

Sustainable Antitrust

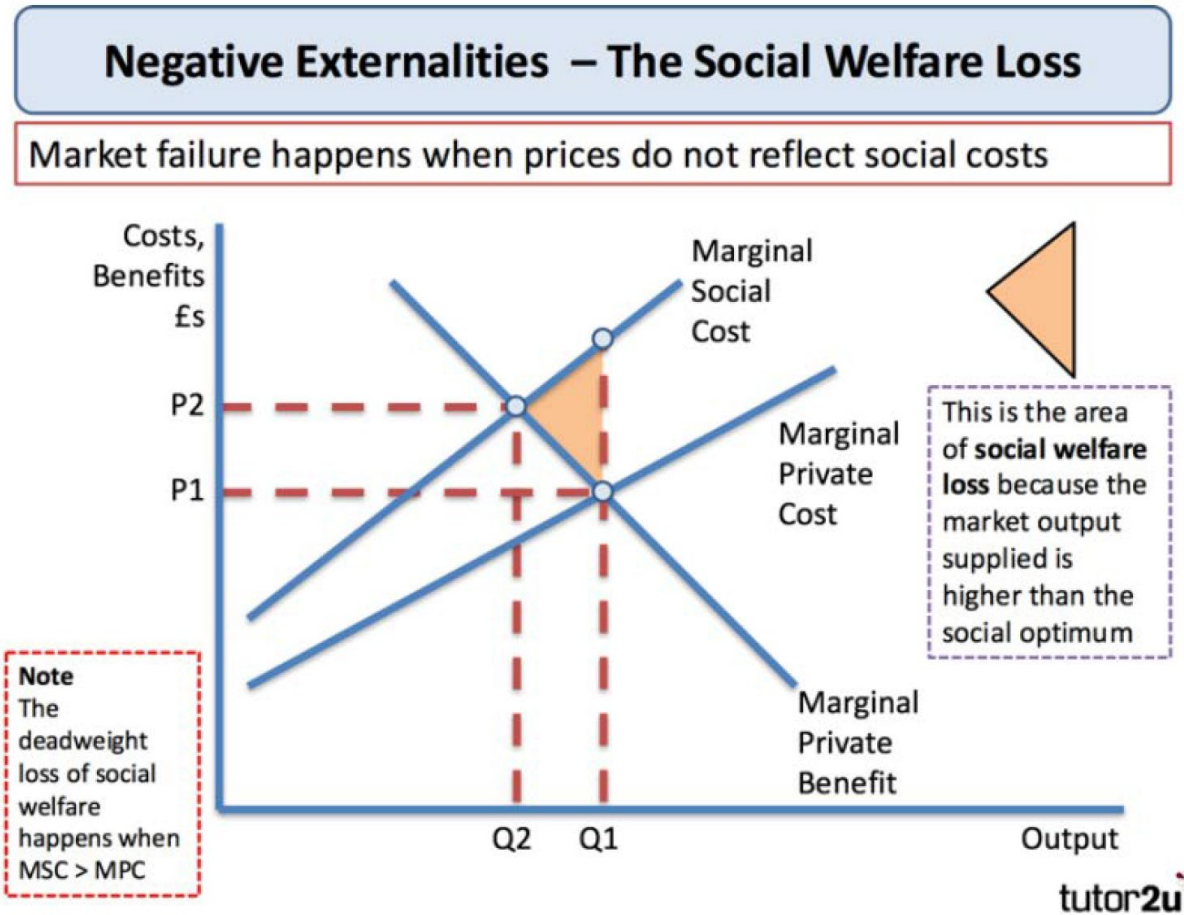
A review of the draft revised Horizontal Guidelines

European University Institute debate on “Greening Competition Law?”

