the anticompetitive effect would also reduce the effectiveness of the regulation in protecting the environment), how should it be made?

-- Under what circumstances and in what way did the competition authority come to examine the case in question? Is there a process of interministerial reconciliation whereby environmental and competition policies can be integrated?

NOTES

1. The principle was set forth for the first time in the OECD Council's Recommendation on "Guiding Principles Concerning International Economic Aspects of Environmental Policies" [C(72)128], adopted on 26 May 1972.

2. Although, it still contends that full application of this principle remains the objective, the European Union does allow aid to help businesses bear the cost of pollution abatement as in the case of industries for which this principle would create severe difficulties, in transition periods for countries facing major socio-economic problems as a result of their environmental policies or when subsidisation is not expected to cause any serious distortion of trade or investment.

3. For example, it is becoming increasingly difficult for the authorities to use direct regulation against widely dispersed pollution of industrial, agricultural or urban origin, and to tackle global problems such as climatic change.

4. See the note by the Netherlands Delegation presented at the CLP meeting on 20 and 21 October 1994.

5. See OECD (1991) *Environmental Policy: How to Apply Economic Instruments*.

6. The OECD publication *Managing the Environment: The Role of Economic Instruments* (1994) gives a detailed description of the various economic instruments implemented in the OECD area, their economic and policy foundations and their practical application, including their effects on international trade.

7. See the aforementioned OECD (1991) *Environmental Policy: How to Apply Economic Instruments*.

8. In the aforementioned OECD (1991), it is stated that, in a more limited definition of efficiency, "Attention should be given both to the direct costs of pollution abatement technologies and the indirect costs in terms of opportunities foregone. Policy makers should recognise that pollution control policy may have significant effects on industrial structures and technical developments, and should ideally assess costs in these terms. Economic efficiency of economic instruments will be best achieved if marginal pollution abatement costs vary significantly between polluters or when demand elasticities of polluting products and substances are high" (pp. 18-19).

9. See OECD Environment Monograph No. 82, *Applying Economic Instruments to Packaging Waste*. These charges represent (external) costs that are not already factored into the conventional costs of waste collection and disposal. Packaging is one component of the waste on which the charges are levied.

10. Chapter 8 of the aforementioned OECD publication *Managing the Environment: The Role of Economic Instruments* analyses the effects of these instruments on international trade. Research in this area is continuing at the OECD.

11. POTIER, Michel (1994), "Agreement on the Environment", *The OECD Observer*, No. 189 (August-September).

12. Actually, there is an informal system of sanctions: if industry does not fulfil its contract, it can expect that regulation -- which will be perceived as more costly -- will take its place.

NOTE DE RÉFÉRENCE
(par le Secrétariat)

Introduction

Cette note passe brièvement en revue divers modes d'intervention en matière d'environnement et tente de dégager les effets anti concurrentiels qu'ils comportent. Ces effets n'ont jusqu'à présent pas été analysés par le Comité en dépit de la préoccupation de voir ces réglementations exploitées en vue de l'obtention d'un avantage en terme de concurrence.

Le dénominateur commun aux divers modes d'intervention, qu'ils relèvent des pouvoirs publics (réglementation directe et instruments économiques), de l'initiative seule de l'industrie (l'auto-réglementation pure) ou d'une combinaison des pouvoirs publics et de l'industrie (accords volontaires notamment) est que le pollueur paye[1] et que les producteurs et les consommateurs doivent payer le coût social complet de leurs actes. Ceci implique que lorsque une production a des effets négatifs pour l'environnement, ces effets doivent être reflétés dans les coûts, permettant au mécanisme des prix d'exercer sa fonction d'indicateur. Ce principe est en lui même cohérent avec la politique de la concurrence dans la mesure où il remédie à une défaillance du marché, internalisant les coûts de pollution[2].

La suite de la note est divisée en trois parties. La première identifie quelques types génériques d'effets anticoncurrentiels de la réglementation en matière d'environnement. La seconde présente un aperçu des catégories d'intervention en matière d'environnement. La dernière partie propose quelques points pour la discussion de la mini table ronde.

Potentiels effets anticoncurrentiels de la réglementation environnementale

En examinant les effets potentiels sur la concurrence de la réglementation environnementale, il peut être utile de clarifier quel marché peut être affecté par la réglementation et d'avoir à l'esprit les principaux effets anticoncurrentiels potentiels qui pourraient en résulter sur ce marché.

Marché affecté

Une mesure environnementale donnée peut affecter un, ou davantage, marché pertinent. En particulier, le marché du produit affecté peut être celui du produit primaire, du produit intermédiaire, du produit final ou au niveau de la distribution. Plus d'un niveau peut être concerné. Ainsi une réglementation sur l'emballage peut avoir des effets sur la demande de matières premières (ex. verre versus plastique, matière recyclée versus matière vierge) sur les fournisseurs d'emballage, les producteurs de produits emballés et même les distributeurs de ces produits finaux. Indépendamment de l'emballage, la réglementation peut affecter la concurrence entre les producteurs de produits finaux par exemple par l'établissement de normes d'émission ou de recyclage qui évinceraient des entreprises ou renchériraient les prix de manière disproportionnée pour certaines entreprises. De plus, on peut également avoir à l'esprit les marchés de services et d'équipement de contrôle de la pollution. La réglementation peut affecter la concurrence dans l'octroi d'autorisation de telles technologies ou la vente d'équipement correspondant. Elle peut affecter également la concurrence entre fournisseurs de services de recyclage ou fournisseurs d'équipements ou de technologie de retraitement. Il peut y avoir un effet sur la concurrence à travers un effet sur le marché géographique. Ainsi, une règle concernant le recyclage peut renchérir le coût du recyclage à assurer dans un lieu donné pour une entreprise éloignée.

Types d’effets

Barrières à l’entrée

Des barrières à l’entrée peuvent être érigées de différentes façons. Elles peuvent l’être si la réglementation accroît l’intensité capitalistique de l’industrie, par exemple en exigeant de voir une technologie coûteuse de contrôle de la pollution introduite dans des usines existantes ou nouvelles. Cet accroissement peut augmenter l’échelle d’efficience minimale de l’industrie ainsi que la concentration.

La réglementation pourrait s’appliquer seulement aux nouvelles usines, les usines existantes en étant dispensées. Ou encore, une réglementation moins exigeante pourrait être appliquée aux usines existantes alors qu’une réglementation plus stricte le serait aux nouvelles usines. De telles réglementations créeraient également une barrière à l’entrée.

Des entreprises en place pourraient se plaindre qu’un produit, un procédé ou un matériau nouveau ou existant est nuisible pour l’environnement, plaidant soit pour son interdiction soit pour l’imposition de mesures coûteuses de contrôle de la pollution. Dans la mesure où des entreprises peuvent soit interdire soit bloquer l’entrée soit augmenter le coût de produits de substitution, de procédés ou de matériaux, il y a, là encore, restriction de la concurrence. Il en va de même, si les normes d’environnement sont libellées de manière à favoriser les produits, procédés ou matériaux existants par rapport à leurs rivaux existants ou potentiels.

Le délai requis par un processus réglementaire peut lui même constituer une barrière à l’entrée. Par exemple, le délai nécessaire pour obtenir l’agrément au titre de l’environnement pour un nouvel atelier, une usine, un produit, un procédé ou un matériau pourrait être d’une longueur telle qu’il créerait une dissuasion à l’entrée. (En langage de contestabilité, des procédures réglementaires longues empêchent la possibilité de raid éclair).

Les permis de pollution peuvent également être utilisés pour ériger des barrières à l’entrée. En particulier, si les permis sont mis aux enchères ou négociés, une entreprise dominante en place pourrait surenchérir sur des rivaux potentiels ou existants dans la mesure où de tels permis peuvent être d’une plus grande valeur pour une entreprise dominante que pour des rivaux plus petits ou des nouveaux venus potentiels.

Favoriser la collusion

L’élaboration ou la mise en oeuvre de réglementations d’environnement pourrait favoriser la collusion de différentes manières. L’échange d’information sur la technologie ou les coûts, par exemple, pourrait simplifier la coordination entre rivaux. Ou encore, une étroite coopération résultant d’un processus de contrôle de la pollution pourrait déraper vers des activités concurrentielles. La collusion pourrait également être favorisée par des réglementations environnementales qui limitent le nombre de concurrents soit sur le marché même du contrôle de la pollution soit sur le marché en aval. Enfin, la collusion serait d’autant plus stable que les concurrents parviendraient à ériger des barrières à l’entrée ou que la réglementation environnementale favoriserait l’expansion.

Types d’interventions en matière d’environnement

Intervention des pouvoirs publics

Réglementation directe

La réglementation directe, que nos pays Membres ont initialement privilégiée, repose sur une approche de type normative, fondée sur des mesures à caractère contraignant: permis, zonage, normes etc. Elle est élaborée par les pouvoirs publics, à partir des informations dont ils disposent ; son respect est obligatoire et il existe des sanctions en cas d’infraction.

Les limites d’une réglementation publique détaillée, y compris au regard de l’environnement[3] sont désormais connues. Ces limites sont liées, entre autres, aux coûts d’application et aux restrictions à l’innovation dans la mesure où la réglementation directe tend à figer la situation du marché au moment considéré et dans ces conditions, à freiner l’évolution technologique[4].

Mais la réglementation directe présente aussi des risques sérieux du point de la vue de la concurrence dans la mesure où elle peut être manipulée par les entreprises en place de manière à ériger des barrières à l’entrée et favoriser les intérêts de certaines entreprises et en exclure d’autres du marché. Ce phénomène résulte de la dépendance des pouvoirs publics s’agissant de l’information qui leur est fournie par l’industrie. Dans cette hypothèse, la réglementation favoriserait les intérêts des grandes entreprises en place et léserait ceux des petites et moyennes entreprises qui, elles, n’auraient pas les moyens de s’organiser en groupes de pression efficaces ainsi que les intérêts de nouveaux venus potentiels.

De même, l’opinion publique qui peut avoir un effet sur la publication d’agréments peut être plus facilement influencée par de grandes entreprises en place que par leurs concurrents plus petits et moins bien organisés.

En dépit de ces inconvénients, il est peu probable que la réglementation directe soit abandonnée car il s’agit d’une approche familière pour les pouvoirs publics et qui offre, du point de vue de l’environnement, la certitude que la politique se révélera efficace. L’industrie peut également la préférer aux instruments économiques dans la mesure où les entreprises peuvent avoir une influence plus grande sur les réglementations que sur le niveau des redevances.

Il est, par conséquent, vraisemblable que l’approche réglementaire persiste quoique combinée de manière croissante avec d’autres outils d’intervention publique, à savoir les instruments économiques et les accords volontaires. Il est, d’ailleurs, fréquent d’associer un instrument économique et une réglementation directe comme il peut arriver que les instruments économiques précédent les modifications de la réglementation en vigueur ou la mise en place de nouvelles réglementations[5].

Instruments économiques[6]

Le recours aux instruments économiques tels que taxes et redevances s’est considérablement développé dans les pays Membres de l’OCDE. Il est désormais reconnu qu’ils apportent une contribution essentielle au développement durable et qu’ils permettent une intégration effective des processus économiques et environnementaux, renforçant ainsi l’efficacité des politiques de l’environnement. Il est également généralement constaté qu’ils ont l’avantage d’offrir une plus grande souplesse dans la recherche de solutions satisfaisantes, notamment parce que le marché peut traiter une multitude d’informations, ce qui se traduira par une meilleure répartition des ressources. Le choix en faveur de l’un des instruments économiques ou d’une combinaison de certains d’entre-eux, s’opère habituellement en fonction d’un certains nombre de critères, et en particulier[7]:

i) l'efficacité du point de vue de l'environnement, c'est-à-dire dans quelle mesure l'instrument réussit à réduire les effets sur l'environnement, compte tenu des objectifs que se sont fixés les pouvoirs publics ;

ii) l'efficience économique, c'est à dire dans quelle mesure l'instrument permet une allocation optimale des ressources (capital, main d'oeuvre, matières premières et énergie)[8] ;

iii) l'acceptabilité, c'est à dire dans quelle mesure l'application et le respect de l'instrument peuvent être assurés de façon satisfaisante sans se heurter à des problèmes d'incompatibilité avec les réglementations, principes et politiques en vigueur, ou à l'opposition de groupes du fait de l'inégalité supposée de la répartition des charges.

Dans la perspective d'une politique de gestion des déchets, il existe plusieurs instruments économiques sur lesquels on peut jouer selon que l'objectif poursuivi est la réduction à la source, la réutilisation des produits, le recyclage des matières, la récupération d'énergie ou la gestion des résidus finaux :

i) Les redevances sur produits favorisent à la fois la réduction à la source, la réutilisation et le recyclage ; il s'agit de taxes à la production qui viennent s'ajouter au prix du produit ; elles s'accompagnent d'éléments de coûts importants comme des dépenses en capital ou des coûts de gestion du système. Les produits entièrement composés en matières recyclées doivent en être exemptés et les produits composés en partie de matières recyclées peuvent être taxés à un niveau plus bas, à condition que la réutilisation et le recyclage constituent des solutions souhaitables. Dans le cas des déchets d'emballage, on peut à titre d'alternative appliquer une taxe sur les matières vierges qui frappe les matières brutes utilisées pour la production d'emballage et qui a pour objet de réduire leur utilisation et d'encourager l'emploi de matières recyclées.

ii) Les redevances sur les déchets frappent soit la collecte soit l'élimination des déchets ; Il s'agit surtout de redevances pour service rendu, dont le produit sert à financer la collecte ou l'élimination. Dans le cas des emballages, les redevances d'élimination qui interviennent en bout de chaîne, viennent alourdir le coût de l'élimination finale des déchets[9].

iii) Les systèmes de consignation supposent des quantités de produits soumis à consignation suffisamment importantes, que ces produits se prêtent à une standardisation (emballages, batteries, pneus d'automobiles) et que le système de collecte soit facile à mettre en place (notamment, tenir compte de l'incidence du transport). Ils induisent des coûts importants au niveau des dépenses en capital, des coûts de gestion du système y compris les coûts de lancement qui peuvent dans certains cas être prohibitifs.

iv) Les permis négociables sont également une option dans le cadre de systèmes imposant aux entreprises des pourcentages déterminés de déchets à recycler et autorisant la négociation de ce type de permis entre entreprises.

Ces systèmes présentent des avantages par rapport à l'approche de la réglementation directe. Les permis négociables sont, par exemple, jugés plus porteurs pour la croissance que la réglementation directe. En outre, de tels systèmes peuvent, parfois, être moins exposés aux manipulations et à l'influence des intérêts établis. De plus, des instruments économiques comme des redevances de caractère incitatif, peuvent également encourager l'innovation technologique avec la création de nouveaux marchés, de nouveaux produits.

D'une manière générale, il s'avère néanmoins que les instruments économiques accroissent les coûts supportés par les producteurs et ont, par conséquent, un effet sur les prix. A court terme, les

producteurs peuvent être confrontés à des dépenses importantes susceptibles de nuire à la continuité de l'entreprise. Ces instruments peuvent également constituer des barrières à l'accès sur le marché par exemple si une entreprise dominante achéte des permis négociables ou si le système de consignation accroît l'intensité capitalistique[10].

L'auto-réglementation

Dans le cadre de l'auto-réglementation, l'industrie s'engage unilatéralement à améliorer ses performances en matière de protection de l'environnement. Ce mode d'intervention qui est né au Canada et s'est développé aux États-Unis et au Royaume-Uni ne concerne pas le secteur des déchets proprement dits mais le secteur de la chimie uniquement. Il est néanmoins utile de le mentionner au nombre des modes d'intervention décrits ici car il présente des risques évidents au regard de préoccupations de concurrence. Ce procédé peut par exemple être utilisé comme véhicule de collusion ou pour désavantager des rivaux en instaurant des normes difficiles voire impossibles à atteindre pour les rivaux, et qui tireraient leur force de leur adoption dans des codes locaux ou de la demande des consommateurs.

Intervention combinée des pouvoirs publics et de l'industrie

Une troisième approche combine l'intervention des pouvoirs publics et celle de l'industrie. Cette approche de "gestion publique souple" ("flexible governance") répond à une implication et à une motivation grandissantes des milieux d'affaires ainsi qu'à une tendance à la réduction de l'intervention de l'État et à la promotion de la déréglementation.

Les accords volontaires

Les accords volontaires[11] qui sont des engagements bilatéraux, de caractère formel, entre les pouvoirs publics et l'industrie (associations professionnelles, organisations de branches, coalition d'entreprises) fixent les objectifs environnementaux et les moyens à mettre en oeuvre pour les atteindre. Leur utilisation est en progression dans les pays Membres de l'OCDE, en particulier en Europe du Nord où il existe une longue tradition de ce type de coopération entre l'État ou les Autorités locales et les organisations professionnelles. Il n'existe aucune sanction formelle en cas de non respect des engagements[12] mais une menace implicite de voir adoptée une réglementation.

Les accords volontaires peuvent couvrir soit les objectifs soit les méthodes de contrôle de la pollution. Les entreprises dont les coûts de dépollution sont faibles peuvent être amenées à faire pression en faveur d'un objectif ambitieux qui pénaliserait les concurrents. Les entreprises peuvent aussi être conduites à militer pour le moyen qui reportera une bonne part du fardeau sur ses concurrentes. De telles négociations peuvent également favoriser la collusion ; ou encore, le système peut être conçu de manière à décourager les nouveaux venus.

Un tel système peut aussi comporter une politique de produits fondée sur le principe du cycle de vie intégrée qui va du choix des matières premières servant à fabriquer un produit à son élimination finale ou à son recyclage. Là encore la collusion peut être favorisée dans la mesure où les entreprises peuvent ainsi échanger des informations sur la programmation future des produits. De même, il est probable que des ressources substantielles seront nécessaires pour analyser les cycles de produits intégrés et que les petites et moyennes entreprises pourront manquer des ressources financières pour le faire. De même, il semblerait que les grandes entreprises soient en meilleure position que les petites pour introduire leur propre système de gestion de l'environnement tels que des plans, des procédures et des contrôles en matière d'environnement (par exemple des diagnostiques environnementaux).

Coopération inter entreprises

Dans le cadre de cette approche, les entreprises s'organisent entre elles pour assurer la réalisation des objectifs fixés par la loi. Si ce type de coopération entre entreprises présente des avantages pour la mise en oeuvre de la politique de l'environnement, elle comporte des risques intrinsèques pour la concurrence.

A titre d'exemple on peut citer une entreprise privée créée conjointement par l'industrie de l'emballage, détaillants, remplisseurs, fournisseurs de matières vierges pour prévenir, réduire, et retraiter les déchets d'emballage produits par les ménages. Cette organisation a pour mission de faire en sorte que tous les emballages primaires soient restitués par le consommateur pour être recyclés. Les entreprises de recyclage garantissent que les déchets seront recyclés selon les objectifs fixés par la réglementation. Pour financer la collecte auprés des utilisateurs finaux (par opposition aux secteurs commercial et industriel) et le tri de ces emballages, les entreprises adhérentes au système versent une redevance qui leur permet d'apposer sur leurs produits un symbole commun appelé point vert.

Ce mode d'intervention dont l'efficacité est d'autant plus grande qu'il concerne un nombre limité d'entreprises, bien organisées et de préférence ayant déjà l'habitude de travailler ensemble, présente un certain nombre de risques intrinsèques qui ne doivent pas être sous estimés :

i) Le fait que de tels systèmes fonctionnent mieux avec peu de participants biaise le système au détriment des plus petites entreprises et des nouveaux venus.

ii) Dans la mesure où les revendeurs n'achétent et ne vendent que les produits portant l'étiquettage (c'est à dire la marque distinctive du système de collecte, le "point vert"), il y a là un danger que les entreprises qui ne participent pas au système, soient évincées du marché ou dans l'incapacité d'y entrer.

iii) Les entreprises de recyclage approuvées peuvent établir des quotas ou fixer les prix qu'elles font aux producteurs; de même elles peuvent agir de concert en leur qualité de revendeurs à des marchands de produits recyclés.

iv) La coopération à des fins environnementales peut déraper vers des ententes plus larges visant à appuyer des stratégies industrielles et commerciales des entreprises parties prenantes à cette coopération.

Questions pour la discussion

Chaque étude de cas présentée durant la discussion de la mini table ronde pourrait faire l'objet d'une brève analyse qui tenterait de cerner les risques pour la concurrence. En particulier, pour chaque cas étudié, la discussion pourrait porter sur les questions suivantes :

-- Quel est le(s) marché(s) affecté(s) par la réglementation?

-- Quels sont les principaux effets anti concurrentiels?

-- Existe-t-il d'autres moyens de parvenir à l'objectif d'environnement avec moins de restrictions pour la concurrence?

