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Hans Maks\*

# The "New" Horizontal Agreements Approach in the EU: An "Economic" Assessment

Recent trends in EU antitrust policy (especially cartel arrangements as covered by the Union Treaty article 81) indicate two aspects. One is to enlarge the scope of competition policy towards other ends, e.g. towards environmental goals. The other is to depart from a "general prohibition of cartels unless" towards "it is allowed unless". In this paper we shall largely confine our analysis to the first trend. Our central question then is whether this development leads

- to effective competition policy in the traditional sense in terms of the maintenance of competition, or to the reverse, and
- to a more "economic" approach by antitrust policy.

The essence of the "new" horizontal approach will be sketched below. Following that, two definitions of "economics" are given. This leads to a specification of our central question. In order to be able to indicate the direction of our answer, the experience with antitrust policy in the Netherlands in the period 1958-1997 is first analysed before the answer is presented. Specific considerations regarding environmental goal instruments are then dealt with, the "new" guidelines on environmental agreements are reconsidered and the Commission's washing-machine example is commented on. Finally, we conclude that it might be a proper choice for competition policy to concentrate on its traditional core business and not to bungle around with environmental externalities in an ineffective way.

## Horizontal Cooperation Agreements: The New Approach

The new approach is based upon two new block exemptions<sup>1</sup> and the Commission's notice "Guidelines on the applicability of article 81 of the EC Treaty to horizontal cooperation agreements".<sup>2</sup> The new block exemptions exempt all research and development (R&D) and specialisation agreements subject to certain conditions but exclude some hardcore restrictions.

The R&D exemption regulation applies if the combined market shares of the cooperating firms do not exceed 25% (previously 20%) of the relevant market. They are also allowed joint distribution for seven years, again under the 25% market shares condition, although this share may temporarily be higher. The hard core prohibitions relate e.g. to not restricting the freedom of research in unconnected research fields, to limitation of outputs, to price fixing (although joint distribution is allowed for seven years) etc.

The new regulation allows more and prohibits less. The combined market shares of the R&D cooperating firms increases from 20% to 25%. The threshold for joint distribution increases from 10% to 25%. The increase of 20% to 25% is relatively small. Whether the possible increase of exempted cases will benefit the customers depends on the market structure in which the R&D based product or service is sold. Market shares of the cooperating firms are allowed to increase, in the seven years after the R&D based

<sup>1</sup> Regulation Nos. 2658/2000 and 2659/2000 OJ L 304, 05.12.2000, p. 3 and p. 7 respectively.

<sup>2</sup> See OJ C 3, 06.01.2001, p. 2.

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product or service is introduced on the market, to more than 30%. In the previous approach the exemption period for joint distribution was five years with a maximum market share of 10% (+ 2% temporarily).

In general there is no theoretically or empirically guaranteed evidence that these changes are always beneficial and allocate a fair share of the agreement to the customers. Article 7 of the regulation of course makes it possible to withdraw the benefit of the exemption individually if the Commission finds results contradicting 81(3). But since in general there is no obligation to notify the agreements, it cannot be expected that a lot of 81 (3) conflicting cases will be remedied. Finally it is to be noted that in the block exemption text no references corroborating the positive welfare effects of the changes are given. The only relatively assured effect may be that the workload of the Commission and the national antitrust authorities will decrease.

According to the regulation of the specialisation agreements the combined market shares of the participating firms should be less than 20%. Unilateral specialisation is allowed. This is a form of outsourcing agreement in which one party ceases production and purchases from another who manufactures and supplies. In cases of reciprocal specialisation cross-supply obligation agreements are allowed. Joint production agreements are also exempted. All these types of agreement should lead to efficiencies in production.

The specialisation regulation also allows more and prohibits less. Without argumentation the market share threshold is 20% in contrast to the 25% of the R&D exemption. One might imagine that the old Schumpeterian notion could be behind this: innovation needs larger funding, hence the combination of firms should be larger. Specialisation agreements do not need a lot of investment and are especially allowed to strengthen competition by reinforcing the competitive power of smaller firms. Of course, any reference that may justify the difference or the chosen 20% is lacking. It is the aim of this new exemption to contribute to "economic" welfare without creating a risk for competition. In this case the risk seems *prima facie* acceptable.

