



**Asia-Pacific
Economic Cooperation**

Advancing Free Trade
for Asia-Pacific **Prosperity**

Competition Policy and Sustainable Development

Bangkok, Thailand | 9 November 2022

APEC Competition Policy and Law Group

July 2023



**Asia-Pacific
Economic Cooperation**

Competition Policy and Sustainable Development

Bangkok, Thailand | 9 November 2022

Post-Workshop Report

APEC Competition Policy and Law Group

July 2023

APEC Project: CPLG 01 2022S

Competition Policy and Sustainable Development

Produced by

Trade Competition Commission of Thailand

Prepared by

Mr. Karnrapee Phollit

Foreign Affairs Officer

Trade Competition Commission of Thailand

international@tcct.or.th

Project Overseer

Mr. Akarapon Houbcharaun

Director of Foreign Affairs Division

Trade Competition Commission of Thailand

international@tcct.or.th

For

Asia-Pacific Economic Cooperation Secretariat

35 Heng Mui Keng Terrace

Singapore 119616

Tel: (65) 68919 600

Fax: (65) 68919 690

Email: info@apec.org

Website: www.apec.org

© 2023 APEC Secretariat

APEC#223-EC-04.3

Co-sponsoring APEC economies: Canada; Mexico; The Philippines; Singapore; and Chinese Taipei

Funded by Trade Competition Commission of Thailand

Disclaimer:

The opinions and conclusions are the views of the author of this report. The Analysis and Recommendations in this report do not necessarily reflect the views of APEC member economies.

The names of public or private institutions referenced in this document do not imply the political status of any APEC economy

Table of Contents

Project Overview	1
Executive Summary	2
Background	3
Introduction—Sustainable Competition?	3
Safeguarding Competition to Support Sustainable Development	4
1) Anti-cartel enforcement	4
2) Abuse of dominance	6
3) Mergers and Acquisitions	9
4) Advocacy	12
A Place for Sustainability-Oriented Horizontal Agreements	14
Environmental Effects in Competitive Assessments	14
Navigating the Gray Area	16
Background Conclusion and Points of Discussion	23
Event Summary: Competition Policy and Sustainable Development	25
Opening Remarks	25
Amb. Krisda Piampongsant, Convenor, Competition Policy and Law Group	25
Prof. Sakon Varanyuwatana, Chairman, Trade Competition Commission of Thailand	25
Mr. Sontirat Sontijirawong, Former Minister of Energy and Former Minister of Commerce, Thailand	26
Panel 1: Are Competitive Markets More Sustainable Markets	26
Prof. William Kovacic, Global Competition Professor of Law and Policy and Director of Competition Law Centre—The George Washington University Law School	26
Ms. Christina Volpin, Competition Policy Expert—OECD	27
Mr. Simon Roberts, Expert on Competition and Advocacy—International Trade Centre	28
Questions and Discussions	29
Panel 2: Competition Advocacy towards Sustainable Development	30
Mr. Carlos Kuriyama, Senior Analyst, Policy Support Unit—APEC Secretariat	30
Prof. Michael Schaper, PhD, Adjunct Professor, Faculty of Business and Law—Curtin University	31
Ms. Mariana Escalante Seyffert, General Coordinator, Collaboration with the Academic Sector, the Direction General of Competition Advocacy—The Federal Economic Competition Commission of Mexico	32
Mr. Alberto Heimler, Expert on Competition and Regulation—International Trade Centre	33
Questions and Discussions	34
Panel 3: Sustainability Business Agreement	35
Prof. Simon Holmes, Visiting Professor—Oxford University; Member—UK Competition Appeal Tribunal; and Legal Adviser—ClientEarth	35

Mr. Martijn Snoop, Chairman—the Netherlands Authority for Consumers and Markets	36
Mr. YOSHINARI Ryohei, Assistant Director, Coordination Division—Japan Fair Trade Commission	38
Mr. Tom Leuner, Executive General Manager, Exemptions and Digital Division—Australian Competition & Consumer Commission	39
Questions and Discussions.....	40
Closing Remarks	41
Mr. Raksagecha Chaechai Commissioner—Trade Competition Commission of Thailand.....	41
Conclusion and Recommendations	41
Bibliography	44
Annex 1 Workshop Agenda.....	48
Annex 2 Speaker Bios.....	52

Project Overview

Recognizing the close interplay between competition policy, business practices, and the crucial role they play in supporting the transition towards sustainable economy, Thailand, co-sponsored by Canada; Mexico; The Philippines; Singapore; and Chinese Taipei, undertook a project under the Competition Policy and Law Group (CPLG) titled Workshop on Competition Policy and Sustainable Development (CPLG 01 2022S).

The Project aims to contribute to the ongoing debate on how competition authorities can contribute to the sustainable development agenda by:

- Assessing the role of competition policy in supporting green innovation and sustainable business choices;
- Revealing key obstacles for APEC economies in aligning competition regulation and enforcement with sustainable development and greenhouse gases (GHGs) emission goals; and;
- Identifying best practices on aligning competition regulation and enforcement with environmental sustainability goals.

To facilitate the discussion, a background note was developed to provide an overview of the arguments surrounding the role of competition policy in furthering sustainability objectives as well as helping plan the panel discussions. A 1-day hybrid workshop was held in Bangkok on 9 November 2022 (Annex 1: Workshop Agenda). Prof. Sakon Varanyuwatana, the Chairperson of the Trade Competition Commission of Thailand and Amb. Krisda Piampongsant, the Convenor of the CPLG delivered the welcoming and opening remarks. The workshop was kickstarted by a keynote address delivered by Mr. Sontirat Sontijirawong, Former Minister of Energy and Former Minister of Commerce of Thailand titled “Bangkok Goals on Bio-Circular-Green Economy (BCG): The Interlink between Sustainable Investment and Competition Policy” and followed by three panel discussions on “Are Competitive Markets More Sustainable Markets,” “Competition Advocacy towards Sustainable Development,” and “Sustainability Business Agreements,” featuring 11 speakers from Australia; Japan; Mexico; Thailand; The United States; APEC PSU; the Organisation for Economic Co-operation and Development (OECD); The Netherlands Authority for Consumers and Markets; and the International Trade Centre.

The closing remark was delivered by Mr. Raksagecha Chaechai, Commissioner of Trade Competition Commission of Thailand. The event was attended by 112 virtual and in-person participants from Australia; Brunei Darussalam; Canada; Hong Kong, China; Indonesia; Japan; Mexico; the Philippines; Russia; Chinese Taipei; Thailand; and the United States. An evaluation survey was circulated after the workshop to participants. This report aims to provide the project background and implementation, the summary of the discussion, as well as setting out recommendations from the Project.

Executive Summary

The global transition towards sustainable economy not only presents economic opportunities but is crucial to ensuring humanity's survival amidst the climate change crisis. And while government will lead the effort through environmental regulations, investments, and incentives; business sector's participation can and have made significant contributions utilizing their commercial knowhow, innovation capability, and influence over responsible consumption.

Competition law and sustainable development intersect on their emphasis on efficient resource allocation, protecting product quality, and promoting technological advancement and innovation. Thus, competition authorities will have a considerable influence on the direction of sustainability-related business practices. Competition authorities can focus enforcement efforts against anticompetitive and consumer protection infringements that pose harms to these dimensions, such as cartels to slow down technical development in greenhouse gas emission reduction technology, market abuse that prevents more sustainable competitors from entering the market or competing on an equal footing, or mergers that could lead to reduced green innovation. In this regard, authorities will continue to develop their understanding on green product markets, green quality, and mergers' impact on pace and amount of innovation.

Through advocacy, competition authorities can help guide emerging green markets, such as GHG trading schemes, personal use solar panels and electric vehicles to be free, fair, and competitive so that consumers can enjoy best quality products at the lowest price, which is essential to speedy adoption of these products and the transition towards green economy. On the policy advocacy front, competition authorities will have to engage with other parts of the government to make sure that existing and future environmental regulations, trade, and investments policies regarding green industries are informed by competition principles to best facilitate innovation, technology transfer, and investment in green industry.

On the other hand, competition does not always lead to sustainable outcomes due to market failures on both the demand and supply sides. For example, the fear of being undercut by rivals, the "first-mover disadvantage" prevents firms from choosing materials or production methods that are more sustainable but also costlier. Information asymmetries and the underestimation of their environmental impacts are also preventing consumer trends from shifting fast enough. Thus, collaborations between competitors have been suggested as a potentially helpful tool in overcoming these market failures, but concerns over the incompatibility with competition law remain an obstacle.

The ongoing debate is centered around whether and how competition assessment frameworks can include environmental benefits and adjust the concept of consumer benefits to allow business agreements that could harm competition but would generate greater environmental benefits. Experiences and approaches taken by competition authorities such as the European Commission, the Netherlands Authority for Consumers and Markets (ACM), the Australian

Competition and Consumer Commission (ACCC), and the New Zealand Commerce Commission (NZCC) can provide concrete examples of the possible way forward.

In this light, competition authorities should increase engagement and cooperation with businesses to find opportunities and obstacles to environmental business practices, as well as building a network with environmental agencies to boost understanding on the link between competition and sustainable development. International cooperation among antitrust agencies will be highly helpful in possibly coordinating the approach and build an international level playing field to facilitate inter-economy initiatives and technology sharing.

Background

Introduction—Sustainable Competition?

Defined by the World Commission on Environment and Development's 1987 "Our Common Future" report, sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." It pushes for the advancement in technology and social organization so that all people, especially the underprivileged, can enjoy economic benefits while preserving the natural resources and environmental conditions for future generations. The UN 2030 Agenda for Sustainable Development is crafted in a way that both environmental and socio-economic dimensions of sustainable development are pursued in unity.

In APEC, "sustainable growth" first appeared in the 1993 APEC Economic Leaders' Declaration setting out the mission of protecting the quality of air, water, and green spaces and managing energy and renewable resources to ensure sustainable growth and provide a more secure future for the people. And most recently, recalling APEC Putrajaya Vision 2040, the APEC Economic Leaders endorsed the Bangkok Goals on the Bio-Circular-Green (BCG) Economy which outlines the roadmap to achieve sustainability and inclusion objectives and tasking all APEC committees and sub-fora to integrate this agenda into their strategies and work plans.

Before now, the onus has fallen upon governments to play the central role in advancing the sustainable development and environmental protection agenda through the implementation of environmental policies, taxation on harmful substances, and investment in green markets. It has become clear, however, that only the effort of the whole society will be sufficient. The Intergovernmental Panel on Climate Change urges policymakers to include the participation of communities, educational institutions, investors, and businesses as part of the vital holistic effort in the fight (IPCC, 2022). UNSDG 17 emphasizes global partnership in the achievement of the goals. UNSDG 12.6 also elevates the role of companies, especially large and transnational companies in adopting sustainable business practices to ensure responsible production and consumption. And as consumers' preference for more sustainable products grows and green technology continues to develop, companies will have economic incentives to act along

the sustainability line without being obliged to do so by regulations, especially after the COVID-19 pandemic (Kachaner, Nielsen, Portafaix, & Rodzko, 2020).

Unfettered competition, however, has been singled out as the driving factor for unsustainable business practices. The race to the bottom to offer consumers the lowest price at the maximum quantity led companies to disregard negative externalities, such as unrecyclable materials and greenhouse gas emissions. On the other hand, competition policy proports to champion innovation, efficient use of resources, and the welfare of consumers who are now more conscious of their consumption choices. This makes its goals align with that of sustainable development. Competition authorities thus can at least play a complementary role to environmental regulations by ensuring the market conditions conducive to innovation and disruptions by new, sustainable companies and moderating the market powers of incumbent firms who have gained their dominant positions through polluting technologies. Tools at the authorities' disposal, from enforcement, advocacy, to merger review, are all equipped to pursue this goal as will be demonstrated in the following section.

Given its close interaction with and influence over business conducts and the structure of the economy, competition policy can play a complementary role to environmental regulations by ensuring that anticompetitive conducts with spill-over effects of harming the environment are prohibited, the pace and amount of green innovation are maintained, and consumers can choose more suitable products at reasonable prices.

This background note is organized as follows. **The first section** provides examples and potential ways competition policy already can contribute to sustainable development goals through enforcement and advocacy activities. **The second section** navigates the debate around the integration of environmental concepts in competition assessments, sustainability-oriented horizontal business agreements, and different approaches and initiatives taken by competition authorities worldwide are presented. **The concluding section** summarizes the paper and highlights points of discussion for the Workshop.

Safeguarding Competition to Support Sustainable Development

1) Anti-cartel enforcement

Cartels harm economic efficiency by distorting prices, limiting consumers' choices, enacting artificial barriers to new entrants, or slowing/halting the pace of quality improvements and innovation. If a cartel occurs in markets on which the achievement of emission goals is depended on or where transition is needed, such as automotive, GHG trade, or agriculture, these competition welfare harms will spill-over to have negative environmental impacts as well. The European Commission, for example, having identified an environmental quality as a non-price dimension of competition, fined car manufacturers for agreeing to halt competing on developing GHG technology. In the subsequent press release, Commissioner Vestager commented that the conduct could "jeopardize" the European Green Deal (European Commission, 2021).

Box 1 AdBlue Cartel – European Commission

The European Commission found Daimler, BMW, and Volkswagen Group (Volkswagen, Audi, and Porsche) guilty of breaching the EU antitrust laws by agreeing to reduce competition in emission treatment technology innovation.

In 2007, the EU introduced minimum standards to reduce harmful emissions from vehicles. Between 2009-2014. The carmakers then were allowed to meet and discuss and cooperate on the development of the technology which eliminates nitrogen oxide from diesel passenger cars through the injection of a chemical named AdBlue.

However, the Commission found that they went beyond what was necessary for the joint development effort and agreed to standardize AdBlue tank size, ranges, and average AdBlue consumption rate, and exchange commercially sensitive information, effectively limiting the competition to innovate the system beyond the EU standards despite relevant technology being available.

The Commission found them in infringement of Article 101(1)(b) TFEU in the form of a limitation of technical development and imposed a fine of EUR875 million. It also noted that this is one of the product characteristics relevant for the customers.

It was the first time the Commission has taken action against a cartel inhibiting technical development. It then provided guidance on which aspect of the cooperation it deemed non-problematic, such as the standardization of the AdBlue filler neck, the discussion of quality standards for AdBlue or the joint development of an AdBlue dosing software platform.