-- Dans l'hypothèse d'un arbitrage entre des objectifs de concurrence et de protection de l'environnement (par exemple, réduire l'effet anticoncurrentiel réduirait aussi l'efficacité de la réglementation destinée à protéger l'environnement), comment cela s'opérerait-il?

-- Dans quelles circonstances et de quelle façon les autorités de la concurrence en sont elles venues à examiner le cas en question? Existe -t-il une procédure d'arbitrage interministériel qui permettrait d'intégrer les politiques de concurrence et d'environnement?

NOTES

1. Le principe a été énoncé pour la première fois dans la Recommandation du Conseil de l'OCDE, adoptée le 26 mai 1972, relative aux "Principes directeurs relatifs aux aspects économiques des politiques de l'environnement sur le plan international" (C(72)128).

2. Tout en continuant à affirmer que l'application intégrale de ce principe demeure l'objectif, l'Union Européenne tolère des aides destinées à aider les entreprises à assumer les coûts de dépollution comme dans le cas d'industries où ce principe créerait de graves difficultés, ou en période de transition, pour les pays qui se heurteraient à de graves difficultés socio-économiques du fait de leurs politiques d'environnement, ou encore lorsqu'aucune distorsion grave des échanges ou des investissements n'est à prévoir.

3. Les pouvoirs publics se heurtent par exemple à des difficultés croissantes pour utiliser la réglementation directe dans le cas de pollutions diffuses d'origine industrielle, agricole ou urbaine ainsi que dans le cas de problèmes globaux comme le changement climatique.

4. voir la Note de la délégation des Pays-Bas présentée au CLP des 20 et 21 octobre 1994.

5. Voir OCDE(1991) "Politique de l'environnement - Comment appliquer les instruments économiques".

6. La publication de l'OCDE "Gérer l'environnement - le rôle des instruments économiques" (1994) décrit de façon détaillée les divers instruments économiques mis en oeuvre dans la zone OCDE, leurs fondements économiques et politiques, leur application pratique y compris leurs effets sur les échanges internationaux.

7. Voir OCDE (1991) "Politique de l'environnement - comment appliquer les instruments économiques" précité.

8. Dans OCDE (1991) précité, il est indiqué que dans le cadre d'une définition plus restrictive de l'efficience, il convient de s'attacher aux coûts directs des technologies de dépollution et aux coûts indirects en terme d'opportunités manquées. Les pouvoirs publics devraient admettre que les mesures de lutte contre la pollution peuvent avoir des effets significatifs sur les structures industrielles et les progrès techniques, et l'idéal serait qu'ils évaluent les coûts en ces termes. les instruments économiques seront plus efficients sur le plan économique si les coûts marginaux de dépollution différent d'un pollueur à l'autre ou si les élasticités demande de produits et des substances polluantes sont fortes (p.19).

9. Voir la Monographie OCDE n°82 "L'application des instruments économiques à la gestion des déchets d'emballage". Ces redevances représentent des coûts (externes) qui ne sont pas déjà pris en compte dans le montant des coûts classiques de collecte et d'élimination des déchets. L'emballage est une composante des déchets sur lesquels la redevance est imposée.

10. La publication précitée de l'OCDE "Gérer l'environnement - le rôle des instruments économiques"- analyse dans son chapitre 8 les effets de ces instruments sur les échanges internationaux. Des travaux de recherche se poursuivent, par ailleurs, dans ce domaine à l'OCDE.

11. M. Potier, "Les accords volontaires sur l'environnement", l'Observateur de l'OCDE, n°189, août-septembre 1994.

12. En réalité, il existe un système informel de sanction: si le contrat n'est pas respecté, l'industrie peut s'attendre à la mise en place, à titre d'alternative, d'une réglementation qui sera perçue comme plus coûteuse.

CONTRIBUTION FROM DENMARK

Introduction

Below an example of a Danish environmental agreement on collecting and recycling of discarded products is described; the so-called Environmental Refrigerant System (Kølebranchens Miljøordning (KMO). First, the original agreement is described. Secondly, the presented problems of competition in the agreement are commented on, and finally the changes in the agreement, which were made at request of the Competition Council, are mentioned.

The reason for concluding the KMO agreement, as for a number of other voluntary environmental agreements in Denmark, is the wish of the Danish environmental authorities (The Environmental Protection Agency) to involve and to hold the industry responsible on a voluntary basis, and thereby avoiding compulsory legislation, forcing the industry to comply with the environmental requirements.

With the agreement, the environmental authorities wanted partly to simplify the handling of the rules of refrigerants, partly to establish a uniformed and efficient collecting arrangement on a national basis. The KMO agreement, thus, became a private environmental agreement between importers, wholesalers and electricians of refrigerants. The total number of 600-700 companies are taking part in the agreement.

The original agreement

The purpose of the agreement is to contribute to a reduced consumption of refrigerants and to ensure a correct collecting, recycling and destruction of used/polluted refrigerants.

The agreement can be divided in three main parts dealing with an approval arrangement of companies producing refrigerants, a collecting arrangement for used refrigerants (also including a report arrangement to the environmental authorities) and a finance arrangement for the projects.

The original KMO agreement came into force as from April 1992. The approval arrangement was in this agreement elaborated so that all companies dealing with refrigerants should be approved. They had to pay an annual tax of DK_r 1 000 for the KMO approval arrangement. Approval was assigned after an evaluation based on objective criteria in order to establish whether the companies had the necessary environmental knowledge and the requisite equipment to operate safely with refrigerants. Also, the agreement provided that companies which did not have a KMO approval could not buy refrigerants.

The collecting arrangement was framed so companies were given a financial incentive to use a central recycling and removal arrangement by means of a subsidy per kilo refrigerant which were delivered for recycling on the approved KMO facilities. The payment amounted to DK_r ten/kilogram, if recycling was possible, while the payment amounted to DK_r five/kilogram, if the products were polluted.

In addition to the collecting arrangement, a report arrangement was established for the companies' purchases, consumption and selling back of CFC-gas. This information was passed on to the local councils and the Environmental Protection Agency.

The expenses to the approval arrangement and collecting arrangement were to be financed through a compulsory environmental charge of DK_r 18/kilogram for all bought refrigerants. This environmental charge should be invoiced separately and without any profit in all stages of trade.

Complaint filed by a competitor

The Competition Council received a complaint from a refrigerant company, which found it unreasonable that it had to pay for another removal arrangement, when the company removed the used/polluted refrigerants itself. The complainant were developing a removal and recycling arrangement - aiming at the same as the KMO agreement. The complainant claimed that its own arrangement possessed a better technology than the KMO arrangement.

The competitive problems

The KMO agreement - described above - implied several competitive problems. The approval arrangement of the agreement contained an exclusive provision according to which a KMO approved company could not buy refrigerants from the wholesalers being parties of the agreement. The parties of the agreement claimed that the provision was necessary in order to make the companies participate in the arrangement. The provision implied that all electricians of refrigerants were forced to take part in the agreement.

The KMO agreement thereby caused a restriction of competition which could not be considered as necessary for fulfilling the purpose of the agreement, viz. a reduction in consumption of refrigerants and sound environmental removal. If a company wished not to participate in the agreement, and the company at the same time could substantiate that it complied with the objective environmental requirements, then this company should have same access to orders in the same way as the parties of the agreement.

The collecting arrangement of the agreement contained a provision saying that the companies could only receive the mentioned supplements, if the used refrigerants were delivered to recycling facilities approved by KMO. This meant that recycling companies which did not wish to be KMO approved would have limited possibilities to receive used refrigerants for recycling.

Thus, the provision implied that the companies choosing not to participate in the agreement were price discriminated. Recycling companies which chose not to participate, were forced to offer prices for used refrigerants etc., sufficiently attractive to make the electricians give up the KMO agreement and instead use the competing recycling company.

Furthermore, the fixed subsidies paid during the collecting arrangement limited competition between companies participating in the agreement as far as the costs of recycling and removal were concerned.

Besides, the finance arrangement of the agreement implied that the new price on all refrigerants by the environmental subsidy were raised with DK_r 18/kilogram in all distribution links. This implied a taxation on all sold refrigerants, and caused that companies not being part of the agreement, financed the payments which were only of benefit for the parties of the agreement.

It must be noted that the KMO agreement will not affect competition between different types of refrigerants. According to the Danish legislation in this area the industry must develop alternative refrigerants not based on CFC-gas.

The final agreement

On the basis of the above-presented problems, the Competition Council initiated negotiations with the parties of the agreement about putting an end to the damaging effects on the agreement. After these negotiations the parties changed the agreement in following respects:

The approval arrangement was changed so that all companies fulfilling reasonable, factual, objective and consistently implemented criteria can be approved, whether the companies take part in the agreement or not. At the same time the KMO approval was made free of charge implying that all companies which can prove their environmental capability to handle refrigerants properly, receive deliveries of refrigerants, so that the free trade no longer is restricted by the KMO agreement.

The change of the approval arrangement also implies that a subsidy (according to the collecting arrangement) is payable by delivering used refrigerants to recycling companies not participating in the agreement, only these companies shall be approved by the KMO. Thereby, the price discrimination that these companies were exposed to was eliminated.

Finally, the finance arrangement was changed so that companies, which take care of the recycling of polluted refrigerant themselves, or deliver the polluted refrigerant to a KMO approved removal facility, can be exempted from the environmental tax. Exemption from payment of environmental taxes can of course only be obtained if the company itself pays the expenses connected with the removal. With this change the companies participating in the agreement can be exempted from financing services used by the parties of the agreement.

However, one competitive issue from the original KMO agreement is still left - viz. the fixed subsidies which are being paid during the collecting arrangement are limiting competition on the costs for recycling and removal between the participating companies.

Despite this issue the Competition Council accepted the revised KMO agreement. In its decision, the Council stressed the social dimension of the agreement to ensure an environmental correctly removal of CFC-gas. Furthermore, it was stressed that the agreement no longer prevents alternative removal arrangements from gaining access to the market for removal of used/polluted refrigerants if these possess a better technology or are more efficient than KMO.

The matter illustrates the competitive problems in private environmental agreements. Such agreements often contain unnecessary restrictive provisions which are irrelevant for the purpose of the agreements. At the same time, new alternative solutions which may be cheaper from an efficiency point of view or better from an environmental technological point of view, are often blocked in such agreements.

Finally, it must be noted that in private environmental agreements, in general, problems in questions of competence to act may occur, as the industry itself often is in charge of the environmental control and approval functions. This question will, however, only be subject to competitive interest, if the parties of the agreement cause further restriction of competition through the administration of this environmental responsibility. If this responsibility is administered from factual, objective, reasonable and consistently sustained criterions, no competitive misgivings will exist.

CONTRIBUTION FROM GERMANY

COLLECTION AND RECYCLING PROCESS OF WASTE DISPOSAL

Introduction

The handling and treatment of waste in Germany is governed by the Waste Prevention and Disposal Act (Abfallgesetz) of August 27 1986. The legislative intent of this law is that for reasons of environmental policy and prevention of waste should have priority over the further aims of as much recycling as possible and, lastly, the disposal of waste. The problem of recycling or disposing of waste materials is to be solved on the basis of free-market principles by using the "polluter pays" approach, i.e. by giving manufacturers greater responsibility for their individual products.

Under the Waste Prevention and Disposal Act (Abfallgesetz), manufacturers and distributors of certain products may be required to accept the return of their used products and to provide for their being re-used or recycled in an environmentally sound manner outside the public waste collection system.

With reference to the Waste Prevention and Disposal Act (Abfallgesetz), the federal government on June 12 1991 issued the Ordinance on the Prevention of Packaging Waste, the so-called Packaging Ordinance.

As regards the effects of the Packaging Ordinance on competition in the waste disposal industry, the Federal Cartel Office's experience is largely based on the implementation of the Ordinance (1991) and its implications for competition.

The Packaging Ordinance (VVO)

The Packaging Ordinance's chief environmental purpose is the prevention of waste within a free-market framework. The Ordinance distinguishes between outer-packs, transport packaging and sales packaging and required manufacturers and/or distributors to take back and recycle specific quotas of each type of packaging. In an annex to the Packaging Ordinance, collection- and sorting targets are laid down which industry must meet. Manufacturers may use third parties to fulfil those obligations. The environment ministries of the various Länder are monitoring compliance with the obligations. If companies fulfil their take-back and recycling duties themselves, competition problems do not arise. But the Packaging Ordinance also permits the use of co-operative systems, and this has had serious competitive consequences and caused the Federal Cartel Office to raise objections under competition law:

Competition problems involved in the disposal of sales packaging by Duales System Deutschland GmbH (DSD)

Companies need not themselves fulfil the take-back and recycling obligations prescribed by the Packaging Ordinance if they join a system that guarantees regular and nation-wide collection of sales packaging waste from or close to end users (by contrast with the commercial and industrial sectors). In order to satisfy the requirement of nation-wide disposal as prescribed by the Packaging Ordinance and to avoid, at the same time, having to take back and recycle the waste individually, German industries in 1990 set up one common waste collecting enterprise, the Duales System Deutschland (DSD): Manufacturers, fillers and distributors subscribing to this system pay a levy which allows them to use a common symbol, the so-called "green dot" on their products. This levy serves to finance the collecting and sorting of sales packaging. To ensure the functioning of this scheme, trading companies are generally seeking to carry only goods with packaging that is marked by the green dot. DSD has a network of waste disposal contractors

which hand the waste material over to recycling companies free of charge. The recycling companies guarantee that the packaging waste is recycled in accordance with the targets set in the Packaging Ordinance.

Central restraints of competition connected with DSD

Restrictions of competition caused by recycling companies

Recycling companies were mainly set up by associations, by ad-hoc companies, created especially for this purpose by the packaging industry, or by joint ventures of the waste materials trade and the waste disposal industry. In respect of certain waste materials, the recycles have given an overall purchasing and recycling guarantee. The Federal Cartel Office has scrutinised the statutes of those companies mainly for quota and price agreements. Recycling companies must not act as purchasing cartels of the packaging manufacturers or as sales cartels of waste disposal firms/waste materials traders.

Competition problems in the trade sector

The Federal Cartel Office considers the general intention of the retail trade to buy and sell only goods with packaging bearing the green dot to be a possible violation of the German cartel ban which results necessarily from the fact that there is only a single system, the DSD. Using its discretionary powers, the Federal Cartel Office will take no action against the system as long as it serves the purposes of the Packaging Ordinance, does not obstruct the technological development of new, environmentally sound packaging methods, and is not applied in a discriminatory manner. As regards Article 85 of the EEC Treaty, the system in particular must not negatively affect trade between member states (especially imports and re-imports).

Restrictions of competition caused by regional waste disposal monopolies

To be exempted from the individual collecting and sorting obligation, a manufacturer also needs to obtain an authorisation from the local or regional public authority responsible for waste disposal. Local and regional public authorities have in several cases set up joint ventures with waste disposal firms. These joint ventures have concluded long-term exclusive dealing contracts with DSD for the collection and recycling of the waste materials. This may also contribute to safeguarding the interests of the municipality or region concerned. In the Federal Cartel Office's view, there is a danger that the joint venture obtains a permanent monopoly position in its region, since the local or regional public authority can be expected to grant the joint venture the necessary authorisation again after the initial contract with DSD has expired. The Federal Cartel Office has so far issued no prohibition where the term of the joint venture was limited to the duration of the waste disposal contract and the statutes did not provide for investments to be made that could make it impossible to dissolve the joint venture after that period.

Competition problems resulting from an extension of DSD's activities

DSD's attempt to extend its operations into the collection of used sales packages in the commercial and industrial sectors met with grave concern on the part of the Federal Cartel Office. The Office therefore initiated proceedings against DSD for violation of the cartel ban on the ground that the market for commercial and industrial waste collection would be seriously affected. DSD had offered its contractors, which would have been charged with collecting commercial and industrial waste, a refund of

costs. This cost advantage would have resulted in large-scale elimination of small and medium-sized competitors outside the DSD system.

While a further DSD proposal would have removed the last-mentioned distortions of competitions, it also provided for the collection and disposal of transport packaging. This proposal has in the meantime been prohibited by the Federal Cartel Office. It was likely that DSD would extend its monopolistic position as a buyer in the market for sales packaging into the neighbouring market for transport packaging, and this would have led to the elimination of small and medium-sized waste disposal companies as well as of competing waste disposal schemes for transport packaging.

Conclusion

A large number of restrictions of competition are implicit in the Packaging Ordinance itself. Most of the restrictions come under the cartel ban. By setting collecting and sorting targets, the Packaging Ordinance has resulted not only in an uniform, collective system, but also in a highly objectionable monopolisation of demand for certain waste disposal services. From the point of view of competition law, it would appear more appropriate when preparing such regulations to take care that as few restrictions of competition as possible are implicit in the regulation itself.

Against the background of the experiences with the competitive impact of the Packaging Ordinance, the German draft ordinances relating to used cars, papers waste, electronic waste and used batteries, which were modelled on the Packaging Ordinance, have so far not been adopted.

Annex I

Case study: Competition and Waste Disposal

The Federal Cartel Office has prohibited Duales System Deutschland (DSD) from extending its operations into the collection of transport packaging.

Before the coming into effect of the Packaging Ordinance, commercial, trading and industrial companies arranged for the collection of their waste packaging by concluding individual contracts with waste collection firms. The collection and marketing of waste materials took place under such contracts between individual companies, the market being largely competitive. In the waste paper market, in particular, a great number of small and medium-sized waste paper dealers and container services were active.

The Packaging Ordinance, which provides for the taking back of used packaging, distinguishes, among other things between, transport and sales packaging. Transport packaging means containers and wrappers serving to protect goods from being damaged on their way from the manufacturer to the trader (Section 3 of the Packaging Ordinance).

The Packaging Ordinance requires the makers and distributors of transport packaging to re-use or recycle the latter after use (Section 4 of the Packaging Ordinance). Manufacturers and distributors of transport packaging may entrust third parties with these duties.

While the Packaging Ordinance provides that companies need not themselves fulfil the take-back and recycling obligations if they join a system guaranteeing the nation-wide collection of sales packaging which is the reason why the DSD was set up -, there is no such possibility of exemption from the individual obligation as regards transport packaging.

The DSD tried, through its subsidiary DEGI, to do away with the distinction between sales and transport packaging in order to bundle the demand for collection services in the area of transport packaging as well. The Federal Cartel Office took the view that this presented a danger that the DSD might extend its quasi-monopoly as a buyer on the market for the collection of sales packaging into the neighbouring market for transport packaging, a monopoly position which the Federal Cartel Office has only tolerated so far. There was a risk that waste collection companies not belonging to the DSD system would be driven from the market.

The Federal Cartel Office prohibited the project and the decision has in the meantime become unappeasable.

CONTRIBUTION FROM HUNGARY

General remarks

In the last few years considerable progress was made in the regulation of environment protection in Hungary. In May of 1995 the Parliament passed the 'Act on Environment' which is really in close conformity with the OECD rules. This was followed by the 'Act on Product Charges', which serves to introduce market economy-type incentives in order to reach basic environment protection goals. It is also very important to underline, that modernization of the regulatory and institutional system of the Hungarian environment policy has been substantially supported by the OECD accession process.

Due to environmental damage caused in the past decades, the importance of environmental protection is increasing. Environmental lobbies are formed one after the other, and the activity of private organisations is also strengthening in this respect. Many undertakings now consider that it is worthwhile stressing in their marketing activity the environmental character of their products or technology or the sensitivity of the firm towards environmental problems.

In addition to the establishment of regulatory and institutional framework further steps are to be taken in order to increase the sensitivity of the society towards environmental issues to the level similar in the developed OECD member countries. Though there are some subsidy systems favouring environmentally friendly products and technologies or recycling or reducing their cost disadvantages, for budgetary reasons even some existing subsidies (i.e. tax allowances) have become rarer in recent years. Penalties imposed on polluting products or technologies to reduce competitiveness and increase their costs vis-à-vis more environment-friendly competing products are not really effective because they have not been able to keep pace with inflation in recent years.

All in all, for the time being, the majority of the companies show insignificant interest in environmental protection activities (waste treatment, waste collection, etc.). These areas are not characterised by strong competition in spite of the fact that there are no considerable administrative or discriminatory market entry barriers.

Method of regulation

According to the current Hungarian regulatory system, production technologies and products are required to satisfy definite environmental norms. Once they meet these requirements, they can be manufactured and distributed without any further restrictions. Thus, regulation is not based on the "command an control" method, but basically on quality norms. These norms are equally for each market player, in such a way that this regulation can be principally regarded as a neutral one as it does not restrict competition.

