

# Incorporating Sustainability Benefits in Competition Analysis

Roman Inderst  
Goethe University Frankfurt

- The (possible) incorporation of sustainability benefits raises many questions: Why? Which? How?
- The argument is far from purely academic. See the (draft) guidelines of the Dutch Competition Authority, changes in the Austrian competition law or the Commission's draft horizontal guidelines (DHG).
- This talk:
  - Brief overview of the DHG
  - General (conceptual) discussion

- Sustainability Agreements: Very broad definition, with explicit reference also to, e.g., human rights and animal welfare (para. 543). But examples are mainly framed in the context of the avoidance of externalities with explicit reference to market failures not already addressed by regulation (para. 546).
- Separate consideration of agreements not raising competition concerns (Section 9.2), e.g., those relating to the creation of a database about sustainable suppliers or distributors.
- Also separate consideration of "sustainability standardisation agreements" (Section 9.3.2), for which a "soft safe harbour" is created.

*Inderst. Incorporating Sustainability into an Effects-Analysis of Horizontal Agreements, commissioned by the European Commission.*

*Inderst/Thomas. Sustainability Agreements in the European Commission`s Draft Horizontal Guidelines, Journal of E Comp Law & Practice, 2022*

### Efficiencies

- Though they always have to be “objective, concrete and verifiable” (para. 579), the consideration is explicitly wider than cost/price benefits.
- The DHG acknowledge explicitly that next to use value benefits (Section 9.4.3.1), non-use value benefits may be of particular relevance (Section 9.4.3.2).
- And with this the use of the respective measurement instruments (such as surveys, conjoint analysis) becomes important.

*Inderst/Thomas: Prospective Welfare Analysis: Extending Willingness-to-Pay Assessment to Embrace Sustainability. Journal of Comp Law and Ec, 2021*

*Inderst/Thomas: Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis. Journal of Comp Law and Ec, 2021*

*Inderst/Thomas: Measuring Consumer Sustainability Benefits. Journal of E Comp Law & Practice , 2021*

### Indispensability

- The DHG acknowledge explicitly
  - that without an agreement there may be freeriding on the investments to promote sustainability (“first mover disadvantage”, para. 584),
  - that parties may not sufficiently concentrate efforts on the respective standard or label, which may then fail to reach sufficient scale (para. 585),
  - and that consumers may fail to sufficiently understand or appreciate benefits (para. 586).

*R. Inderst, E. Sartzetakis, A. Xepapadeas. Firm Competition and Cooperation with Norm-Based Preferences for Sustainability. Journal of Industrial Economics*

*R. Inderst, F. Rhiel, S. Thomas. Sustainability Agreements and Social Norms, NKarZ*

### The DHG also acknowledges “collective benefits”

- My understanding is that this remains within the full-compensation consumer welfare paradigm.
- But it acknowledges benefits that accrue to consumers in the same market if other consumers change their behavior (externality).

### “Case” (hypothetical example)

- Jointly agreed introduction of a new car fuel, phasing out of old car fuel.  
[Implies that large fraction of citizen are consumers]
- No direct use value, but less (sufficiently “local”) harmful emissions
- Previous (individual) attempts to introduce new fuel failed (insufficient take-up)

## Extending the scope of CW analysis

- First focus on standard (“individualistic”) consumer welfare analysis  
→ Elicit Willingness-To-Pay (WTP) ceteris paribus
- There exist widely recognized tools, such as surveys or conjoint analyses  
→ Example: Hypothetical choice experiments
- Key: Non-use values may considerably change with context of elicitation, e.g., awareness, information, social norms  
[Example: “Chicken-for-Tomorrow” case]
- In particular, currently observed purchase behaviour may provide insufficient information



### Notes on measurement:

1. Context-specific realization of WTP is not an artefact, but can represent an opportunity: Introduce sustainability objectives without compromising consumer sovereignty  
→ But careful: No over-expansion (consumer view not citizen view, consumer's specific preferences not general values)
2. Careful phrasing of context for e.g. hypothetical choice experiments may make obsolete the super-imposition of "true preferences" (e.g. for supposedly not recognized energy-saving benefits)

- To capture “within-market-externalities”. I.e., WTP for a change (also) in other consumers’ choices. Elicitation thus not by “ceteris paribus” questions, but through scenario changes

### Methods and measurement:

- In addition, indirect methods can be used regarding impact on consumers, e.g.,
  - Hedonic pricing methods (in surrogate markets)
  - Measuring consumers’ averting or defensive expenditures
  - Health impact studies (monetizing increased morbidity risk etc.)

*R. Inderst, E. Sartzetakis, A. Xepapadeas. Technical Report on Sustainability and Competition, commissioned by ACM/HCC*

But, if at all, such an approach must be applied with great care:

1. “WTP” for change of consumption of others is not paid up by consumer
2. Which preferences over consumption of others are legitimate?
3. Competition authorities lack instruments for compensation / (re-)distribution of burden
4. Prevailing standards are the outcome of a political process, already reflecting collective preferences, including for distribution / fairness – and taking into account the whole set of available instruments

*Inderst/Thomas. The Scope and Limitations of Incorporating Externalities in Competition Analysis within a Consumer Welfare Approach, World Competition, 2022*

Proposals:

1. If expansion through collective CW analysis, indispensability criterion may safeguard against over-expansion. E.g. asking why current standards / environmental taxes are deemed insufficient, why there is a gap in enforcement
2. Alternative: Rely on ancillary restraints doctrine
  - It is then up to legislators to generate “sustainability corridors”, to both prioritize certain sustainability goals and make their realization concrete / measurable

*Inderst/Thomas. Legal Design in Sustainable Antitrust, 2022*