

# A New Approach to Assess Certain Sustainability Agreements under Competition Law

THEON VAN DIJK\*

Netherlands Authority for Consumers and Markets

## I. Introduction

Under competition law in the European Union and in most Member States, a restriction of competition in the form of cooperation between competitors is not prohibited if consumers receive a fair share of any benefits resulting from that cooperation.<sup>1</sup> Which “consumers” are considered in this “fair-share-to-consumers” condition? And what share is a “fair” share?

The short and traditional answer to these questions is as follows. Only the consumers in the same relevant market as the cooperating competitors are considered when accounting for the benefits, because they are the ones that are exposed to any negative effects due to the restriction of competition. And a fair share means that these consumers should be fully compensated for any negative effects. The net effect of the cooperation for them should at least be neutral.

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\* Theon van Dijk is chief economist, Authority for Consumers & Markets (ACM) in the Netherlands and has over 20 years’ experience as an expert on the economics of competition law.

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<sup>1</sup> This is one of four cumulative conditions for countervailing benefits under the Dutch Competition Act, art 6(3), or the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, art 101.

This paper proposes an alternative interpretation of “consumers” and “fair share”, in specific and well-defined circumstances, in order to facilitate sustainability agreements that reduce negative external effects and increase total consumer surplus (more precisely: total surplus of citizens, including consumers and non-consumers). This proposal is set out in the new draft sustainability agreement guidelines that were published recently by the Dutch Authority for Consumers and Markets (ACM).<sup>2</sup> Out of a sense of urgency to make a competition policy contribution (or at the very least not to be perceived as an obstacle), ACM’s draft guidelines have the objective to facilitate efficient joint private initiatives in the Netherlands to reduce environmental damage caused by overuse of common resources, such as damage due to greenhouse gas and air pollutant emissions, to complement public action in this area.

## **II. The Same Test For Different Categories of Cooperation?**

As a starting point it is useful to note that, from a consumer surplus point of view, the traditional fair-share-to-consumers condition for exceptions to the cartel prohibition makes sense in many but not all cases. The reason is that the condition works out differently for different categories of cooperation.

Clearly, cooperation between competitors in the form of, for example, price cartels is prohibited. They only increase prices without resulting in any benefits for consumers – and therefore also not a fair share of benefits. Here there are no exceptions, and this is naturally captured by the fair-share-to-consumers test.

The second category of agreements is aimed at generating benefits for the group of consumers of the product in question. An example are R&D cooperation agreements that result in improved products or lower production costs, or in faster ways to achieve these. Although there can be positive R&D spill-overs that benefit others than those direct consumers, in the development phase the main beneficiaries are typically the consumers that purchase the improved products and pay lower prices.

The traditional fair-share-to-consumers condition is expected to work reasonably well for this category of cooperation agreement, in the sense that most effects on consumer surplus are taken into account, as this is the very object of the cooperation. The consumers that suffer from the restriction of competition – in this example in the form of reduced individual R&D incentives or an increased risk of product market collusion – must at least be compensated by any benefits that are passed on to them. Since, by and large, the consumers that are exposed

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2 ACM, “Draft Guidelines: Sustainability Agreements” (first published for consultation on 9 July 2020. Second Draft Guidelines published 26 January 2021).

to the negative effects of the R&D cooperation are the same ones that benefit most from it, the fair-share-to-consumers test is naturally confined to the same relevant market. Out-of-market benefits are typically expected to be small or not present.

This is different for a third category of horizontal cooperation agreements. There are areas of cooperation where the main object of the cooperation and the resulting benefits are not confined to the cooperating firms or to the consumers of the product in question. Think for example of products or production processes that emit large volumes of greenhouse gases or air pollutants. The negative effects of these emissions go far beyond the consumers of these products. More importantly, these negative effects imposed on others are usually not accounted for in the prices that consumers pay for the products. In other words, there are negative external effects at play that suppress total surplus of consumers and non-consumers (citizens). Consequently, when competing producers of such products cooperate with the object of reducing emissions, the benefits end up not only with the consumers of these products but with a wider group of beneficiaries.