Of course, quality norms ensure benefits for those undertakings that are more prepared to consider the given norms than their competitors. The latter are obliged to sustain losses, and in some cases they may be forced to exit the market. For instance, two petrol distributing undertakings in Hungary would like to see the strengthening of environmental regulations to the point many other economic operators would be driven out of the market of filling stations since they would be unable to satisfy the proposed norms. In this case, it is obvious that regulation would be formally and invariably neutral from the point of view of competition, since any undertaking that statistics the provisions can enter on the market. Nevertheless, this strengthening would restrict competition in practice. Although the authority of environmental protection considers these endeavours as positive, it has not yet realised them at the level of regulation.

Even with complete competition rules, their control or enforcement can be partial. There is no general overview of the Hungarian circumstances in this respect; they are only concrete experiences in a few cases.

Regulation on communal waste is also undertaken partly by local authorities. To some extent this made the unification of the rules and assessment of the regulation difficult. As to the present practice, some competition supervision proceedings launched at the Office of Economic Competition show that regulation, or the conduct of the local government, prefers certain companies that make cross-financing possible or distort competition in another way. However the 'Act on Waste Management' is to be adopted by the Parliament in 1996, which will set the framework legislation covering hazardous and non-hazardous wastes. In addition, a new Government Decree on hazardous waste will come into force in 1997. This legislation will establish full compliance with the pertinent OECD requirements.

Horizontal agreement or cooperation

The environmental regulation does not contain either appeal or order as to horizontal agreements or co-operations. Pursuant to the regulation, waste treatment is the responsibility of producers. On the other hand, environmental policy supports vertical co-operation since important interest is attached to economic utilisation of the waste caused. The regulation does not support exclusivity or monopolistic practices.

Product substitution

For the time being in Hungary, products manufactured by means of recycling appear basically in four fields as competitors of primary products: in the field of recycled paper, recycled oil, refillable and recycled glass bottles, respectively and recapped tyres. These recycled products do not create serious competition for primary products.

The regulation can be described as a neutral one from the point of view of competition. This statement is basically justified as to the competition of substitute products as well. The legal regulation in force does not contain provisions of a discriminative character. It is a general principle of environmental policy that primary products as well as recycled products must meet certain quality, functional and environmental requirements.

As mentioned in the introductory remarks, in June of 1995 the Parliament passed the 'Act on Product Charges, which covers fuels, tyres, coolants and packing materials. The basic objective of the introduction of product charges was to stimulate the development of recycling industry . Inasmuch as technical parameters of the substitute product are below those of the original product (i.e. recapped tyres), this translates into lower prices, as well. For certain recycled products used for specific purposes, products that are made from recycling (i.e. recycled paper and processed oils) are considered to be of identical value in use with the original product. In these cases, preferential credit possibilities and some tax allowances contribute to the competitiveness of the product.

For the time being, the enlargement of the penalty system operated in the form of environmental charges is in the planning stage. At present, charges of this nature are imposed on petrol and are to be extended to tyres as well as to product containing Freon (e.g. refrigerators). This concept is supported by international experience that in the case of certain products negative externalities arise (e.g. pollution). In other words, the costs incurred are paid by society (by means of restoring environmental damages). Environmental charges make these externalities internal. The charges collected are gathered into a central fund financing the restoration of environmental damages.

Pollution abatement

The Central Environmental Protection Fund is the most important element of state funding of pollution abatement. Through tenders, the Fund finances and supports programs that aim at pollution abatement such as including scientific researches. The Fund, although it has been in operation for a long while, became OECD-conform only after its regulation in 1992/1993. The regulation does not contain elements distorting competition.

CONTRIBUTION FROM JAPAN

Basic considerations

The Basic Law for Environmental Pollution Control points out the need to create a sustainable economy that has a minimum impact on the environment. It has therefore become essential that firms, including manufacturers and distributors, deal with such environmental issues as waste reduction and recycling as part of their business activities.

The problem with these activities is that they are not part of regular business, and so it is difficult for firms to factor them into product costs. Therefore, a study is being conducted on how to use economic methods to factor these environmental efforts into the costs of products, services, etc. (economic methods: see note below). At the same time, firms are studying the issue and taking steps to incite all industries to tackle these problems, such as encouraging other firms to participate in joint ventures, among other things.

In Japan, economic operations are based on the promotion and maintenance of fair and free competition within a free market system, and in terms of environmental issues, it is vital to let the market mechanism take as large a role as possible in the promotion of environmental protection. At the same time, when dealing with these environmental issues, there is a need to ensure that the competitiveness of products, etc. in the market is not restrained.

In this sense, dealing with environmental issues does not run counter to competition policy, and the effective exercise of the market mechanism through the Antimonopoly Act contributes to the resolution of environmental problems.

Note: Regulatory methods are effective when there is a need to ensure that a certain standard of environmental measures are met. However, when it is necessary to use the market mechanism to implement environmental measures over the long term, then economic methods (surcharges, subsidies, deposit systems, etc.) are effective. This is because they have a direct impact on the costs and benefits of certain voluntary activities by various economic agents, such as firms and consumers, and thus encourage desirable behaviour in terms of environmental preservation.

FTC views on environmental measures taken by firms

With regard to environmental measures taken by firms, important issues from the viewpoint of competition policy may be grouped into three categories: waste disposal, recycling and waste reduction. Below, previous consultation cases involving the Fair Trade Commission (FTC), cases of administrative co-ordination, and other examples are used to illustrate the relationship between environmental efforts and either competition policy or the Antimonopoly Act.

Waste disposal

Waste disposal may be categorised into individual waste or that generated by businesses. In terms of the relationship between waste disposal and competition policy, the question is whether or not competition is being restrained in the waste disposal industry.

Under Laws Governing the Collection and Disposal of Waste, waste disposal can be divided into ordinary and industrial; local government disposes of ordinary waste and private firms take care of

industrial waste. Because industrial waste is dealt with by private enterprises, disposal costs are internalised, and disposal is carried out through the market mechanism.

Activities that require consideration in terms of competition policy are as follows:

Joint ventures between waste disposal firms

Just as with ordinary joint ventures, illegality under the Antimonopoly Act is judged by whether or not a particular joint venture dominates the market, or whether or not a cartel has been formed by participating firms.

Note: Ordinarily, the illegality of joint ventures under the Antimonopoly Act is judged on the basis of the following:

a. How the merger will affect market dominance.
b. Restraints on competition due to the effects of a cartel among the investing companies.
c. Restraints on potential competition in those cases in which potential competitors set up a joint venture with existing competitors.
d. Exclusion of third parties due to market closure in cases of vertically integrated joint ventures.

Joint ventures by manufacturers, etc.

There are two ways in which firms can dispose of waste: joint disposal by the parties concerned and cases in which payment for disposal is either received from or paid out to other firms. The former cases do not pose immediate problems under the Antimonopoly Act, but in the latter, there is a need to discern whether competition within a market is restrained by the very formation of that market. In those cases in which it is difficult for individual firms to dispose of waste efficiently, there is little fear that a joint venture will cause problems. Furthermore, in those cases in which existing disposal firms do not participate in the joint venture, there is the issue of whether or not existing disposal firms are being restricted from the market.

Example

- A joint venture by wholesalers to collect and dispose of used tires (1992)

This was a case in which an automobile tire wholesalers association worked together to recycle used tires and sell them to cement manufacturers. The FTC judged that there was no problem under the Antimonopoly Act because: l) individual firms could not guarantee a stable supply of the number of tires needed by the cement manufacturers; 2) used tires are not recycled separately by brand; and 3) while processing and treatment machinery is needed to shred the tires so they can be used for fuel in the manufacture of cement, in terms of the cost of this machinery, wholesalers other than those affiliated with these specific tire manufacturers' vertically-integrated groups ("keiretsu") are unable to respond to this need.

Cartel acts involving compensation, etc. for disposal

In those cases in which a specific joint venture has been approved, and when the joint venture itself does not pose a problem, then the participating firms may determine the amount of compensation, etc. for the joint activities. However, in those cases in which waste is disposed of by individual firms, if these firms act in concert simply to determine the amount of compensation, etc., then this poses a problem, as it constitutes a cartel act, such as a price cartel, etc.

Example

- A cartel by general waste disposal firms to raise their handling fees (1992)

This was a case involving a decision by a co-operative of general waste disposal firms to raise their handling fees. Each member of the co-operative disposed of its own waste and so the FTC judged that the co-operative's decision to raise a member company's handling fees posed a problem under the Antimonopoly Act.

Recycling

Recycling is the act of recovering waste and transforming it so it may be used again. There are cases in which the waste is used the same way as it was originally, such as recycled bottles, and cases in which it is used for different purposes. Consequently, in terms of possible problems under the Antimonopoly Act, it is necessary to determine whether or not competition is restrained among the firms which are involved in recycling and those involved in the use of reusable items.

Recycling activities that require consideration under the Antimonopoly Act are as follows:

Joint venture by recycling firms

These are considered in the same light as ordinary joint ventures.

Joint ventures by distributors, manufacturers, etc.

Unlike waste disposal, recycling activities are based on the premise of reuse and thus have economic value. For this reason, problems arise when a market is formed and when competition among recycling firms is restrained. Whether competition is fair or not is judged by the share each company has in the market, etc. However, it is often hard for individual firms to recycle efficiently on their own, and joint ventures can be set up without undue difficulty in these cases. Additionally, in those cases in which there are existing recovery firms that do not participate in the joint venture, there is the problem of whether or not these existing firms are being kept from the market.

Cartel acts involving compensation, etc. for recycling

In those cases in which a specific joint venture has been approved, and the joint venture itself does not pose a problem under the Antimonopoly Act, then the firms participating in the joint venture may collectively determine the amount of compensation, etc. for waste recovery. In those cases in which recovery by individual firms has been approved, if these companies work together simply to determine the amount of compensation, etc. for waste recovery, then this poses a problem under the Antimonopoly Act, as it constitutes a cartel act, such as a price cartel, etc.

Example

- The charging of fees for waste oil recovery by a waste oil recovery and recycling association (1993)

Firms that recover and recycle waste oil, a type of industrial waste, first recover lubricating oil and other types of waste oil from gasoline stations, automobile repair stations, etc. then refine this oil and sell it as fuel for use in factories and elsewhere. In the past, there have been various conditions for this recovery: some firms obtain the waste oil at no expense while other firms purchase it. Due to the recent increase in the cost of recovering waste oil and a drop in the price for recycled oil, member firms have no longer found it financially practical to recover waste oil under the conditions originally established for its recovery, and came to the FTC to ask about the possibility of charging recovery fees.

In response, the FTC decided that if the association as a whole were to set a fee for this service, then this would pose a problem under the Antimonopoly Act. However, if the member firms merely explained their difficulties to the customers that provided them with waste oil, with a request that the conditions for waste oil recovery be generally improved, then this would not pose a particular problem.

Deposit systems

A deposit system consists of raising the incentive for consumer returns (of a purchased product) by first increasing the retail price of a product by a set amount (a "deposit"), and then reimbursing the consumers in this set amount when they return the empty container. In and of itself, this deposit system does not pose any problems in terms of competition policy. However, if several firms work together to implement this system, then the determination of the additional charge -- which would take the product's retail price into consideration -- could pose a problem in terms of its impact on the retail price of the product.

In those cases in which a specific waste recovery joint venture has been approved, and when the joint venture itself does not pose a problem, then joint venture participants may, as a part of the venture, collectively decide to adopt a deposit system, and determine the additional amount to be charged.

In those cases in which a deposit system is implemented as part of the recycling activities by individual firms, then the additional charge itself can be considered not to be a form of compensation for a product or service. Further, since this system is in place to protect the environment, there is no fear that this will restrain free and fair competition among sellers. Even when the additional charge is collectively determined by the firms, this action in and of itself does not violate the Antimonopoly Act. However, there is a problem under the Antimonopoly Act in those cases in which a cartel is formed to set the retail price itself during the process of determining the additional charge. Thus, in those cases in which competing firms collectively determine the additional charge, they must be careful to ensure that retail price competition is maintained.

In those cases in which a deposit system is one of the joint recycling activities by a manufacturer or a distributor and sellers, then there is no problem, even if the manufacturer or a distributor sets the additional charges. However, in those cases in which the manufacturer or a distributor interferes in the setting of the retail price of the product itself, then this poses a problem under the Antimonopoly Act as it constitutes resale price maintenance. Therefore, in those cases in which manufacturers or a distributor implement a deposit system, they must be careful to ensure that retail price competition is maintained.

Note: Example of how the deposit system has been implemented:

- A glass bottle deposit system by beer manufacturers

Three beer manufacturers that use the same bottles have implemented a system whereby each adds five yen to the price of a bottle and 200 yen to the price of a bottle container called an "R" crate, which has either 20 or 30 bottles; this deposit is reimbursed when the bottles or crates are returned.

Recycling (reuse)

Recycling consists of the production and sale of recycled items, or of the purchase and use of these items. From the perspective of competition policy, when several firms jointly engage in recycling activities, it is important to ensure that competition is maintained in areas of business in which the recycled product plays a role.

Joint ventures involving the production and sale of recycled items

There are joint ventures among recycling firms and among manufacturers, among others. Joint ventures among recycling firms are considered in the same light as regular joint ventures. In the cases of joint ventures among manufacturers and others, there are instances in which the recycled item is to be used as it was originally and those in which it is to be used for other purposes. One of the issues in the former case is whether or not competition is restrained in the market which includes both the original product and the recycled product. In most cases, joint production of recycled items will be approved when it is difficult for individual firms to produce the recycled item on their own, as this would benefit the buyer. However, even in these cases, if joint acts involving the sale of recycled items occur, then this poses a problem under the Antimonopoly Act.

In those cases in which the recycled item is to be used in another way, the issue is whether or not competition will be restrained in the market in which the recycled item will be sold. In these cases, the market share of the recycled item is usually small, and thus there is no problem in most instances. It should be noted that in those cases in which recycling firms already exist, there is the issue of whether or not these companies are being restricted from the market.

Joint ventures involving the use of recycled items

These joint ventures may include the joint purchase of recycled items by manufacturers that use them. The key issue in this case is whether or not competition involving the products that use the recycled item is restrained. There is concern that competition will be restrained in those cases in which the recycled item has a large share in the market involving the use of the recycled item, or if the recycled item plays an essential role in the production of the product, or if the recycled item has a significant impact on the determination of the price of the product.

Cartel acts involving compensation, etc. for recycling

In those cases in which a specific joint venture has been approved, and the joint venture does not pose a problem in and of itself, participating firms may jointly determine the amount of compensation, etc. as part of their joint activities without this posing a problem.

In those cases in which recycling activities are carried out by individual firms, if these firms act in concert simply to determine the amount of compensation, etc. for such activities, then this poses a problem, as it constitutes a cartel act, such as a price cartel, etc.

Waste reduction, measures addressing environmental issues, etc.

When firms work together to reduce waste by voluntarily restricting the use of harmful substances or reducing packaging, as long as such efforts are limited to these ends, they pose no problems under the Antimonopoly Act. However, there is a problem under the Antimonopoly Act in those cases in which

activities to reduce waste directly affect the production or sales activities of firms through, for example, production adjustments or price increases to the product itself. Moreover, in those cases in which firms' joint activities directly affect important means of competition, such as marketing methods and packaging, then these activities also pose a problem under the Antimonopoly Act.

Cartel acts that affect production and marketing activities

Joint adjustments in production or marketing, even if their purpose is to reduce waste go beyond the mere end of reducing or eliminating waste and restrain competition in production and marketing. These acts thus pose a problem under the Antimonopoly Act. However, a joint request to manufacture and sell products that exceed certain industry standards is granted as long as: (i) such acts do not restrain competition involving production of goods and sales; (ii) their aim is truly to reduce waste; (iii) such acts do not harm the interests of users; and (iv) firms are not forced to adopt such standards.

Example

- Reduction of studded tire shipments (1988)

As a result of arbitration by the Environmental Disputes Co-ordination Commission, it was decided that production of studded tires would be stopped by December l987, and that sales of these tires would be prohibited by March 1991. At that time, the Ministry of International Trade and Industry (MITI) consulted with the FTC regarding the provision of guidance in the form of a production reduction schedule to avoid confusion.

The FTC recognised that guidance in this case was an unavoidable temporary measure designed to prevent any confusion resulting from the stoppage of production and sales of studded tires. However, to prevent such guidance from causing any problems under the Antimonopoly Act, the FTC made a request to MITI that: i) guidance on shipment reduction not be the same for all firms, but that the rates of reduction be treated as guidelines only, and that such guidance be administered separately for each firm based on its specific circumstances; ii) a vigorous public relations campaign directed at consumers be carried out to promote voluntary restraints on the use of studded tires; and iii) no cartels be formed by any firm.

The establishment of rules, etc. for marketing methods

There is no problem posed by the setting of fixed rules for marketing methods, such as packaging designed to reduce or eliminate waste, as long as these rules do not unjustly harm the interests of users and force them to comply.

As for charging fees for wrapping or other special packaging services, there is a problem when this packaging attracts significantly more customers, or when it directly affects the price of each piece of merchandise. However, other cases may be treated in the same way as those involving rules for marketing methods.

Example

- Establishment of voluntary standards for appropriate packaging by department store groups (1991)

The FTC has determined that no special problems would arise if a department store group established, at MITI's request, standards concerning appropriate packaging as long as they were strictly voluntary. These standards include: i) efforts to reduce the volume of wrapping material by simplifying

and/or omitting wrapping; ii) charging of fees, as a basic rule, for special wrapping of gifts and other items at the consumer's request; and iii) requests to manufacturers and suppliers to meet official packaging standards as established by local governmental law or ordinance.

However, in those cases in which consumers request special wrapping for gifts or other items, it was determined that the decision to charge for the cost of this special wrapping should be left up to each member of the group. The FTC has cautioned that collective decisions by members of the group to charge fees -- even when, for example, such decisions do not involve the establishment of specific fees -- pose problems under the Antimonopoly Act.

CONTRIBUTION FROM JAPAN

(APPENDIX)

Method of regulation

In Japan, all waste is classified into two types, according to the Waste Disposal and Public Cleansing Law: (1) domestic waste, which is managed by municipalities; and (2) industrial waste, which is managed under the responsibility of, and disposed of by, the generator firms. Industrial waste, whose cost is internalised in the generator's account, is managed according to the market mechanism.

Levels of environmental standards also affect competition. A high level requirement might promote technical innovation and enhance industrial competitiveness. However, it is possible that an environmental regulation may inadvertently affect market competition, or that a regulation whose original objective is to protect the environment in fact operates as an economic regulation. Therefore, the situation should be specifically examined on a case-by-case basis.

The manner in which management of waste is regulated can possibly restrain competition at the stage of manufacturing or distribution, and therefore, should be closely monitored. For example, several firms, in response to the regulation, may co-operate in the recycling of resources and in the rationalisation of packaging. It is important that such activities be promoted in such a way as to comply with the Antimonopoly Act.

The regulative approach is an effective means of assuring a certain level of policy implementation. However, an economic approach, using the surcharge, subsidy and deposit system which directly presents the cost/benefit options for each economic actor (firm, consumer etc.) to choose from, and which encourages environmental protection, is effective in cases where the government implements long-term environmental policy with the use of market instruments. [See Attachments 1, 2, 3]

Horizontal agreement or co-operation

Although the objective of environmental regulation is to protect the environment, neither horizontal nor vertical agreements are permitted among firms because they violate the Antimonopoly Act. The current environmental regulations are not exempt from the application of the Antimonopoly Act, and all of the activities under the regulations should be judged by whether they substantially restrict competition in the relevant market. [See Attachment 4, Section 2 (4) and (6), and Section 31]

Substitute product

Regulation of the environment is classified by two approaches: regulatory and economic. As mentioned above, while the regulatory approach is effective in maintaining a certain level of policy implementation, the economic approach (surcharge, subsidy, deposit system, etc.) directly addresses the costs and benefits of the options available to each player and encourages the player to take a positive step towards environmental protection. The latter approach is effective in implementing long-term environmental policy, with the use of the market mechanism.

The two approaches can wither promote competition between substitute products or reduce competition, depending on whether they are employed properly. For example, the fact that waste oil (used

or unnecessary lubricated oil or cleansing oil, etc.) is considered by the Waste Disposal and Public Cleansing Law as industrial waste and that the firm generating the waste must dispose of it is thought to encourage competition between virgin oil and recycled oil.

It should be emphasized that the original purpose of environmental regulation is not to promote competition but to protect the environment. [See Attachment 3]

Pollution abatement

In cases where a trade association is engaged in a joint undertaking, such as the establishment of a fund for eliminating environmental pollution, if it substantially restricts competition, unfairly restricts the functions or activities of the constituent firms, or compels them to use such undertakings or discriminates against them on the use of the undertakings, it may violate the Antimonopoly Act. [See Attachment 4, Section 2, (2) and Section 8]

Attachment 1

Waste Management and Public Cleansing Law

Law No. 137 of 1970

[Definition]

Article 2

(1) In this law, "waste" refers to refuse, bulky refuse, ashes, sludge, human excreta, waste oil, waste acid and alkali, carcasses and other filthy and unnecessary matter, which are in a solid or liquid state (excluding radioactive waste and waste polluted by radioactivity).