European Commission Executive Vice-President Vestager remarked on the decision that “Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives.”

Source: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581

More examples of anticompetitive agreements with environmental damage could be agreements to reduce product differentiation on sustainable quality, standard-setting agreements among retailers that prevent greener products from being sold, and greenwashing cartels where firms collude to raise prices or engage in other exclusionary practices using sustainability claims as justifications without proportional contribution towards environmental goals.

Nonetheless, authorities should be aware of the deterrent effects rigorous enforcement can have on lawful collaborations. Guidelines like the ones issued by the Dutch, Greek, and UK competition authorities provide the private sector the legal certainty they need to help advance environmental protections.

Generally, agreements between competitors are unlikely to infringe on competition law if they do not appreciably affect price, choice, or quality or impose restrictions on existing or potential competitors.

Examples include:

- Non-binding and inclusive common objectives or targets;
- Standards, code of conduct, or labelling systems with open and voluntary participation, and fair, reasonable, non-discriminatory, and transparent criteria and processes that are not used to impose restrictions on non-participating parties or prevent them from creating an alternative system without sharing of sensitive and unnecessary information;
- Patent pools with clear and specific objectives and only essential patents are pooled;
- Joint R&D effort with only necessary resources and information shared;
- Agreements to improve the sustainable quality and phase out less sustainable ones without impact on price or choice;
- Jointly announcing collective demand for sustainable raw materials or waste management schemes needed to kickstart a new business, service, or industry;
- Agreements required by environmental laws and regulations.

Nonetheless, initially legal cooperation could over time generate anticompetitive effects, so competition authorities still have to remain vigilant. But to boost the business sector's participation in sustainability goals, supporting or at least not discouraging legitimate collaborations may be just as important as prosecuting harmful ones. The Dutch Competition Authority's assurance that they will not impose fines if undertakings follow the guidelines in good faith and are receptive to the Authority's amendment requests is another way to minimize the deterrent effect of competition law (The Netherlands ACM, 2021). It is important to note, however that this ACM's legal innovation does not intend to promote the relaxation of competition law but to provide companies with practical guidance of what can be done within the confines of the law. Alternatively, the European Commission's New Draft Guidelines for Horizontal Agreement introduced a "soft safe harbour," setting out criteria for undertakings to assess whether their prospective agreement would be lawful or not. Authorities may take the incubator role of procompetitive arrangements as well as the enforcer against harmful ones by increasing engagement with businesses, holding discussions, providing case-by-case consultations, disseminating the decisions where sustainability agreements are found to be in compliance with the law, etc.

2) Abuse of dominance

The link between market power and environmentally unfriendly practices has been often observed. Indeed, the top 100 companies are responsible for 71% of global greenhouse gas emissions (CDP, 2017). But beyond this fact, dominant firms that have risen to their position through portfolio and investment in polluting technologies thus have incentives to exercise their power to maintain their advantageous position and resist disruptive changes. This can manifest in enacting barriers against new entrants, imposing unfair conditions which force operators along their value chains to engage in unsustainable practices. The objective for

policymakers and regulators who wish to achieve systematic, structural change and create a more inclusive, innovative, efficient, and sustainable economy will be to open the markets for new challengers and put competitive pressures on comfortable companies.

In a case against Google, the Italian Competition Authority took into account the effects its unilateral conduct could have had on the development of the electric mobility market, which is considered instrumental to reaching Italy's emission goals, in setting the sanction and the cease-and-desist order.

Box 2 Electric Vehicle Charging Application – The Italian Competition Authority

The Italian Competition Authority (AGCM) fined Google EUR100 million for its refusal to make its Android Auto system interoperable with JuicePass, a rival application from Enel X that provides services related to electric vehicle charging and ordered Google to provide programming tools for making applications compatible with the Android Auto system to Enel X and all other developers.

Android Auto is an application by Google that connects an android device with a compatible car and allows users to interact with their Android applications safely while driving. JuicePass provides electric vehicle charging services, such as charging session management, charging station reservation, mapping and navigation for charging stations. Google's Google Map only offered a charging station location service.

AGCM found Google in an infringement of Article 102 TFEU by favoring its own Google Map. In the final decision, the Authority noted that in addition to reducing consumer choice, differentiation and quality of service, the conduct could have negatively impacted the adoption rate of electric vehicles in the crucial initial phase of its launch and thus delay the transition toward sustainable mobility industry.

Source: <https://en.agcm.it/en/media/press-releases/2021/5/A529>

The AGCM also took several actions against Italy's national recycling consortia for abusing its dominant position and institutional powers to drive out competitors.

Box 3 Competition Interventions in the Waste Management Market – The Italian Competition Authority

In 1997, the Italian government created an economy-wide packaging waste management and recycling system and established six consortia responsible for collecting and recycling each material e.g., paper, plastic, etc., and the National Packaging Consortium to coordinate between them. The government contended that free market would not be able to launch this industry due to supply-side market failures, and thus participation and flat rate fees are

mandatory. However, several interventions by the AGCM suggested that the waste management market is not functioning as efficiently as possible.

For example, in 2009, the AGCM fined COBAT, the consortium for collecting and recycling used lead batteries, and seven other lead recycling companies EUR13 million for making anticompetitive agreements to prevent attempts to develop recycling activities outside COBAT.

In 2020, the Authority fined COREPLA, the national plastic waste management consortium, EUR27 million for abusing its dominance and status as the official accreditor to prevent its rival CORIPET from competing on a level-playing field. Specifically, COREPLA refused to share the household plastic packaging waste with CORIPET. Its agreement with the National Association of Italian municipalities also included exclusivity clauses. It also prevented COREPLA from achieving full, permanent operation rights within the statutory 2-year period. The AGCM viewed that COREPLA tried to drive its only competitor out of the market and thus was in infringement of Article 102 TFEU. Additionally, the conduct prevented the implementation of more innovative waste management system that would have increased waste collection and recycling in geographical areas with lower environmental performance.

Moreover, the AGCM conducted two in-depth market studies in 2008 and 2016 and found that the monopolistic model and the mandatory flat fee did not reflect the economic and environmental costs of recycling. For example, the fee paid by manufacturers who used plastic packaging was set equally regardless of different plastic types' varying recyclability, resulting in the softening of competition to lower the cost by using more easily recycled plastics and benefiting producers of less recyclable packaging.

The enforcement experience and findings from the market studies informed the AGCM's advocacy for a shift from the consortium-based system to a compliance-based system. While recognizing that the consortia were instrumental to the creation of the waste management market, AGCM noted that opening up competition for alternative schemes would allow for better reflection of the true cost of recycling and drive innovation in the sector.

Source: [https://one.oecd.org/document/DAF/COMP/WD\(2021\)49/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)49/en/pdf)

Moreover, some dominant firms have the power shape consumer choices and influence business decisions of their partners along the supply chains. Large supermarkets, for example, have the power to set the standards of what can be sold in their stores, which products to promote, to shelve arrangements. These 'Gatekeeper' firms must also be regulated and moderated in order to open the markets, ensure inclusion, and return the power to make consumption choices to the consumers (Roberts, Nair, & Andreoni, 2022).

3) Mergers and Acquisitions

With regards to sustainability, mergers can increase efficiency by eliminating redundancies and streamlining production and logistical processes. Mergers between freight companies, for example, can reduce the number of trucks on the road and overlapping routes. Nonetheless, competition between companies in the market is the main driver for innovation and quality improvements. So, merger reviews should go beyond the effect of prices and give equal, if not more attention to the possibility and incentive of merging parties to reduce their development and innovation efforts or engage in exclusionary or environmentally harmful practices with their increased market power.

Effects on (Green) Quality

A merger reduces competitive constraints and pressure exercised by rivals. This could lead to higher prices or lower quality. In the merger case between Pannar and Pioneer, the South African Competition Tribunal blocked the merger between the local and the American seed companies, partly basing its decision on concerns raised by an environmental NGO on the potential effect on seed prices, consumers' preference, and seed diversity, which is considered crucial to sustainable agriculture, biodiversity, and food security in South Africa.

Box 4 Pannar/Pioneer Merger - South African Competition Commission and Tribunal

In 2010, the South African Competition Commission (Commission) prohibited a merger between Pannar Seeds, South Africa's largest independent seed company, and Pioneer Hi-Bred International, a US-based subsidiary of DuPont on the ground of substantial lessening of competition in the maize seed market. And after the case was referred to the Competition Tribunal (Tribunal), it also blocked the merger after hearing the Commission, the merging parties, and the African Centre for Biodiversity (ACB).

South Africa's Competition Act 89 of 1998 stipulates that public interest be factored into merger reviews and conduct assessments. In case of merger reviews, "public interests" are defined as the impacts on a) a particular industrial sector or region; b) employment; c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and d) the ability of national industries to compete in international markets.

In 2011, the Tribunal allowed the ACB and Biowatch, South Africa-based environmental NGOs, to participate in the proceedings and provide their views on the merger's potential effects on pricing and the availability of alternative products; the effect on smallholder farmers, small-scale commercial black farmers, and consumer choice; the resulting barriers to entry; and the public interest effect of the proposed merger, particularly on Pannar's maize seed inventory and development opportunities.

ACB raised concerns over the loss of product differentiation in the maize seed market and long-term price effects. The importance of seed diversity to sustainable agriculture and food

security was also highlighted. As a result, the Tribunal also prohibited the merger. Later, however, a higher court cleared the merger with conditions including the maintenance of Pannar's current catalogue, investments in seed breeding R&D in South Africa, licensing of plant materials to Syngenta Crop Protection and Dow Agro Sciences--international competitors of DuPont, and South African public institutions for crossbreeding to create more seed variants.

Source: [https://one.oecd.org/document/DAF/COMP/WD\(2021\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)53/en/pdf)

Effects on Buyer Power

In the Aurubis/Metallo merger, the European Commission investigated whether an increased purchasing power from the merger between Europe's largest copper producer and the world's top copper recycler would enable the merged entity to lower the price for recycled copper scraps. One concern was that it would reduce the incentives to collect and pre-process copper scraps and invest in recycling technology. The European Commission Executive Vice-President Vestager commented that "A well-functioning circular economy in copper is important to ensure a sustainable usage of resources in the context of the European Green Deal." The merger was later cleared due to the sufficient availability of alternative scrap buyers (European Commission, 2020).

Effects on Innovation

Merging firms will have incentives to slow down or discontinue overlapping research and development efforts between the parties. Alternatively, a company might abandon their sustainable practices or technology and adopt that of their merging counterparts that are cheaper but more polluting. Assessing these possibilities and applying appropriate remedies is another area competition authorities can contribute to sustainable development.

In the Dow/DuPont Merger case, the European Commission imposed a divestiture remedy to preserve competition on pesticide research and development. The Commission looked into both overlapping R&D efforts and the 'innovation space' which would be greatly diminished due to the industry's high entry barrier before ordering Dupont to divest major parts of its research resources.

Box 5 Dow/DuPont Merger – The European Commission

In 2017, the European Commission found that the merger between Dow and DuPont, two American chemical giants would lead to a significant reduction of competition in pesticide innovation, whose continued advancement is integral to improving human health and environment protection.

After the investigation, the Commission found evidence that pointed to the merged entity's intention to cut back on overlapping R&D pipelines. The Commission also considered the fact that there were only five players globally who engaged in R&D efforts at that level of

comprehensiveness and the industry's high barriers to entry would result in long term loss of active players in this innovation area.

Thus, the Commission approved the merger with a divestiture remedy of major parts of DuPont's global pesticide business, including its global R&D organization.

Source: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_772

Another type of merger with potential damage green innovation is a killer acquisition, a type of nascent acquisition where the acquired party's products or R&D efforts are abandoned afterwards. It is possible that incumbent firms might see that this strategy will be more cost effective than engaging in R&D competition to develop new products.

However, the challenges involved are twofold. First, establishing counterfactual such as acquirer's intentions, the acquiree's potential to become an effective competitor, the product/technology's contribution towards environmental goals, involves many uncertainties and needs a longer assessment time frame than traditionally applied by authorities. Secondly, companies could be acquired at so early of a stage that the purchase does not meet the merger notification threshold in the first place.

The OECD (2020a) suggests that uncertainties can be mitigated by an optimized internal documents collection and analysis strategy. For example, documented communication between executives, board minutes, risks assessments reports, presentations to investors on R&D ambitions, and whether the financial plan accounts for the development of the product/technology could help reveal the acquirer's intention with the target company. Authorities could request information on the parties' innovation capabilities and assets, R&D budget and headcount, and patent portfolios. Comments from other potential acquirers and neutral parties can also help determine this synergy. Consumer surveys and outside analyst comments can also help evaluate the target company's protentional competitiveness.

And in the attempt to address the second hurdle, the European Commission has released a statement that EU domestic competition agencies can refer M&A cases that could be harmful but do not meet their notification threshold to the Commission to investigate.

However, not all nascent acquisitions are killer acquisitions. And nascent acquisitions themselves are an important cog in the innovation process. Incumbent firms could be motivated by the desire to scale up acquiree's greener technology or integrate it into their product line or manufacturing process.

Furthermore, in light of the European Commission's tougher stance against killer acquisitions, some commenters expressed a concern that stricter enforcement in this area will have the opposite effect of deterring investors and inventors who develop their technology in hopes of being bought out by larger firms to make quick profits by complicating their exit strategy (Lombardi, 2021).

Through the protection of quality, choice, innovation, and the moderation of firms' power, competition authorities can make significant contributions to the climate change mitigation effort.

Nevertheless, it is clear that these competition cases concern competition first and the environment second. The next step for competition enforcers should be sending a clear message that these types of cases will be prioritized in their enforcement actions. Cooperation between competition authorities and environmental regulators can be the next step to coordinate their litigation actions against firms abusing their dominance or engaging in cartels with the spillover effect of harming the environment.

At the APEC level, as the prime forum for capacity building and experience sharing, APEC and CPLG can undertake future activities to develop members' capacity in assessing the dynamic-effect of competition (innovation, quality, firms' behaviors) for competition authorities who may have only experience in evaluating short-term price effects. Further dialogue between competition agencies, business sectors, environmental experts, and economic planning organizations can be useful in educating all relevant stakeholders' understanding of this important subject.