The horizontal guidelines should be applied to agreements not covered by the new block exemptions. They describe the general approach that should be followed when assessing horizontal agreements on the basis of 81(3). The elements that should be addressed, such as market power, market structure,

relevant market, market shares, economic benefits, fair share for the customers and the indispensability of the agreement, are dealt with. The guidelines are applied to R&D, production, purchasing, commercialisation, standardisation and environmental agreements. For each type a hypothetical example is given and analysed.

For purchasing agreements it is maintained that they could likely be accepted if the combined purchasing market share and the combined selling market share of the cooperating firms remain below 15%. Also for the commercialisation agreements it is indicated that a combined market share of less than 15% would lead to a *nihil obstat*. In the circumscription of economic benefits the guidelines give the regular approach. However if we look at the application of the guidelines in the case of one environmental agreement we see a remarkable irregularity.<sup>3</sup> It is the pretence of the new approach to be more "economic" in terms of a more effective control of agreements between companies holding market power, in terms of the regulatory burden for the Commission and the firms and in terms of producing more economic welfare.

It is remarkable to see that for the Commission the likely absence of market power varies in the new guidelines and the two new exemptions with thresholds of respectively 15%, 20%, 25% and temporarily even above 30%. The "economic" consistency of these differences is not too obvious. That the regulatory burden is diminished for the Commission is pretty clear. However it remains to be seen whether the new approach leads to a more effective realisation of the traditional goals of competition policy: the control of agreements between companies holding market power and the realisation of more economic welfare. We shall now attempt to analyse this question.

### "Economic" in Two Senses

As we have already seen it is the ambition of the "new" horizontal approach that it is more "economic". This immediately raises the question in what sense the term "economic" is to be conceived. There are two very different interpretations relevant in this context: the scientific definition and the newspaper usage.

The most advanced scientific definition is very precisely given by Lionel Robbins in his "An Essay on the Nature and Significance of Economic Science".<sup>4</sup> Economics has, as Robbins posits,<sup>5</sup> to analyse human

<sup>1</sup> See the section on the washing-machine example below.

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behaviour purposively directed to given ends with given scarce means, which have alternative uses. Scarcity "means limitation in relation to demand".<sup>6</sup> Scarcity may be reflected in the prices of items traded on markets, but it may also not be expressed in price, because the item is not traded or is not tradable on markets, like clean air, the beauty of a landscape etc.

Robbins emphasises that "economics is entirely neutral between ends" and "to speak of an end as being itself 'economic' is entirely misleading".<sup>7</sup> He also acknowledges the uncertainty with regard to the future availability of scarce goods and-scarce factors,<sup>8</sup> and hence rejects completely and objectively rational behaviour. This implies the rejection of what is called the economic principle. This rejection means that human action may be purposively directed to whatever aims, but that full knowledge is and should not be assumed. In the economic analysis, scope is offered for agents (including governments) who act upon limited, subjective information. They may hold expectations that turn out to be wrong.

So, in economic science we should not restrict our analysis to "economic" motives, say in terms of income or profit expressed in money. These magnitudes may be used as motives next to motives such as altruism, utility, group appraisal, power etc. From these insights it follows clearly that indeed "environmental economics" can be seen as, and really is, a part of economic science and should not be conceived as a "contradictio in terminis".

Moreover it is obvious that the analysis of so-called external (non-priced) effects influencing the welfare of consumers or producers caused by the acts of other consumers or producers, say pollution, noise and the like, is a regular part of the core business of economists. In short: economics should be, and in fact is, concerned with both priced and non-priced scarcities. Thus, economic analysis does, and should, take care of environmental considerations.

Also, economics should be concerned with the question to what extent agents succeed in realising their goals, i.e. to what extent the economic principle holds. It is clear that if the agents are not perfectly informed they might not succeed. In this context one

should refer to the seminal contributions to economics of the 2001 Nobel-prizewinners Akerlof and Stiglitz who focus especially upon problems arising from asymmetric information.