(2) In this law, "domestic wastes" refers to wastes other than industrial wastes.

(3) [- - - - -]

(4) In this law, "industrial wastes" comprise the waste categories defined below:

1) Ashes, sludge, waste oil, waste acid, waste alkali, waste plastics and others specified by a cabinet order among all the wastes left as a result of enterprising activity.

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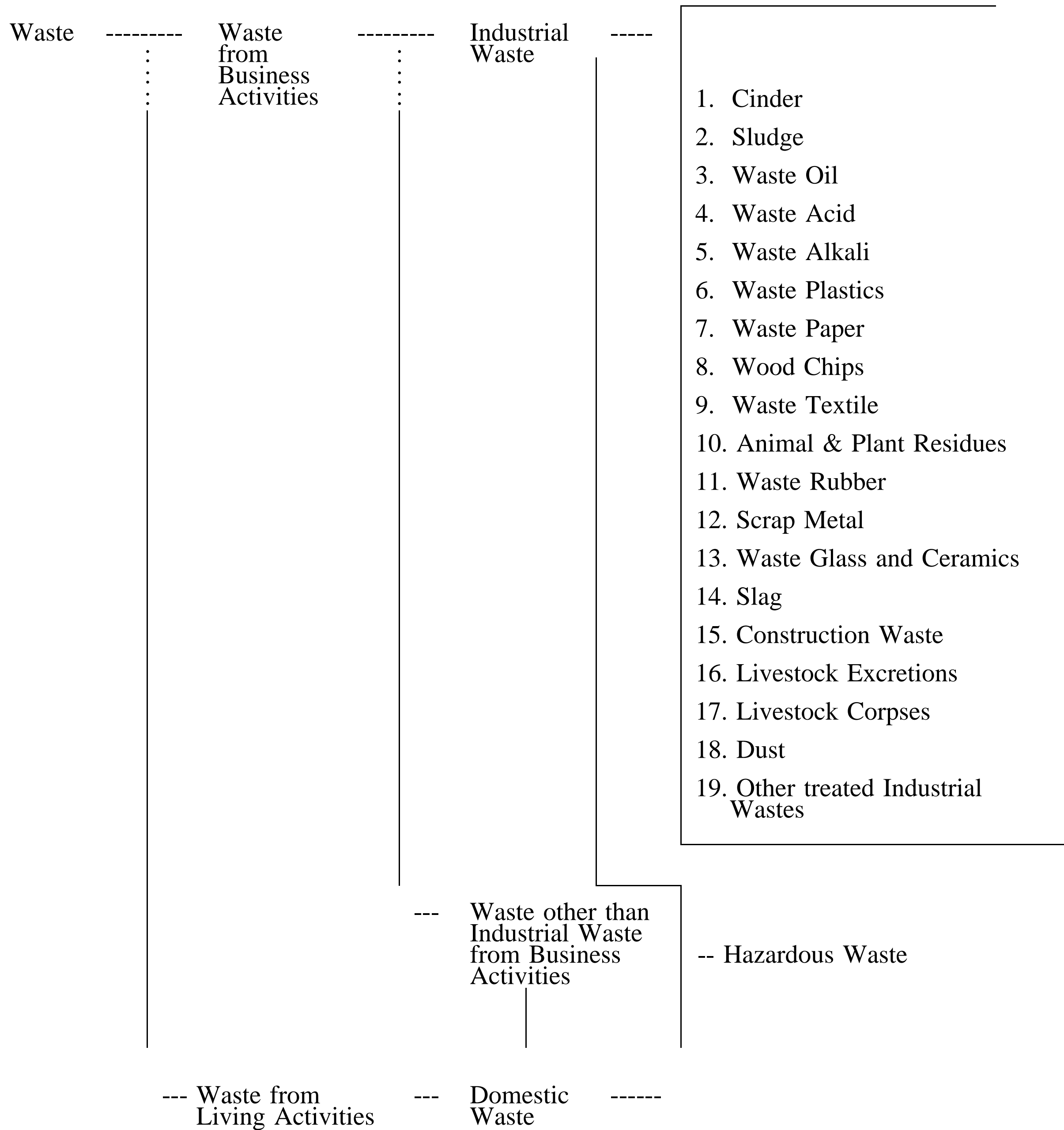
Attachment 2

(Classification of Wastes)



Attachment 3

Problems in Government Regulations and the Direction of their Review, from the Viewpoint of Competition Policy (10 December 1993; Study Group on Government regulations, etc., and Competition Policy)

(EXTRACT)

1. Importance of Reviewing Government Regulations from the Viewpoint of Competition Policy

1. Competition and Government Regulations

Underlying the free market system, on which Japan's economy is dependent, there exists the principle that the engagement of consumers and firms in free economic activities at their own discretion makes it possible, through market mechanisms, for firms to fully demonstrate their creativity and initiative, and, at the same time, realise energetic economic development and a wide range of choices for consumers, which may lead to an affluent national life. In a free market economy, it is vital to maintain and promote fair and free competition among firms.

On the other hand, there are some areas in which the government intervenes in private economic activities. In these areas, the government lays regulations on business activities such as market entry, pricing, etc., with a view to addressing, for instance, social problems (such as those related to the protection of the environment or the health and safety of the people) which cannot be solved merely through free economic activities; ensuring optimum distribution of those goods and services which are almost free from the effects of market mechanisms (e.g. goods and services provided by public utilities with an intrinsic monopoly); securing a steady supply of goods and services indispensable for people's daily lives; or protecting and fostering specific industries.

However, it is perceived that as a result of social and economic changes, some of these regulations have become questionable in their necessity or excessive in their intensity in the light of their objectives; such regulations are either distorting or impeding the fair distribution of resources and giving rise to problems too serious to ignore in their restrictive effects on competition.

Government regulations are often classified into two groups; one being economic regulations, which are implemented from the viewpoint of demand-supply adjustment among other things, such as those on market entry, or those affecting prices, etc.; and the other being social regulations, which are carried out for securing public health and safety, protecting the environment, and so forth. However, it should be noted that even if a given regulation is intended to secure public health and safety, for example, there are some cases in which its impact on competition in the market is too great to ignore or it is actually functioning as an economic regulation in spite of the fact that it was originally implemented for social purposes. Therefore, such distinctions cannot necessarily be made clearly.

Attachment 4

Antimonopoly Act

(Act Concerning Prohibition of Private Monopoly and

Maintaining of Fair Trade, Act No. 54 of 1947)

Section 2 [Definitions)

(2) The term "trade association" as used in this Act shall mean any combination or federation of combinations of two or more entrepreneurs having as its principal purpose the furtherance of their common business interest as entrepreneurs and includes one taking either of the following forms: providing that a combination or federation of combinations of two or more entrepreneurs whose stock or other share capital is owned by the constituent entrepreneurs, and whose principal purpose is to operate and which is actually operating a commercial, industrial, financial or any other business for profit shall not be included:

(i) Any incorporated or unincorporated association of which two or more entrepreneurs are members (including any position similar thereto);

(ii) Any foundation with or without juridical personality of which two or more entrepreneurs control the appointment or dismissal of directors or managers, and the execution or existence of business; and

(iii) Any partnership of which two or more entrepreneurs are members, or any contractual combination of two or more entrepreneurs.

(3) [- - - - -]

(4) The term "competition" as used in this Act shall mean a situation in which two or more entrepreneurs do or may, within the normal scope of their business activities and without undertaking any important change in their business facilities or kinds of business activities, engage in any act prescribed in any one of the following paragraphs, provided that paragraph (ii) below shall not apply to such competition as provided for in Chapter IV (stockholding, interlocking directorates, mergers and acquisitions of business):

(i) Supplying the same or similar goods or services to the same consumer or users; or

(ii) Obtaining supplies of the same or similar goods or services from the same supplier.

(5) [- - - - -]

(6) The term "unreasonable restraint of trade" as used in this Act shall mean that any entrepreneur, by contract, agreement or any other concerted actions, irrespective of the names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or customers or

suppliers, thereby restraining, contrary to the public interest, substantially competition in any particular field of trade.

Section 3 [Prohibition of private monopolisation or unreasonable restraint of trade]

No entrepreneur shall affect private monopolisation or any unreasonable restraint of trade.

[- - - - -]

Section 8 [Prohibited acts of a trade association, filing requirement]

(1) No trade association shall engage in any act which comes under any one of the following paragraphs:

(i) Substantially restraining competition in any particular field of trade;

(ii) Entering into an international agreement or an international contract as provided for in Section 6(l);

(iii) Limiting the present or future number of entrepreneurs in any particular field of business;

(iv) Unjustly restricting the functions or activities of the constituent entrepreneurs (meaning an entrepreneur who is a member of the trade association; hereinafter the same); or

(v) Causing entrepreneurs to employ such acts as constitute unfair trade practices.

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CONTRIBUTION FROM THE NETHERLANDS

Introduction

At the round table on 'The role and enforcement of competition policy in regulated sectors', held on 21 October 1994, the Dutch delegation presented a paper entitled 'Environmental regulation and competition policy'. This paper concluded that literature dealing with regulation has so far paid too little attention to the effects which the regulation of safety, the environment and health has had on the way the market operates. The particular form taken by this 'social' regulation is having a major impact on the effectiveness of competition policy. The authors therefore argue that when selecting instruments for government intervention, their effects on competition should be taken into consideration. This paper will begin by discussing the relationship between different forms of regulation and competition policy. It will then analyze and assess the potential effects of environmental regulation on competition policy, using two examples from the waste disposal sector. It will conclude by giving some recommendations from the point of view of competition policy, which should be taken into account when implementing environmental regulation.

The increasing interaction between competition policy and environmental policy

There has been a strong growth of interest recently in the development of market oriented solutions in environmental policy. There have been calls from various quarters for more self-regulation, regulatory levies and tradeable emission rights. In the Netherlands' waste policy the principle of self-regulation plays an important role. Self-regulation will, where necessary, be assisted by facilitating public regulation. When self-regulation proves difficult to realise an obligatory 'take-back' scheme will be introduced by means of public regulation.

Whenever an environmental policy creates more scope for market players to exercise self-regulation and to realise environmental goals through the market mechanism, the question of competition policy always comes to the fore. In the light of the developments described above, competition policy has to decide how to deal with environmental regulation in general and how in particular to encourage market oriented solutions within environmental policy.

As already pointed out, the particular form in which environmental regulation is implemented affects competition policy. This section will examine the interaction between different forms of environmental regulation and competition policy.

Regulatory levies and tradeable emission right

The use of market-oriented instruments such as levies and tradeable emission rights within environmental policy is the clearest and most direct way of interpreting the 'polluter pays' principle. By interpreting the principle in this way, the negative effects of a product or production process are internalised in the costs of products and services, and it becomes possible for market players to compete by means of their environmental performance. After all, the costs of developing less polluting product-s and processes and carrying out research into more environmentally-friendly options will always be recouped in the form of lower levies to be payed or fewer emission rights needed. In this way, the market mechanism can be used to put the economy structurally on a more environmentally-friendly track.

However, the effectiveness of the 'polluter pays' principle will be threatened if the operation of the market mechanism is hampered or frustrated through monopolisation or restrictive practices of cartels. If enterprises can avoid the pressure of competition, they will feel less need to make a positive

contribution to the environment due to their ability to shift the costs of their environmental pollution onto other market players.

Instruments which make use of the market mechanism will become more effective when the market mechanism is allowed to operate more freely. Consequently, an effective competition policy is vital for the establishment of a market-oriented environmental policy, and can make a substantial contribution to the enforcement of such a policy.

Tradeable emission rights are still a matter of fierce debate. Not all forms of environmental pollution lend themselves to this commercial solution. From the point of view of competition policy, too, there are a number of advantages and disadvantages (market power, entry) which will not be covered in more detail here. Reference is made to the growing body of literature on the applicability of tradable emission rights.

Self-regulation

Self-regulation can also be seen as a market-oriented approach to environmental problems. In fact, it is a 'softer' interpretation of the 'polluter pays' principle. By appealing to the individual responsibility of market players, a better environmental performance can be achieved.

Although self-regulation is based on the individual responsibility of companies, this responsibility is often exercised in a cooperative way. A joint approach can have the advantage of acting as a catalyst in tackling environmental problems. Because all the market players are tackling these problems together, there is a stronger basis of support for making a positive environmental contribution. However, in a joint approach one faces the problem of free-riders.

Another advantage of the joint approach is that it more readily creates potential for the growth of new markets for e.g. disposal, processing and recycling activities. Initially, these markets will not always be profitable, but they will eventually become so following technological developments. Cooperation between market players can both stimulate and frustrate the further development of these markets.

The basic premise underlying competition policy with regard to environmental self-regulation is that environmental goals will lead to the development of markets for new environmental activities. These markets should be treated like normal markets. In that way a climate of free competition will lead to efficient solutions for environmental problems. In other words, self-regulation will be able to make a better contribution to a positive environmental performance if the incentive provided by the market mechanism is left intact as much as possible.

Because cooperation between competing enterprises can have the effect of restricting competition, such cooperation will be submitted to evaluation by competition policy. The role of competition policy with regard to self-regulation will be both to monitor and to facilitate it. On the one hand, it will be necessary to prevent new regulation arrangements from arising on new markets which hamper or block market access and dynamism, thus impeding the further growth of these markets. At the same time, however, competition policy must facilitate cooperation aimed at achieving a positive environmental performance. The practical interpretation of this role will be discussed in section three of this paper, on the basis of two examples.

Public regulation

If public regulation hampers or frustrates the operation of the market mechanism, this will have the same effect on competition as private contracts and/or dominant positions which lead to distortions of competition. The evaluation of both situations by competition policy will be the same.

However, in a situation in which public regulation fixes prices, shares markets or obstructs market access to (potential) suppliers, an environmental law (as a "lex specialits") will override a competition law (as a "lex generalis"). Where public regulation directly restricts or distorts the working of the market mechanism, there is therefore little possibility for national competition laws to prevent this infringement.

One way of avoiding the restrictive effects of government regulation on competition is through direct intervention in the legislative processes of other ministries. However, the result of such intervention depends on the degree to which these ministries take competition policy into account, and will often have the nature of a political compromise. From the point of view of competition, self-regulation can have the advantage of providing direct foot-holds for competition policy.

Two case studies from the waste disposal sector

This section will discuss two examples of environmental regulation which were established in the context of the Netherlands' waste policy. The aims of this policy are to prevent the generation of waste wherever possible, and where this is not possible, to ensure a leak-proof disposal of waste. Priority is given at the disposal stage to the re-use and recycling of products and materials in preference to incineration or dumping.

Like the EU waste policy, the Netherlands' waste policy is based on the 'polluter pays' principle. This principle is reflected in, among other things, the principle of producer responsibility. The principle of producer responsibility assumes that a manufacturer or importer is responsible for his product when it reaches the waste phase. The aim of this policy is to internalise the external effects generated through disposal of waste products.

If a producer is not confronted with the 'external' costs of disposing of his product due to the fact that these costs are passed on to the public through an environmental hygiene tax, he will have no incentive to keep these costs as low as possible. If, however, these external effects are 'internalised' through producer responsibility, the costs of disposal will become part of a commercial decision. Faced with this decision, a producer will ensure that when reaching the waste phase, his product is -disposed of in the most cost-efficient way possible.

The principle of producer responsibility is reflected in the fixing of agreed goals between the government and industry (self-regulation) and in public regulation such as the obligatory 'take-back' scheme and compulsory waste treatment. Both forms of environmental regulation occur in the examples described below.

Case study 1: Wrecked cars (self-regulation)

Since 1 January 1995, the Netherlands has been operating a disposal system for wrecked cars. The government and industry have agreed directional targets for the prevention and recycling of waste from wrecked cars. The automobile industry has committed itself to ensuring that at least 86 per cent of the overall volume of wrecked cars is recycled (through the re-use of products or materials) by the year 2000, thereby avoiding incineration or dumping (this percentage is at this moment 70). The set target not only applies to new vehicles but also to the existing stock of vehicles in the Netherlands. On the basis of these targets, the automobile industry has established a joint disposal system. This system is an example of self-regulation in which the role of government is limited to the introduction of facilitating public regulation.

The system

For every new car that is sold and every car that is imported in the Netherlands, a disposal fee of NLG 250 must be paid into a fund by the manufacturer or the importer of that car. A registration certificate for a car will only be given if this disposal fee has been payed. The fund is used to cover the losses incurred by companies during the removal of certain materials from wrecked cars. These losses are incurred in cases where certain materials have a positive residual value in themselves, but the costs of disassembly or recycling are so high that the total yield is negative. The fund is used to pay out subsidies to car disassembly firms to cover the non-profitable disassembly work they carry out. These subsidies have been fixed on the basis of disassembly tests and are uniform for all disassembly firms. This system enables more materials to be submitted for recycling or shredding. The market for the recycling of materials from wrecked cars is thus becoming a (to some extent privately) subsidised market.

Centralised implementing organisation

The various market players (manufacturers/importers, damage repair firms, garages, vehicle disassembly firms, shredder companies) have jointly established an organisation called Auto Recycling Nederland. This implementing organisation is responsible for the collection of the disposal fees, the management of the fund, the paying out of the disposal subsidies and the monitoring of the disposal system. It is also responsible for mediating between market players, such as the disassembly, transport and recycling firms, in the transport and marketing of materials released by the subsidised disassembly activities. This is done by means of public tenders. The implementation organisation does not engage in disassembly, transport or recycling activities itself.

Certification

Car disassembly firms wanting to take part in the system must be certified by an independent certification institute. In order to qualify for this certificate, they must meet a number of objective standards relating to their environmental and labour conditions and their administrative organisation. This qualifies them for the subsidies from Auto Recycling Nederland. Participating firms undertake to accept and disassemble vehicles in accordance with these standards without charging the supplier.

The role of government

The government's role is to initiate and facilitate. As initiating party, the government enters into negotiations with industry to agree task allocations and to draw up implementation plans to carry out these tasks. It also holds out the threat of imposing statutory regulations forcing companies to implement these tasks if they fail to meet their set targets.

The government's role as a facilitator in the wrecked cars disposal system consists in declaring the disposal fee to be generally binding. To this end, the government has introduced an option in the Environmental Protection Law. If a significant number of enterprises in a particular branch have established a disposal system for a particular waste stream and have agreed on a disposal fee, they can ask the Environment Minister to declare the disposal fee generally binding. This will ensure that all the companies in the branch concerned pay the disposal fee and thus can take part in the disposal system. This avoids the problem of 'free riding'.

The disposal system for wrecked cars is the first waste disposal system that uses the option of the generally binding declaration of a disposal fee. Plans for other waste streams indicate that a great deal of disposal systems under consideration wish to make use of this option.

Case study 2: Used oil (public regulation)

The system described below is designed to provide a leakproof, efficient and controllable disposal system for used oil. Because used oil has been designated a dangerous waste substance, the government has applied strong regulatory measures to the market for collecting and processing used oil. Government regulation applies mainly to market access, regions of activity and the fixing of tariffs.

Collection

At the end of the 1980s, the number of firms collecting used oil was reduced by the Environment Ministry from as many as 50 to a mere six, each of which was awarded a license by the Minister. This operation was accompanied by the establishment of a reform fund in which companies and government took part financially. At the same time, the Netherlands was divided into six corresponding regions for the purpose of collecting used oil. These six companies have each been assigned a region in which they are obliged to collect all the used oil that is submitted to them. At the insistence of the Ministry of Economic Affairs, they have each also been given the authority to make collections in the designated region of another firm. These firms charge a collection fee to transport companies, garages and vehicle disassembly firms. The fee charged is tied to a maximum tariff which is fixed each month by the Environment Minister.

Centralised recycling plant

Used oil is currently treated by means of sedimentation, decantation and separation, in which impurities and water are removed from the oil. The treated oil is then used as a secondary fuel for boat engines. The government has stated that for environmental reasons, it is no longer desirable to employ used oil in boat engines, but to recycle it to obtain a higher grade product (lubricants). It has also been stated that in view of the volume of used oil supplied and the current status of technology, recycling of this kind would only be profitable if it were carried out on a large scale. The government therefore concluded quite recently that there would only be enough demand in the Netherlands for one recycling plant for used oil. Manufacturers of lubricants, the firms collecting used oil and an independent refinery have each submitted plans for establishing a processing unit. In accordance with the principle of producer responsibility, the government has asked the manufacturers of lubricants to establish and run the recycling plant.

The role of government

The regulation of the disposal of used oil forms the implementation of EC Directive 75/439. Under this Directive, EU Member States are obliged to take all necessary measures to guarantee that used oil is collected and disposed of without causing avoidable damage to the environment. The Directive allows the government to impose licensing requirements on collection firms.