What would the fair-share-to-consumers test look like if such out-of-market benefits are important? One could take the traditional view and only count within-the-market benefits as relevant for the fair-share-to-consumers test. However, that would completely miss the point – a large proportion of the benefit does not end up with present or even future consumers in the relevant market, and that is not the object of the cooperation. That would in principle make the argument for taking out-of-market efficiencies into account.<sup>3</sup> However, there can be good reasons to stick to the traditional approach, even in these cases. This is explored in the next section.

### **III. Arguments For and Against a New Approach For Certain Sustainability Agreements**

#### **1. Arguments in favour of a new approach**

What are the considerations in favour of deviating from the traditional interpretation of the fair-share-to-consumers test to justify cartel prohibition exceptions for sustainability agreements?

First of all, in the Netherlands and elsewhere in Europe, there is a sense of urgency to reduce the emission of greenhouse gases, including mainly but not exclusively carbon dioxide (CO<sub>2</sub>), and to battle climate change and its negative effects on

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3 Note that out-of-market efficiencies do not refer here to one or more specific other markets but to improvements in consumer surplus more broadly. In fact, the efficiencies are social benefits that result from solving the coordination problem that causes overuse of common resources.

social welfare. Other substantial environmental damage (in the Netherlands, even more so than greenhouse gas emissions) is caused by the emission of air pollutants, in particular by nitrogen oxides (NO<sub>x</sub>) and ammonia (NH<sub>3</sub>) emissions, and also this has substantial negative effects on social welfare, in particular in terms of health and biodiversity.

Admittedly, this urgency is not immediate, since the most damaging effects of, for example, CO<sub>2</sub> emissions do not materialise in the very short term. But that makes it an even harder problem to tackle. Measures are required now but the full benefits follow only generations later. The problem is not always perceived as immediately pressing enough to overcome political differences. It may be for this reason that public measures do not sufficiently come off the ground and governments and NGOs frequently call upon the business community to take responsibility for their own role in climate change. Perhaps more so than with other policy problems, all hands are needed on deck, and the sooner the better. Initiatives from the private sector are needed to complement public measures (in particular if the public sector fails to deliver).

Against this background, and with the appropriate modesty about the role of competition policy in the larger scheme in mind, the question is how competition policy can encourage joint private initiatives to reduce environmental damage – or at the very least not discourage them. The traditional fair-share-to-consumers test does not take the crucial broader social benefits of environmental agreements into account. It is therefore inadequate to facilitate certain efficient private cooperation initiatives to reduce environmental damage. That is the second consideration in favour of a new approach.

Besides urgency, in combination with the inability of the traditional approach to take the key aspect into account, a third reason to make an exception is that sustainability is increasingly a dimension over which firms compete with each other. Many consumers value sustainability and are prepared to pay a premium for sustainable products. Thus, just like competition in dimensions such as quality, R&D and innovation, competition in sustainability is in some sectors at the heart of the competitive process. Sustainability is therefore not just any public interest that is unrelated to competition policy (just like the quality, R&D and innovation dimensions). However, in some circumstances competition hinders sustainability initiatives or results in less efficient outcomes (as may happen for those other competition dimensions). Restriction of competition in the form of agreements to jointly improve sustainability, through new or improved production processes or products, or through withdrawing the most polluting processes or products, may then be positive.

Finally, there are arguments for a new and more open approach that follow from economic reasoning. According to the polluter-pays-principle, it is fair (as well as more efficient from a social welfare perspective) that consumers of polluting products are the ones that pay a higher price for the reduction of the negative

external effects they are causing with their consumption. By comparing the negative price-increasing effects paid for by the consumers with the benefits that occur both inside and outside the market, this is exactly what happens.

A more abstract economic reasoning goes as follows. In a way, the “non-consumers” of a polluting product are essentially “consumers” of the negative external effects. These “consumers” derive a negative utility from their forced consumption of pollution. Even though this is, of course, not a market in the traditional sense, with a stretch it could be seen as one: there is supply of, say, greenhouse gases; there is demand, which is forced and inevitable; and the virtual price paid is a negative utility. In this interpretation, the reduction of negative external effects benefits the “consumers” in the market of pollution. Hence all benefits are within the affected “markets” and the traditional fair-share-to-consumers test can be applied.