Although all this is common knowledge among economists, it is not sufficiently known, realised or applied by journalists or by scientists of other disciplines like sociologists, political scientists and lawyers, or - most relevant - by politicians. In their communications it was and is customary to distinguish between economic, environmental and social goals. Economic goals are usually associated with priced scarcities, i.e. with items (goods, services, labour, capital goods etc.) leading to magnitudes such as business profits or money incomes.

Moreover, even if a journalist does know that economics is more than a concern related to priced scarcities, he will not use the broader concept because the readers do not appreciate this. They are used and conditioned to the narrow "priced scarcity" interpretation of the term economics. This implies that in daily usage economics relates to the "financial" consequences for customers and producers. There is nothing wrong with this persistent habit as long as one realises its proper scientific background.

### Our Central Question Reformulated

Hence, if the question is analysed whether the new approach of horizontal agreements is more "economic" we have to do this against these two interpretations and against the background of policy effectiveness. But before we do this we may reflect a little on the general insights into the merits and demerits of the functioning of free markets.

Since the beginning of the more general acknowledgement of the coordinating capability of the functioning of markets in 1776<sup>9</sup> there has been awareness of market failures. Nowadays every economics text book lists as major shortcomings: lack of competition, negative external (non-priced) effects leading to e.g. pollution and the like, an insufficient supply of collective or club goods, an unequal income distribution, asymmetric information and cyclical instability in economic development. One might even say that the bigger part of economic science is devoted to the design of policy instruments to remedy these shortcomings.<sup>10</sup>

Every type of market failure has basically inspired a more or less separate sub-discipline within

<sup>4</sup> See e.g. the 1969 London edition. For an overview of the development of the economic motive and principle in economics, see J. A. H. M a k s: The Evolution of the Economic Principle and Motive towards a Creative Homo Agens, in: J. G. B a c k h a u s: Evolutionary Economic Thought, European Contributions and Concepts, Cheltenham 2002, Edward Elgar.

<sup>5</sup> Lionel Robbins, op. cit., pp. 16, 24 and 93.

<sup>6</sup> Ibid., p. 46.

<sup>7</sup> Ibid., p. 24.

<sup>8</sup> Ibid., pp. 77-78.

<sup>9</sup> The year of publication of Adam Smith's "Inquiry into the Causes of the Wealth of Nations".

economics. So cyclical instability is, since Keynes, the specialised topic of macro and monetary economics. Pollution is addressed by environmental economics. And the allocation of collective and club goods and income distribution by public economics. Nowadays the partial analysis of the lack of competition is addressed (in a partial context) by industrial economics.

The lack of competition and its potentially adverse effects on welfare in society are the main and traditional concern of competition policy.<sup>10</sup> The policy should lead to the preservation of sufficient, workable competition: the type of competition that leads to competitive price levels, cost reduction and higher quality products and services. From this narrow and precise goal it is immediately clear that this goal falls within the daily, political, more narrow definition of economics. Economics as concerned with priced scarcities.

Now if we look at the recent trends in antitrust policy (especially cartel arrangements as covered by the Union Treaty article 81) we see two aspects. One is to enlarge the scope of competition policy towards other ends, e.g. towards environmental goals. The other is to depart from a "general prohibition of cartels unless" towards "it is allowed unless". We shall largely confine our analysis to the first trend.

Our central question then is whether this development

- leads to effective competition policy in the traditional sense in terms of the maintenance of competition, or to the reverse, and
- leads to a more "economic" approach of antitrust policy. We will elaborate this latter point in the two senses of economics (broad and narrow) indicated above and in terms of effectiveness.

If one looks for indications of the effects of a competition policy directed to broader goals than to maintaining competitive relations in their economy we should look to countries with experience with this broader approach. In this paper we shall deal with the Netherlands in the period 1958-1997.

<sup>10</sup> Although there is a growing tendency to add here a concern with the failures of governments in their efforts to remedy the failures of the market being captured by the interest of pressure groups. This concern is highlighted in the seminal contribution by G. Stigler, although he tends to assume that the private market agents are equipped with full rationality. Cf. G. Stigler: The theory of economic regulation, in: *The Bell Journal of Economics*, 1971, Vol. 2, pp. 3-21.