The government issues licenses for the collection and treatment of oil. Without a license, these activities may not be carried out. Because only a limited number of licenses are given out, access to this market is practically impossible, except through a takeover of an existing company. Once the centralised recycling plant will be taken into operation, the collection firms will be obliged to supply their oil to that plant. At the same time, the treatment licenses of the collection firms will be withdrawn and the central recycling plant will hold the only license for the treatment of used oil.

The import or export of used oil will only be permitted if the rules drawn up by the Environment Minister to cover such movements are satisfied and if these imports or exports do not threaten the existing programme for the disposal of used oil. In practice, this means that exports will more or less be prohibited due to the fact that processing standards in other countries are not as high as

they are in the Netherlands, and that imports will only be permitted if they can be used to fill up existing recycling capacity.

The competition aspects in both case studies

Both regulation arrangements described above are designed to provide for a leakproof and efficient disposal of a particular waste stream. However, the form of the regulatory market intervention in each case differs quite substantially. The first case study involves private self-regulation underpinned by a facilitating public regulation, whereas the second involves a government-imposed 'command and control'-regulation. This section analyzes and evaluates the competition aspects of both forms of regulation.

Restricting competition on non-profitable markets

One characteristic of many markets for waste disposal is that the yield of the waste is negative because of (still) high costs of recycling. However, technical and economic developments can lead to positive yields. Disassembly activities can be loss-making, although the materials themselves have a positive residual value. Processing can also involve losses due to the fact that the market for materials is still developing. The growth of demand for materials will have a knock-on effect on prices, thus reducing or even eliminating the losses. A situation could also arise in which recycling using a certain technology only becomes profitable if a certain minimum scale of operation is achieved.

The first of these aspects applies to the market for the disposal of wrecked cars. Although this market is profitable at this moment, the higher environmental goals that are agreed demand the performance of disassembly activities which are not yet profitable. By subsidising these disassembly activities, one can stimulate that materials are released and that a market for these materials will emerge.

The various suppliers on the market for car disassembly are not competing on the basis of the cost of these unprofitable disassembly activities, since they are all getting the same subsidy for their work. In this instance, greater efficiency could lead to the realisation of a profit, but it will not lead to lower prices charged for these activities.

The second aspect applies to the disposal of used oil. The existing low-grade method for treating used oil is profitable, when taken into account the current scale of the six collection firms currently in business. However, the higher environmental goals demand high grade methods of treatment. The introduction of a high-grade reprocessing technology for used oil would only be profitable when applied on a scale that is greater than the whole supply of used oil in the Netherlands. The higher environmental goals ask because of technical and economic reasons for a national monopoly.

The guiding principle governing competition policy will be that competitive restrictions must in principle be digressive by nature. A restriction of competition can be used as a catalyst in encouraging an artificial market process, developing new markets or launching the application of new technologies. Ultimately, however, any new activities and/or new technologies will have to survive in an atmosphere of free competition without damaging the environment.

Exclusive positions and market power

In the collection and recycling of used oil, regulation is responsible for creating exclusive positions for some market players. In each region only two of the six collection and treatment companies operate. The possibility of exploiting this duopolistic situation by charging higher prices is limited by the maximum tariff which is fixed by the Environment Minister.

However, the new recycling plant will enjoy a monopoly on the treatment of used oil. Because low-grade treatment is prohibited and exports are effectively banned, the only remaining outlet for the used oil collected by these companies is the recycling plant. As a result, this plant enjoys an exclusive position on the demand-side of the market, which it can exploit by insisting on low purchasing prices.

The creation of joint disposal systems also provides an opportunity for market dominance and exclusive positions. If manufacturers negotiate on a joint basis with collection and processing firms concerning the supply of services, they will do so from a position of concentrated purchasing power. However, the opportunity to exploit this purchasing power is weakened in the wrecked car system due to the fact that suppliers of transport and recycling services can submit offers through open tender.

If the materials which are released for recycling following disassembly are jointly offered on the market, the supply of these materials will be concentrated on a single market player. Such a concentration can be useful since the continuous supply of large quantities can make the recycling of materials more attractive, but can also lead to the emergence of supplier dominance.

In general can be said that the abuse of exclusive positions and abuse of supplier dominance or purchasing power can be avoided through the use of open tender techniques. When the licences to perform activities or the contracts for certain activities are put periodically on public tender, the stimulating effect of competition will be kept intact as much possible.

Pricing agreements

Agreements concerning the uniform and sperate charging on of disposal fees to the consumer are forbidden in the Netherlands. The costs of disposal should, in common with all other cost elements, remain subject to competition. By leaving manufacturers and importers free to choose whether or not to include all, some or none of the costs of disposal in the price of the car, these costs will remain under competitive pressure.

Cooperation between companies in the disposal system for wrecked cars is having the effect of restricting competition on the costs of disposal for certain materials. The costs of disposing of these materials are divided up between these companies on the basis of product units: for each car sold, the manufacturer or importer pays a disposal fee into a fund.

The collection of a disposal fee for each vehicle can easily lead to pricing agreements concerning the charging on of the disposal fee in the resale price. Although this has been neither prescribed nor agreed, the danger is present that each initial buyer will be required to pay NLG 250 more for his car. Because the uniform and separate charging on to consumers of a disposal fee is not necessary for environmental reasons, such pricing agreements will not be tolerated.

Market sharing

Especially in the collection of waste market sharing arrangements can emerge. When waste is considered a good with a negative residual value and the collection thereof is considered a utility function this is common practice. Most utilities enjoy geographical monopolies because of these conditions.

In the case that waste is becoming a product with positive residual value, these monopoly conditions are not so natural any more. As consequence the creation of geographical monopolies should be avoided in regulation.

In the case of wrecked cars the market for collection activities of disassembly firms is not divided in regions. In the case of used oil the sharing of the market is clear. In each region exists a

duopoly of two collecting firms. One has a duty to collect the oil that is offered to him, the other has a right to collect used oil this region. Although competition between the six collecting firms is not completely restricted, it would be preferable if collection companies would have the right to collect in all of the six regions.

Impeding market access

The regulation of market access in the waste disposal sector is designed to ensure that products are disposed of during the waste phase in an environmentally responsible and controllable way. The regulation of market access in the interests of environmental aims always results in a restriction of competition.

In the case of used oil, the government has deliberately restricted competition at collection level. Using data relating to the size of the market and the estimated optimum scale of collection firms, it was calculated on the basis of a demand criterion that the market would tolerate only six collection firms. The aim of use of a demand criterion is to avoid ruinous competition which can have negative consequences for the continuity of disposal. However, the attainment of the optimal scale and continuity can also be (and probably better) guaranteed by the market mechanism.

By allowing only a limited number of players onto the market through the granting of collection licenses in which each player is assigned a particular region, the government will also be able to effectively monitor the disposal of used oil to ensure that it is carried out in an environmentally friendly way.

In the case of wrecked cars, access to the market is not regulated by a licensing system but by a system of certification. The requirements made by this system are objective, and the system does not operate on the basis of a demand criterion. Here, too, the certification requirements are designed to enable effective monitoring to ensure that disposal is carried out in an environmentally friendly way.

From the point of view of competition policy, certification can be a lighter way of obstructing market access than public regulation. However, because certification systems are devised by the branches themselves, there is always a danger that the requirements that are set go beyond what is required for the environmental target. This could close the market to small suppliers who cannot meet these high requirements.

Another aspect that should be taken into account when evaluating certification systems is the objectivity of the certification process. Because the certification is sometimes done by experts who are in one way or the other related to companies in that particular branch, there can be a danger of non-objectivity in the certification process.

Because of the reasons mentioned above some form of objective monitoring of certification systems (for example by the government) is needed.

If manufacturers decide to establish a joint disposal system that is leak-proof, this will usually have the effect of covering the entire market. Because the establishment of an individual system is often more costly than joining a cooperative system, gaining access to the system becomes a de facto condition for gaining access to a particular market. In order to prevent existing suppliers of a product from using a joint disposal system as a means of screening markets from would-be suppliers, a disposal system must be open to all existing and potential suppliers of the product concerned in a non-discriminatory manner.

Technological developments and market dynamics

As stated earlier, markets for recycling are very much at the growth stage. Opportunities for recycling are generally still restricted by technological limitations. Precisely in order not to restrict market growth, it is necessary to tackle waste problems in a market-oriented way, thus providing scope for technological development and for new forms of environment related activity. However, it must be remembered that regulation has the capacity to restrict or prevent growth and innovation in the market.

Various forms of market dynamics are built into the disposal system for wrecked cars. The system encourages the development of markets for recycled materials. Because the disposal fee increases costs but may not be charged on separately to the consumer, it remains subject to market pressure. The level of the fee is also periodically evaluated. In the long term, the disposal fee could be differentiated according to the brand or model of a car, so that car manufacturers offering more environmentally friendly products can benefit from lower disposal fees.

The fact that the system is generally binding means that it is largely protected from the competitive pressure exerted by other (potential) disposal systems. Nevertheless, some residual competition is allowed to remain. Any manufacturer or importer who can demonstrate that he can provide at least an equivalent quality of disposal, but at a lower cost, may be exempted from participation in the system. As such, the declaration provides room for technological development and allows the costs of disposing of wrecked cars to be subject to market pressure.

The reprocessing of used oil will use 'state of the art' technology. Due to the scale on which this technology will need to operate, it will take a long time before the costs of its introduction are recouped. Regulation based on the current state of technology has moreover created a monopolistic structure. This has removed for some time to come the market incentive which would otherwise encourage a reduction in costs.

One of the problems associated with public regulation which dictates the structure of a market over the longer term is that such regulation is often inflexible and difficult to adjust, and therefore tends to be outdated fast. Consequently, technological developments which lead to the scaling down of reprocessing activities can lead to a regulated structure being rapidly overtaken by changing practices.

Influence on international trade

Public intervention on national markets by means of environmental regulation or the declaration of private self-regulation as generally binding can have consequences for international trade. EU Member States may not introduce measures that have the same effect as trade restrictions (Art. 30-34 of the EC Treaty) or that strengthen or expand the operation of a cartel that influences interstate trade (Art. 3g-5-85 of the EC Treaty).

The declaration as generally binding of a disposal fee may cause effects on interstate trade. The following applies to the trade in new cars. The disposal fee accounts for only a very small part of the price of a car (no more than 1 per cent on average) and there is no obligation or agreement to charge this amount on to the customer. It can therefore be concluded that the payment of a disposal fee does not substantially influence the interstate trade in new cars.

The subsidisation of disassembly activities does not have the effect of creating a stream of wrecked cars to or from the Netherlands, since only wrecked cars registered in the Netherlands are eligible for subsidies. Moreover, the export of wrecked cars does not result in the refunding of the disposal fee. Consequently, this again has no substantial influence on the interstate trade in wrecked cars.

Clear trade restrictions do exist in the case of used oil. However, EU policy on dangerous waste substances operates on the basic premise that the processing of waste should wherever possible take place in the country of origin. According to article 36 of the EC Treaty and the 'Cassis de Dijon' doctrine, trade restrictions can be justified in the event of 'mandatory requirements'. Environmental protection can be seen as one of these mandatory requirements.

The legal justification of these trade restrictions does not take away the f-act that there is an imbalance in the way in which the import and export of used oil is treated in waste policy. Exports are not permitted for environmental reasons, yet imports are permitted for economic reasons. This practice is leading to the creation of national monopolies which will not always encourage the cost-effective disposal of waste.

Conclusion and recommendations

This paper has discussed the possible infringements which environmental regulation can have on the way the market works, using two actual situations as examples. As these two examples show, both forms of regulation lead to the restriction of competition.

We have seen that government-imposed environmental regulation of the 'command and control' type can affect the operation of the market in a rigid and inflexible way, and that such actions can only be corrected through intervention by the competition authorities in the legislative processes of the ministry concerned.

By means of intervention in the legislative process of the Environment Ministry we have reached the following alterations:

-- When the Environment Ministry wants to declare waste disposal fees generally binding this is done in consultation with the competition policy directorate of the Ministry of Economic Affairs. Agreements that come in conflict with national or European competition policy will not be declared generally binding.

-- In cooperation with the Directorate General for Competition of the European Commission the exemption for alternative systems is build into the Environmental Protection Law.

-- The collection firms for used oil is given the right to collect in a second region to encourage some competition in each region.

However, possibilities in the field of intervention are only one side of the story. In the context of self-regulation the possibilities for environmental regulation which affects the operation of the market in a less restricting way are present. Because self-regulation is formulated in contracts drafted under private law, it remains subject to competition policy.

In choosing which form of government intervention to use and in implementing environmental regulation, attention must be given wherever possible to competition aspects. This not only applies to self-regulation, to which competition policy will continue to apply, but also to public regulation. The following recommendations should be taken into account:

Market access

If access to a market or to a disposal system is regulated, selections should not be based on a demand criterion but on non-discriminatory selection criteria which do not go beyond the need to satisfy environmental requirements.

Price arrangements

When collection and recycling is financed through a disposal fund, the charging of uniform environmental surcharges on resale prices of products should be avoided.

Market sharing

The creation of regional collecting monopolies for waste products that are expected to have positive residual value (or will have in the future) should be avoided.

Exclusive positions

The creation of exclusive positions should be avoided. This is possible by keeping open the options for alternative disposal systems. When access to a joint system is an economic necessity for gaining access to a particular market, access to the system should be guaranteed for all (potential) suppliers on equal conditions.

Market power

When the demand for certain services or the supply of materials or services is concentrated in one organisation, it is advisable to make use of public tendering. In this way the determination of prices is not distorted.

Market dynamics

Regulation should not impede technological developments by way of prescribing methods or technologies to be used or the fixing of market structures. As much flexibility as possible should be build into regulation. The working of the market mechanism should be left intact as much as possible. Restrictions of competition must in principle be digressive by nature.

Interstate trade

Restrictions on interstate trade as results of public regulation or private self-regulation should be avoided as much as possible.

CONTRIBUTION FROM SWEDEN

This note answers to the following questions listed in the Secretariat's letter on
15 December 1994:

i) Does the method of regulation (e.g. "command and control" versus quality norms) in the sector limit competition in manufacturing or distributions? In waste collection, transport or treatment?

ii) Does the environmental regulation involve a horizontal agreement or co-operation (e.g., among producers, distributors or recyclers) which is unnecessarily restrictive or which could facilitate collusion? On what criteria do you base this judgement?

iii) Does the regulation promote or suppress competition from a substitute product (e.g., virgin and recycled oil)?

iv) Does the funding of pollution abatement distort competition with respect to price (e.g. a producer without access to a system set up by this competitors to finance pollution abatement will not benefit from any economies of scale they derive from it and, since his disposal costs will be higher, so will the final cost of his products)?

i), ii)

On October 1st, 1994 Sweden adopted a regulation on packaging and packaging-waste. The regulation covers packaging made of plastics, paper, cardboard, steel, aluminium, glass and corrugated cardboard and it sets different targets for recovery and recycling of the different types of packaging materials. The regulation states that an economic operator has to supply households and other customers with convenient systems that facilitate the sorting and removal of used packaging. Every economic operator shall see to it that packaging that is sorted out is removed and re-used, recovered, energy recovered or taken care of in some other, environmentally acceptable, way.

Also on October 1st, 1994 a regulation concerning recycled paper was adopted. The regulation states that by the year 2000, 75 per cent of the newsprint consumed shall be collected for recycling. According to the regulation an economic operator shall take the measures necessary to facilitate for households and others to deposit recycled paper. An economic operator shall also see to it that the recycled paper that is sorted out and collected is also removed and recycled or taken care of in some other, environmentally acceptable, way.

The handling of drinking-cans made of aluminium is regulated in a specific act, as well as the handling of PET drinking-bottles. The act on aluminium drinking-cans was adopted in 1982 and concerns activities to promote recovery of the cans by a deposit system. Such activities must be authorised by the Swedish Government. The only authorised system for aluminium cans is jointly owned by PLM (an undertaking that produces aluminium cans), the breweries and the retailers. The Swedish Government participated in the creation of this system by negotiations with the industry on some of the details of it.

The act on PET-bottles was adopted in 1991. According to this act it is necessary to obtain a permission to fill or import PET-bottles. Such a permission is given if the bottles are part of an (authorised) recycling deposit system. The act also obliges any producer of beverages, who uses PET-

bottles, to label the bottles with information on its participation in the recycling system. The European Commission is handling a complaint concerning this labelling requirement.

There is also a regulation concerning the environmental handling of tyres. The regulation lays down the same principles as the above-mentioned regulation on packaging and packaging-material. It should also be mentioned that an introduction of similar regulations on other product groups, e.g. electronic products and cars, is being analysed.

The applicability of competition law

Anti-competitive agreements which do not express the free will of the parties to it, but are the direct or intended result of legislation or the unavoidable effect of it, do not fall within the scope of the Competition Act.

Even if the above-mentioned regulations do not expressly force the economic operators to co-operate within recycling systems, they nevertheless constitute an incentive for co-operation. With reference to the provisions in the regulations, the economic operators are jointly creating recycling systems. The aim is to establish a single nation-wide system for each packaging material. (For specific types of packaging - i.e. packaging made of glass, cardboard and aluminium - there are already systems established on the Swedish market). In these cases it is a delicate and complicated task to decide to what extent an activity is necessary in order to achieve the targets for recovery and recycling laid down by law, and to what extent the activity goes beyond what is a requirement of law. There is obviously a risk that this type of environmental regulations, although they do not expressly provide for it, might lead to activities restricting competition on the market. One example is that the functioning of the systems to some extent needs a certain exchange of information, e.g. on the volume of packaging put on the market. It is important to make sure that this information is really necessary and that it is treated as strictly confidential. Another example is if the use of recycled material is limited, i.e. if it is available as raw material only to certain producers or products. This might diminish incentives for technical progress.

It can also be anticipated that the present systems for collecting packaging will, at least to begin with, each get a sole position on the market for their respective packaging material. This fact can in itself make it difficult for other kinds of recycling systems to enter the market. It is also of great importance to make sure that the administrators of the systems do not abuse this sole position e.g. by imposing unfair trading conditions or discriminating undertakings wishing to take part in the system.

The regulations can sometimes lead to a reduction of existing competition. On the market for recycled paper there have been a number of undertakings operating until now. However, the economic operators interpret the regulation in such a way as to give them the right to appoint only one undertaking per region to collect recycled paper.

iii)

The tax-rate for "environment friendly" products is sometimes lower than that for products that cause more damage to the environment. Leaded petrol is for instance more heavily taxed than unleaded petrol. Another example is that fossil fuels are more heavily taxed than biofuels.

iv)

It can be anticipated that there will only exist one recycling system per packaging-material on the market, at least to begin with. If these systems are not open to product standards used in foreign states, there is an obvious risk that imports of foreign products will be obstructed. The importer may of course build a system of his own, but this entails both economic and practical difficulties, particularly on a small market.

Another solution to the problem is clearly the adjustment of the system so that it accepts products of different standards. However, this solution raises some questions. The first question is to what extent this kind of "monopolistic" system would be obliged under competition laws to be adjusted technically in order to be open for products of different standards. Is the essential facilities doctrine applicable, and if so, to what extent? Another question concerns who is responsible for the extra costs of the adjustment of the systems. Should the costs be payed solely by the economic operators that want to participate in the system with products of a different standard?

CONTRIBUTION DE LA COMMISSION EUROPÉENNE

Introduction

Avec l'entrée en vigueur du Traité sur l'Union européenne, appelé aussi couramment "Traité de Maastricht", la protection de l'environnement est devenue une politique communautaire majeure. L'article 130R du Traité stipule en effet que:

"La politique de la Communauté dans le domaine de l'environnement contribue à la poursuite des objectifs suivants:

-- la préservation, la protection et l'amélioration de la qualité de l'environnement,
-- la protection de la santé des personnes,
-- l'utilisation prudente et rationnelle des ressources naturelles,
-- la promotion, sur le plan international, de mesures destinées à faire face aux problèmes régionaux ou planétaires de l'environnement.

.... Les exigences en matière de protection de l'environnement doivent être intégrées dans la définition et la mise en oeuvre des autres politiques de la Communauté".

La politique de la concurrence, comme tout autre politique communautaire, doit donc tenir compte de la dimension environnementale.

Toutefois, les liens qui existent entre l'environnement et la politique de concurrence ne jouent pas en sens unique. La concurrence a un rôle très important à jouer dans la réalisation d'objectifs environnementaux.

Le but de ce papier est de traiter un des principaux thèmes découlant des développements récents dans le domaine de la protection de l'environnement - c'est à dire les accords volontaires - en terme d'interactions avec la politique de la concurrence.