4) Advocacy

Competition advocacy is a powerful tool to create an economic environment that naturally deters anticompetitive practices and allows for inclusive participation in the market. Advocacy activities can be directed towards consumers, governmental bodies, and businesses.

As climate change and green growth promotion climb to the top of political agenda, we can expect that more regulations, subsidies, government incentives, and tax policies will be centered around 'greening' the economy. These initiatives, while welcomed, must be assessed their impact on the functioning of markets by imposing constraints on businesses and encouraging or prohibiting certain conducts or materials.

Competition authorities' role will be working closely with legislators and actively providing opinions on upcoming regulations to ensure that any benefits or incentives are unbiased and proportional, applied to all players evenly and that any restriction to competition is directly linked to intended outcomes. Overly specific and strict product or manufacturing requirements can result in lower innovation effort. And superfluously burdensome reporting requirements will, for example, leave only large players in the markets who can bear these costs.

Advocacy will also have a more significant role in shaping existing and emerging green markets, such as for personal use solar panels and electric cars, to encourage competition on price and quality which is crucial to speedy mass adoption of these products and the shift away from polluting products. Especially, in GHG emission trading markets where the optimal price and market function is directly linked to the achievement of climate change goals, identifying barriers to competition and issuing appropriate recommendations will be one of competition authorities' critical contributions. And in economies where these markets are non-existent or

not mature enough, competition authorities can advocate against protectionism in green sectors that would prevent crucial technology transfer and dissemination.

For example, the Mexican Federal Economic Competition Commission (COFECE)'s market study into the Clean Energy Certificate (CEL) market allowed them to highlight problems that were impeding private investment in clean energy generating plants that would result in Mexico missing its clean energy target.

Box 6 Clean Energy Certificate Market Study and Competition Advocacy – COFECE

In 2013, Mexico embarked on an energy reform by amending the constitution to allow private participation in generation and commercialization of electricity. The reform also aimed to promote energy generation from clean sources. For this purpose, the government introduced the Clean Energy Certificates (CEL), which are granted to companies generating electricity from clean sources and can be sold to suppliers, consumers, and obliged parties to meet their consumption requirement. During this liberalization process, Mexico's Federal Economic Competition Commission (COFECE) advocated for increased consumer choice, challenged provisions in secondary regulation that could hamper effective competition, and carried out a market study into the CEL market to assess the competition conditions.

The market study revealed four sets of obstacles to the efficient functioning of the CEL market that had been preventing Mexico from meeting its clean energy target.

Demand side problem: The number of players obliged to obtain CEL remained low because users did not migrate to other providers due to complicated procedures. Uncertainties from lack of definitive tariff calculation methodology disincentivized new entrants. Thus, the demand was concentrated within CFE SSB, Mexico's state enterprise that still offered 81% of the Mexico's consumption after the liberalization.

Supply-side problem: The private sector remained reluctant to invest in the sector for a number of reasons. For example, in 2019, the CEL eligibility requirement was changed to allow CFE's plants that had been operating before the introduction of CEL to obtain the certificates, increasing the supply and thus reducing the price of CEL. Another problem was the delays in generation permit granting. Regulatory uncertainty was another factor discouraging investments. In 2020, The Secretariat of Energy published a new policy that aimed at preventing clean energy's equal access to the central power grid citing its unreliability. Although the policy was voided after the Supreme Court upheld COFECE's challenge, it had already sent adverse signals to private investors.

Commercialization problem: At the moment, only one of three possible CEL commercialization channels is in operation. The three types of transactions allowed are 1) short-term market which never came into force, 2) long-term auctions which were cancelled

by the Secretariat of Energy in 2019, and 3) private bilateral agreement which remained as the only way to sell CELs.

Lack of monitoring: COFECE's pointed out that the Secretariat of Energy has not published a public report since April 2020 on the total and unitary cost of CEL by technology, market tendencies, and clean energy penetration and their impact on costs and tariffs, making it difficult to estimate the member of CEL in the market. Additionally, The Energy Regulatory Commission has never imposed sanctions for non-compliance with the CEL requirements, damaging the credibility of CEL and discouraging purchases.

Non-compliance with Mexico's energy goals: COFECE's estimated that due to the slowdown in clean energy investment, Mexico could only achieve at best 33.6% clean energy generation in 2024 from the goal of 35%.

The study made several recommendations to correct the above issues aimed at increasing the value of CEL and in turn, the incentives for private players to invest in clean electricity.

In September 2021, the Mexican government proposed a bill that would reverse the 2013 liberalization reform, as well as cancelling CEL. Following the introduction, COFECE filed a complaint to the Supreme Court which was rejected. COFECE also petitioned Congress against the proposed counter reform, alleging that it would lead to increased electricity prices, eliminate regulatory oversight, and as pointed out by the study, prevent Mexico from reaching its clean energy goals. Congress later rejected the bill in April 2022.

Source: [https://one.oecd.org/document/DAF/COMP/WD\(2021\)77/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)77/en/pdf)

A Place for Sustainability-Oriented Horizontal Agreements

Environmental Effects in Competitive Assessments

While free markets and competition have generated tremendous economic benefits and improved the quality of life for billions around the world, certain market failures have resulted in less than environmentally friendly outcomes (Dolmans, 2020; OECD, 2021).

The social and environmental costs associated with production and distribution such as, GHG emission mitigation or collection and recycling, are almost always not represented in the final selling price. This omission of negative externalities contributed to the race to the bottom where companies compete to offer the lowest price and disregard the long-term impacts of their business models. Another supply-side market failure is the fear of the “first-mover disadvantage,” where companies hesitate to adopt practices or introduce products that would lower their environmental impacts but are costlier, leaving them vulnerable to being undercut by less environmentally conscious rivals.

On the demand side, information asymmetries can distort consumer's ability to make optimal environmental choices. The complexity of modern-day supply chains makes it impossible for the general public to be fully aware of the environmental impacts of their consumption. Various types of plastics, each with different degrees of recyclability for example, can overwhelm consumers and make them resort to simpler matrix such as price. Secondly, free-riders are consumers who expect others to make up for their unsustainable choices. Lastly, some can also engage in 'hyperbolic discounting' when they underestimate their long-term environmental impacts.

While environmental regulations, appropriate incentives, and public awareness campaigns are the direct and effective tools in correcting these market failures. Competition policy can lay the ground rules and create an environment in which firms are pressured by market forces to make sustainable choices. And considering that maintaining efficiency in markets necessarily involves recognizing and remedying market failures, environmental impacts of business conducts can and should be accounted in competition authorities' activities.

The proponents of this view contend that competition promotion is not a goal in itself, but a means to promote other public interests which can be more comprehensive than the narrow approach of maximizing output and minimizing costs in the short term (Holmes, 2020). For example, South Africa's competition law stipulates the uplifting businesses belonging to historically disadvantaged groups as one of the core goals of competition promotion. And sustainability dimension could arguably already fit in the assessment of innovation, product quality, and efficiency.

On the other hand, democratic legitimacy is one major concern precluding such a significant paradigm shift that could contradict case law precedents and create unnecessary power overlap between antitrust enforcers and environmental regulators. Views expressed during the OECD 2010 Policy Roundtable were that non-economic benefits are solely related to environmental policies (OECD Secretariat, 2010). It is argued that this moral judgement and shift in public policy goals should be left to the elected politicians (OECD, 2020). The lack of expertise on competition authorities' part also make them underequipped to deal with such considerations and vulnerable to misdirection by companies. Moreover, a note submitted by Australia and New Zealand to the 134th OECD Competition Committee Meeting said that that environmental activism from competition authorities can lead to patchy application of sustainability initiatives (OECD, Sustainability and Competition – Note by Australia and New Zealand, 2020).

The feasibility and the extent to which a competition authority can integrate purely environmental objectives into its assessment differ depending on the legal framework in which each competition law exists in. For example, European legal experts often interpret Article 11 TFEU, which states that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development," to mean that EU's competition policy (TFEU 101-103) is legally obliged to consider and integrate sustainable development into their proceedings (Dolmans, 2020; Holmes, 2020).

In this light, competition authorities will play a central role in engaging with policymakers and leading the discussion on whether competition policy and enforcement need to do more to contribute to each economy's overarching development goals and international environmental obligations. Through engagement with stakeholders, businesses, and the government, competition authorities will help examine whether a new approach to competition is necessary. For instance, in 2021 Austrian parliament passed an amendment to the Austrian Cartel Act to explicitly include sustainability in the law as a part of cartel exemption criteria.

Navigating the Gray Area

As mentioned, there are several types of business agreements and cooperation that are unlikely to raise competition concerns. However, some commentators doubt their effectiveness to create substantial or systematic changes. Self-stated goals or labelling systems may result in another meaningless marketing strategy used to raise prices or mislead consumers. Some argue that truly effective collective initiatives are those that are mutually binding, monitored, and compliance-enforced to effectively develop new markets or phase out harmful substances. Businesses have also expressed their willingness to take initiatives that go beyond their legal obligations but are reluctant due to antitrust fears.

At this moment, it is the European competition authorities that are leading the debate in this area. The European Commission's statement and the Netherlands Authority for Consumers & Markets' guidelines for sustainability initiatives explore how environmental benefits can be weighed against competitive harms. The wealth of experience of the ACCC and NZCC in applying the "public benefit test" can also give practical suggestions on how competition assessment can evolve to include a wider diversity of public benefit objectives. Associated with this weighing exercise are five considerations: the types of benefits, quantification, the assessment timeframe, relevant consumers, and the necessity of such initiatives.

a. Types of Benefits

Many sustainability benefits can be readily counted as advancement in economic efficiency and consumer welfare. In the narrow sense, less polluting or energy intensive products and manufacturing processes will be objectively more technically advanced and efficient than the alternatives. And if more choices of high quality of green products are presented to consumers, it is an increase in their welfare as well.

Taking a wider approach to consumer welfare, the European Commission's 2022 revised draft horizontal guidelines accepts three types of benefits. (1) Individual use value—benefits from direct product consumption when more sustainable products are also superior in other parameters, such as being healthier or more durable; (2) Individual non-use value—benefits obtained from consumers' appreciation of the sustainability quality; and (3) collective benefits—which accrue to consumers irrespective of their individual appreciation of the sustainability quality, such as cleaner air fewer natural disasters.

In Australia and New Zealand competition law's 'public benefit test,' the broadest definitions of 'public benefits' and 'public detriments' are applied, allowing environmental considerations along with other potential consequences affecting the society to be weighed against competition effects.

In the Battery Stewardship Scheme case, the Australian Competition and Consumer Commission authorized an agreement among battery importers, retailers, and recyclers to introduce a levy on battery and commit to deal with only other parties of the agreement. The public benefits considered were reduced chemical pollution, public awareness, and increased incentives to invest in battery recycling. The potential harm encompasses both competition concerns such as increased price, dealing restrictions, non-member exclusions, as well as safety risks.

Box 7 Battery Stewardship Scheme - Australian Competition and Consumer Commission (ACCC)

In September 2020, ACCC granted the authorization for the Battery Stewardship Scheme which was set up to encourage battery recycling throughout Australia by introducing a levy of AUD0.04 per 24g (the weight of an AA battery) which would be passed onto consumers. The rebates would be paid to recyclers to offset the cost of collecting, sorting, and processing expired batteries. Participation is voluntary but members agreed to only deal with other members along the supply chains with limited exceptions.

In determining if the scheme should be exempted from the application of the competition law, the ACCC weighed potential public benefits against possible public detriment.

The first public benefit identified was the increased number of batteries getting recycled which would reduce toxic chemical leakage from disposing batteries in landfills. At the time, there was a lack of commercial incentives to promote appropriate batteries disposal because waste management responsibility fell to local governments. The levy and rebate system would help internalize the cost of responsible disposal. Increased public awareness of proper battery disposal and reuse was considered another benefit. Lastly, the rebate system will provide the industry with financial incentives and certainty to invest in research and development into the recycling sector in addition to government funding.

The possible public detriments included harms to competition, increased price, and safety risks. The large market share of parties and the trading restrictions against non-members would likely prevent them from fairly competing with members and making it harder to develop alternative schemes. However, this harm could be largely mitigated by exceptions for existing contracts, members with geographic limitations, and free membership. The exclusive dealing obligation was considered necessary to prevent the freeriding effect. The agreement also included provisions for recognizing alternative programs to facilitate the development of other recycling schemes.

The uniformity of price increase meant that it was unlikely to affect competition among members. The estimated price increase of up to 6% of the final selling price represented a small proportion of the final price. The levy was also adjustable as the sector developed and the recycling cost went down. The last potential public detriment was safety risks arising from consumers holding on to expired batteries that could cause fire and choking hazards, especially in children.

After consideration, the ACCC found that the Scheme would likely result in net public benefits and thus granted the authorization until 2025. And to lessen the safety risks, the Commission ordered the Scheme to develop a safety strategy within 12 months. It also remarked that the Scheme must demonstrate strong take-up and effective administration and risk management in applying for the authorization extension.

Source: [https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination %20-%202004.09.20%20-%20PR%20-%20AA1000476%20-%20BSC_0.pdf](https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%202004.09.20%20-%20PR%20-%20AA1000476%20-%20BSC_0.pdf)

The ACM's draft guidelines on sustainability agreements also take into account Dutch government's own policies and goals as well as international obligations in determining the relevance of a proposed initiative's goal.

b. Quantification of Benefits

Benefits associated with environmental conservation can be both qualitative and quantitative. While competition authorities can and have taken qualitative effects such as choice and innovation into their assessment, quantification can offer more lucidity in the weighing exercise between traditional competition considerations such as costs and prices. The European Commission and the ACM's guidelines accept qualitative benefits that are sufficiently described and clearly demonstrated to be enough to offset the competitive restrictions. The ACCC's authorization process involves rigorous public consultations to help the Commission contextualize various potential effects, competition and environmental.

Nevertheless, quantification is a useful tool in the weighing exercise especially given the competition agencies' unfamiliarity with environmental effects. Multiple tools provided by the field of environmental economics are readily available to be integrated into the assessment framework. The OECD, for example, has published environmental social cost—benefit analysis (SCBA) guidelines specifically for environmental projects.