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1. Markets alone do not solve the climate crisis because of market failures:



Supply side market failure and “collective action problem” illustrated:

Figure 1 First-mover disadvantage in green coordination

Firm payoff matrix

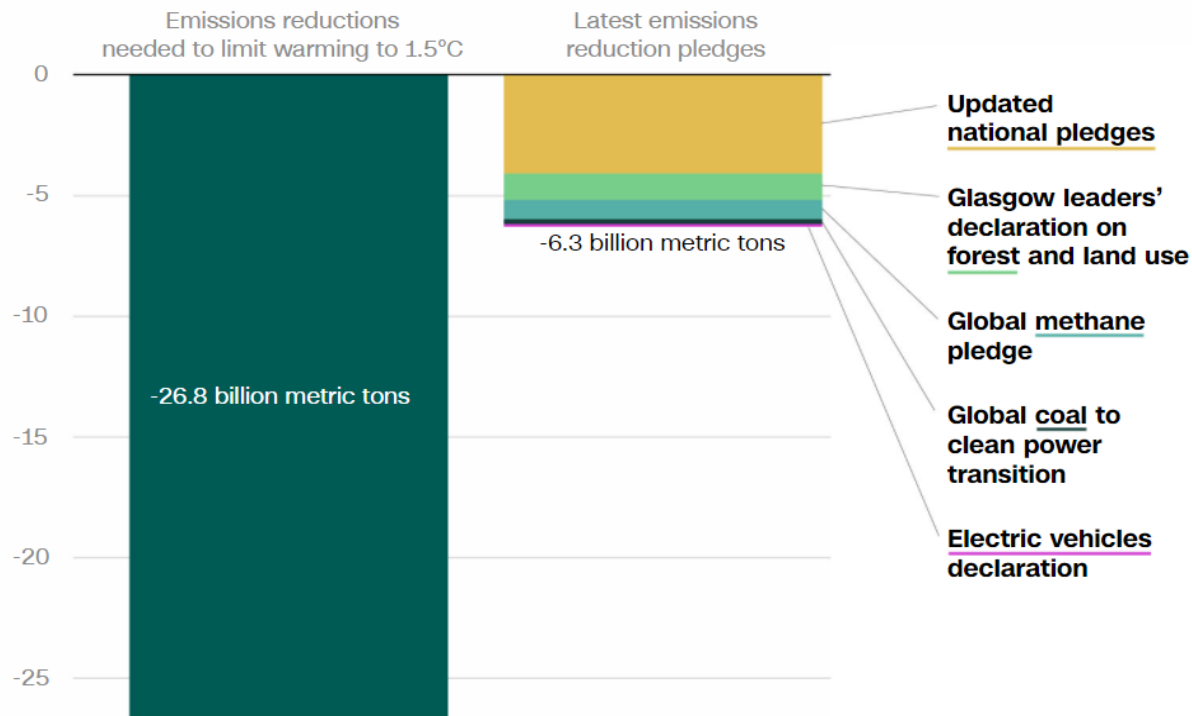
		Firm B	
		Grey	Green
Firm A	Grey	50, 50	60, 25
	Green	25, 60	50, 50

See Jenkins, Rosenboom et al (Oxera), “When to give the green light to green agreements”

- And “free rider” market failures also appear on the demand side

Regulation and taxation alone do not solve the climate crisis, because of policy failure:

Estimated reductions in annual global greenhouse gases by 2030, compared to current policies, in billion metric tons of CO₂ equivalents.



Note: Chart uses average estimates for current policy level projections and median estimates for emissions leading to 1.5°C of warming.

Source: Climate Action Tracker

Graphic: John Keefe, CNN

2. Private cooperation is needed to achieve “sustainability spill-over benefits” (positive externalities)

Firms increasingly realize that (a) they benefit in the long term, if (b) their *rivals* eliminate greenhouse gas emissions (“spillover benefits”), and (c) these private benefits align with public benefits. If so, firms have a genuine incentive to pursue efficient sustainability goals together with their rivals, and competition authorities don’t need to assume that they are just out to raise short-term profits at the expense of consumers.