## **2. Arguments against a new approach**

What are possible reasons for not taking out-of-market efficiencies into account when assessing cooperation agreements that reduce negative external effects?

One reason is that such an approach could open the floodgates for other agreements, meant to reduce negative external effects in other areas. This is the “slippery slope” argument. Cooperation agreements between competitors, for example, that genuinely boost employment may reduce the negative external effects associated with unemployment. Or agreements to create national champions, which might generate positive external effects beyond the direct and possibly negative effects, might also be argued to deserve a special treatment.

Another consideration for not having a more open competition law treatment of certain sustainability agreements, is that it could “crowd out” public measures to reduce environmental damage. With more private initiatives, there is arguably less need for public measures, and it may even be used as an excuse for not taking public measures. However, under the traditional approach to out-of-market-benefits (that is, without any crowding-out effect), public measures have insufficiently come off the ground. Moreover, important to note is that this crowding-out is only problematic if the public measures that otherwise would be taken come at a lower social cost than the negative effects of cooperation agreements that restrict competition.

To some extent weighing the arguments in favour and against the new approach is a matter of personal preference or belief. The crowding-out argument is, however, not very convincing if one places much weight on the large negative effects for social welfare that are associated with even a small risk of public inaction. The slippery slope consideration can to a large extent be dealt with by applying the new approach to very specific circumstances, as in the next section. Admittedly, the question remains why environmental and no other external effect-reducing agreements deserve a new approach. The answer lies in a

combination of the close relationship between competition and sustainability, and the urgent need to make a competition law contribution toward solving common-resource problems (rather than abusing the exemption provision for competition-reducing agreements that serve national interests in competition between countries).

## IV. “Isolating” Sustainability Agreements With Substantial

### Out-of-Market Benefits

The key to keeping the benefits while reducing the risks, is to “isolate” the new approach to specific sustainability agreements and under specific circumstances (and only to those). The draft ACM guidelines formulate the following limiting conditions:

1. The agreement under consideration should be related to environmental damage with substantial negative external effects caused by overuse of common resources. Agreements between competitors to reduce the emission of *greenhouse gases or air pollutants* are examples in point.

By defining the specific group of agreements to which it applies, the new approach is clearly limited. This limit is economically substantiated: the external effects of greenhouse and air pollutant emissions are caused by overuse of common resources, known in public economics as the common-pool problem.<sup>4</sup> At its heart this a coordination problem, the solution of which results in social benefits. Some other environmental sustainability agreements or social sustainability agreements (such as animal welfare or fair trade) are not or are much more distantly related to negative externalities – or in any case not to externalities caused by overuse of common resources.

2. There should be a *concrete policy goal set* by the government or another public institution for the reduction of the emission of the substance in question in the Netherlands. This can be a set policy target that is not binding for government. Another possibility is that there is a legal requirement based on a treaty ratified by parliament that binds the government to such goal. This goal is not (yet) binding for firms or industries.

This limiting condition serves two goals. First, it provides the democratic legitimacy for a competition authority to redistribute consumer surplus from consumers to

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4 In public economic terms, common resources are the category of goods that are non-excludable (restricting access to use is not possible) and rival (use by one affects the use by another). See Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods and Club Goods* (CUP 2003) for the distinguishing characteristics of private goods (excludable and rival), public goods (non-excludable and non-rival), club goods (excludable and non-rival) and common resources (non-excludable and rival). See Mancur Olson, *The Logic of Collective Action* (2nd edn, Harvard UP 1974) and Garrett Hardin, “The Tragedy of the Commons” (1968) 162 *Science* 1243, for more on common-pool resources.

non-consumers (which is in fact what happens under the new approach). Second, it allows the use of the abatement method from environmental economics, which as set out below has a number of advantages for the practical assessment. Additionally, the reason for the goal not (yet) being binding for firms is that if the goal were binding for firms, encouragement of sustainability initiatives would not (no longer) be needed. In the latter case, cooperation might still be beneficial to achieve certain efficiencies but those do not concern out-of-market efficiencies.