Willingness to pay analysis is a useful tool to assess the non-use value benefits. Various methods can be employed to find consumers' willingness to pay (Claici & Lutz, 2021). The demand for related green goods can be used to estimate how much consumer will spend on completely new products. Defensive expenditure—implies that the cost people pay to avoid or correct damage caused by climate change are related to the price they are also prepared to pay

to prevent it. For example, the higher electricity bill from using air conditioners implies that people are willing to pay that much additional cost to keep the climate cool.

Directly obtaining the willingness to pay from consumers can also be done through surveys, choice experiments, or interviews. However, issues causing above demand-side market failures can also skew the results. Unfamiliarity with the environmental effects, behavioral biases, the failure to grasp their individual impact, and influences from survey design can all lead to an underestimation of the willingness to pay. Nadine Watson (2021) in the submission to the OECD 136th meeting of the Competition Committee, proposed the discrete choice method of surveying – a stated preference survey that asks the respondents to choose between a set of choices with different attributes from price, quality, and environmental impacts. It is noted that the researchers must carefully craft the surveys and make sure that the respondents fully comprehend the objectives of the survey, through techniques such as using simple language and concepts, regularly ensuring and assessing the respondents' understanding, the use of visual aids, etc.

The “Chicken of Tomorrow” case is often brought up as a demonstration of how competition law can be an obstacle to sustainability initiatives. In 2015, the ACM blocked an agreement between chicken producers, traders, and retailers to raise sustainability and animal welfare requirements in the poultry meat market after finding that the public's willingness to pay for better chicken welfare is not enough to offset the expected price increase. The ACM later ran a study in 2020, the year when Chicken of Tomorrow's targets are expected to be reached and found that the chicken welfare standards were better than the agreement's initial goals. However, it cannot be concluded whether the improvements would have been realized sooner or to a better extent under the agreement (The Netherlands ACM, 2020). The time issue is especially relevant as climate change does not wait for consumer trends to catch up.

To establish the true economic benefit where the willingness to pay may be lacking, Theon Van Duk (2021) suggested longstanding environmental economics' shadow prices—the price of unmarketed goods that will help translate values generated from the avoidance of monetary social welfare loss caused by environmental deterioration. The shadow prices can be calculated using the ‘damage cost method’ or the ‘abatement cost method.’ The first method involves identifying how much monetary damage an additional unit of emission will cause to public health, biodiversity, damage to building, etc. The sum of which is then multiplied by the amount of reduced emission to get the final value. The abatement cost method looks to governmental policies with the same goal as the conduct being examined, and the costs of the implementation of the most expensive policy thus represent the highest the society is prepared to pay.

c. Time Frame of Analysis

Given that the positive impacts of sustainability initiatives will arise later than the short-term harms, the length of the timeframe will have a considerable impact on the final decisions. Thus, adopting a longer timeframe would give a more complete picture of the agreement's purposes

and impacts. OECD (2021a) also suggests that the current 2–3-year timeframe be applied after potential constraint is expected to have occurred and reached maturity. Under the ACCC’s approach, each authorization is valid for 5 years, after which the undertakings can reapply for extensions when the Commission will have the full information on the effectiveness of the initiative. However, the longer the timeframe, the more uncertainties are involved. One way to combat this is to apply “social discount rates” to stated impacts. The lower the discount rate, the more weight is put on the latter time to adequately reflect long-term sustainability effects (Claici & Lutz, 2021). In this light, experience sharing and consultation with environmental and competition experts are critical to developing best practices in tailoring different time frames to different initiatives’ stated goals.

d. Relevant Consumers

Under EU law, for otherwise illegal agreements to be granted exemption from penalties, one criterion is that harmed consumers are allowed a fair share of the resulting benefit. However, so long as environmental effects are concerned, resulting benefits can accrue to those outside the affected market. The question is how these ‘out-of-market’ efficiencies will be considered. Two possible approaches have been suggested, distinguished by the relationship between the consumers harmed by the agreement and those benefiting from it and how much of the benefit the former group is entitled to.

The first, narrower approach is to allow out-of-market efficiencies if those in said markets are completely or substantially the same as the harmed market. This interpretation could also include benefits to society since harmed consumers are also part of the larger society. It can involve prescribing a portion of the total societal benefits to account only for the number of harmed consumers. This approach ensures that competition authorities do not make decisions that benefit some group of consumers at the expense of the others. This is the approach taken by the European Commission’s 2022 draft revised horizontal guidelines. The guidelines consider affected consumers to have received a fair share of benefits if the benefits are at least equal to the harms and accepts the accumulative of all three types of benefit previously mentioned.

An alternative perspective is to allow benefits to society to compensate for the harmed consumers, even though the allocated portion of the benefits does not fully cancel out the harms. The ACM’s draft guidelines, for example, takes this approach and rationalizes that these consumers’ demand for unsustainable products imposes negative externalities on others in the society that have to bear that cost but are not allowed the benefits from the consumption. This approach allows for effective internalization of negative externalities. The ‘polluter pays’ principle justifies not completely compensating these consumers because it would lead to fairer distribution of economic burdens and responsibilities.

ACM’s Draft Guidelines also suggest that it is possible to forgo full compensation if the agreement (1) aims to prevent obvious environmental damage and (2) contribute to domestic

and international policy objectives. If these conditions are not met, full compensation is still required.

In any case, the consensus seems to be that for any out-of-market efficiency to be counted, the affected consumers must be able to get at least some value from it as well, whether through the generated benefits or their willingness to pay. Therefore, beneficiaries outside the relevant market who neither completely or substantially overlap with harmed consumers nor part of the society to which the harmed consumers also belong would not be included in this balancing exercise. The definition of society, in the European Commission's revised guidelines also seem to be limited by jurisdiction boundary and thus excludes those living outside the European Union from assessments. In this regard, the transnational nature of climate change and modern value chains may require competition policies that are globally oriented and are internationally harmonious.

e. Effects on Competition

Despite the inclusion of sustainability elements, the main objective of competition policy is still safeguarding competition. Thus, undertakings are required to prove that restrictions on competition are necessary and at the minimum level possible to achieve the stated goals.

On top of providing sufficient evidence that the conducts or agreements' outcomes would bring a net value to society and/or consumers, businesses must be able to demonstrate that, compared to their initiatives, existing government regulations and programs, consumer trends, market conditions, projected technological developments, etc. would not be enough to realize those outcomes or do so in a considerably slower or less efficient manner. Moreover, they must be able to explain how each restriction directly contributes to the goals and that there are no less restrictive measures which would be able to overcome market failures and produce the desired results.

Demonstrating the application of above exemption criteria is the Conseil Européen de la Construction d'Appareils Domestiques (CECED) case where the European Commission granted an exemption from competition law to washing machine manufacturers and importers to phase out the import and production of less energy-efficient machines. The case is also given as an example in the 2022 Draft Horizontal Guidelines.

Box 8 CECED Case – European Commission

In 1999, the European Commission (EC) decided that the agreement among The Conseil Européen de la Construction d'Appareils Domestiques (CECED) members to phase out less energy efficient washing machines satisfied the cartel exemption criteria and granted the authorization until 2001.

Washing machines sold in the EEA were categorized according to their energy efficiency from A to G grades, with A being the most efficient. The Agreement aimed to greatly limit

the production and import of machines with ratings lower than C, improve the availability of information on environmentally friendly way to use washing machines, and increase dissemination of energy-saving technologies.

The agreement would have constituted a cartel because CECED members made up around 90% of manufacturers and sellers in the European washing machine market and would reduce the choice for consumers and raise the average selling price. Moreover, because each manufacturer focused on different efficiency ranges, the endeavor would affect each market player unevenly. Imposing a standard on energy efficiency, which was an important product characteristic, would reduce competition in this parameter.

To qualify for cartel exemption in the Article 53(3) of the European Economic Area Agreement, the CECED agreement would have to satisfy three culminative criteria: contribution to economic or technical progress and conferment of benefits on the consumer, indispensability of restrictions, and no elimination of competition.

Contribution to economic or technical progress

The EC considered that the agreement's goal of improving washing machines' energy efficiency by 20% in four years would contribute to technical progress in this technology because a machine which, other factors remaining the same, consume less electricity would be objectively more efficient. The improvement rate in this regard projected that the goal would have taken eight years instead of four.

Conferment of benefits on the consumer

It was estimated that savings from electricity bills would allow consumers to recoup the cost of more expensive machines within nine to 40 months. Moreover, as the agreement would not restrict price competition, there remained possibilities that companies would continue to compete to offer energy efficient machines at lower prices. Reduced electricity consumption would also indirectly lead to reduced pollution estimated at 3.5 tons of CO₂, 17,000 tons of SO₂, and 6,000 tons of N₂O. Using the estimated savings from avoided marginal damage from pollution specified by Article 174 of the EC treaty, the economic benefit to society would be more than seven times greater than anticipated price increase.

Indispensability of restrictions

The EC assessed that less restrictive agreement than compulsory industry-wide target would allow importers with bargaining powers to focus their orders on machines below category C to undercut rivals.

No elimination of competition

The agreement only concerned the energy efficiency of washing machines, meaning that firms were still free to compete on price, brand image, and technical performance which major distributors saw as having more influence on consumers' purchasing decision. The technology needed to produce machines under A-C categories was universally available. And third parties would remain free to produce and import machines below category C.

Therefore, the EC concluded that the CECED agreement fulfilled the exemption criteria and granted exemption until 2001.

Source: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000D0475>

Although EU competition law is highly regarded, each competition enforcer will continue to develop its own criteria and approaches according to its own legal framework. In this light, APEC can facilitate discussions and experience sharing between economies to increase the understanding and develop a set of considerations that would produce the most beneficial results both to competition and the environment within each economy's own unique context aided and guided by international best practices. A consistent approach in competition law application will also facilitate cooperation and initiatives on the international or global scale. The most productive course of action will be increasing positive engagement with other environmental experts and regulators, private sectors, and legislators to identify the obstacles and potential avenues so that competition authorities can be a part of the global effort to preserve our environment for future generations.

Background Conclusion and Points of Discussion

There is a growing call for more concrete and decisive action on climate change from all sides. Although competition law is neither the best nor the most direct tool for environmental protection or climate change mitigation, its championing of market-led structural change and innovation positions it as an indispensable part of the holistic effort to deliver sustainable development goals.

Experience shows that competition authorities can contribute to the advancement of green innovation and technology by promoting efficient functioning in the markets as well as allowing new players to disrupt the status quo. Competition authorities had and were able to quickly adapt and rise to the challenges posed by the pandemic and the rapid rise of the digital economy. Likewise, as markets evolve and emerge as a consequence of rising awareness on the impact of climate change and the criticality of the fight against it, competition policy will continue to evolve and become more proactive in expediting the transition towards green economy.

On this new frontier, dialogue among competition authorities, academic experts, and even the private sector will be critical in expediting the learning curve and encouraging an internationally aligned approaches to the interpretation and implementation of competition law.

In this light, conversations and debates will help navigate and clarify questions such as the relationship between competition and the environment and how authorities can guide competition in markets to produce environmentally friendly outcomes, which tools already exist, and which ones need to be developed. At the APEC level, the CPLG can explore mutual interests in capacity building for members to tackle new issues, encourage experience sharing

and identify key green regional markets that members can collaborate to guide development and ensure long-term benefits and competition.

Event Summary: Competition Policy and Sustainable Development

Opening Remarks

Amb. Krisda Piampongsant, Convenor, Competition Policy and Law Group

Amb. Piampongsant delivered welcoming remarks to Workshop participants. He thanked Thailand for undertaking the project and for inviting CPLG members and stakeholders, including consumer protection agencies, sector regulators, the judiciary, and private sector participants.

He emphasized that climate change necessitates a paradigm shift on how we conceptualize and operate our economy and regulations. He highlighted that the mission of APEC, including the Putrajaya Vision 2040 and the Bangkok Goals on Bio-Circular-Green (BCG) Economy to be proposed by Thailand during the Leaders' Meeting would lay the foundation for all stakeholders across APEC to take role in advancing the sustainability objectives.

In his conclusion, he pointed out that competition policy can already be a tool for climate change mitigation and adaptation by fostering innovation and efficiency. But on the other hand, there are new perspectives to realigning competition law and environmental goals. As such, this workshop would make a meaningful contribution to this debate and encourage CPLG members to continue the discussion beyond the event and join the fight against climate change.

Prof. Sakon Varanyuwatana, Chairman, Trade Competition Commission of Thailand

Prof. Varanyuwatana opened the workshop by welcoming participants and thanking the co-sponsors of the project: Canada; Mexico; The Philippines; Singapore; and Chinese Taipei.

As the host of APEC 2022 under the theme "Open Connect, Balance," Thailand would propose the Bangkok Goals on Bio-Circular-Green Economy to guide APEC's mission to achieve a balanced, inclusive, and sustainable growth.

And as a member of the CPLG, the TCCT wished to contribute to this deliverable as well as the ongoing global discussion on competition policy and law in support of sustainable development.

Finally, Prof. Varanyuwatana then introduced upcoming sessions which are an address titled "Bangkok Goals on Bio-Circular-Green Economy: The Interlink between Sustainable Investment and Competition Policy" to be delivered by Mr. Sontirat Sontijirawong, Former Minister of Energy and Former Minister of Commerce of Thailand; and three panel discussions on "Are Competitive Markets More Sustainable Markets?" "Competition Advocacy towards Sustainable Development" and "Sustainability Business Agreements."

Mr. Sontirat Sontijirawong, Former Minister of Energy and Former Minister of Commerce, Thailand

Mr. Sontijirawong delivered a speech on “Bangkok Goals on Bio-Circular-Green Economy (BCG): The Interlink between Sustainable Investment and Competition Policy,” casting an overview on the trend towards green economy and how competition authorities can accompany this transition.

He also cast a look at the positive trends where green energy is becoming cheaper and more efficient than traditional sources. Nevertheless, technological leaps in batteries, construction, as well as agriculture were still needed. As such, all policy domains should be directed and implemented in a way that promotes innovation and just transition from carbon-based growth.