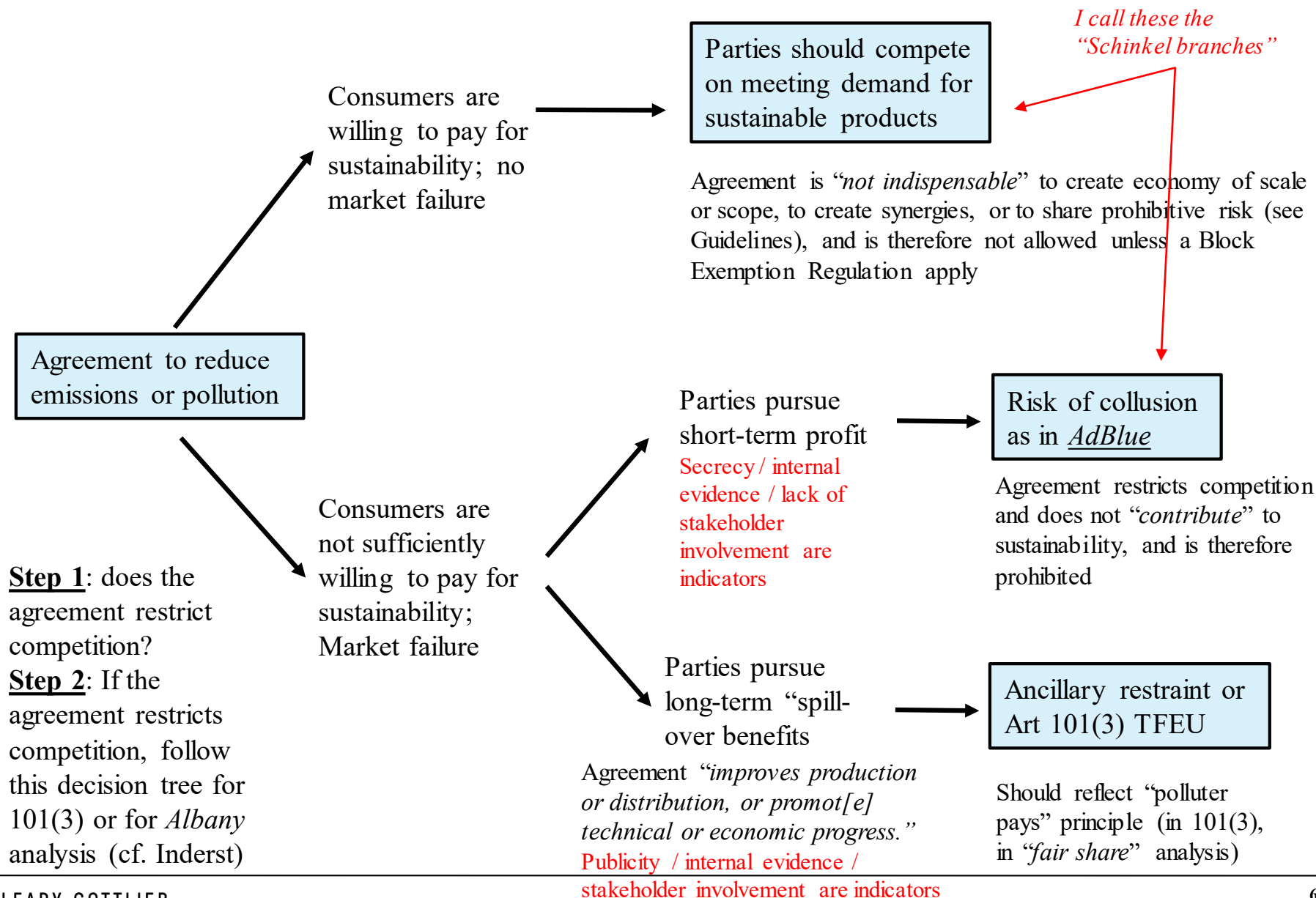
“where positive spill-overs exist between firms, efforts by one firm also benefit other firms. In this case, the level of sustainability efforts by other firms would actually have a positive effect on a firm achieving its own objectives. Allowing firms to coordinate their sustainability efforts will then lead to higher overall effort levels.”