3. The measure to reduce the emissions that cause environmental damage, as foreseen in the cooperation agreement, should result in an *efficient contribution* towards achieving the set goal. This includes an assessment of whether the measure is cost-efficient.

The new approach does not apply to instances in which the set policy or legally binding goal has already been achieved. As far as measures are concerned that are more costly than the lower-ranking-in-cost measure that is just needed to achieve the set goal: these do not meet this efficient contribution test. This will be explained in the brief exposition of the abatement cost approach below.

An additional point to note is that a sustainability agreement could propose a measure that results in an efficient contribution towards emission reduction, but not the most efficient measure possible. Still, under the abatement cost approach this would count as an efficient contribution and is not problematic as long as it does not stand in the way of more efficient measures being implemented (which is indeed the case as emissions are still far off the set goal).

4. The *total benefits* that are passed on to all persons that suffer from the negative external effects – that is, to consumers of the product plus out-of-market benefits to non-consumers, or indeed social or citizens' benefits more generally – should outweigh any negative effects for consumers that are due to the restriction of competition. In other words, there should be a net positive effect on the total consumer surplus.

These limiting conditions narrow down the novel interpretation of the fair-share-to-consumers test to specific circumstances. As long as each of the above conditions are met, consumers are considered to have a “fair” share of the net social benefits resulting from the sustainability agreement.

## **V. Methods From Environmental Economics to Value the Benefits**

### **1. Environmental cost – benefit analysis**

A qualitative assessment of the fair-share-to-consumers condition can suffice in some cases. For example, when it is obvious that the total benefits are much larger than the costs, or when reliable estimates of the benefits are not available.

The fair-share assessment of most environmental damage agreements, however, is expected to require at least some quantification.

It is important to note that the new approach conceptually boils down to an environmental social cost – benefit analysis (SCBA). Total benefits for consumers and non-consumers are balanced against the total costs, which are the negative effects of the restriction of competition due to the agreement (often a price increase and reduced demand). SCBAs are routinely carried out by governments in various areas to assess the impact of policies or interventions. The Dutch government has published SCBA guidelines with instructions how such analyses should be carried out.<sup>5</sup> In an international context, the OECD has published SCBA guidelines specifically for environmental projects.<sup>6</sup> Similarly, the European Commission carries out impact assessments before specific measures are taken or new policies are implemented.<sup>7</sup>

A key concept in environmental SCBAs is the so-called “shadow price”: the social value of environmental damage caused by one unit of emission. For example, the shadow price of CO<sub>2</sub> has been estimated (central estimate with large range) to be €57/tonne in 2017 in the Netherlands.<sup>8</sup> This implies that, by and large, a reduction in CO<sub>2</sub> emissions of 5.000 kilotons is centrally estimated to represent a value of €285 million.

Below, the two main methods to estimate shadow prices are first briefly explained. Next it is discussed how shadow prices can be used in a practical assessment of the effects of environmental agreements.

## 2. Methods to estimate shadow prices<sup>9</sup>

In order to quantify the total social benefits of an agreement that reduces environmental damage, insights from environmental economics are needed. In monetary terms the total environmental damage of the emission of a greenhouse gas or air pollutant in a specific geographic space is, by and large: (1) the quantity of emissions × (2) the cost per unit of emission. The cost per unit of emission is the monetary social welfare loss due to the environmental damage caused by one unit of emission – in other words: the shadow price.

The cost per unit of emission cannot be valued using market prices, since the damage caused by emissions is an external effect for which by definition there are no market

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5 CPB Netherlands Bureau for Economic Policy Analysis and PBL Netherlands Environmental Assessment Agency, “Algemene leidraad voor maatschappelijke kosten – batenanalyse” (2013).

6 OECD, *Cost-Benefit Analysis and the Environment: Further Developments and Policy Use* (OECD 2018) <[www.oecd.org/governance/costbenefit-analysis-and-the-environment-9789264085169-en.htm](http://www.oecd.org/governance/costbenefit-analysis-and-the-environment-9789264085169-en.htm)>

7 See documents related to the European Commission’s Environmental Impact Assessment (EIA) Directive: European Commission, “Nature Protection and Environmental Impact Assessment” <[https://ec.europa.eu/environment/legal/law/2/module\\_3\\_1.htm](https://ec.europa.eu/environment/legal/law/2/module_3_1.htm)> accessed 2 January 2021.