Mr. Sontijirawong provided an overview of the Bio-Circular-Green Economy, which is a model that highlighted innovation as a driver to bring about a sustainable economic system. Bioeconomy emphasizes the ability to recognize and take advantage of the value in the rich biodiversity of the Asia-Pacific region and strive to preserve it. The Circular Economy recognizes the importance of extending the use span of materials to minimize waste and aid the regeneration of natural resources. And lastly, the green economy presents the opportunity to move away from carbon-based growth.

Free and fair competition, coupled with the right rules and incentives, will be the most important factor in pushing the markets in a sustainable direction. He also pointed out that the pursuit of competition should answer to the needs of the entire society and that competition authorities should increase their engagement with key stakeholders, from private sector, regulators, and policymakers to understand how to develop and enforce competition law so that it becomes a part of the holistic, inclusive, and cohesive climate strategies.

Panel 1: Are Competitive Markets More Sustainable Markets

Prof. William Kovacic, Global Competition Professor of Law and Policy and Director of Competition Law Centre—The George Washington University Law School

Prof. Kovacic provided an overview of the four areas in which competition authorities can drive sustainable development and green transition. First is the utilization of their advocacy power. Because government investments and public procurement will play a fundamental role in restructuring the economy and foster green innovations, competition authorities can 1) safeguard competitive bidding in public procurement for green initiatives 2) advocate for procompetitive infrastructure policies such as in the Electric Vehicle charging station market and 3) ensure that subsidies to promote innovations are granted on the basis of the potential of the inventions, not the size of the companies.

The second area where competition agencies can help is conducting consultations to gauge whether and how antitrust enforcement is potentially deterring research and development and seek ways to overcome it. Prof. Kovacic suggested the development of a framework that

encourages firms to bring their proposed initiatives to the competition authorities for case-by-case assessments.

Thirdly, he emphasized the room for traditional competition law enforcement, for example, merger and acquisition reviews for the preservation of independent sources of inventive activities; scrutiny of exclusivity provisions in agreements between dominant firms and suppliers; and ensure that government funded inventions are openly accessible and not held by the implementing firms.

The fourth area is the integration of competition principles into other public policy domains—such as procurement and intellectual property. Competition agencies are encouraged to leverage their micro and macroeconomic knowledge gained from cases and research to provide economic policy advice to decisionmakers and elected officials to help them identify how other policy domains affect competition and suggest procompetitive strategies. Prof. Kovacic also brought up policy experimentation and sandbox approaches as this new agenda for competition policy is an occasion to take inventive approaches and put funds into small firms' hands with promising technologies.

On business collaborations for sustainability objectives, proportionality and careful evaluation on an ongoing, frequent, and regular basis are crucial to assess whether each business collaboration or agreement is an appropriate solution to proposed problems as to avoid spill over into other areas and permanent cooperations among rivals.

Finally, Prof. Kovacic highlighted the benefits of cooperation across policy domains and economies which could help accelerate learning on this new topics, test diverse policy approaches, and realize the knowledge network among agencies, academic hubs, and universities.

Ms. Christina Volpin, Competition Policy Expert—OECD

Ms. Volpin discussed how markets, private initiatives, and competition policy can play a complementary role to government regulations and measures in reaching carbon neutrality and environmental protection targets. Contrary to the notion that competition policy's sole purpose is keeping prices low, it also aims to promote quality, innovations, and choices. Thus, competition can help sustainability in three scenarios. First, when greener products mean higher quality products that are valued by consumers. In this light, competition authorities should utilize the assessment framework that seeks to preserve quality and innovation rather than a price-centric model. Secondly, when greener products are cheaper than traditional counterparts, such is the case in renewable energy and circular economy where recycling allows savings in terms of raw resource consumption and in turn encourages a more efficient economy. Thirdly, when anticompetitive harms coincide with environmental harms, such as the AdBlue case undertaken by the European Commission, or the investigation by the French Competition Authority in 2021 looking into a collusion in the floor covering market which partly involved the agreement not to advertise the environmental dimension of the products.

On the other hand, there are also three potential conflicts between competition policy and sustainability that can be navigated. The first conflict is when the demand for green technology is absent or insufficient, which can be caused by information asymmetries and behavioral biases, resulting in low incentives to invest in new technologies. So, competition authorities may have to consider these market failures' effects on market power and barriers to entry. Secondly, the high barrier to entry due to high green premiums, such as in energy, air travel, hydrogen, and construction sectors could make cooperation among rivals be an alternative due to the absence of disruptors. The third conflict may arise when the path dependency in polluting technologies is deeply entrenched, making it difficult for new technologies to be developed and catch up. This issue can generally be tackled by industrial policies, regulations, and government support; but in cases when this is not possible, perhaps due to each economy's fiscal capacity, private cooperation can be supplementary.

In conclusion, competition policy as is can already promote sustainability in vast the majority of scenarios. Nevertheless, there might be a need to rethink the price-centric approach and whether it is the best indicator of the well-functioning of the markets or should authorities give more weight to promoting the quality of goods and services. Competition agencies should also be aware of the potential conflicts between the short and long-term benefits. In this regard, competition authority should give legal certainty to businesses, and businesses should come to authorities and demonstrate how their initiatives to advance sustainability are positive in competition terms.

Mr. Simon Roberts, Expert on Competition and Advocacy—International Trade Centre

Mr. Roberts gave a presentation on how competition can be a driver for green transition in the context of the food and agriculture markets. Mr. Roberts highlighted the need for convergence between the debates on competition policy and green transformation in the food and agriculture markets. The food markets account for a third of all emissions, and it is also one of the industry's worst impacted by climate change.

Moreover, competition will be the key driver for transformation in these markets for two reasons. First, the number of sector-specific regulations in agriculture industry are few compared to others such as energy. And it is a market with very high global concentrations which has been exacerbated by the recent wave of mergers around the world; the integration between commodity trading, process, to retail gives the incumbents significant ability to write the rules and govern the supply chains as well as raising the barriers to entry.

Naturally, incumbents wish to protect their positions against new entrants. So, they may engage in writing regulations to impose adjustment costs on others and engage in anticompetitive conducts, such as greenwashing, lobbying, and cartels—such as one discovered in the US among the largest global trader, the largest meat producer, and the largest poultry producers involving market sharing, price fixing through exchanges of information through third parties; two of the colluding companies controlled 90% of poultry breeding stock in the world. The

results of these conducts are evident in largest companies not meeting their own environmental and climate commitments.

Mr. Roberts recommended three actions to be taken by competition authorities. First is to prioritize tackling global market concentration to understand what disruptions are required. Secondly, competition agencies should utilize their ability to gather and analyze data to communicate and recommend policy directions to stakeholders and decisionmakers. And finally, because the supply chains in food and agricultural markets are global, we need to think about international cooperation and coordination when designing rules and regulations to shape the markets for transformation.

Questions and Discussions

Mr. Varin Sachdev, the Session Moderator directed questions at speakers.

Q: What are the driving forces behind new green products and technologies in the markets?

Mr. Roberts: Some government measures such as carbon taxes and subsidies have opened up opportunities and changed the incentives. The speed of innovation will depend on competition in the markets; where there is strong competition for change, there will be rapid changes by the incumbents.

Prof. Kovacic: We may look at the electric vehicle market. What we are seeing is that it is the small companies that are driving the technologies. And so, we might look at what mix of policies will open doors for new players especially the wise use of public expenditures.

Ms. Volpin: When companies see the opportunity for profits, they will have the incentive to innovate or enter a new market. In this case, it is important that governments do not engage in ‘winner picking’, but instead implement policies that boost whole industries and technologies, as well as sunset the support as soon as the competition can sustain itself. Market studies can also shape market development such as the market study on the electric vehicle charging station market finished by the UK Competition and Markets Authority which recognized that consumers’ trust in the electric vehicle charger infrastructure is fundamental to attracting investments and the transition away from combustion engine cars.

Q: How can we build a network of international cooperation among competition authorities?

Prof. Kovacic: It is important to build trust among economies. During the onset of the pandemic, competition authorities realized that their effectiveness could be enhanced by deepened and regular cooperation and coordination. The next steps are to craft a common agenda based on mutual interest and pursue collective actions. This can be done by taking incremental steps, such as common research projects, aligned policy objectives, and soft policy tools.

Ms. Volpin: Due to the international nature of modern supply chains, there are anticompetitive harms of regional concern. Thus, the regional framework to address these issues is crucial and would increase the resiliency and innovation along supply chains.

Mr. Roberts: Market studies are useful in creating a common understanding on how markets are functioning and what changes are required.

Panel 2: Competition Advocacy towards Sustainable Development

Mr. Carlos Kuriyama, Senior Analyst, Policy Support Unit—APEC Secretariat

Mr. Kuriyama gave a presentation on the importance of competition policy in structural reforms for green recovery.

Beside the pandemic, climate change causes significant economic damage, amounting to USD111 billion annually in the Asia-Pacific Region between 1989-2021. However, out of USD16.5 trillion global economic stimulus packages deployed during the pandemic, only 3.1% went to green recovery.

In order to foster green recovery, governments must keep in mind certain principles to encourage smooth and efficient functioning of environmental markets which are 1) consistent pricing of environmental goods and services to ensure that resources are used effectively and efficiently 2) market signals that promote innovation and adoption of greener technologies and 3) increased regulatory certainty, particularly on the longer term.

Well-functioning and competitive markets are crucial to green structural reform. So there needs to be a mix of policies to safeguard these conditions and correct market failures: 1) the market-based instruments such as carbon taxes and subsidies; 2) good regulatory practices on environmental performance, standards, and information transparency; and 3) complementary instruments such as innovation, investment procurement, capacity building, green industrial policy, and international cooperation.

Effective competition can reinforce environmental policies by increasing efficiency and innovation. In this regard, central is pricing that reflects the social marginal costs of environmental externalities because it will provide incentives for reducing pollutions and investing green technologies. On the international level, a competition-friendly approach will promote innovation better than protectionist measures. Thus, we should implement a well-functioning competitive market for greenhouse gas emission permits and temporary subsidies to promote competitiveness of new technologies in the face of market failures.

To promote green recovery and structural reforms, competition agencies can take three actions. First is to have a clear competition objective because market powers are in the hands of established firms and new technologies are at a disadvantage to those competing on old technologies. Secondly, competition authorities could deal with arrangements between firms interested in cooperating to improve environmental outcomes e.g., monitoring and compliance,

labelling, and non-binding standards. Third, consumer protection provisions are particularly relevant in protecting consumers from misleading environmental claims and information.

Question from the Moderator: Are there any tools from APEC to help public and private investment in green technologies?

Mr. Kuriyama: Access to finance is important. However, when businesses maximize short term profits, they might not have the incentives to invest in green technologies which is a form of market failures. In this regard, governments can support through funding in basic science, education, training, or subsidies and tax breaks. As for the mobilization of funding towards green investments, examples of tools include financial market regulations that compel banks to manage climate risks or invest in activities with positive impacts on the environment or divest from harmful ones. We can also use regulatory and monetary instruments to make companies disclose their environmental performance. And finally, I think we need to remove barriers to climate finance, for example, when fossil fuels subsidies create a barrier to climate-friendly energy sources.

Prof. Michael Schaper, PhD, Adjunct Professor, Faculty of Business and Law—Curtin University.

Prof. Schaper discussed the practice of greenwashing, how it undermines sustainability goals and creates distortions in the markets, and how it can be addressed.

In essence, greenwashing is making false environmental claims. They are often presented in terms that strike a receptive response from consumers but are hard to measure, prove or disprove such as ‘natural,’ ‘organic,’ ‘eco-friendly,’ ‘green,’ and ‘clean coal.’ They can also be half-truths, for example, EV companies might advertise the non-consumption of fossil fuels consumption but omit the large amount resources used in the production process. It is estimated that up to 30% of international advertising may fall under this area.

This is the exploitation of information asymmetries because consumers have no capacity to verify these claims. Greenwashing distorts consumers’ purchasing patterns, penalizes legitimately eco-friendly businesses who are bearing the additional costs. Carbon intensive incumbents might engage in greenwashing to reinforce existing market dominance, allowing unsustainable practices to continue and creating risks for new sustainable entrants.

In the vast majority of jurisdictions, consumer protection law, specifically the provisions against misleading and deceptive conducts and advertisements, are the most direct tools to tackle this malpractice. Additionally, some authorities have endorsed or participated in industry bodies issuing legitimate certification schemes. At a regional level, ASEAN is trying to determine financial taxonomy or ways of defining financial services, investments, and environmentally sustainable commodities to work out whether the financial sector has been honest about their green investments. The ASEAN Climate Governance Network also brings together cooperate regulators and company executives to bring awareness to greenwashing

among other climate issues. Finally, raising awareness among consumers using media outlets can be effective.

Question from the Moderator: How can we address greenwashing at its roots, and how should appropriate penalties be determined or imposed?

Prof. Schaper: Businesses are generally pressed by their peers. So, we can foster a business environment where companies do not see greenwashing as legitimate practice or one that is unsupported by the public. We can also encourage consumer groups to voice their concerns or work with legitimate certification organizations.

As for the penalties, some degree of public shaming can also be effective. There needs to be a carrot and stick approach to foster a culture of compliance. This is also an opportunity for competition and consumer protection agencies can work together, sharing ideas on how to raise public awareness, determining appropriate penalties as well as appropriate tools, for example, administrative fines are often more effective than court cases, which can take years to pan out.

Ms. Mariana Escalante Seyffert, General Coordinator, Collaboration with the Academic Sector, the Direction General of Competition Advocacy--The Federal Economic Competition Commission of Mexico

Ms. Escalante Seyffert provided COFECE's experience in the energy industry in which the pursuit of competition coincides with the promotion of sustainability.

In 2013, Mexico reformed its electricity regulations, to open up the sector for private generation and wholesale while transmission and distribution remained public. As a result, the sector went from a public monopoly to a model which allowed private competition with public enterprises. The aim of the reform is to reach 35% clean generation by 2024 and 50% by 2050.

The reform also introduced two drivers to contribute to clean energy generation. First was the creation of competition in generation. Because cost reduction competition would motivate more efficient generation projects which were usually from clean sources. Second was the creation of Clean Energy Certificates (CELs). CELs allowed wholesalers to prove that they were compliant with their obligations and acquire and sell certificates for a certain amount of electricity from clean sources.

During this process, the role of competition authority was twofold. First, COFECE accompanied the liberalization process and advocate for Mexican consumers' access to cheaper and cleaner energy. And secondly, the Authority had was tasked with carrying out a market study on CELs two years after the market began operating in 2020.