Examples: reduced existential threat from climate change; genuine social objectives; common cost savings; improved industry reputation; avoiding costly and inefficient regulation

— Publicity / internal evidence / stakeholder involvement are indicators firms seek these benefits

Source: “When to give the green light to green agreements” (Jenkins et al, Oxera)

When Could Private Cooperation Be Helpful for Sustainability ? – a Proposed Decision Tree



3. Draft Horizontal Guidelines may allow Sustainability Cooperation

- Draft Guidelines confirm that sustainability is a EU policy priority;
- Draft Guidelines confirm sustainability agreements may **fall outside the scope of the prohibition** of Article 101 TFEU, if they do not affect any parameters of competition:
 - agreements that do not bear upon their core commercial activities, *e.g.* to reduce use of inputs not used in production;
 - agreements to create database containing information about sustainable suppliers;
 - agreements for organizing industry-wide or consumers' awareness campaigns.
- Guidelines describe “soft safe harbor” for widely defined **sustainability standards agreements – even if mandatory** – if 7 cumulative conditions are met:
 - unlimited participation and transparent process for selecting the standard;
 - no obligation for third parties to comply to the standard; [571 - “no pressure”?]
 - participating companies can adopt a higher sustainability standard;
 - no exchange of commercially sensitive information beyond what is necessary;
 - non-discriminatory access to the outcome of the standardization process;
 - no appreciable increase in price; [“appreciable”?; could narrow the safe harbor?]
 - monitoring system ensuring compliance.

Draft Horizontal Guidelines – 4 conditions under Article 101(3) TFEU

- Agreements that restrict competition can still be justified by **sustainability benefits**;
- Agreement must prove **necessary** to attain the sustainability objective: *e.g.* to
 - overcome first mover disadvantage;
 - cure market failures where public policies and regulations fail to do so;
 - achieve economies of scale;
 - nudge consumers' preferences.
- Consumers must receive a **fair share**, deriving from three different kinds of benefits:
 - “individual use value benefits” -- such as better quality of product;
 - “individual non-use value benefits” -- consumers' appreciation of the impact of their sustainable consumption on others (note that WTP surveys for conjoint analysis should avoid demand-side collective action problem!);
 - “collective benefits” -- positive externalities that benefit society.
 - HG 603: “*where consumers in the relevant market **substantially overlap** with, or are **part of** the beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market occurring outside that market, can be taken into account if they are **significant enough** to compensate consumers in the relevant market for the harm suffered.*”
- Residual competition

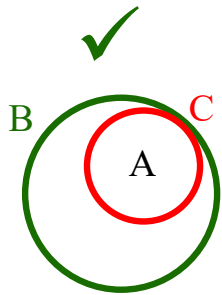
When (and how much) do collective benefits count? (1)

- Until 2001, collective benefits counted fully, under the **CECED** (1999) precedent
 - *“Individual economic benefits ... savings on electricity bills allow recouping of increased costs of upgraded, more expensive machines within nine to 40 months”*
 - *“Collective environmental benefits ... the benefits to society ... appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers”*
- After modernization in 2001, collective benefits no longer counted, until **Mastercard** (2014):
 - *“appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for competition [Consten & Grundig]”* (para 234)
 - As the Dutch ACM explains
 - “this statement by the Court therefore does not determine whether full compensation of negatively affected consumers is necessary or whether these advantages should be in or out of market. ... MasterCard clarifies the case law ... as follows:*
 - (i) out of market benefits are counted towards compensation of the consumers negatively affected, in particular if they affect substantially the same group;*
 - (ii) out of market efficiencies benefiting other consumers can also be counted toward a fair share for consumers overall; and*
 - (iii) full compensation of the negatively affected consumers is not required, just conferral of appreciable objective advantages. “*