8 Sander de Bruyn and others, *Environmental Prices Handbook 2017* (CE Delft 2018).

9 This section is based on E Drissen and H Vollebergh, “Monetaire milieuschade in Nederland, een verkenning” (PBL Netherlands Environmental Assessment Agency, 15 June 2018).

prices. Therefore, a shadow price, which is a virtual price, needs to be determined. Generally, there are two main methods to do this: (1) the damage cost method; and (2) the abatement cost method. Each is explained in further detail below.<sup>10</sup>

### ***A. Damage cost method***

In the damage cost method, the valuation of the environmental damage caused by emissions depends on valuations by individuals. These can be estimated or constructed in various ways.

One possible way is hedonic pricing or contingent valuation, which identifies external factors that affect prices. An illustration: the difference in average housing prices in the same area between houses close to a park and houses close to a highway can be used to estimate the shadow price of unattractive views and noise disturbance (for example, expressed as the housing price difference per kilometre closer to the park). As well as methods based on revealed preferences, stated preference methods such as conjoint analysis can be used to value or determine the willingness-to-pay of individuals for specific environmental aspects.

Another way is to construct shadow prices more broadly across individuals by deconstructing the total environmental damage into different components. Each component can then be valued. To get a flavour, a damage cost method to value the damage caused by greenhouse gas and air pollutant emissions could look as follows. This example uses nitrogen oxides ( $\text{NO}_x$ ), which are gases produced during combustion.

- Step 1 is to express the substance into a concentration or a deposition per geographic unit, for example, 365 ppm (parts per million)  $\text{NO}_x$ , equivalent to 748 mg  $\text{NO}_x$  per  $\text{m}^3$ .
- Step 2 is to determine how this concentration is related to damage components such as damage to health, climate, ecosystems and buildings.
- Step 3 is to express each damage component in monetary units.
  - For health damage, the monetary valuation of a quality-adjusted life year (QALY) in the Netherlands can be used to assess the monetary value of a reduction in expected QALYs due to the relevant  $\text{NO}_x$  concentration.
  - For damage to the ecosystem, the value of biodiversity can be expressed as PDF (potentially disappeared fraction of species) per square metre per year. The monetary value of a unit of PDF can be based on valuation studies for specific species.

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10 For a more elaborate overview of economic measurement methods, see Roman Inderst, Eftichios Sartzetakis and Anastasios Xepapadeas, “Technical Report on Sustainability and Competition”, jointly commissioned by the ACM and the Hellenic Competition Commission (forthcoming).

- Finally, the value of environmental damage to buildings, including corrosion and damage to stones or paints due to acidification, can be based on maintenance and repair costs.
- Step 4 is to sum up these damage valuations for components to form the shadow price for a unit of NO<sub>x</sub> emission, which has been estimated €34,700 per kiloton of NO<sub>x</sub>.

### **B. The abatement cost method**

Abatement costs are the costs associated with reducing environmental damage. When applied to public policy and social valuation of damages, the abatement cost method requires a specific environmental objective. Objectives can be set by government in law or in policies.<sup>11</sup> The method then estimates the costs that are needed to achieve that objective. To that end a supply curve is constructed, ranking possible measures to prevent damage according to their costs (from low to high). This curve represents the marginal abatement costs at different levels of emission reduction. The shadow price for the emission of a specific substance is equal to the costs associated with the costliest measure on the supply curve that is just needed to achieve the government objective. This price reflects the highest cost society is prepared to pay, as determined by the public policy goal, for environmental damage reduction.

The advantage of the abatement cost method compared with the damage cost method is that no valuation of the damage by individuals is necessary to estimate the shadow price. This is an advantage because these valuations can be complex and have large error margins. A governmental or other formal objective, as defined by a target emission level of a specific substance, and the supply curve for emission-reducing measures for that substance, are all that is needed to determine the shadow price.