Même s'il n'existe pas actuellement à la Commission une analyse complète de tous les accords volontaires conclus dans les États membres, des informations informelles fournies par la Belgique, le Danemark, l'Allemagne, la Finlande, la France, les Pays-Bas, la Suède et le Royaume-Uni, il ressort que le nombre total d'accords volontaires déjà conclus dépasse les 200.

L'analyse se limite aux aspects liés à l'anti-trust et n'aborde pas le thème relatif aux aides d'État.

Il ne s'agit là que d'une première analyse, à la lumière des cas que la Commission a eu à connaître depuis quelques années et dont on peut penser que le nombre va s'accroître.

Protection de l'environnement, allocation des ressources et rôle de la concurrence

Le principe du pollueur-payeur

L'importance attachée à l'environnement dans nos sociétés et les contraintes juridiques qui en découlent en font un enjeu important, aux conséquences financières considérables, que les entreprises doivent intégrer dans la structure de leurs coûts, dans leur politique en matière des prix et, finalement, dans leur politique générale.

Un des principes de la politique de la Communauté en matière d'environnement est celle du "pollueur payeur" dont l'efficacité dépend notamment du fonctionnement du mécanisme des prix, qui doivent traduire en termes des coûts les effets négatifs d'une production pour l'environnement afin de pouvoir jouer leur fonction d'indicateur, qui est à la base de l'économie du marché.

Lorsque le mécanisme des prix joue dans toute la Communauté son rôle d'indicateur et permet donc aux entreprises de convertir en termes financiers le coût pour l'environnement d'une activité économique, c'est la concurrence qui entraîne l'allocation la plus efficace des ressources, parce qu'elle incite à comprimer les coûts. Cela est positif tant du point de vue de l'environnement, que de celui de l'économie en général. La pression de la concurrence est donc l'un des mécanismes qui incitent les entreprises à réduire leurs émissions en utilisant notamment des techniques de production et de recyclage des déchets moins polluantes. A plus long terme, ces incitations par les prix stimulent la recherche de produits ou de techniques de production plus écologiques, ce qui permet d'organiser les activités économiques sur un mode moins polluant.

Pour que le mécanisme des prix puisse jouer son rôle d'indicateur d'une façon correcte il faut que, d'une part, les entreprises internalisent les coûts liés à la protection de l'environnement et que, d'autre part, ces coûts soient les plus proches possibles des coûts sociaux de dépollution réellement supportés par la société. Cependant, il faut reconnaître que, dans de nombreux cas, il est très difficile d'établir un système budgétaire qui internalise et privatise tous les coûts sociaux de la pollution. Dans ces conditions, il est nécessaire d'envisager la mise en oeuvre d'autres instruments pour protéger l'environnement.

Réglementation directe et accords volontaires

Le 5ème Programme d'Action Communautaire pour l'Environnement et la Communication de la Commission sur la Compétitivité industrielle et la protection de l'environnement, approuvés par le Conseil et le Parlement européen en 1992, cherchent à encourager le recours à des accords volontaires ou à d'autres formes d'auto-réglementation comme élément d'un paquet de mesures intégrées et complètes en vue de répondre aux interactions des politiques environnementales et industrielles.

Le recours à une gamme élargie d'instruments pour répondre aux objectifs de la politique environnementale de la Communauté correspond à une tendance qui s'est développée ces dernières années dans la plupart des pays OCDE. Les accords volontaires entre entreprises individuelles ou entre secteurs industriels et autorités environnementales sont de plus en plus utilisés en tant qu'instrument intégré dans les politiques environnementales nationales, notamment aux Pays-Bas, en Allemagne ou dans les pays scandinaves et ce, en parallèle avec une tendance à la déréglementation et à une moindre intervention de l'État.

Les accords volontaires, comme l'autoréglementation, sont considérés souvent comme une solution possible à l'essouflement des approches plus traditionnelles.

Les accords volontaires sont des contrats entre l'industrie et l'administration incluant un certain nombre d'objectifs environnementaux à réaliser par le secteur concerné selon un échéancier. En général, aucun système de sanction n'est prévu en cas de non-respect des engagements.

Les accords volontaires peuvent porter tant sur les objectifs que sur les moyens pour les réaliser. Quand l'accord porte essentiellement sur la définition d'objectifs, c'est un outil complémentaire de la réglementation directe. Quand il est centré sur les moyens, il devient un instrument original fondé sur la négociation entre firmes.

Analyse économique

L'avantage fondamental des accords volontaires par rapport à la réglementation directe réside dans le fait qu'ils peuvent amener à la définition d'objectifs qui assurent mieux l'équilibre entre les bénéfices liés à l'amélioration de l'environnement et les coûts réels supportés par l'industrie. Les avantages sont d'autant plus forts que les paramètres économiques (par exemple les coûts de dépollution) sont mal maîtrisés au départ par l'administration.

"La négociation sur les moyens a un effet positif sur l'efficacité allocative, c'est-à-dire la réduction des coûts supportés par l'industrie à objectif donné, via la mise en place d'une négociation intrafirmes"[1].

Le deuxième avantage consiste dans la flexibilité permise par l'approche contractuelle qui semble être favorable aux efforts d'innovation des firmes.

En revanche, les accords volontaires présentent un désavantage par rapport à une politique qui consiste à taxer les facteurs polluants. En effet, du point de vue économique, et dans une vision concurrentielle, la taxation est l'instrument qui permet le mieux au mécanisme des prix de jouer son rôle d'indicateur à travers l'internalisation des coûts par les entreprises[2].

Les accords volontaires, ainsi que la réglementation directe, représentent donc une solution de "second best". Cependant, l'internationalisation des mesures sociales via les mesures fiscales n'est dans la plupart des cas n'est qu'une possibilité théorique étant donné les difficultés pratiques et politiques. Les accords volontaires peuvent constituer en certaines circonstances la seule solution pratique.

Accords volontaires et ligne directrice de la politique européenne de la concurrence

Le cadre juridique

L'une des priorités de la Commission est de faciliter, par une politique de la concurrence suffisamment claire et des décisions rapides, les coopérations entre entreprises qui ne remettent pas en cause la concurrence effective et le dynamisme du marché[3].

Rien n'interdit *per se* des accords entre entreprises visant, soit l'application d'une loi nationale ou d'une directive communautaire, soit l'établissement conjoint avec les autorités publiques d'une ligne de conduite soit enfin, à mettre en place une autoréglementation.

La liberté de coopération est limitée par l'exigence de préserver la concurrence effective : dans la pratique la liberté de coopération pour les entreprises est limitée par l'application des articles 85 et 86 du Traité.

L'article 85 paragraphe 1 établit que tous accords, toutes décisions d'associations d'entreprises et toutes pratiques concertées qui sont susceptibles d'affecter le commerce entre États membres et qui ont pour objet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun, sont interdits.

Toutefois, l'article 85 paragraphe 3 prévoit une exemption pour les restrictions qui contribuent à améliorer la production où la distribution ou à promouvoir le progrès technique ou économique, tout en réservant aux utilisateurs une partie équitable du profit qui en résulte. De telles restrictions doivent, cependant s'avérer indispensables et ne doivent pas donner aux entreprises la possibilité d'éliminer la concurrence pour une partie substantielle des produits en cause.

L'article 86 interdit tout abus de position dominante.

Enfin, au cas où une législation nationale ou communautaire déléguerait son pouvoir dans un domaine économique aux opérateurs privés et qu'il en découlerait une restriction sensible de concurrence, il y aurait double violation des règles du Traité (L'État violant les articles 3(g) et 5 et les entreprises les articles 85 et/ou 86).

L'application de ce cadre juridique aux "accords volontaires" : les principes directeurs

Les accords volontaires ou l'autoréglementation peuvent contenir des restrictions de la concurrence, telles que visées par l'article 85 paragraphe 1 (par exemple : la fixation des prix ou d'autres conditions de transactions ou la répartition du marché. Voir à ce sujet les exemples concrets traités dans les encadrés).

D'autre part l'amélioration de l'environnement peut certainement être considérée, selon l'article 85(3), comme un élément d'amélioration de la production ou de la distribution, ou comme un élément de promotion du progrès technique ou économique.

La Commission, dans son analyse des affaires individuelles sous l'angle de l'art. 85 (3), met en balance les restrictions de concurrence découlant de l'accord et les objectifs environnementaux que cet accord permettra d'atteindre en appliquant le principe de proportionnalité. Dans la pratique il s'agit, d'une part, de vérifier si les restrictions sont indispensables pour atteindre les objectifs environnementaux et, d'autre part, de s'assurer que les consommateurs bénéficient d'une partie importante des avantages découlant de l'accord.

Quant il s'agit d'évaluer l'intérêt des consommateurs, même s'ils sont pénalisés en termes pécuniaires à court terme, on considère que l'intérêt à prendre en compte est celui constitué par la protection de l'environnement. Il faudra, bien sûr, s'assurer que l'augmentation éventuelle des prix pour les consommateurs soit le résultat de la prise en compte des aspects environnementaux et non de l'élimination de la concurrence.

Il est difficile, à ce stade, de dégager des lignes d'analyse exhaustives pour ce qui est des accords dans le domaine de l'environnement dans la mesure où la Commission n'a qu'une connaissance récente et restreinte de ces accords jusqu'à présent.En effet, la Commission a été amenée à en traiter une dizaine sur un total recensé de quelques centaines. Les affaires de taille importante (et donc d'intérêt communautaire) ont souvent été portées à la connaissance de la Commission par des plaintes d'entreprises.

Il convient d'indiquer au passage que l'application de l'article 85 paragraphe 3 est de la compétence exclusive de la Commission. Donc au cas où il y aurait une plainte devant un tribunal national, ce dernier ne pourrait pas conduire une analyse basée sur ce paragraphe de l'article 85. Il serait amené à constater une infraction éventuelle uniquement sur base de l'article 85 (1).

En conséquence, la notification à la Commission des accords volontaires dans le domaine de l'environnement où les parties considèrent que ces accords pourraient être dans le champ d'application assurerait une meilleure prise en compte du poids de l'élément "protection de l'environnement" au travers de l'application du principe de proportionnalité[4].

A cet égard, les problèmes de concurrence les plus sérieux sont ceux relatifs aux accords qui, *de jure ou de facto:*

- fermeraient les marchés nationaux aux opérateurs étrangers et interdiraient l'accès des tiers à un système;

-- empêcheraient la pénétration ou le maintien d'un produit dans un marché;

-- fixeraient les prix de façon multilatérale.

Les paragraphes suivants traitent de ces problèmes.

Ouverture des marchés nationaux aux opérateurs étrangers et liberté d'accès des tiers à un système

La Commission a l'intention de continuer à être très ferme sur ces deux principes.

a) La Commission ne peut pas accepter des clauses qui, de facto, (même indirectement) excluent les opérateurs d'un autre État membre d'un marché et qui, en général, discriminent selon la nationalité.

Tel pourrait être le cas, par exemple, des accords qui prévoient que l'accès à un système de recyclage est subordonné à une certification lorsqu'elle est liée à l'enregistrement dans le pays.

Les priorités de l'Union en terme de réalisation du grand marché intérieur et d'union économique et monétaire nous permettent d'affirmer qu'un objectif environnemental ne devrait jamais être en mesure de justifier la fermeture des marchés nationaux aux opérateurs d'un autre État membre. Les cas traités à ce jour par la Commission et décrit ci-dessous dans ce texte ne nous offre d'ailleurs pas d'exemple montrant l'indispensabilité [en termes de l'art. 85 (3)] de telles clauses pour atteindre des objectifs environnementaux.

La position prise par la Commission dans le cas SPA-GDB (voir encadré n° 1) est une illustration concrète de cette attitude de principe.

b) Les accords volontaires dans le domaine de l'environnement peuvent poser aussi d'importants problèmes pour ce qui concerne l'accès des tiers à un système. En effet, la coopération entre entreprises qui prévoient des systèmes privés de traitement des déchets représente souvent pour celles-ci le seul moyen de satisfaire à des normes et de gérer des systèmes de collecte et de récupération privés.

Afin de recylcer ou reprendre certains matériaux d'emballage, il est souvent considéré nécessaire par les entreprises concernées, de créer un système unique plutôt que divers systèmes concurrents étant donné que les coûts d'un système unique sont plus bas.

Il convient alors de se demander si l'existence d'un système unique pouvant déboucher sur la création d'un pouvoir de monopole est justifiée et si la participation au système représente, en fait, pour les producteurs, en particulier ceux extérieurs, une condition pour l'accès au marché national. Autrement dit, il s'agit de savoir si le système pourrait servir de barrière à l'entrée de nouveaux concurrents.

La Commission continuera donc d'être ferme sur le principe de liberté d'accès des tiers à un système, comme elle a déjà eu l'occasion de le montrer à l'occasion du cas IFCO (voir encadré n° 2).

Encadré N°1 : Affaire SPA/GDB

Le producteur d'eau minérale belge Spa avait déposé, en 1989, une plainte formelle contre le refus de la GDB (Genossenschaft Deutscher Brunnen) de lui ouvrir l'accès de son pool de bouteilles en verre et de caisses normalisées réutilisables.

Il convient de rappeler qu'une plainte similaire émanant de producteurs d'eau minérale belge et français avait été rejetée par la Commission en décembre 1987. La Commission avait alors estimé que l'accord ayant fondé la GDB et l'exclusion des producteurs d'eau minérale étrangers qu'il entraînait n'avaient pas d'effets négatifs appréciables sur la situation des tiers ni sur le commerce intracommunautaire, notamment parce que d'autres emballages, comme les bouteilles en PVC ou les bouteilles en verre non réutilisables, avaient libre accès au marché allemand. En fait, jusqu'en 1988, les exportations d'eau minérale vers l'Allemagne, notamment de France et de Belgique, ont connu une augmentation rapide. La Commission avait néanmoins exprimé son intention de reconsidérer la situation si une législation contraignante était adoptée en matière d'utilisation de bouteilles jetables pour l'eau minérale. Les bouteilles en PVC/PET étaient en fait l'emballage courant le plus utilisé pour l'exportation d'eau minérale vers l'Allemagne jusqu'à la fin de 1989.

Par le biais d'une communication des griefs envoyée en décembre 1992, la Commission a demandé à la GDB d'ouvrir son pool aux producteurs d'eau minérale des autres États membres, en faisant notamment valoir que la situation sur le marché allemand de l'eau minérale s'était modifiée au point que le seul moyen, pour les producteurs étrangers, de rester concurrentiels sur ce marché était de conditionner leur production dans des bouteilles GDB. L'accès à ce pool leur était donc indispensable. En effet, à ce moment-là, la législation allemande sur le traitement des déchets, qui était entrée en vigueur en 1989, avait abouti au retrait du marché des bouteilles en plastique non récupérables. Par ailleurs, il s'était révélé que les autres emballages, comme les bouteilles en plastique recyclable ou les bouteilles en verre non récupérables, ne sont pas des substituts suffisants.
En outre, depuis l'entrée en vigueur du nouveau règlement "emballage" (Verpackungsverordnung) au début de 1993, les bouteilles en verre jetables (non récupérables) et les autres emballages perdus son également interdits si aucun système n'est prévu pour les recycler. Un producteur/distributeur utilisant des récipients non réutilisables doit obligatoirement les consigner.

Par ailleurs, la création d'un pool concurrent de celui de la GDB pour les bouteilles en verre réutilisables n'est pas une solution envisageable pour les producteurs extérieurs à la GDB, car la plupart des grossistes en eau minérale et des grandes surfaces ne souhaitent pas la mise en place d'un deuxième pool qui entraînerait pour eux des coûts de manutention et de stockage considérables.

Dans cette affaire, la Commission n'a pas remis en question la législation antipollution allemande mais elle a précisé que, vu l'évolution depuis 1990 du marché allemand de l'eau minérale - et notamment l'adoption d'une législation contraignante sur l'utilisation de bouteille jetables pour l'eau minérale, la réaction du commerce de détail à cette législation et son incidence sur les exportations communautaires vers l'Allemagne,-l'accord GDB et sa mise en oeuvre pouvaient constituer une barrière à l'entrée des producteurs étrangers sur le marché allemand.

A la suite de cette prise de position de la Commission, GDB a ouvert son pool aux producteurs étrangers.

Encadré 2 : Liberté d'accès à des tiers à un système :
systèmes nationaux de collecte et recyclage de déchets et affaire IFCO

Plusieurs États membres connaissent des systèmes qui organisent sur une base nationale la collecte et le recyclage de déchets (voir par exemple le système allemand "DSD" (Duales System Deutschland) ou français "Ecoemballage"). Les systèmes permettent aux entreprises qui en font partie et qui acquittent une redevance d'estampiller leurs produit avec un "point vert" qui atteste que l'emballage fera normalement l'objet d'un tri et sera susceptible d'être recyclé. Le système DSD a suscité de nombreuses plaintes qui posent plusieurs problèmes importants en terme de barrière à l'entrée de nouveaux concurrents et qui font actuellement l'objet de discussions entre les services de la Commission et le DSD.

Des problèmes semblables se posent dans une autre affaire actuellement en cours d'examen. Elle concerne un système de cageots en plastique réutilisables pour le transport des fruits et légumes frais.

Contre une redevance, l'IFCO (International Fruit Container Organization), créée par des négociants allemands, s'engage à produire, à fournir, à reprendre et à nettoyer ces cageots, de telle sorte qu'ils puissent être réutilisés. Les négociants ont informé leurs fournisseurs de fruits et légumes qu'ils "n'achèteraient, dans la mesure du possible, que des marchandises livrées dans des cageots IFCO". Ils ont également notifié ce système à la Commission.

Des groupements d'associations nationales et européennes rassemblant, d'une part, des fabricants d'emballages en carton et, d'autre part, des producteurs de fruits et légumes se sont plaints de ce système.

En juin 1993, la Commission a publié un communiqué de presse pour clarifier un point spécifique. La lettre par laquelle les négociants avaient informé leurs fournisseurs de l'existence du système IFCO s'écartait de la notification, dans la mesure où elle donnait l'impression que les négociants n'accepteraient que des cageots IFCO. La notification prévoyait que les négociants s'engageaient uniquement à promouvoir les cageots IFCO par l'utilisation d'une quantité minimale de cageots jugée nécessaire pour garantir le lancement du système. La Commission a informé le public qu'à sa demande les négociants avaient adressé une nouvelle lettre à leurs fournisseurs pour clarifier ce point et confirmer leurs engagements antérieurs.

Pénétration et maintien d'un produit dans un marché

L'analyse des restrictions qui consistent à fixer des normes qui, *de facto*, empêchent la pénétration où le maintien d'un produit dans un marché peut amener à mettre en doute l'efficacité des résultats globaux découlant des accords volontaires.

La limitation de l'utilisation d'un produit sur un marché peut se faire par quatre canaux :

-- une réglementation publique qui interdit l'utilisation de ce produit. Dans ce cas, l'autorité publique soupèse les avantages et désavantages d'une telle mesure. Ensuite elle choisit la solution qui résume le résultat de cette sorte d'analyse coût-bénéfices en termes globaux pour la société, après consultation des partenaires sociaux ;

-- l'imposition d'une taxe qui vise à ce que les entreprises internalisent les coûts sociaux résultant de l'utilisation du produit en question, coûts qui pourront ensuite être incorporés dans le prix final du produit (voir discussion précédente) ;

-- un accord volontaire qui, sous la supervision de l'autorité, laisse aux entreprises le soin d'en déterminer le contenu (en termes des seuls moyens ou en terme d'objectifs et des moyens). Dans une telle situation, la présence du secteur public devrait amener à ce que d'autres objectifs économiques et sociaux puissent être pris en compte ;

-- l'autoréglementation de la part du secteur concerné.

Certes, les accords volontaires présentent souvent l'avantage de la souplesse et, dans certaines circonstances, de mieux refléter les coûts réels supportés par le secteur concerné.

Dans la pratique, là où des accords prévoient l'exclusion progressive de l'utilisation d'un produit dans la fabrication d'un bien, l'analyse en terme de respect des règles de concurrence devra se faire au cas pas cas.

Jusqu'à maintenant la Commission n'a pas été amenée à traiter des accords qui présentaient des restrictions concernant la pénétration ou la permanence d'un produit dans un marché.

La Commission sera particulièrement vigilante vis-à-vis des accords qui auraient comme conséquence l'élimination de la concurrence pour une partie substantielle, ou la totalité, du produit en cause. Tel serait le cas, par exemple, si les supermarchés dans un pays faisaient un accord volontaire et sans obligation légale pour commercialiser uniquement les boissons dans des bouteilles en plastique.

Fixation multilatérale des tarifs ou des prix

Pour ce qui concerne la fixation multilatérale des tarifs ou des prix conséquente à la mise en pratique d'un accord au sujet de l'environnement, (par exemple la fixation d'un prix unique -non différencié selon les produits où les opérateurs - pour la collecte des déchets à l'intérieur d'un système de recyclage), la Commission n'estime pas qu'un objectif de protection de l'environnement soit en mesure de rendre indispensable une telle restriction. Elle examinera donc ce genre de restrictions avec la plus grande réserve. Sa prise de position dans le cas VOTOB (voir encadré n° 3) est une illustration concrète de cette orientation générale.