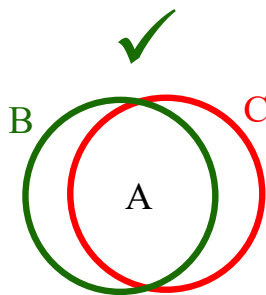
When (and how much) do collective benefits count? (2)

EC appears to insist on “full compensation” of consumer, when Art 101(3) only seeks “fair share”. This leads to two limitations in the Horizontal Guidelines:

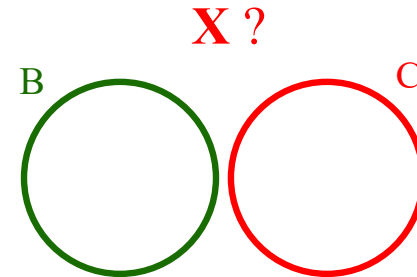
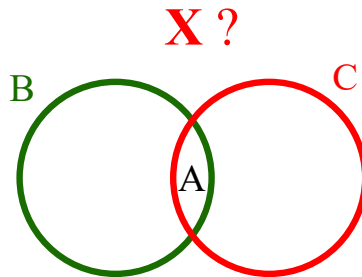
Limitation 1: Collective benefits can justify restriction only where “*consumers in the relevant market substantially overlap with, or are part of the beneficiaries*” (as EC proposes in HG para 602-605)?



e.g., Consumers (C) paying for clean energy are Beneficiaries (B) from lower emission (or substantially overlap)



Consumers (C) buying sustainable wood mostly grown abroad: bio-diversity Benefits (B) don't count at all?



Consumers (C) buying sustainable cotton made abroad: collective Benefits (B) don't count at all?

Limitation 2: What share of the benefits are counted to balance against competitive harm?

- All benefits (B)?
- Or only those experienced by consumers who pay (A), as EC proposes (= individual use value benefit!).

This leads to unjust and bad results – EC would allow sustainability agreements only if they benefit EU; Agreements against harm abroad would be banned? Example of 1st class fliers asked to pay for sustainable fuel – Agreement banned because A is less than the extra price they pay, even if collective benefits (B) are great?

When (and how much) do collective benefits count? (3)

Limitations in the draft Guidelines are:

- Inconsistent with “polluter pays” principle in Article 191(2) TFEU -- They should *pay* for damage that they cause, not *be paid* for *not* causing damage.
- Unfair (applying Rawls’ *Theory of Justice* analysis, Kant’s Categorical Imperative, or the “Golden Rule”)

Proposed answer: “Fair share” analysis should be in two steps

- **Step 1:** *before* assessment of the benefit to consumers, social cost (“externalities”) should be internalized to calculate “true price” (as required in “polluter pays” principle Art 191(2) TFEU).
- **Step 2:** *After* step 1, if agreement price > “true price”, check if agreement confers “*appreciable objective advantages of such a character as to compensate for the disadvantages ... for competition*” (Mastercard)
 - Compensation need not be full, but must be “fair”; damage costs instead of abatement costs
 - Para 588 should be adjusted: “*Consumers receive a fair share of the benefits when the benefits deriving from the agreement constitute appreciable objective advantages for the consumers affected by the agreement of such a character as to compensate for the disadvantages which that agreement entails for competition outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral*” *Compensation need not be full, and need not be in the same market as where the competitive impact is felt, but must be fair and reflect the “polluter pays” principle. Therefore, sustainability benefits that ensue from the agreements have to be related to the consumers of the products covered by those agreements. Climate change abatement and mitigation, the protection of biodiversity, and the reduction of large scale pollution qualify as appreciable objective advantages that “relate” to the consumers – in the sense that they affect everyone including the consumers.*”



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