From the market study, COFECE found that:

1. Entry into the electricity generation was difficult for new participants because of the constant change in public enterprise prices and lack of traceability. This harmed competition and desensitized big users to buy in the wholesale market. This meant that

CELs obligations were concentrated in public enterprises, impeding users from using different producers.

2. There were delays in the generation permit granting by the Energy Regulatory Commission. The market study found that by 2020 the Commission had 99 unsolved obligations and 153 pending modification requests. Additionally, permits took up to 300 working days to be granted.
3. Lack of expansion of transmission and distribution networks which created the difficulty to connect new projects to the electric grid.
4. Cancellation of long-term auctions without justification, eliminating possibility to compete in CELs and wholesale markets as well as making it difficult to finance new energy projects.
5. It was estimated that in 2022, more than 12 million CELs could be missing from the market. And Mexico was likely to miss the 2024 goal and would only reach 29.8% clean generation.

Recently however, the government has introduced a counter-reform that disincentivized the installation and operation of new electricity projects, including those using clean energy sources through temporary guidelines, policies by the Ministry of Energy, and electricity law reforms. COFECE considered that these measures could severely affect competition in the generation and wholesale of electricity.

In conclusion, when environmental sustainability and competition objectives overlap, important synergies can arise. The CELs market can act as an example where the institutional design of a market recognizes the social value of environmental objectives and pursues the creation of this value through competition.

Question from the Moderator: Was entry barrier a challenge in liberalizing the energy sector?

Ms. Escalante Seyffert: Permits are clear barriers. Lack of certainty is also a problem. Therefore, giving certainty and harmonization in clean energy policies will help develop more competition in the markets.

Mr. Alberto Heimler, Expert on Competition and Regulation—International Trade Centre

Mr. Heimler discussed the role of competition advocacy in guiding the development or the transition of green markets drawing examples from the United Kingdom's study in the electric vehicle charging station market and India's energy sector reforms. Mr. Heimler observed that as a new green market emerges, whether by shifting consumer preferences or government interventions, if competition is not properly taken into account, there likelihood of market concentration and monopoly is high.

In the UK, the Government has set a goal that only EVs can be sold starting from 2030. Thus, to realize this transformation, the charging station infrastructure had to be developed. In this regard, the UK Competition and Markets Authority undertook a market study into this sector

to determine the obstacles to competition and how competition can be fostered to create an efficient and well-functioning charging station infrastructure market.

In the UK context, the main challenges were 1) the development of charging stations along the motorways, especially in remote areas where demand is lower 2) the capacity of local governments to properly intervene and guide market development (in land concessions, funding, etc.) and 3) the needed upgrades to the electricity infrastructure.

In India, as the cost of renewable energy is now competitive with traditional sources. However, one of the big obstacles was the bad condition of the distribution companies, especially the inefficient government-owned enterprises.

The policies enacted have mostly concerned regulatory reforms to expedite the permit granting process and reverse auctions to maximize investments in renewables at the lowest cost.

In conclusion, competition authorities will play a pivotal role in monitoring and making sure that green markets develop in a procompetitive direction. To achieve this, authorities have to closely follow market developments from the start, minimize unnecessary regulatory obstacles facing prospective entrants, and scrutinize government interventions and make sure that they are strictly necessary and exit once the competitive force take hold. Moreover, following the UK CMA, many competition authorities are also undertaking their own studies into the electric vehicle charging station market. So, this is a great opportunity to create a network of collaboration and research to facilitate the flow of knowledge.

Questions and Discussions

Mr. Varin Sachdev, the Session Moderator directed questions at speakers.

Q: Could you share your views towards subsidies and government support?

Mr. Heimler: In some jurisdictions, we have controls and limits over subsidies. This control is also flexible, and we were able to relax it during the pandemic. In the EU and the UK, subsidies are acceptable when they create an advantage in the economy and do not distort competition. Subsidies for government-owned enterprises are also controlled in the EU. And in many economies, there is a tendency to prop up inefficient enterprises.

Prof. Schaper: In many market-driven economies, subsidies are seen as distorting, so there must be a clear public policy framework to determine their necessity and appropriate scope. Best practices suggest that subsidies must be rigorously tested and time-bound as to not create embedded distortions or a rent-seeking situation but only to achieve particular purposes at particular time. Subsidies are not always at odds with competition, but there is a need for careful management of the tensions between the two.

Q: You have mentioned that competition authorities should monitor market creation and development from the start, do you have any thoughts on how we can be the driver of change?

Mr. Heimler: Sometimes regulations can stand in the way of market development. Earlier in the day we heard about Tesla which emerged in the US' lightly regulated economy. Uber is another example. It started in California and then expanded globally. On the other hand, services like Uber are prohibited in Italy, so it would not have been possible to start this in the first place. So, I think unjustified, restrictive regulations are obstacles to competition and market development. So, I think my advice is to promote competition and eliminate these types of regulations.

Mr. Kuriyama: I think we need to be wary of firms that are using old technology that are trying to keep regulations on their side by influencing government decisions.

Ms. Escalante Seyffert: I think it is important for competition authorities to work closely with regulators, environmental or otherwise, so that sustainability regulations do not unnecessarily affect the level-playing field, so new companies can enter the markets and existing companies can compete fairly.

Q: There is a trend of casting competition in a negative light. Considering this, how do we go about advocacy?

Mr. Heimler: I think this unfavorable attitude comes from instances when competition has not delivered benefits to consumers. In public transport, for example, where the introduction of competition led to declined service quality and increased prices.

Prof. Schaper: I think this is also a part of competition regulators' role, which is not simply a judicial, enforcement, or regulatory one. Competition requires constant advocacy, especially when it is viewed negatively. So, we do not exist only to police, but to educate which requires us to constantly put the message out, cultivate support and build a coalition of stakeholders.

Panel 3: Sustainability Business Agreement

Prof. Simon Holmes, Visiting Professor—Oxford University; Member—UK Competition Appeal Tribunal; and Legal Adviser—ClientEarth

Prof. Holmes argued that the fear of competition law could be a barrier to positive business agreements towards sustainability objectives and that there is legal basis for competition law to allow such agreements and collaborations.

The relationship between sustainability and competition is two-sided. On the one hand, competition is the main driver of innovation. But on the other, it can lead to a race to the bottom, the disregard of social costs of production and consumption, ultimately resulting in unsustainable practices. Moreover, in this fight against climate change, every member of society, including competition authorities must take actions. Although regulations are the main tools in this, they can often be slow, limited in scope, and not ambitious enough.

There is also room for business working together to achieve change. While firms can compete to invent and introduce sustainable products, they can be discouraged by first-mover

disadvantages. Moreover, if the green products remain only in niche markets, the crucial scale and speed of change will not be realized. Nevertheless, the fear of anti-cartel provisions can have a spillover effect inhibiting positive collective actions. One survey found that 60% of firms shy away from cooperating with other firms due to the fear of regulatory capture.

Examples of business agreements that can contribute to mitigating environmental degradation include 1) a sustainable fish coalition which agreed to prevent overfishing. However, a legal consultant advised against the agreement because it may constitute a collective boycott 2) a UK-based waste and resources collection programme, a body responsible for increasing the rate of recycling and promoting responsible use of plastics. The programme required suppliers and retailers to agree on a singular system. From a sustainability perspective, had supermarkets and their suppliers devised their own scheme, it will result in overlaps and inefficiency. In this regard, businesses need steering and legal certainty from competition authorities on which conducts are not problematic.

Another question is whether there is a legal basis for competition authorities' activity in sustainability. To use an example in the European law, the Treaty on the Functioning of the European Union provide a “constitutional provision” in Article 11 which states “Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.” In other jurisdictions, the environmental provisions could be found in other laws, such as human rights, climate change laws, or international commitments such as the Paris Agreement.

However, competition law is already capable of addressing climate change in itself. To continue the European example, an otherwise anticompetitive agreements can be exempted from competition enforcement if the agreements “contribute to improving in the production or distribution of goods or promoting technical or economic progress.” Considering this, sustainability initiatives aiming to reduce resource consumption should amount to economic progress. Greener production, sharing logistics, eliminating overlaps should contribute to technical progress or improving distribution. So, I would encourage businesses to come to authorities for consultations. Some agencies are also developing specific guidelines to clarify how the current law will be applied.

In closing, we currently have to legal tools to enable positive business collaboration, we just need to revisit how we apply them. And we need to apply them in a coherent manner with other policies to fight climate change and build a more sustainable future. There will be some difficulties, but they can be overcome by competition authorities, businesses, and governments working together toward the same goal.

Mr. Martijn Snoep, Chairman—the Netherlands Authority for Consumers and Markets

Mr. Snoep provided background and mechanisms under the Netherlands Authority for Consumers and Markets' Draft Guidelines on sustainability agreements.

Mr. Sneep stated that the purposes of the Draft Guidelines are twofold. First is to give guidance to businesses that wish to enter into genuine collaboration to improve sustainability outcomes. Secondly, the ACM wished to spark the European and global debate on competition law and sustainability.

On top of giving criteria and practical examples of lawful business collaborations. The two important elements of the guidelines directed at removing the fear of competition law are the offering of case-by-case informal consultations and immunity from fine to good faith agreements. On the former, the Netherlands usually utilizes a self-assessment approach to business agreements. However, in this case, the ACM is willing to devote resources to provide informal guidance to companies. On the latter, the ACM promises to waive the fines if the agreements that were initially pursued in good faith and followed the guidelines that over time generated anticompetitive effects due to unforeseen circumstances. In this case, the ACM will order changes to remove the anticompetitive effects but not impose fines.

However, the number of initiatives and consultation requests were not as many as initially anticipated. Mr. Snoep theorized some reasons for this. Firstly, the Netherlands is but a small open economy in Europe. So, even when companies feel protected from Dutch competition law, they still risk legal actions by other domestic competition authorities or the European Commission. Secondly, just as is the case with environmental policymaking, it is also difficult for businesses to enter into agreements to reduce negative externalities potentially due to lack of trust or a monitoring and policing system.

Nevertheless, the ACM has provided five informal guidance to five proposed initiatives.¹ An example of consultation case is one among electricity grid operators agreeing to use the same CO2 reduction standards in their tendering processes by aligning their purchasing behavior to create clarity in the market. Another example is one between soft drink manufacturers and bottlers that agreed to reduce and standardize the type of plastic to improve the recyclability. Third, a joint venture between Shell and Total in the area of CO2 capture and storage in the North Sea involving a joint development and marketing of CO2 storage capacity. The final example is an agreement between garden centers collectively boycotting plant growers who used illegal pesticides. The regulatory agency responsible for enforcing the law did not have sufficient capacity to enforce the pesticide law. So, pressured by NGOs, a group of garden centers, which made up 80% of the market share, agreed to boycott growers who engaged in this practice. The ACM considered that competition law is intended to only protect 'legal' competition. Thus, competition based on illegal practices cannot be protected by the law.

¹ Unrealized and unfinished agreements are not published. The Authority's guidance will also only be published after the parties have made the agreement public.

The guidelines are not the only approach competition authorities can adopt. Some agencies are using non-prioritization, which can work well in jurisdictions without private enforcement. In other economies with active enforcement, authorities can still be proactive by declaring which types of agreements should not be problematic, as well as educating the court on this issue.

In short, we see now that both businesses and competition authorities are actively looking to increase their contribution to sustainability. What we wish to see more is businesses coming forward and entering into agreements, and competition authorities giving clarity and assurance to companies operating within competition law.

Mr. YOSHINARI Ryohei, Assistant Director, Coordination Division—Japan Fair Trade Commission

Mr. YOSHINARI provided the JFTC's experience in facilitating business initiatives contributing to social objectives.

The JFTC has been providing guidance for joint business activities towards public goals for a long time by providing consultations and issuing guidance. Mr. YOSHINARI provided an example of three guidelines released by the JFTC from 1993-2001.

- 1) The Guidelines Concerning Joint Research and Development (1993). R&Ds are instrumental to innovations. However, if one company is not able to undertake R&D alone, joint ventures sometimes are essential to make technological breakthroughs. The Guidelines state that "Joint R&D projects aimed to address so-called externality, such as developing an environmental or safety measure, may not in itself immediately exclude the possibility for such project to pose problems [...]. However, taking into account cost, risk, [...] related to R&D, it may not be so easy to carry them out alone. In such a case, these are less likely to pose problems under the Antimonopoly Act."
- 2) The Guidelines Concerning the Activities of Trade Associations (1995). The JFTC recognizes that in some cases, joint activities of businesses acting as a single entity can contribute to pursuing social objectives. And the Guidelines say that setting of voluntary standards regarding variety, quality, or function of goods and services, which is deemed reasonably necessary to achieve socially beneficial purposes such as environmental protection or safety assurance (as long as the standards do not unjustly harm interests of users; and except for the conduct referred to in ...), is not illegal in principle.
- 3) The Guidelines Concerning Joint Activities for Recycling (2001). At the time, recycling was promoted by the Japanese government, so the JFTC expected that business initiatives promoting recycling would increase. The Guidelines state that joint activities for recycling will lead to the vitalization of the recycling market and create new demand in the market and therefore would generally have procompetitive effects. Some examples included in the guidelines are joint recycling systems, goals, guidelines, standardizations, etc.

The JFTC has also been regularly publishing anonymized consultation cases to give legal certainty to the business community. Some of these cases concerned sustainability agreements such as an agreement to stop using harmful material in manufacturing process (1995), a private safety standard in building materials (1998), and one among retailers to reduce fees for plastic bags (2007).

As for sustainability and green transition, the previous guidelines demonstrate that the competition law as is can already accommodate joint business activities towards green goals. Although new guidelines are not strictly necessary, the JFTC wishes proactively promoting business initiatives that contribute to carbon neutrality, green growth, and sustainability. And so, it has been closely observing the debate on sustainability and competition law. In March 2022, the JFTC held an international symposium focusing business activities achieving carbon neutrality and green growth, inviting colleagues from the DGCOMP and the ACM to learn about their draft guidelines. In addition to their presentations, panel discussion with Japanese experts was held. Also, the Chair of the JFTC also spoke about the necessity of competition policy in achieving green growth.