<sup>11</sup> From the considerations given above it follows that an increase in welfare in economics may denote a decrease in priced and non-priced scarcity. The regularly used yardstick of national income is thus not a comprehensive welfare measurement instrument.

### The Netherlands, 1958-1997

In the Netherlands a new competition act was introduced in 1998. This new act is to a large extent a copy of the European system of that moment. Before 1998 the Netherlands had a competition law (the so-called *Wet Economische Mededinging*, (*Wem*)) based upon two basic characteristics:

- the abuse system: every competition-restricting agreement or action was allowed unless
- it harmed the general interest.

This latter is a broad concept in which, as it turned out, every political goal could be caught, just to the liking of the Minister of Economic Affairs. He could mould the general interest into the political direction he thought relevant at the particular moment. It could serve as an instrument to battle inflation or to serve the interest of business, i.e. especially the interest of the competition-restricting firms. The agreements could even be declared generally binding.

The consequences of this approach have turned out to be detrimental in various respects. Firstly, the Netherlands built a solid reputation as a cartel country. "Nederland kartelland" was the commonly used Dutch expression for this situation.<sup>12</sup> If one reviews the enforcement of the *Wem* in its period of existence (1958-1997), one is compelled to conclude that the act has been proven to be a failure as a competition act. It has been used as an instrument to stabilise prices to control inflation by regulating cartel prices.<sup>13</sup> In its application things are very often allowed which elsewhere would be declared illegal.<sup>14</sup> Minimum prices for sugar, milk, bread and spirits are also allowed and declared as generally binding. This leads precisely to the reverse effect of strengthening the competitive position of the big retailers. And if one attempts to act in the spirit of articles 81 and 82, one fails, as was clearly demonstrated in the Hoffman-La Roche abuse case in 1977.

The main cause of the failure of the competition act is not primarily the abuse system, although this is an

<sup>12</sup> See H.W. de Jong: *Nederland, het kartelparadijs van Europa?*, in: *E.S.B.*, Vol. 75, pp. 244-248; H.W. de Jong: *Het kartelparadijs, de punten van bezwaar*, in: *E.S.B.*, Vol. 77 (II), pp. 921-927; J.A.H. Moks: *Het Duitse en Nederlandse mededingingsbeleid in Europees perspectief*, in: *Maandschrift Economie*, Vol. 61, 1997, pp. 337-362.

<sup>13</sup> And, as Moks observes, this has nothing to do with competition policy. Cf. R.M. Mok: *20 jaar Wem*, in: *S.E.W.*, 1978, Vol. 17, pp. 737-760, here p. 757.

<sup>14</sup> The OECD observes that the competition-restricting agreements in the Netherlands that "dominate the Cartel Register would be illegal in most other OECD countries with a more stringent competition policy." See OECD: *Competition and competition policy: the unusual Dutch case*, OECD Economic Surveys: The Netherlands, Paris 1993, Ch. 3, pp. 57-87.

important aspect. More important is the vague and malleable criterion that is central in the act: the general interest. The act is used for all sorts of goals, has a bad record in realising these goals, but most specifically it fails as a competition policy instrument.

A serious further consequence was that the economy became insufficiently competitive and innovative. Also due to the labour market regulations, it became pretty inflexible to the extent that it has been named and is known since then as the "Dutch disease": the awkward combination of inflation and high structural unemployment. This was, although pretty late, generally recognised around 1990. The insight has been the start of a gradual policy process leading towards a structural increase in the flexibility of the economy. Competition policy was redirected towards increasing competition and in this context the new competition act (Mwe), totally based upon the European Union system, was introduced in January 1998.

### The Answer

From this Dutch observation we have a first indication of the nature of the answers we are looking for.<sup>15</sup>

First we see that general interest as a goal of competition policy is more "economic" in terms of economics in its proper scientific (broad) meaning, because it also takes into account non-priced scarcities such as culture, environment and stability. On the other hand it is also pretty clear that if we focus upon the traditional competition goals it is less "economic" in the narrow sense.