## **VI. How Can the Assessment Be Carried Out in Practice?**

After this short detour to get a flavour of methods to estimate shadow prices, how can the assessment of the benefits and costs of a specific environmental damage agreement take place in practice?

### **1. Benefits**

To calculate the benefits, first it needs to be established which substances (greenhouse gases and air pollutants) are affected by the agreement. In the Netherlands, the quantities of physical emissions of a large number of greenhouse gases, air pollutants and other environmentally damaging substances to land, water and

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<sup>11</sup> Or, exceptionally, determined in court as in the *Urgenda* judgment in which the Dutch Supreme Court ruled that greenhouse gas emissions in the Netherlands should be 25% lower by the end of 2020 compared with 1990.

air are centrally registered in the Emissions Register (“Emissieregistratie”). The Emissions Register uses a bottom-up approach, measuring emissions at installations of companies. Reports of emissions are available per company.<sup>12</sup> Similarly, at European level, the European Environment Agency maintains an EU Registry on Industrial Sites.<sup>13</sup>

Next, for each of these substances the reduction in emission volumes that is foreseen by the parties under the agreement needs to be scrutinised, and the plausibility substantiated.

Once the actual emission volume reductions due to the agreement are determined for each substance, these need to be multiplied by the shadow price per substance. In the Netherlands, shadow prices are estimated and periodically published by environmental thinktank CE Delft in its *Environmental Prices Handbook*.<sup>14</sup> This Handbook sets out the methodology that is used and provides an overview of estimated shadow prices (with lower, upper and central estimates) for hundreds of substance emissions that damage air, water and soil.<sup>15</sup> In an international context, for example, the OECD has estimated shadow prices for a number of greenhouse gases and air pollutants for selected countries.<sup>16</sup>

In the simplest possible and crude way, the total benefits are estimated by the reductions in emissions of substances due to the agreement (which also includes a demand-reduction effect due to the price increase)  $\times$  the shadow price per unit of the substance. These benefits constitute the benefits for consumers and for the non-consumers that suffered from the negative external effects.

## 2. Costs

The costs are any negative effects that are due to the restriction of competition resulting from the agreement. In practice, these will typically take the form of a price increases and demand reduction, due to more costly production processes or to withdrawing cheaper product varieties. More precisely, the expected price increase of a specific agreement is based on: (1) the costs of adjusting the product or production process in order to be able to generate lower emissions  $\times$  (2) the degree of passing-on of these additional cost to consumers through higher retail prices.<sup>17</sup>

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12 See Emissieregistratie <[www.emissieregistratie.nl/erpubliek/erpub/facility.aspx](http://www.emissieregistratie.nl/erpubliek/erpub/facility.aspx)>.

13 See European Environment Agency, Eionet Reporting Obligations Database <<https://rod.eionet.europa.eu/obligations/721>>.

14 n 8, English version <[www.cedelft.eu/en/publications/2113/envionmental-prices-handbook-2017](http://www.cedelft.eu/en/publications/2113/envionmental-prices-handbook-2017)>.

15 CE Delft uses the abatement cost method for the CO<sub>2</sub> shadow price, and the damage cost approach for the valuation of other substances.

16 T Dang and A Mourougane, “Estimating Shadow Prices of Pollution in OECD Economies” (2014) OECD Green Growth Papers, No 2014-02.

17 This assumes that the additional costs that are absorbed (not passed on) in the vertical supply chain should not be part of the cost – benefit analysis.

According to the new approach, consumers receive a fair share of the benefits as long as the total benefits are larger than the additional costs that are passed on (and the other conditions are met as well). If all households in the Netherlands are consumers, as is for example the case for energy consumption, then the cost – benefit analysis boils down to comparing the post-agreement retail price increase to the reduction in environmental damage per unit of produced energy, based on the shadow price. If consumers are only a subset of those affected by negative external effects, then the difference in volumes on the cost side (only consumers) and benefit side (all affected) needs to be accounted for.