In developing the new green guidelines, the JFTC established the “Study Group on Guidelines for Business Initiatives toward Green Society” comprising of experts such as academics, private practitioner, representative from business community, and observers to discuss what kind of guidelines should be published. The scope of the draft guidelines will be broader than business agreements, recognizing that business conduct can be relevant to other areas of the law. The guidelines will also cover monopolization, abuse of a superior bargaining position, and mergers.

In conclusion, Mr. YOSHINARI believes that it is necessary for competition authorities to publicize their perspectives to give the most room within the competition law to beneficial business conducts.

Mr. Tom Leuner, Executive General Manager, Exemptions and Digital Division—Australian Competition & Consumer Commission

Mr. Leuner gave an overview of Australia’s ‘Public Benefit Test,’ an analysis framework assessing whether otherwise illegal conducts could be exempted from competition law enforcement due to overall benefits outweighing the harms.

Australian (and New Zealand) competition law contains a formal exemption framework where businesses can propose an otherwise illegal initiatives and prove to the Commission that they will result in a net positive result and can be exempt from the law. The authorization from the ACCC will give the business full immunity from the Commission and private actions, which is a clear distinction from other jurisdictions with only informal exemptions such as letters of comfort.

The test applied is a weighing exercise between the potential public benefit and competition harm generated by the conduct. The ‘benefits’ and ‘harms’ are defined in the broadest possible way. Moreover, unlike European law, there is no requirement that the affected consumers have to be compensated. The process is an individual assessment involving public consultations and takes approximately six months for the Commission to make the final decision.

Some examples of authorized agreements range from one promoting recycling and removing harmful chemicals, for example, a levy imposed on battery manufacturers and importers which is then used to fund the establishment and development of battery recycling system; a joint purchase of green power; and joint tendering by local governments to support investment in green waste collection. In the battery case, potential price increase from the levy was compared to the benefits such as stopping toxic waste getting into landfills, ozone depletion, and pollution. Moreover, it was considered that including the cost of recycling will internalize the externalities stemming from the use of battery, thereby reflecting the true cost of consumption.

However, during the several years this framework has been in place, there is a marked absence of initiatives aiming to limit emissions or contribute to carbon neutrality. To provide some hypothetical examples, trucking companies may agree to a binding emission reduction target more ambitious than the regulation by agreeing to buy only electrical hydrogen powered trucks or carbon abatement limitations.

The process of the authorization can be complicated due to the lack of environmental expertise. The exercise also involves predicting the future benefits and detriments coming from the proposed conducts. These challenges can somewhat be overcome by mobilizing the expertise of environmental sciences, input from the public, as well as putting safeguards to minimize the harm to competition. It is also important not to discourage unilateral actions from companies wishing to compete on sustainability basis (i.e., stronger green credentials). So, the test must be careful of these factors and consequences as well.

Questions and Discussions

Mr. Varin Sachdev, the Session Moderator directed questions at speakers.

Q: Since we operate in open economies, how do we encourage a genuinely global transition and avoid some cheaper, unsustainable products still being produced and exported?

Mr. Leuner: To use the example on the recycling-funding levy, the fee is imposed to both domestic manufacturers and importers. So, the level playing field is maintained.

Mr. Snoep: Of course, the primary solution is international regulation. There has been a global solution that worked, such as the Montreal Protocol which was successful in phasing out the use of ozone-depleting substances. There are also proposed measures restricting international trade, such as the Carbon Border Adjustment Mechanism being discussed in Europe. However, without it, the second-best solution could be business agreements.

Prof. Holmes: There is also a need for coherence across policy domains because this question concerns the area of international trade. So, authorities need to consider whether their legal frameworks and applications are consistent with other policies and international practices. The coherence between policies in climate change, trade, and competition will be crucial in this effort.

Mr. Ryohei: We also need to be mindful that promoting competition and efficiency remain the central objectives of competition policy. While it can play a complementary role in advancing sustainability goals, we still have to recognize that competition authorities cannot do everything.

Closing Remarks

Mr. Raksagecha Chaechai Commissioner—Trade Competition Commission of Thailand

Commissioner Chaechai delivered the workshop’s closing remarks by thanking all speakers and participants for their contribution to the event. He gave a summary of the panels and reiterated the centrality of swift and just green transition which he likened to the Sufficiency Economy Philosophy theorized by His Majesty King Bhumibol Adulyadej. The principles of wisdom, moderation, and prudence, he said, should underpin the policy direction. He also showed appreciation to the private sector for voicing to the regulators their commitment to the green transition and echoed regulators’ commitment to facilitating beneficial initiatives. He finally called for continued discussion on the topic beyond the event and a pleasant stay in Bangkok for onsite participants.

Conclusion and Recommendations

As far as competition leads to efficient use of resources, promotes innovation and technical progress, competition policy and law as is can already support sustainable development objectives. However, there might be room to refine competitive assessment frameworks to account for market failures such as negative externalities in prices, first-mover disadvantage, information asymmetries, etc. Moreover, competition agencies may need to go beyond price effect considerations and give more weight to effects on choice and innovation.

Recommendations:

1. Actively identify and tackle anti-competitive conducts with potential harms to choice, quality, and innovation in green products.
2. Adopt an analysis framework that equally values choice, quality, and innovation as much as price and prioritizes market failures corrections.
3. The CPLG can facilitate members to share relevant cases and experience and explore capacity building projects for effective enforcement and case prioritization strategies.

Trends such as increasing consumers' willingness to pay more for greener products, falling price of clean energy generation, as well as economic and security risks from fossil fuel dependency point towards upcoming green economic transition. And as markets emerge and policies are introduced, competition authorities will have a central role in harnessing competitive forces and directing markets toward a long-term innovative and competitive environment by ensuring that small players with potential are able to compete with incumbents and drive systemic changes.

Recommendations:

4. Competition agencies should take active role in studying and monitoring the players, drivers, and dynamics in important markets and relaying their findings and recommendations to relevant policymakers and regulators to advocate for procompetitive development, financing, and procurement policies. Moreover, CPLG can facilitate inquiries into certain regional markets to understand the international forces at play. The Bangkok Goals on Bio-Circular-Green Economy has named tourism, manufacturing, agriculture, transport, and logistics, low-carbon digital and technology as industries to be emphasized at both domestic and regional levels.
5. Competition authorities should increase their engagement with environmental regulators and policymakers, as well as the academic sector to raise awareness on the link between competition, markets, and environmental sustainability concepts—as well as trying to align competition objectives with wider public priorities on environment.
6. Competition authorities should work closely with the government on environmental financing mechanisms to ensure that subsidies, government support, procurement process are competitive, specific, time-bound and foster long-term market development and efficiency.
7. International cooperation among competition authorities, experts, and relevant stakeholders will help accelerate the learning curve, share diverse policy approaches, and build a network of knowledge. The CPLG can also seek cross fora collaborations with other sector-specific APEC groups such as the EC, EWG (energy), ATCWG (agriculture), TPTWG (transportation), and the SMEWG (SMEs).

Collaborations or agreements between business competitors could complement policies and regulations in overcoming market failures such as the first-mover advantage, information asymmetries and behavioral biases to achieve sustainable outcomes. Competition authorities will play a key role in drawing a line between lawful collaborations and cartels, raising awareness with consumers and companies, as well as giving business operators the legal certainty as to encourage the private sector's contribution to sustainable development.

Recommendations:

8. Competition authorities should seek the expertise of environmental scientists and economists on how to contextualize environmental concepts within competitive assessments.
9. Competition authorities should engage with the private sector with the objective of encouraging their participation in the climate effort and to learn which obstacles can be overcome by private cooperation and where competition will bring more beneficial outcomes. Authorities may try to give the private sector a greater degree of legal certainty by issuing specific guidelines or offer case-by-case informal consultations.
10. Competition authorities may take innovative policy approaches such as sandboxing to test initiatives in a controlled manner.
11. The CPLG should continue to encourage members to share experiences in dealing with the trade offs between competition and environmental protection, and examples of business collaborations with beneficial outcomes. Members might consider harmonizing their approaches to the assessments both for domestic and international business cooperation.

Bibliography

- ACCC Decision - Application for Authorisation AA1000476, AA1000476 (Australian Competition & Consumer Commission September 4, 2020). Retrieved from https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2004.09.20%20-%20PR%20-%20AA1000476%20-%20BSC_0.pdf
- AGCM. (2021, May 13). *A529 - ICA: Google fined over 100 million for abuse of dominant position*. Retrieved June 20, 2022, from <https://en.agcm.it/en/media/press-releases/2021/5/A529>
- APEC. (1993, November 20). *1993 Leaders' Declaration*. Retrieved June 4, 2022, from https://www.apec.org/meeting-papers/leaders-declarations/1993/1993_aelm
- APEC. (2020, November). *APEC Putrajaya Vision 2040*. Retrieved May 25, 2022, from https://www.apec.org/Meeting-Papers/Leaders-Declarations/2020/2020_aelm/Annex-A
- CDP. (2017, July 10). *New report shows just 100 companies are source of over 70% of emissions*. Retrieved from CDP: <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions>
- Claici, A., & Lutz, J. (2021). Beyond the Policy Debate: How to Quantify Sustainability Benefits in Competition Cases: Lessons Learned from Environmental Economics. *Eur. Competition & Reg. L. Rev.*(5), 200.
- Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, IV.F.1/36.718.CECED (The European Commission January 24, 1999). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000D0475>
- Dolmans, M. (2020, March 1). Sustainable Competition Policy. *Competition Law and Policy Debate CLPD*, 5(4). doi:10.2139/ssrn.3608023
- Duk, T. V. (2021). A New Approach to Assess Certain Sustainability Agreements under Competition Law. In S. Holmes, D. Middelschulte, & M. Snoep (Eds.), *Competition Law, Climate Change & Environmental Sustainability*. New York: Institute of Competition Law.
- European Commission. (2017, March 27). *Mergers: Commission clears merger between Dow and DuPont, subject to conditions*. Retrieved May 10, 2022, from https://ec.europa.eu/commission/presscorner/detail/en/IP_17_772

- European Commission. (2020, May 4). *Mergers: Commission clears Aurubis' acquisition of Metallo*. Retrieved May 10, 2022, from https://ec.europa.eu/commission/presscorner/detail/en/ip_20_801
- European Commission. (2021, July 8). *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars*. Retrieved May 15, 2022, from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581
- European Commission. (2022). Sustainability Agreements. Brussels: European Commission. Retrieved from https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en
- Holmes, S. (2020, July). Climate Change, Sustainability, and Competition Law. *Journal of Antitrust Enforcement*, 8(2), 354-405. doi:10.1093/jaenfo/jnaa006
- IPCC. (2022). *Climate Change 2022: Impacts, Adaptation and Vulnerability--Summary for Policymaker*. Switzerland: Intergovernmental Panel on Climate Change. Retrieved from https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf
- Kachaner, N., Nielsen, J., Portafaix, A., & Rodzko, F. (2020, July 14). *The Pandemic Is Heightening Environmental Awareness*. Retrieved May 15, 2022, from <https://www.bcg.com/publications/2020/pandemic-is-heightening-environmental-awareness>
- Lombardi, P. (2021, October 14). *The unintended consequences of Vestager's tougher take on 'killer acquisitions'*. Retrieved June 15, 2022, from Politico.
- OECD. (2020a). *Start-ups, Killer Acquisitions and Merger Control*. Paris: OECD. Retrieved from <https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf>
- OECD. (2020b). Sustainability and Competition. In OECD, *OECD Competition Committee Discussion Paper*. Paris: OECD. Retrieved from <https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>
- OECD (Ed.). (2020c). Sustainability and Competition – Note by Australia and New Zealand. *Sustainability and Competition*. Paris: OECD. Retrieved from [https://one.oecd.org/document/DAF/COMP/WD\(2020\)62/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf)
- OECD (Ed.). (2020d). Sustainability and Competition – Note by the Netherlands. *Sustainability and Competition*. Paris: OECD. Retrieved from [https://one.oecd.org/document/DAF/COMP/WD\(2020\)66/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)66/en/pdf)

- OECD. (2021a). Environmental Considerations in Competition Enforcement. In OECD, *OECD Competition Committee Discussion Paper*. Paris: OECD. Retrieved from <https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm>
- OECD (Ed.). (2021b, November 24). Environmental Considerations in Competition Enforcement – Note by Italy. *Environmental Considerations in Competition Enforcement*. Paris: OECD. Retrieved June 20, 2022, from Environmental Considerations in Competition Enforcement: [https://one.oecd.org/document/DAF/COMP/WD\(2021\)49/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)49/en/pdf)
- OECD (Ed.). (2021c, December 1). Environmental Considerations in Competition Enforcement – Note by Mexico (COFECE). *Environmental Considerations in Competition Enforcement*. Paris: OECD. Retrieved June 15, 2022, from Environmental Considerations in Competition Enforcement: [https://one.oecd.org/document/DAF/COMP/WD\(2021\)77/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)77/en/pdf)
- OECD (Ed.). (2021d). Environmental Considerations in Competition Enforcement – Note by South Africa. *Environmental Considerations in Competition Enforcement*. Paris: OECD. Retrieved from [https://one.oecd.org/document/DAF/COMP/WD\(2021\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)53/en/pdf)
- OECD (Ed.). (2021e, December 1). *Environmental Considerations in Competition Enforcement – Note by South Africa*. Retrieved June 20, 2022, from Environmental Considerations in Competition Enforcement: [https://one.oecd.org/document/DAF/COMP/WD\(2021\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)53/en/pdf)
- OECD Secretariat. (2010). Executive Summary. In OECD (Ed.), *Policy Roundtables: Horizontal Agreements in the Environmental Context* (p. 11). Paris: OECD. Retrieved from <https://www.oecd.org/competition/cartels/49139867.pdf>
- Roberts, S., Nair, R. d., & Andreoni, A. (2022). Rethinking Markets for Food Systems Transformation in Southern Africa: A Just Transition. In *Supporting a Just and Climate-Resilient Transition in South Africa*. Johannesburg: The South African Presidential Climate Commission.
- The Netherlands ACM. (2020, September 1). *Welfare of today's chicken and that of the 'Chicken of Tomorrow'*. Retrieved June 10, 2022, from Authority for Consumers and Markets: <https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf>
- The Netherlands ACM. (2021). *Draft Guidelines Sustainability Agreements: Opportunities within competition law*. The Hague: The Netherlands ACM. Retrieved from <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>