Moreover if we look at the economic principle it looks as if the broader scope of general interest clearly undermines the effectiveness of competition policy in its traditional sense. It did lead to an inflexible, highly cartelised economy. It also shows that the goals of the broader scope are also to a large extent not realised. The impression is even that the failure of competition policy to be effective obstructs the effective application of e.g. the macro-stabilisation policies. This of course is what one could expect. If one prevents the proper functioning of markets, a macro-stabilisation instrument that presupposes flexible markets cannot be effective.

So, prima facie, we have evidence that more economics in the broader definition leading to striving after more goals for competition policy, which is the same as less economics in the narrow sense, leads to less effectiveness of that policy for all goals but especially for the goal of maintaining workable competitive conditions in the economy.

### Specific Considerations Regarding the Environmental Goal

In environmental economics pollution is regarded as an externality. Externalities are (non-priced) by-products of consumption and production that may harm or benefit other people. In the literature the following policy instruments are normally identified to remedy the problem of externalities:<sup>16</sup>

- The taxation/subsidisation of the activities that cause the negative/positive externalities, incentives to eliminate negative externalities. The taxation should be done such that the marginal cost of the polluting activity shifts so as to include the marginal costs of the pollution.
- Emission standards that restrict the polluting activity. The norm should be set in such a way that the marginal benefits of the reduction in pollution are equal to the marginal costs of reducing the activity.
- The introduction of property rights that allocate tradable rights to pollute or rights to be free from pollution. Here we should refer to the well-known Coase theorem. This instrument leads to an optimal outcome if the trade in the rights is not impeded, but it has of course effects on the income distribution. Impediments to obtaining the optimal outcome are the high transaction costs because of the large number of individuals affected, a lack on information on the costs and benefits of the pollution and strategic bargaining behaviour that may block reaching an agreement.

The first two instruments require a careful government that informs itself adequately to obtain an optimal application.

A cartel is a voluntary agreement by firms. The agreement involves policing costs of the antitrust authority. If one exempts on the basis of a decrease of environmental externalities one has a quite complex task to perform. One has to weight the pros and cons in terms of priced and non-priced welfare for society. This is a complicated task as we shall see below.

<sup>15</sup> Japan is another, much stronger, example of a nation that abuses antitrust policy for other goals. It is especially used to serve industrial policy and stabilisation goals. It thereby produced an economy that is inflexible to the extent that the recession is highly persistent and monetary or macro-stabilisation instruments have hardly more than negligible effects.. Even zero interest rates are not able to induce investments. See U. Schaeede: Cooperative Capitalism: Self Regulation, Trade Associations and the Japanese Antimonopoly Law, New York 2000.

<sup>16</sup> See e.g. N. Acocella: The Foundations of Economic Policy: Values and Techniques, Cambridge 1998, pp. 225 ff.; J. Cullis and P. Jones: Public Finance and Public Choice, 2nd edition, New York 1998, pp. 38-42.

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Firms strive for the cartel solution if they expect to benefit more from this than from the traditional, dedicated policy instruments. This benefit is likely to be a priced burden for their customers. Besides, the inter-firm contacts necessary to reach the agreement might foster further (secret) agreements on other issues. These agreements might further "price harm" their customers. If there is a gain in a decrease in priced or non-priced scarcity it should be weighed against these losses. Next, one has to compare this policy instrument to decrease pollution with the traditional instruments in terms of policing costs and effectiveness. This implies that the agreement can only be declared indispensable for the achievement if the traditional, dedicated policy instruments in a weighted cost-benefit analysis prove to be inferior.

Taken together, it seems that antitrust policy directed to a correction is a highly complex task that may be more demanding than application of the traditional instruments and likely leads to less effectiveness in terms of maintaining workable competition in society. It is indeed likely that the complex task leads either to high application costs or to a less effective environmental policy.

Anyhow, this indicates that it is very recommendable to analyse in general and in specific cases what policy instrument is most suitable to do a desired trick. This might be a difficult and expensive task but a priori it is not at all clear that antitrust policy always should include environmental considerations as article 6 of the Union treaty seems to suggest. Or worse: that every policy instrument applied should always take into consideration all possible externalities.