Encadré 3 : Fixation multilatérale des prix : affaire VOTOB

L'association néerlandaise -"Vereniging van Onafhankelijke Tankopslag Bedrijven" (VOTOB) - regroupe six entreprises qui offrent des installations de stockage exploitants indépendants qui réservent leurs services de stockage aux tiers. Les membres de VOTOB ont décidé la fixation d'une augmentation uniforme des prix pratiqués à l'égard de leurs clients à compter du 1er avril 1990. Cette "redevance pour l'environnement" uniforme (qui devrait être en vigueur pour une durée indéterminée) devait couvrir, même si ce n'était qu'en partie, le coût de l'investissement inhérent à la réduction des émissions de vapeur qui se dégagent des réservoirs de stockage des membres.

VOTOB a pris cette décision après avoir conclu avec les autorités néerlandaises un pacte relatif à l'amélioration des normes d'environnement. Toutefois, ce pacte ne mentionnait pas la fixation d'augmentations uniformes de prix et ne contenait aucune obligation, imposée à VOTOB par les autorités néerlandaises, de recourir à de telles augmentations.

La Commission a considéré que cette redevance n'était pas compatible avec l'article 85 pour les deux raisons suivantes. Premièrement, elle est fixée pour tous les membres, qui doivent l'appliquer, quelle que soit leur situation spécifique. Deuxièmement, elle fait l'objet d'une facture séparée adressée au client, ce qui l'apparente à une "taxe" imposée par le gouvernement.

La fixation d'un prix ou d'un élément de ce prix élimine la concurrence sur cet élément de prix. La fixation de la redevance, qui représente un système de recouvrement, fait que les membres sont moins enclins à chercher à réaliser les investissements les moins chers et les plus rentables. Cela produit un effet d'entraînement sur le marché pour les entreprises qui offrent des services de réfection et d'assainissement et pour la R & D. Les membres seront, en effet, moins incités à passer des contrats avec les entreprises susceptibles d'offrir les meilleurs résultats au moindre coût ou le plus aisément.

L'adoption uniforme de cette redevance ne tient aucun compte des différences qui existent entre les situations particulière de chaque membre.

La Commission soutient que, s'il n'y avait pas eu fixation horizontale de cet élément particulier de coût, chacun des membres aurait pu calculer le coût de l'investissement nécessaire, décider soit d'y faire face en puisant dans ses propres bénéfices, soit de le répercuter sur ses clients, et, dans ce dernier cas, déterminer de quel montant augmenter ses prix. Tout cela aurait été réalisé par les entreprises, de façon indépendante, compte tenu des conditions du marché et de leur propre position concurrentielle.

Le but de l'adoption uniforme de cette redevance semble donc celui d'éviter des rivalités entre entreprises qui puissent donner lieu à des recherches de compétitivité et empêche donc que la concurrence joue son rôle positif.

A la suite de la prise de position de la Commission, l'association VOTOB a renoncé à cette clause.

Conclusions

L'analyse développée précédemment a permis de dégager les indications suivantes :

-- un des principes de la politique de la Communauté en matière d'environnement est celui du "pollueur payeur". L'efficacité de ce principe dépend notamment du fonctionnement du mécanisme des prix qui doivent traduire en terme de coûts les effets négatifs d'une activité économique sur l'environnement ;

-- pour que le mécanisme des prix puisse jouer son rôle d'indicateur d'une façon correcte, il faut satisfaire les deux conditions suivantes :

. que les entreprises internalisent les coûts liés à la protection de l'environnement ;

. que ces coûts soient les plus proches possibles des coûts de dépollution réellement supportés par la société.

-- En général, il n'y a pas de conflit entre l'application de mesures fiscales et la politique de concurrence. En effet, ces mesures permettent à la concurrence de jouer son rôle positif afin de résoudre les problèmes d'environnement. Cependant dans beaucoup de cas ces mesures ne sont pas fiables ;

-- les accords volontaires peuvent présenter plusieurs avantages par rapport à la réglementation directe. Tout d'abord, par rapport à la législation traditionnelle, ceux-ci sont susceptibles de mieux encourager une approche proactive de l'industrie à l'égard d'objectifs publics de protection de l'environnement. Ensuite, la négociation et le dialogue entre les autorités publiques et l'industrie concernée sur les mesures à mettre en oeuvre pour la réalisation des objectifs de la politique environnementale peuvent contribuer à une meilleure évaluation des conséquences techniques et économiques des mesures et, dès lors, à en assurer une plus grande efficacité environnementale pour un coût industriel optimal. Enfin, les accords volontaires ont l'avantage de la flexibilité, permettant ainsi la prise en compte de situations industrielles différentes par rapport aux changements techniques à introduire et ils facilitent en conséquence la mise en oeuvre des solutions les plus efficaces et les moins coûteuses ;

-- les accords volontaires ou l'autoréglementation peuvent contenir des restrictions de la concurrences telles que visées par l'article 85 paragraphe 1 du Traité. La Commission, dans son analyse des affaires individuelles, met en balance les restrictions de concurrence découlant de l'accord et les objectifs environnementaux que cet accord permet d'atteindre en appliquant le principe de proportionnalité (article 85, paragraphe 3) ;

-- la Commission a l'intention de continuer à être très ferme sur le principe d'ouverture des marchés nationaux aux opérateurs des autres États membres et sur le principe de la liberté de l'accès des tiers à un système ;

-- la Commission a une attitude négative vis-à-vis des accords aboutissant à l'éviction d'un produit d'un marché ;

-- la Commission a également une attitude négative vis-à-vis de la fixation multilatérale des tarifs ou des prix conséquente à la mise en pratique d'un accord volontaire.

Documents de référence :

-- XXIIème rapport sur la politique de concurrence §3 - (1992) Environnement ;

-- XXIIIème rapport sur la politique de concurrence, § 3 - (1993) Environnement ;

-- Communiqué de presse de l'affaire SPA/GDB ;

-- Communiqué de presse de l'affaire IFCO.

NOTES

1. M. GLACHANT : "Les accords volontaires dans la politique environnementale", document préparé pour le Groupe sur l'Intégration des Politiques Économiques et de l'Environnement, OCDE-Direction de l'Environnement - Février 1994, page 2.

2. Le même effet d'internalisation des coûts peut être obtenu avec un système de licences, qui résultent de la vente aux enchères de certains "droits à polluer".

3. Voir XXIIIème Rapport sur la politique de la concurrence, point 1, page 23.

4. La directive 83/189/CEE modifiée en mars 1994 (entrée en vigueur 1/7/95), parmi les règles techniques qui devraient être notifiées à la Commission, prévoit "les accords volontaires auxquels l'autorité publique est partie contractante et qui visent dans l'intérêt public, le respect de spécifications techniques ou d'autres exigences, à l'exclusion des cahiers de charges des marchés publics".

AIDE-MÉMOIRE of DISCUSSION

(by the SECRETARIAT)

The Chairman introduced the discussion by explaining the background to the difficulties faced by competition authorities in reconciling the aims of competition with the requirements of environmental protection. He stressed the fact that economic activity generated negative externalities in the shape of environmental pollution. This phenomenon could be regarded as a market failure, and attempts were being made to counter it through regulation and collective action. The competition authorities, for their part, had a dual role: on the one hand that of advocate to ensure that competition issues were taken into account from the outset in the decision-making process, and, on the other hand, as judge to decide how far the effectiveness of certain measures justified any resulting restrictions on competition.

The Chairman then asked that those delegations which had sent a written contribution should briefly present them prior to the general discussion. The Delegate for the European Commission summarily explained the content of the working paper from his Directorate-General. He emphasised its preliminary nature and said that a dialogue with environment officials was continuing within the Commission, as it undoubtedly was at national level given the way in which the problem was constantly evolving, especially with regard to voluntary agreements.

The Delegate went on to say that, when analysing this problem, the Commission -- like all OECD Member countries -- attached great importance to observance of the "polluter-pays" principle (PPP) in a competitive context, since this seemed to be the best way of internalising pollution costs and enabling producers and consumers to find the best balance between their conflicting interests. In the Commission's eyes, voluntary agreements were a second-best solution inasmuch as the preferences of economic agents were less in evidence and might be overshadowed by rules established by the State or business.

Furthermore, the Delegate for the European Commission stated, there existed a framework approved by the Commission within which Member States could subsidise environmental activities and which made it possible to standardise subsidies in the various Member States.

Basically, he pointed out that the Commission endeavoured to strike a balance between, on the one hand, clearly defined rules of competition (Article 85 of the EEC Treaty, under which agreements could be prohibited by the Commission) and, on the other, the political value of having an environment policy, as the European Union now had with the Maastricht Treaty (Article 130R stated that "environmental protection requirements must be integrated into the definition and implementation of other Community policies"). It was relatively easy to maintain this balance since Article 85 allowed for authorisation of agreements or co-operation agreements between undertakings provided that certain conditions were met, in particular that the situation should be in the general economic interest and that competition should not be eliminated to any substantial extent.

In this respect, the Commission had always taken an extremely severe view of all major restrictions, especially where market access was concerned. The Delegate for the Commission mentioned three examples:

i) The Spa/GDB case, concerning the recycling of mineral water bottles in Germany, where foreign competitors were no longer able to compete on equal terms with German producers;

ii) The IFCO case, concerning the collection and recycling of plastic crates, where it was necessary to re-introduce competition within this same collection and reprocessing system;

iii) The VOTOB case, concerning a multilateral price fixing agreement.

The Delegate for Netherlands pointed out, prior to presenting the two case studies described in the Note from the Netherlands, that the choice of environmental policy instruments was not so much between public regulation and private regulation but rather between public or private regulation with or without market competition, given that the latter approach involved a command-and-control attitude which could constitute as much a part of public regulation as of private. In such circumstances it was the competition authorities' task to ensure that competition issues were taken into account and to oppose restricted market access, price fixing and market sharing.

The first case study formed part of the self-regulative approach, involved a disposal system for wrecked cars which was based on an agreement between the government and the car industry. Under this agreement the car industry had undertaken to recycle 86 per cent of the overall volume of wrecked cars by the year 2000 through re-use of products and materials. A disposal fee of NLG 250 had to be paid into a fund by the manufacturer or importer of any new car that was sold or imported. This fund was run by the car industry and was used to pay out subsidies to car disassembly firms to cover the non-profitable disassembly work they carried out. These disassembly firms had to be certified by an independent institute and, for this to happen, had to meet certain standards relating to the environment and working conditions. In this case the role of government had been to set the process in motion and declare the disposal fee to be binding in order to prevent free riding.

The second case study, which formed part of the public regulation approach, aimed to provide a leak-proof, efficient and controllable disposal system for used oil. The role of government was to apply strong measures on licences allowing market access to collection firms, on allocation of regions of activity and on price fixing. Thus six regional firms (one firm to each region) had been designated by government to collect all used oil from transport companies, garages and vehicle disassembly firms. For their part, the regional firms charged their used-oil suppliers a collection fee tied to a maximum tariff set each month by the Environment Minister. To achieve economies of scale, only one recycling plant had been set up by lubricant manufacturers, who ran it jointly but had to meet the recycling standard enacted by the Environment Ministry.

A number of competition issues were raised by these two case studies. In the former example the industry would have liked to add the NLG 250 disposal fee to the price of the new car but was prevented from doing so. In the latter example the firms wanted to set the price themselves, although this was actually the prerogative of the Environment Ministry, which set a ceiling, thus allowing a degree of price competition below this level. In addition, at the request of the Ministry for Economic Affairs, each of the six regional firms had been given authority to make collections in the designated region of another firm.

The Delegate for Germany used the Note by the German delegation as a basis for presenting the German system of collecting and recycling sales packaging. In connection with the 1991 Packaging Ordinance (VVO) a joint venture, Duales System Deutschland GmbH (DSD), was set up by industry to collect waste sales packaging on a nationwide basis. Thus manufacturers and other firms generating this type of waste packaging had to rely solely on this enterprise in order to satisfy the requirements of the Ordinance.

When the Ordinance had been published in 1991 there had been no plans to extend the system to transport packaging because at the time this market for waste was extremely competitive. Since then DSD, strengthened by its monopoly position in the collection of waste sales packaging, had endeavoured to break away from this limitation and attempted to extend its operations into the collection of transport packaging. The Federal Cartel Office had taken the view that this would have ousted from the transport packaging collection market all those companies not belonging to the DSD system and had therefore prohibited the move in order to maintain competition in this field.

The Delegate for Denmark, referring to the case study described in the Note by the Danish delegation, stated that the Danish environmental authorities had requested industry to sign an agreement on the collection, recycling and destruction of used refrigerants containing CFC gas. A number of companies dealing with refrigerants and which had developed their own recycling system had complained to the competition authorities about having to use the process specified in the agreement to which they were a party when they considered their own process to be better.

The Competition Council had been of the opinion that this agreement imposed an unjustifiable restriction on competition and that the environmental aims involved did not require the use of one waste collection and recycling process only. In these circumstances the agreement had been changed so that those companies which so wished might use their own recycling system, thus eliminating distortion of competition between those companies which were parties to the agreement and those which were not. In future, the Delegate for Denmark went on, there should be more dialogue between the competition authorities and the environmental authorities in order to promote alternative solutions which, whilst satisfying the aims of environmental protection, took greater account of economic and competitive factors.

The Delegate for Japan gave a brief outline of two of the case studies described in the Note by the Japanese delegation. The first involved a joint venture by wholesalers to collect and recycle used tyres. In this particular instance, the wholesalers came together to recycle used tyres and sell them to cement manufacturers. The JFTC had judged that there was no problem under the Anti-Monopoly Act because:

i) Individual firms could not guarantee a stable supply of the number of tyres needed by the cement manufacturers;

ii) used tyres were not recycled separately by brand;

iii) only wholesalers affiliated to this association were able to provide these tyres for re-use in cement works owing to the cost of the processing required.

The second case study involved the establishment of voluntary standards for packaging by department store groups. According to the JFTC the introduction of such standards created no problems if they were voluntary. These standards concerned:

i) efforts to reduce the volume of wrapping material by simplifying and/or omitting wrapping;

ii) charging of fees for special wrapping of gifts and other items at the consumer's request;

iii) requests to manufacturers and suppliers to meet official packaging standards as established by local governmental law or ordinance. The JFTC left to each member of the group the decision to charge for special wrapping for gifts; however, it had warned that collective decisions to charge fees would pose problems under the Anti-Monopoly Act.

Following these presentations there was a general discussion, introduced by the Chairman, who asked the Netherlands delegation to clarify the competition issues arising from the existence of one collection firm per region. The Delegate for the Netherlands explained that, with the relaxing of boundaries between the regions, the erstwhile regional monopolies had been superseded by a certain amount of competition between the regional firms collecting used oil. Such being the case, the prices which they charged for the service provided (collection of used oil) had dropped below the ceiling set by the Environment Ministry, and this in turn had enabled collection firms to collect more used oil since the price of their services had fallen or had enabled a greater number of consumers to use them.

The Delegate for Hungary outlined the situation in his country, stressing the following points:

i) Environmental protection was the responsibility of local government, which, for greater efficiency, contracted out waste collection and recycling to a single firm;

ii) Privatisation and the arrival of Western business in Hungary had made it possible to transfer to the private sector the onerous duty of fighting an extremely high level of pollution -- a task which should normally have been taken on by the State;

iii) Parliament was examining a new law which would provide for the use of various instruments employed by industrialised countries, albeit with the exception of negotiable licences.

The Delegate for Austria compared the Austrian system ARA (Altstoff Recycling Austria) with the German system, DSD, inasmuch as both arrangements operated nationally. He asked the German Delegate if, for this reason, Germany was having competition problems similar to those created by ARA, which had revealed the limitations of Austrian competition law. Among these problems he mentioned the creation of a natural monopoly and of local authority monopolies, as well as problems of sole distribution and free riding inasmuch as most firms not belonging to ARA were not monitored by the authorities for compliance with obligations relating to the management of packaging waste. Similarly, he went on, the system gave rise to abuse of dominant positions, problems of principal and agent, and self-contracting problems to the extent that its members were sometimes themselves the contractors responsible for waste collection and management and, as such, were concluding agreements with the ARA system.

The Delegate for Germany acknowledged that although the DSD system represented an important step towards privatising the old system of public waste management, it had a number of drawbacks from the point of view of competition. The system, which formed part of an arrangement whereby industry was itself responsible for reprocessing the packaging it used and could therefore delegate this requirement by means of licences, had been established on a nationwide basis, whereas the German competition authorities would have preferred to see a variety of regional systems. However, the fact that the system was set up on a national basis was owing to the large number of conflicting interests involved at the preliminary stages and especially the various political pressures to which it was subject.

However, when there was only one single body which combined and co-ordinated all interests this had the effect of a cartel, a fact which meant the Federal Cartel Office had been faced with all the competition issues cited by the Delegate for Austria. This being so, there was a growing feeling in Germany that the arrangement ought to be reviewed in order either to introduce more competition or else to exempt the whole of this sector from the rules of competition. Thus far, however, the Federal Cartel Office had successfully resisted the latter option, pointing out that this would amount to introducing into this field the same situation as that which already existed in the power industry. It had also been able to prevent self-contracting problems by indicating clearly that it would not tolerate them.

The Delegate for Germany explained that there were also other fields, apart from waste sales packaging, which were creating problems in Germany. Thus in the car industry measures had been taken which were similar to those in the Netherlands. Although industry was in favour, the Federal Cartel Office was very concerned about the establishment of a national fund to which a fee had to be paid by all car buyers for the purpose of recycling wrecked cars. This would in fact amount to a nationwide system which would lead to price fixing, since price setting by the market was impossible. A similar debate was occurring with regard to used batteries and electronic equipment. Here again, industry would like the funds to be financed by a charge on consumers and would wish to see recycling systems established on a national basis.

Generally speaking, pressure from the Greens, which was already very strong, had tended to become even stronger as their political weight increased. They argued that firms should take greater account of the environment, while the firms, for their part, pointed out that getting rid of pollution was an expensive business and that they could not take this upon themselves without some form of compensation.

As a result the government was endeavouring to achieve its ends by voluntary means. This approach had led to the signing of agreements which were monitored on a national basis, since this was easier, and to the introduction of a set charge on consumers. However, there was an awareness that the cost in terms of competition was now too high and that it was time to reconsider this approach. The Federal Cartel Office for its part ruled out any general exemption from competition laws and, as things stood at present, was using these laws as a lever to introduce elements of competition into the system in order to render the latter acceptable.

The Delegate for the European Commission confirmed that in many Member States industry was tending to organise by establishing extremely monopolistic and integrated systems, generally with strong political support, with all the problems for competition which this entailed. Furthermore, he added, these national systems were accessible only to domestic products and might therefore negatively affect international trade. In such circumstances it was up to the competition authorities to demonstrate that there were other systems which were equally effective from the environmental point of view and which did not constitute monopolies. In this connection, he referred to the experience of Fiat in Italy which had set up a car recycling system on its own initiative.

In reply to the Chairman, the Delegate for Austria, stated that the Austrian competition authorities were of the opinion that competition could work in this field if, in particular, an effort was made to reduce the problems relating to sunk costs and promote competition throughout the system, for example by ruling out long-term contracts and sole distribution contracts. However, the Austrian competition authorities were not convinced that current legislation on cartels was suitable for dealing with such matters, that they themselves were the appropriate supervisory authorities or that it was necessary to have special regulations for practices such as sole distribution in contracts for over six years.

The Delegate for Poland explained that this problem was new to his country, especially viewed in terms of the market economy. If waste as a whole was to be controlled, this must be done in line with market principles and all producers of waste must be subject to the same requirements. Inasmuch as these recycling programmes required a considerable amount of capital, which was difficult to find, they were only implemented on a voluntary or partly voluntary basis, with State aid.

Referring to European Commission's contribution, the Delegate for the Netherlands confirmed that his country was employing national solutions and that the only way to offset this disadvantage would be to harmonise environmental standards at European level. He also acknowledged that the Netherlands system for recycling wrecked cars left something to be desired as far as competition was concerned and explained that a system of exemption had been introduced to enable car manufacturers and importers to develop their own systems provided that they satisfied the environmental objectives set by the State.

In reply to the Delegate for Canada, the Delegate for Germany stated that there were a number of cases of local and regional public authorities having set up joint ventures with recycling firms. In order to operate, these firms had to tender for the necessary licences from the public authorities, which also formed part of the joint ventures. In order to limit collusion, the Federal Cartel Office had therefore tried to ensure that these licences were not issued for an indefinite period. A ceiling of ten years had been fixed as the limit of validity for a licence granted to a joint venture.