## **VII. Indispensability of Cooperation**

The fair-share-to-consumers condition is one out of four conditions that must cumulatively hold for an exception to the cartel prohibition under TFEU, Articles 101(3) and (1), respectively. The other conditions are that there should be efficiency benefits, that the competition restrictions should be necessary to achieve the objective and, finally, that competition should not be eliminated for a substantial part of the products in question.

The necessity condition can be applied at two levels, what could be called “absolute necessity” and “relative necessity”. Whether or not cooperation is necessary to achieve emission reductions in the first place is a question of absolute necessity. Whether or not all provisions or all parties in the agreement are needed (for example, it remains to be seen whether a provision on joint pricing would be necessary) is a question of relative necessity of the agreement.

As far as absolute necessity is concerned, there are general circumstances in which cooperation between competitors is needed and in which it is not needed. Cooperation is not needed if the willingness-to-pay for sustainable products is sufficiently high to cover the additional costs for individual companies. Competition can then take place in the dimension of sustainability, in very much the same way as on product quality or on innovation. Some consumers are prepared to pay a premium for sustainability, and some are not (depending perhaps on income). Sustainable (high-quality) products as well as non-sustainable (low-quality) products coexist in the market.

However, there are also circumstances in which unilateral sustainability initiatives do not come off the ground, and cooperation is necessary.

First, there may be first-mover disadvantages associated with introducing sustainable products. Consumers may switch away in large numbers from more expensive sustainable products to cheaper non-sustainable products, reducing the incentive to be the first to introduce them. Consumers may switch away because their willingness-to-pay for sustainable products is simply too small – in which case cooperation does not help either. But consumers may also

switch away from sustainable products because of free-riding behaviour. They may prefer others to buy sustainable products but still appreciate and enjoy the resulting benefits. In that case the willingness-to-pay can be sufficiently large but not as long as there are cheaper varieties around that allow for free-riding. Yet another possibility is a combination of both motives, and is a more behavioural-economic outcome: the willingness-to-pay can be large if there is some assurance that others also purchase sustainable products and thus contribute to the sustainability improvement.<sup>18</sup> All these possibilities, including the free-rider aspect, can be investigated in a willingness-to-pay consumer survey.

Second, there may be fixed costs associated with making products or production processes more sustainable. If the demand for a sustainable product of an individual company is insufficient to recover those fixed costs, then cooperation to share the fixed costs between more companies may establish the absolute necessity for the agreement.

Once the absolute necessity for cooperation to achieve sustainability improvements is shown, from a relative necessity perspective it should be established whether all restrictions in the agreement are necessary. For example, if the agreement is motivated by fixed-cost sharing, then it is not necessary to have pricing restrictions as part of the agreement.

## VIII. Conclusion

The key aspect of the proposed new approach is to include in the competition law assessment of certain sustainability agreements the benefits to the non-consumers who suffer from the negative external effects caused (eventually) by consumption. Consumers obtain a fair share if the total benefits to consumers and affected non-consumers are larger than the price increase due to restricted competition.

Although the implementation of this new approach is considered practically doable (and this paper has set out in broad and simplified terms how it can be done), there are complicating circumstances which have not been discussed. For example, shadow prices are dynamic and can change over time, depending on what private and public measures to reduce emissions are taken or planned and on whether policy goals are adjusted. In these eventualities further reflections are needed to select the correct shadow prices for the assessment.

Finally, besides the proposed new approach in ACM's draft guidelines, there are other ways to facilitate joint private initiatives that are more in line with

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<sup>18</sup> See, for example, U Fischbacher, S Gächter and E Fehr, "Are people conditionally cooperative? Evidence from a public goods experiment" (2001) 71(3) *Economics Letters* 397.

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the full compensation principle of Article 101(3) TFEU. A recent paper by Thomas and Inderst<sup>19</sup> proposes an interesting way, which is to take account of the likelihood that the willingness-to-pay for sustainability improvements may be higher for future consumers than for current consumers. That could also provide an opening under competition law to be more facilitating to private sustainability initiatives.

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19 Stefan Thomas and Roman Inderst, “Prospective Welfare Analysis – Extending Willingness-to-Pay Assessment to Embrace Sustainability” (25 September 2020) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3699693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699693)>.