Again our conclusion after these more specific considerations points in the same direction as our considerations above. Striving after more goals for competition policy probably leads to less effectiveness of that policy for all goals, compared with the available dedicated instruments, but especially for the traditional goal of maintaining workable competitive conditions in the economy.

We are now going to deal with the hypothetical environmental case given in the new guidelines. The Commission tries to demonstrate that the case passes the conditions of 81(3). We will attempt to show that this is not very likely.

### The Washing-Machine Example

First we shall quote the precise guidelines regarding the assessment under article 81(3) of environmental agreements, including the determi-

nation of the economic benefits. Then we shall give the general circumscription of economic benefits as given in section 32 of the guidelines. Following that, we shall indicate the difference in terms of "economic". Next we give the precise text of the hypothetical example and its assessment and we shall end with a comment leading to an entirely different outcome.

The guidelines regarding the assessment of environmental agreements have the following text:

### "7.4. Assessment under Article 81(3)

#### 7.4.1. Economic benefits

192. The Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the Treaty as well as in Community environmental action plans <sup>(53)</sup>, provided such agreements are compatible with competition rules <sup>(54)</sup>.

193. Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs <sup>(55)</sup>.

194. Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions.

#### 7.4.2. Indispensability

195. The more objectively the economic efficiency of an environmental agreement is demonstrated, the more clearly each provision might be deemed indispensable to the attainment of the environmental goal within its economic context.

196. An objective evaluation of provisions which might 'prima facie' be deemed not to be indispensable must be supported with a cost-effectiveness analysis showing that alternative means of attaining the expected environmental benefits, would be more

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economically or financially costly, under reasonable assumptions. For instance, it should be very clearly demonstrated that a uniform fee, charged irrespective of individual costs for waste collection, is indispensable for the functioning of an industry-wide collection system.

### 7.4.3. No elimination of competition

197. Whatever the environmental and economic gains and the necessity of the intended provisions, the agreement must not eliminate competition in terms of product or process differentiation, technological innovation or market entry in the short or, where relevant, medium run. For instance, in the case of exclusive collection rights granted to a collection/recycling operator who has potential competitors, the duration of such rights should take into account the possible emergence of an alternative to the operator."

Next we give the general circumscription of economic benefits as given in the guideline:

### **"Economic benefits**

32. The first condition requires that the agreement contributes to improving the production or distribution of products or to promoting technical or economic progress. As these benefits relate to static or dynamic efficiencies, they can be referred to as 'economic benefits'. Economic benefits may outweigh restrictive effects on: competition. For instance, a cooperation may enable firms to offer goods or services at lower prices, better quality or to launch innovation more quickly. Most efficiencies stem from the combination and integration of different skills or resources. The parties must demonstrate that the efficiencies are likely to be caused by the cooperation and cannot be achieved by less restrictive means (see also below). Efficiency claims must be substantiated. Speculations or general statements on cost savings are not sufficient."

We observe that this description is purely traditional and is compatible with "economics" in its narrow sense. It is based upon changes of priced scarcities of individual customers and firms. There is no mention of weighting externalities. If we compare this text with the sections 192-194 that give the considerations of economic benefits in the context of environmental agreements we see the sudden introduction of the aggregate consumer. An aggregate consumer does not exist. What is meant is the aggregation of non-priced individual welfare changes. From this it follows that the "economic" benefits described in sections

192-194 represent a step from the narrow traditional definition of "economic" benefits of section 32 towards the broad scientific definition.

The text of the hypothetical case runs as follows:

### "198. Example

Situation: Almost all Community producers and importers of a given domestic appliance (e.g. washing machines) agree, with the encouragement of a public body, to no longer manufacture and import into the Community products which do not comply with certain environmental criteria (e.g. energy efficiency). Together, the parties hold 90% of the Community market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced with more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (e.g. electric utilities, suppliers of components incorporated in the products phased out).

Analysis: The agreement grants the parties control of individual production and imports and concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Consumer choice, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is caught by Article 81(1). The involvement of the public authority is irrelevant for this assessment.