AIDE MÉMOIRE de la DISCUSSION

(par le SECRÉTARIAT)

Le Président a introduit la discussion en exposant les données du problème qui se posait aux Autorités de la concurrence pour concilier les préoccupations de concurrence avec les impératifs de protection de l'environnement. Il a notamment souligné que l'activité économique générait des externalités négatives qui prenaient la forme de nuisances pour l'environnement. Ce phénomène était assimilable à une défaillance du marché, à laquelle on tentait de remédier par la réglementation ou par une action collective. Les Autorités de la concurrence, pour leur part, avaient à la fois un rôle d'avocat à jouer de manière à ce que les considérations de concurrence soient prises en compte aussi en amont que possible du processus de décision et une mission d'arbitrage entre les possibles restrictions de la concurrence résultant de certaines actions et leur efficacité.

Le Président a, ensuite, invité les délégations qui avaient envoyé une contribution écrite, à en faire une présentation succincte en prélude à la discussion générale. Le représentant de la Commission Européenne a brièvement exposé la teneur du document de travail de sa Direction générale. Il a souligné son caractère préliminaire et a indiqué que le dialogue avec les responsables de l'environnement se poursuivait au sein de la Commission comme cela était sans doute le cas au niveau national, en raison du caractère très évolutif de cette problématique, en particulier s'agissant du développement des accords volontaires.

Dans son analyse, a-t-il poursuivi, la Commission privilégie, comme l'ensemble des pays Membres de l'OCDE, le respect du Principe Pollueur Payeur (PPP) dans un environnement concurrentiel, ce qui semble être la meilleure façon d'internaliser les coûts liés à la pollution et de permettre au producteur et au consommateur d'effectuer au mieux leurs arbitrages. Les accords volontaires ne représentent, du point de vue de la Commission, qu'un pis aller dans la mesure où la révélation des préférences des agents économiques est moins forte et qu'elle peut être occultée par des régles fixées par l'État ou par les entreprises.

Par ailleurs, a-t-il rappelé, il existe un cadre autorisé par la Commission permettant aux États Membres de subventionner des activités dans le domaine de l'environnement, et qui constitue un cadre d'homégénéisation des pratiques des différents États Membres en matière d'aides.

Pour l'essentiel, a-t-il fait valoir, la Commission s'efforce de mettre en balance d'une part des régles très claires en matière de concurrence - l'article 85 du Traité selon lequel les ententes peuvent être interdites par la Commission - et d'autre part l'intérêt politique qui s'attache à une politique de l'environnement, désormais politique communautaire en vertu du traité de Maastricht - l'article 130R du traité de Maastricht stipule notamment que "les exigences en matière de protection d'environnement doivent être intégrées dans la définition et la mise en oeuvre des autres politiques de la Communauté". Cet arbitrage est assez aisé à effectuer car l'article 85 prévoit des possibilités d'autorisation d'ententes ou d'accords de coopération inter-entreprises pourvu que certaines conditions soient réunies, en particulier l'existence d'un intérêt économique et l'absence d'élimination substantielle de la concurrence.

De ce point de vue, la Commission s'est toujours montrée très stricte à l'égard de toutes restrictions fortes notamment d'accès au marché ; le représentant de la Commission a mentionné trois cas:

i) l'affaire Spa/GDB qui concernait des opérations de recyclage de bouteilles d'eau minérale en Allemagne, dans laquelle les concurrents étrangers ne pouvaient plus intervenir dans des conditions de concurrence équitables avec les producteurs allemands;

ii) l'affaire IFCO qui concernait la collecte et le recyclage de cageots dans laquelle il y avait lieu de réintroduire la concurrence au sein même du système de collecte et de retraitement;

iii) l'affaire VOTOB qui concernait un accord de fixation multilatérale des prix.

Le délégué des Pays-Bas a fait valoir, préalablement à la présentation de deux études de cas décrites dans la Note de la Délégation néerlandaise, que le choix en matière d'instruments de politique d'environnement n'était pas entre réglementations publiques ou privées mais entre réglementations publiques et privées avec ou sans concurrence sur le marché, cette dernière approche relevant d'une logique de commandement et de contrôle qui peut prévaloir aussi bien dans la réglementation publique que privée. Le rôle des Autorités de la concurrence est, dans ces conditions, de favoriser la prise en compte de préoccupations de concurrence, et notamment de s'opposer à la création de barrières à l'entrée, à la fixation de prix et au partage du marché.

Le premier cas qui, a-t-il précisé, s'inscrit dans une perspective d'autorégulation, concerne un dispositif d'élimination d'épaves automobiles fondé sur un accord entre les pouvoirs publics et l'industrie automobile. Dans le cadre de cet accord, l'industrie automobile s'engage à recycler 86 pour cent du volume global d'épaves d'ici l'an 2000 en réutilisant les produits ou les matériaux. Au titre de l'élimination, une redevance de 250 florins néerlandais doit être versée à une caisse par le constructeur ou l'importateur de tout véhicule neuf, vendu ou importé. Cette caisse, gérée par l'industrie automobile, sert à financer les subventions octroyées aux entreprises de démolition pour couvrir les travaux de démolition non rentables auxquels elles procèdent. Ces entreprises de démolition doivent être certifiées par un institut indépendant et pour ce faire, doivent satisfaire certaines normes d'environnement et de conditions de travail. Dans ce cas, le rôle des pouvoirs publics a été d'engager le processus et de déclarer contraignante l'obligation de payer la redevance d'élimination de manière à éviter les comportements opportunistes "free riding".

Le deuxième cas qui s'inscrit dans une perspective de réglementation publique, vise à assurer un processus d'élimination des huiles usagées qui soit efficace, contrôlable et sans danger pour l'environnement. Le rôle des pouvoirs publics est de faire appliquer des mesures rigoureuses concernant la délivrance de licences permettant aux entreprises de collecte d'accéder au marché, la répartition des régions d'activité et la fixation des prix. Ainsi, six entreprises régionales (une entreprise par région) sont chargées par les pouvoirs publics de collecter toutes les huiles usagées des sociétés de transport, des garages et des entreprises de démolition de voiture. En contrepartie, ces entreprises régionales prélèvent sur leurs fournisseurs en huiles usagées une redevance calculée en fonction d'un tarif maximum établi chaque mois par le ministère de l'Environnement. Pour des raisons d'économie d'échelle, une seule usine de recyclage a été créée par les fabricants de lubrifiants, qui la gèrent collectivement mais sont tenus de satisfaire la norme de recyclage édictée par le ministère de l'Environnement.

Les problèmes de concurrence soulevés par ces deux cas sont divers. Dans le premier cas, l'industrie voudrait imputer la redevance de 250 florins sur le prix des voitures neuves, ce qui lui a été interdit. Dans le deuxième exemple, les entreprises veulent déterminer le tarif, ce qui est fait actuellement par le ministère de l'Environnement qui fixe un plafond permettant une certaine concurrence au niveau des prix, en deça de cette limite; par ailleurs, à la demande du ministère des Affaires Economiques, chacune des six entreprises établies sur une base régionale a été habilitée à procéder à des collectes dans la région désignée d'une autre entreprise.

La déléguée de l'Allemagne a, sur la base de la Note de la délégation allemande, présenté le système de collecte et de recyclage des emballages utilisés au stade de la vente. Dans le cadre de l'Ordonnance sur l'emballage (VVO) de 1991, une entreprise commune, Duales System Deutschland GmbH (DSD), a été créée par les industriels en vue d'assurer la collecte sur une base nationale des déchets d'emballages utilisés au stade de la vente; ainsi, les fabricants et autres entreprises générant ce type de échets d'emballage s'en remettent à cette entreprise unique pour satisfaire aux obligations de l'Ordonnance.

Lorsque l'Ordonnance a été publiée en 1991, il n'a pas été prévu que ce dispositif s'étende aux emballages de transport car il s'agissait, alors, d'un marché très concurrentiel. Depuis lors, DSD, forte de sa position monopolistique dans le secteur de la collecte des emballages utilisés au stade de la vente, a tenté de s'affranchir de cette distinction et a essayé d'étendre ses activités de collecte aux emballages de transport. Le Bundeskartellamt a estimé que cela évincerait du marché de la collecte des emballages de transport toutes les entreprises qui n'adhéraient pas au système mis en place par DSD, et s'y est par conséquent opposé pour préserver la concurrence dans ce secteur.

Le délégué du Danemark, se référant au cas décrit dans la Note de la délégation danoise a précisé que les Autorités danoises chargées de l'environnement avaient demandé à l'industrie de conclure un accord sur la collecte, le recyclage et l'élimination de réfrigérants usés comportant des gaz CFC. Un certain nombre d'entreprises utilisant des réfrigérants, qui avaient mis au point leur propre système de recyclage, se sont plaintes auprès des Autorités de la concurrence d'avoir à utiliser le procédé de l'accord auquel elles avaient adhéré, alors qu'elles estimaient leur procédé supérieur à celui de l'accord.

Le Conseil de la concurrence a estimé que cet accord restreignait la concurrence de manière injustifiée et que la satisfaction d'objectifs environnementaux ne nécessitait pas l'utilisation d'un seul procédé de collecte et de recyclage de ces déchets. Dans ces conditions, l'accord a été modifié de façon à ce que les entreprises qui le souhaitent, puissent recourir à leur propre système de recyclage et ainsi, toute distorsion de concurrence entre entreprises adhérentes ou non adhérentes à l'accord a été éliminée. A l'avenir, a poursuivi le délégué du Danemark, il conviendra d'intensifier le dialogue entre Autorités de la concurrence et Autorités responsables de l'environnement de manière à promouvoir des solutions alternatives qui tout en satisfaisant un objectif de défense de l'environnement prennent mieux en compte des considérations économiques et de concurrence.

Le délégué du Japon a brièvement présenté deux cas décrits dans la Note de la délégation japonaise. Le premier concerne une entreprise commune crée par des grossistes pour ramasser et réutiliser des pneus usés. Dans ce cas, des grossistes se sont associés pour recycler et revendre à des cimenteries des pneus usagés. Selon la JFTC, cet arrangement ne soulève aucune difficulté au regard de la loi antimonopole car :

i) des entreprises individuelles ne peuvent pas assurer une offre stable pour le nombre de pneus nécessaires aux cimenteries ;

ii) les pneus usés ne sont pas recyclés séparément selon leur qualité ; et

iii) seuls les grossistes appartenant à cette association sont en mesure de fournir ces pneus en raison du coût du processus permettant de les réutiliser dans les cimenteries.

Le deuxième cas concerne l'instauration de normes volontaires d'emballage par des groupes de grands magasins. Selon le JFTC, l'instauration de telles normes ne soulève pas de difficultés dès lors qu'elles sont volontaires. Ces normes portent sur :

i) les efforts pour réduire le volume de matériaux d'emballage, en simplifiant et/ou supprimant l'emballage ;

ii) l'imposition d'une taxe pour tout emballage spécial pour des cadeaux, à la demande du consommateur ;

iii) l'obligation faite aux fabricants et aux fournisseurs d'observer les normes officielles d'emballage édictées par ordonnance ou législation locale. Le JFTC a laissé à chaque magasin appartenant au groupe la faculté de décider d'imposer ou non une taxe pour

l'emballage spécial de cadeaux; il les a cependant averti de ce que des décisions collectives d'imposition de taxes poseraient des problèmes au regard de la loi antimonopole.

A l'issue de ces présentations, une discussion générale est intervenue; elle a été lancée par le Président qui a demandé à la délégation néerlandaise de préciser les problèmes de concurrence liés à l'existence d'entreprises par région. Le délégué des Pays-Bas a expliqué qu'à une situation de monopole par région s'était substituée, avec l'assouplissement des frontières entre ces régions, une certaine concurrence entre les entreprises régionales de collecte des huiles usagées. Dans ces conditions, le tarif qu'elles faisaient payer en échange du service rendu (collecte d'huiles usagées), avait baissé à un niveau qui était inférieur au tarif maximum fixé par le ministère de l'Environnement, ce qui par voie de conséquence avait permis à ces entreprises de collecte de ramasser davantage d'huiles usagées puisque le tarif de leur prestation avait baissé, ou encore, avait permis l'accès à ces services d'un plus grand nombre de consommateurs.

Le délégué de la Hongrie a décrit la situation dans son pays, soulignant les caractéristiques suivantes :

i) la responsabilité de la défense de l'environnement incombe aux gouvernements locaux qui, par souci d'efficacité, sous-traitent à une seule entreprise la collecte et le recyclage des déchets ;

ii) la privatisation et l'arrivée d'entreprises occidentales ont permis de transférer au secteur privé la charge très lourde de lutter contre une pollution qui est très élevée en Hongrie, et qu'aurait dû assumer l'État ;

iii) le Parlement étudie une nouvelle loi qui prévoit un recours aux divers instruments mis en oeuvre dans les pays industrialisés, à l'exception toutefois des permis négociables.

Le délégué de l'Autriche a comparé le système autrichien ARA (Altstoff Recycling Austria) au système DSD allemand, dans la mesure où dans les deux cas il s'agit d'un dispositif fonctionnant à l'échelle nationale. Il a demandé au délégué allemand si de ce fait, ne se posaient pas en Allemagne des problèmes de concurrence analogues à ceux générés par l'ARA, qui démontraient les limites de la législation autrichienne de la concurrence. Au nombre de ces problèmes, il a cité la création d'un monopole naturel et de monopoles des autorités locales, ou encore des problèmes de distribution exclusive, de comportement opportuniste "free riding" dans la mesure où la plupart des entreprises qui n'adhérent pas à l'ARA ne sont pas contrôlées par les Autorités s'agissant du respect de leurs obligations de gestion de déchets d'emballage. De même, a-t-il poursuivi, ce système donne lieu à des abus de position dominante, à des problèmes de principal-agent et de "self contracting" conflits d'intérêts dans la mesure où les membres du système sont parfois eux mêmes des entrepreneurs qui assurent la collecte et la gestion des déchets et dans ces conditions concluent des accords avec le système ARA.

Le délégué de l'Allemagne a reconnu que si le système DSD représente un effort important de privatisation de l'ancien système public de gestion des déchets, il comporte de nombreux inconvénients du point de vue de la concurrence. Ce système qui s'inscrit dans le cadre d'un dispositif où il incombe à l'industrie de récupérer les emballages qu'elle utilise et qui permet par conséquent à l'industrie, par le biais de licences, de déléguer cette obligation, a été établi sur une base nationale alors que les Autorités allemandes de la concurrence auraient préféré une multiplication de systèmes régionaux. Mais la mise en place de ce système sur une base nationale a résulté de la multiplicité des parties en présence lors de son élaboration et surtout des nombreuses pressions politiques dont il a fait l'objet.

Or, a ajouté le délégué de l'Allemagne, là où il n'y a qu'une seule instance responsable, où se rassemblent et se coordonnent tous les intérêts, il existe un effet de cartel, ce qui a conduit le Bundeskartellamt a être confronté à tous les problèmes de concurrence énumérés par la délégation

autrichienne. Dans ces conditions, se fait jour en Allemagne le sentiment qu'il conviendrait de revoir ce dispositif soit pour y introduire davantage d'éléments de concurrence soit pour exempter l'ensemble de ce secteur des régles de concurrence. Cette dernière option a, cependant, jusqu'à présent était combattue avec sucés par le Bundeskartellamt qui a fait valoir que cela reviendrait à faire prévaloir dans ce secteur la situation qui existe dans le secteur de l'énergie. De même, il a pu éviter les problèmes de conflits d'intérêts (self contracting problems) en indiquant fermement qu'il ne les tolérerait pas.

Le délégué de l'Allemagne a précisé qu'il existe d'autres secteurs que celui des déchets d'emballages utilisés au stade de la vente, qui posent des problèmes en Allemagne. Ainsi, dans le secteur automobile, des mesures similaires à celles mises en oeuvre aux Pays Bas ont été prises en Allemagne. Alors que l'industrie y est favorable, le Bundeskartellamt est très préoccupé de l'instauration d'un fonds national auquel tout acheteur de voiture devrait payer une taxe pour financer le recyclage des épaves. En effet, cela reviendrait à établir un système sur une base nationale, avec un effet de cartel au niveau des prix, toute fixation de prix par le marché étant exclue. Des discussions du même type sont en cours concernant les piles usées et les matériels électroniques. Dans ces secteurs, l'industrie voudrait également que des fonds soient financés par des taxes prélevés sur les consommateurs et que des dispositifs de recyclage soient établis sur une base nationale.

D'une manière générale, a-t-il conclu, la pression des Verts qui est très forte tend à se renforcer encore à mesure que leur poids politique s'accroit; ils militent en faveur d'une meilleure prise en compte de l'environnement par les entreprises qui de leur côté, font valoir que le prix de la dépollution est élevé et qu'elles ne peuvent l'assumer sans compensation. C'est pourquoi, le gouvernement s'efforce de parvenir à ses fins sur une base volontaire. Cette approche conduit à la conclusion d'accords qui, pour pouvoir être mieux contrôlés, le sont sur une base nationale, ainsi qu'à l'instauration d'une taxe fixe prélevée sur le consommateur. On est, cependant, conscients que le prix en terme de concurrence est désormais trop élevé et qu'il faut reconsidérer cette approche. Le Bundeskartellamt, pour sa part, exclut toute exemption générale à la législation de la concurrence, et, en l'état actuel de la situation, utilise cette législation comme un levier pour obtenir l'introduction d'éléments de concurrence dans ces systèmes, ce qui constitue la condition nécessaire pour qu'il puisse les tolérer.

Le représentant de la Commission Européenne a confirmé que l'on constatait dans un grand nombre d'États membres une tendance à voir l'industrie s'organiser, en mettant en place un système très monopolisé et très intégré, avec un soutien politique généralement fort, avec les problèmes de concurrence qui en résultent. De plus, a-t-il ajouté, ces systèmes nationaux ne sont accessibles qu'aux produits nationaux et peuvent donc avoir des effets négatifs pour les échanges internationaux. Il appartient, dans ces conditions, aux Autorités de la concurrence de démontrer qu'il existe d'autres systèmes aussi efficaces sur le plan de l'environnement et qui n'ont pas de caractère monopolistique. A cet égard, il a cité l'expérience de FIAT en Italie qui, de sa propre initiative, a monté son propre système de recyclage de voitures.

En réponse au Président, le délégué de l'Autriche a précisé que les Autorités de la concurrence autrichiennes estiment que la concurrence peut jouer dans ce secteur, notamment, si l'on réduit les problèmes liés aux coûts irrécupérables "sunk costs" et que l'on favorise la contestabilité pour l'ensemble du système, en excluant par exemple les contrats à long terme, les contrats de distribution exclusive. En revanche, ces Autorités ne sont pas certaines que la législation actuelle sur les ententes soit adaptée à ce type de problème, que les Autorités autrichiennes de la concurrence soient les Autorités de tutelle appropriées ou qu'il ne soit nécessaire de réglementer de manière spécifique certaine pratiques comme la distribution exclusive dans des contrats supérieurs à six ans.

Le délégué de la Pologne a expliqué qu'il s'agissait d'un problème nouveau dans son pays, surtout vu dans une perspective d'économie de marché. Si on envisage de contrôler tous les déchets, ceci doit être fait en accord avec les principes du marché et tous les producteurs de déchets doivent être contraints de se soumettre aux mêmes obligations. Dans la mesure où ces programmes de recyclage nécessitent des capitaux

importants, difficiles de rassembler, de tels programmes ne sont mis en oeuvre que sur une base volontaire ou partiellement volontaire, avec le soutien de l'État.

Se référant à l'intervention de la Commission, le délégué des Pays-Bas a confirmé que les solutions mises en place dans son pays sont de caractère national et que la seule façon de remédier à cet inconvénient serait d'harmoniser les normes d'environnement sur le plan européen. Il a, par ailleurs, reconnu que le système néerlandais de recyclage des épaves de voitures n'était pas satisfaisant du point de vue de la concurrence et a précisé qu'un système d'exemption avait été introduit permettant aux fabricants et aux importateurs de voitures de développer leur propre système à condition qu'il permette de satisfaire les objectifs d'environnement assignés par l'État.

En réponse au délégué du Canada, Le délégué de l'Allemagne a précisé que dans de nombreux cas, les pouvoirs publics à l'échelon local et régional, ont créé avec des entreprises de recyclage, des entreprises communes. Pour opérer, ces entreprises communes doivent obtenir, par voie de soumission, les autorisations nécessaires des pouvoirs publics, qui sont par ailleurs parties à l'entreprise commune. Pour limiter l'effet de collusion, le Bundeskartellamt s'est donc efforcé de veiller à ce que ces autorisations ne soient pas accordées de manière illimitée dans le temps. Un plafond de dix ans a été fixé comme limite de validité de l'autorisation donnée à l'entreprise commune.