- UNGA. (2015). *Resolution 70/1: Transforming our world: the 2030 Agenda for Sustainable Development*. Geneva: The United Nations.
- Watson, N. (2021). Measuring environmental benefits in competition cases – Note by Nadine Watson. *Environmental Considerations in Competition Enforcement*. Paris: OECD. Retrieved from [https://one.oecd.org/document/DAF/COMP\(2021\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)14/en/pdf)
- WCED. (1987). *Report of the World Commission on Environment and Development : note*. New York: The United Nations. Retrieved from <http://digitallibrary.un.org/record/139811>

Annex 1 Workshop Agenda

APEC Competition Policy and Law Group Project

Workshop on Competition Policy and Sustainable Development

Agenda

Date and Venue: 9 November 2022 at Pullman King Power Bangkok <i>and</i> virtually via Zoom	
9:30 – 10:00 (30 mins)	<p>Welcoming remarks</p> <p>Mr. Krisda Piampongsant, Convenor, <u>Competition Policy and Law Group</u></p> <p>Opening Remarks</p> <p>Prof. Sakon Varanyuwatana, Chairperson, <u>Trade Competition Commission of Thailand</u></p>
10:00 – 10:20 (20 mins)	<p>Keynote speech on “Bangkok Goals on Bio-Circular-Green Economy (BCG): The Interlink between Sustainable Investment and Competition Policy” (20 mins)</p> <p>H.E. Sontirat Sontijirawong, Former Minister of Energy and Former Minister of Commerce, <u>Thailand</u></p>
10:20 – 10:40 (20 mins)	Coffee break (20 mins)
10:40 – 12:00 (80 mins)	<p>Panel 1: Are Competitive Markets More Sustainable Markets</p> <p>Among the objectives of competition policy, stimulating innovation and increasing efficiency are the nexus through which competition can support sustainable development goals. The transition towards green economy can be expedited by ensuring that innovative new entrants can compete on a level playing field against industry incumbents and preventing collusive practices that distort prices in key markets. Thus, it is vital that competition enforcers and industry experts engage in productive conversations and find the cooperation opportunities to work towards this shared goal.</p> <p>This session aims to:</p>

	<ul style="list-style-type: none"> • Present competition promotion and enforcement as potential drivers for green innovation; • Increase understanding of the relationship between market power and business practices regarding environmental impacts; and • Facilitate a conversation between competition experts and green industry leaders. <p>Panellists:</p> <ol style="list-style-type: none"> 1. Prof. William E. Kovacic, Global Competition Professor of Law and Policy and Director of Competition Law Centre, <u>The George Washington University Law School</u> (Virtual) 2. Ms. Cristina A. Volpin, PhD, Competition Policy Expert, <u>OECD</u> 3. Mr. Simon Roberts, PhD, Expert on Competition and Advocacy, <u>International Trade Centre (Arise Plus Thailand project)</u>²; Professor at the Barcelona School of Economics; Director at Centre for Competition, Regulation and Economic Development (<u>CCRED</u>); former Chief Economist at the <u>South Africa Competition Commission</u> <p>Moderator: Mr. Varin Sachdev, News Anchor, Thai News Network 16</p>
12:00 – 13:30 (90 mins)	Lunch break
13:30 – 14:50 (80 mins)	<p>Panel 2: Competition advocacy towards sustainable development</p> <p>Competition authorities play a central role in keeping emerging markets of green products open and competitive, both on domestic and international levels, so consumers can enjoy a wide range of quality environmentally friendly products at competitive prices and increase the adoption rate and technological development. They must also ensure that environmental regulations are guided</p>

² ARISE Plus Thailand is a 3-year project funded by the European Union and implemented by the International Trade Centre (ITC). The project aims to support inclusive and sustainable trade growth and poverty reduction in Thailand, while contributing to economic integration in the ASEAN region, including by supporting a more transparent, predictable and competitive business environment. This is done through the strengthening of TCCT capacities for the application of the competition regulatory framework in accordance with international best practices.

	<p>by competition principles as to not erect unnecessary entry barriers or stifle innovation.</p> <p>This session aims to:</p> <ul style="list-style-type: none"> • Highlight the importance of promoting competition in emerging green markets and exchange best practices of doing so; and • Advocate for environmental regulations, policies, and initiatives that observe competition principles and encourage the role of competition authorities in the policymaking process. <p>Panellists:</p> <ol style="list-style-type: none"> 1. Mr. Carlos A. Kuriyama, Senior Analyst, Policy Support Unit, <u>APEC Secretariat</u>. (Virtual) 2. Prof. Michael Schaper, PhD, Adjunct Professor, Faculty of Business and Law, <u>Curtin University</u>. (Virtual) 3. Ms. Mariana Escalante Seyffert, General Coordinator, Collaboration with the Academic Sector, the Direction General of Competition Advocacy, <u>The Federal Economic Competition Commission of Mexico</u> (Virtual) 4. Mr. Alberto Heimler, PhD, Expert on Competition and Regulation, <u>International Trade Centre (ARISE Plus Thailand project)</u>; Chairman of the Working Party on Competition and Regulation of the Competition Committee, <u>OECD</u>; and former Director, <u>the Italian Competition Authority</u> <p>Moderator: Mr. Varin Sachdev, News Anchor, Thai News Network 16</p>
14:50 – 15:10 (20 mins)	Coffee break
15:10 – 16:30 (80 mins)	<p>Panel 3: Sustainability business agreement</p> <p>Collaborations among competitors can help overcome some market failures and bring large-scale environmental benefits but can also raise some competitive concerns. Fear of competition law is often cited as an obstacle to these initiatives. However, competition law can allow agreements without adverse effects on competition or ones whose benefits outweighs the harms.</p> <p>This session aims to:</p> <ul style="list-style-type: none"> • Examine how competition law can have deterrence effects on sustainability business cooperation;

	<ul style="list-style-type: none"> • Enumerate the characteristics of sustainability agreements that are compatible with competition laws; • Explore how environmental benefits can be factored into competitive assessments and permit otherwise illegal agreements; and • Share actions competition authorities can take to give assurance and legal certainty to firms wishing to undertake sustainability agreements. <p>Panellists:</p> <ol style="list-style-type: none"> 1. Prof. Simon Holmes, Visiting Professor, <u>Oxford University</u>; Member, <u>UK Competition Appeal Tribunal</u>; and Legal Adviser, <u>ClientEarth</u> 2. Mr. Martijn Snoep, Chairman, <u>the Netherlands Authority for Consumers and Markets</u> (Virtual) 3. Mr. YOSHINARI Ryohei, Assistant Director, Coordination Division, <u>Japan Fair Trade Commission</u> (Virtual) 4. Mr. Tom Leuner, Executive General Manager, Exemptions and Digital Division, <u>Australian Competition & Consumer Commission</u> <p>Moderator: Mr. Varin Sachdev, News Anchor, Thai News Network 16</p>
16:30 – 16:45 (15 mins)	<p>Wrap-up and Closing remarks</p> <p>Mr. Raksagecha Chaechai, Commissioner, <u>Trade Competition Commission of Thailand (TBD)</u></p>

Annex 2 Speaker Bios

Opening Session

Amb. Krisda Piampongsant

Ambassador Krisda Piampongsant was the inaugural Vice–Chairman of the Trade Competition Commission of Thailand and the Convenor of the APEC Competition Policy and Law Group. He holds a Master of Public Policy and Administration from University of Wisconsin at Madison, and a B.A. from the University of Western Australia. He has served as Thailand’s Ambassador and Permanent Representative to the World Trade Organization, Deputy Permanent Secretary at Ministry of Commerce, Minister at Royal Thai Embassies in the United States, Brussels, Belgium and the European Union. He was also Associate Judge at the Intellectual Property and International Trade Court of Thailand.

Prof. Sakon Varanyuwatana

Professor Sakon Varanyuwatana has served as Chairperson of the Trade Competition Commission of Thailand since 2019 and was appointed as Vice Minister of Commerce. He has a Ph.D. in Social Science with a major in Economics from Syracuse University, USA and was the dean of Faculty of Economics, Thammasat University from 2015-2017. He also served as adviser to various government entities including Fiscal Policy Office, Ministry of Finance, and the National Economic and Social Development Council. His area interest is in microeconomics, public finance with many publications in local finance.

Keynote speech on “Bangkok Goals on Bio-Circular-Green Economy (BCG): The Interlink between Sustainable Investment and Competition Policy”

Sontirat Sontijirawong

Mr. Sontirat Sontijirawong served as the Thailand’s Minister of Energy from 2019-2020 and Minister of Commerce from 2017-2019. He was a former member of Thailand National Reform Council. Before serving in the Thai cabinet, Mr. Sontijirawong had a prolific career in the private sector, as well as the Chairman of Subcommittee on Administrative Projects to Increase Potentiality of Village and Community for Strength of the Local Economy According to the Civil State and a member of the Commission of Small and Medium Enterprise Promotion.

Panel 1 - Are Competitive Markets More Sustainable Markets

Prof. William E. Kovacic

Professor William E. Kovacic is a professor at George Washington University Law School, where he serves as director of their Competition Law Center. Previously, he was a member of the US Federal Trade Commission from 2006 – 2011 and chaired the agency from 2008-2009. He also served as Non-Executive Director at the United Kingdom’s Competition and Markets Authority.

Ms. Cristina A. Volpin

Ms. Cristina Volpin is a Competition Expert at the OECD where she conducts research on various competition law and policy topics for the OECD Competition Committee. She recently authored publications on competition enforcement and policy with regards to environmental sustainability. She took part in the OECD 2022 Competition Open Day where she moderated a panel discussion on the role of competition policy and competition authorities in stimulating green innovation.

Mr. Simon Roberts

Mr. Simon Roberts is an expert on Competition and Advocacy at the International Trade Centre. He is also a professor of economics at the University of Johannesburg, where he founded the Centre for Competition, Regulation and Economic Development (CCRED), and also a Global Practitioner at the University of Strathclyde. Mr. Roberts served as an economics director at the UK Competition and Markets Authority and the Chief Economist and Manager of the Policy & Research Division at the Competition Commission of South Africa.

Panel 2 - Competition Advocacy towards Sustainable Development**Mr. Carlos Kuriyama**

Mr. Carlos Kuriyama is the director of the APEC Policy Support Unit, APEC Secretariat. He was instrumental in the creation of the APEC Economic Policy Report 2022 – Structural Reform and a Green Recovery from Economic Shocks, which advocates for economic and regulatory reforms which ensures that the recovery after the pandemic is resilient, inclusive, and sustainable. Previously, Mr. Kuriyama served at Peru's Ministry of Foreign Trade and Tourism as Chief Negotiator of the Peru-China FTA negotiations, General Coordinator of the Peru-Singapore FTA negotiations, and Advisor to the Deputy Minister of Foreign Trade.

Prof. Michael Schaper

Professor Michael Schaper served as the inaugural Deputy Chair of the Australian Competition and Consumer Commission from 2008-2018. He is currently a board member of the Australian Institute of Company Directors, a member of the Gaming and Wagering Commission of Western Australia, Chair of the Energy and Water Ombudsman, and Chair of the Australian Taxation Office's shadow economy advisory forum. He is an adjunct professor at Curtin University and the University of Western Australia.

Ms. Mariana Escalante Seyffert

Ms. Mariana Escalante Seyffert is the General Coordinator at the Direction General of Competition Advocacy, The Federal Economic Competition Commission of Mexico where she is responsible for advocating for competition principles with the academic sector and outreach.

Mr. Alberto Heimler

Mr. Alberto Heimler is an expert on Competition and Regulation at the International Trade Centre; the Chairman of the Working Party on Competition and Regulation at the OECD's Competition Committee and a member of the Steering Group of the International Competition

Network, as well as the Central Director for Research and International Affairs at the Italian Competition Authority.

Panel 3 - Sustainability Business Agreement

Prof. Simon Holmes

Prof. Simon Holmes is currently a member of the UK Competition Appeal Tribunal; a Visiting Professor at Oxford University where he teaches competition law and a legal adviser to the NGO, ClientEarth as well as a co-chair of the Sustainability and Competition Taskforce of the International Chamber of Commerce. He is one of the most forefront advocates for the increased role of competition authorities in helping to advance sustainable development goals.

Mr. Martijn Snoep

Since September 1, 2018, Mr. Martijn Snoep has been the Chairman of the Netherlands Authority for Consumers and Markets (ACM). Mr. Snoep obtained his law degree from Erasmus University Rotterdam. Until his appointment at ACM, he worked at De Brauw Blackstone Westbroek for 28 years. Operating from both their Amsterdam and Brussels locations, Mr. Snoep gave advice to businesses about the application of competition law in the Netherlands and abroad. As managing partner, he stood at the helm of the firm between 2010 and 2016.

Mr. YOSHINARI Ryohei

Mr. YOSHINARI Ryohei is Assistant Director of Coordination Division at the Japan Fair Trade Commission. Mr. YOSHINARI is taking active part in the JFTC's "Study Group on Guidelines for Business Initiatives toward Green Society". In 2021, he worked for organizing the JFTC's International Symposium "Green Growth and Competition Policy."

Mr. Tom Leuner

Mr. Tom Leuner is the Executive General Manager of the Mergers, Exemptions and Digital Division at the Australian Competition and Consumer Commission where he oversees the application and authorization process of business conducts seeking legal protection from the Australian Competition and Consumer Act against the criteria of not substantially lessening competition or having a net public benefit.

Closing Session

Mr. Raksagecha Chaechai

Mr. Raksagecha Chaechai has been serving as a Commissioner of the Trade Competition Commission of Thailand since 2021. Prior to his tenure at the TCCT, he served as the Secretary General of the Office of the Ombudsman from 2015 to 2020. Mr. Chaechai holds a bachelor's degree in economics from Chiang Mai University, a master's degree in development economics from the National Institute of Development Administration, a Master's degree in Policy Economics from the University of Illinois at Urbana - Champaign, the United States (USAID Scholarship), Doctoral degree in Innovative Management from Suan Sunandha Rajabhat University, and Honorary Doctorate degree in Law from Ramkhamhaeng University.