However, newer products are more technically advanced and by reducing the environmental problem indirectly aimed at (emissions from electricity generation), they will not inevitably create or increase another environmental problem (e.g. water consumption, detergent use). The net contribution to the improvement of the environmental, situation overall outweighs increased costs. Furthermore, individual purchasers of more expensive products will also rapidly recoup the cost increase as the more environmentally friendly products have lower running costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Varied technical means are economically available to the parties in order to manufacture products which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the conditions for an exemption under Article 81(3) are fulfilled."

So we see that the Commission concludes an individual exemption to this "environmental



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agreement". Now we will reconsider the 81(3) assessment in the order of the guidelines given above in the quoted sections.

### **Economic Benefits**

The introduction of energy-saving washing-machines can clearly be seen as a technological improvement. So in the short run this seems an acceptable argument. What, however, is the possible drawback of the agreement to no longer manufacture and import washing-machines which do not comply with certain environmental criteria? The agreement, with the encouragement of the public body, might induce a standstill or a diminishment in technology competition in terms of energy saving. One produces machines with the agreed energy efficiency standard and that is it. So, it might decelerate technological improvements in energy saving. And as a result, seen in the long run, less technological improvement in energy-saving machines is obtained.

In the new approach we have to distinguish between the change in priced and non-priced welfare. First we analyse the changes in priced welfare. It is admitted that the price of the product (washing-machine) increases as a consequence of the agreement. This means that the individual welfare of the consumers in this priced scarcity decreases. A compensation for this might be the fact that the machine uses less energy. The marginal costs of using the machine are thus lower. This might induce a higher usage of the machine. So we conclude that there is an increase in welfare due to a reduction of a priced scarcity. How this balances is not at all certain. It depends on the increase of the price of the washing-machine and the possible change in the lifetime of the new type of machine.

Next we have to analyse the external effects or the changes in non-priced scarcities. First we have to consider the environmental effects of the production of the machines. Since they are more expensive to produce it is likely that they are produced in a more energy-using way. This leads to more pollution and hence to a negative non-priced welfare effect for the consumers. Then we are uncertain concerning the lifetime of the new type. It might be that the machines are less durable and have to be replaced faster. This might also be caused by the more frequent use caused by the lower marginal cost of usage. Again we conclude that more pollution might result in a decrease in non-priced welfare. As a balancing effect, the overall consumption of electricity for the use of wash-ing-machines might diminish. This leads indeed to a reduction in pollution and hence to an increase in

non-priced welfare. Finally, we have to take into consideration how the consumers will spend the saved money. It is not at all certain that they will not spend the savings in a relatively polluting direction.

On balance the direction of the overall change in priced and non-priced scarcities is not all certain.

*Indispensability of the Agreement.* From the considerations above the objectivity of the environmental agreement is not demonstrated. Moreover, it is highly conceivable that a simple customer subsidy on energy-saving machines or an eco-tax on energy might do the trick more effectively. In the present situation the first system is applied in the Netherlands for washing-machines, refrigerators, computer screens and cars.

*No Elimination of Competition.* Together the parties to the agreement hold 90% of the market. It is not very likely that the remaining 10% (even reinforced by additional potential competitors) will be able to induce technology competition leading to further energy saving, given exemption to the agreement. The competition on energy saving might be eliminated by the exemption.

*Conclusion.* The prima facie considerations presented above indicate the conclusion that it is likely that not all of the conditions for an exemption under 81(3) are fulfilled.

### **Overall Conclusions**

Competition policy has as one of its traditional goals the control of agreements between parties with market power. Its traditional aim is to contribute to priced welfare. In the above, arguments are given for the following conclusions. Replacement of this traditional goal by the wider aspiration of general (public) interest (with elements such as pollution diminishment, inflation control, crisis control etc.) leads to an increase in the inefficiency of competition policy. This conclusion is corroborated by experience with this approach in the Netherlands. The finding may be explained by the lack of robustness of the conclusions if 81(3) is applied in such a broad setting. Moreover, it is likely that dedicated policy instruments are more effective in realising environmental, inflation and crisis goals.

Thus, it might be a proper choice for competition policy to concentrate on its traditional core business and not to bungle around with environmental externalities in an ineffective way such that its core task of maintaining workable competition is hampered.