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Green antitrust: (More) friendly fire in the fight against climate change*

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Abstract

The green antitrust movement aims to increase sustainability efforts by allowing restrictions of competition. Yet the economic evidence so far points to more, not less, competition as the right stimulus for inducing sustainability efforts. Incentives to produce more sustainably are stronger when firms compete than when they are allowed to make sustainability agreements. This is also true when firms are intrinsically motivated to promote sustainability. It is not good policy to relax the general competition rules in order to accommodate the rare genuine sustainability agreement. However well-intended, green antitrust risks damaging both competition and the environment. It will suppress the gathering market forces for companies to produce more sustainably, overburden competition authorities, invite abusive cartel greenwashing, and give the part of government that should promote sustainability further excuse to shun their responsibility for designing proper regulation.

Keywords: Sustainability; Competition; Cartel; Corporate social responsibility; Greenwashing; Regulation

JEL Codes: H41; K21; L40

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"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. ... But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book I, Chapter 10.

1 Introduction

The urgency of the climate crisis and the apparent failure of many governments to meet the Paris Agreement objectives have led inspired competition law scholars to push for 'green antitrust policy'.[1] The idea is to revise the competition rules, as far as they may stand in the way of companies contributing to sustainability factors and a climate-neutral economy. Corporate lobbies claim to want to take more social responsibility for a better world, but that this is impossible without collectively restricting competition first. Acting alone while competing, no company would be able to hurdle the so-called "first-mover disadvantage". Whereas in cooperation, the argument is, competitors would be able to make the transition to more sustainable ways of production. The transferred concern is that with restrictions of competition potentially being illegal, companies are restricted from taking joint sustainability initiatives through fear of competition law interventions and liabilities. In response, several European competition authorities are already considering to allow anticompetitive conduct that would be forbidden under the current interpretation of competition law, in return for sustainability benefits. Proposals on how to implement such exemptions of the cartel prohibition, the rules to prevent abuse of dominance, and merger control are being avidly put forward and discussed.[2] They are well received by corporates, politicians, lawyers, and some competition authorities.

The central idea behind the green antitrust movement is that conflicts between market and environment could be resolved by the build-up of market power. Most concrete are proposals to exempt sustainability agreements restrictive of competition from the cartel law, under Article 101(3) of the Treaty on the Functioning of the European Union (TFEU).[3] In essence, these proposals interpret the advance of sustainability factors as

[1]See Townley (2009), Kingston (2011), Monti (2020).

[2]Panel at the 2019 *Competition and Consumer Day*, 25-26 September 2019, Helsinki; GCLC conference *Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy*, 24 October 2019, Brussels; Hellenic Competition Commission, *Competition Law and Sustainability*, 28 September 2020, online; OECD, *Sustainability and Competition*, 1 December 2020, online. The subject of green State aid control, which is also part of this discussion, is outside the scope of this paper.

[3]In US antitrust, wider public policy arguments on welfare merits traditionally have had little traction, see Werden (2014). However, the idea that agreements amongst competitors would be necessary for impactful corporate sustainability efforts is gaining popularity there too. See, for example, Nidumolu et al. (2014), Scott (2016), Henderson (2020), and Polman and Winston (2021).

"economic progress", and an anticompetitive agreement contributing to such progress can be allowed if it gives consumers a "fair share" of the benefits that compensates them for the anticompetitive effects of the agreement. The European Commission set a precedent with *CECED* (1999), in which avoided emissions of carbon dioxide, sulfur dioxide and nitrous oxide were taken into consideration to allow a collective of washing machine producers to take their least energy-efficient models off the market. Importantly, *CECED* (1999) was not decided on the projected environmental benefits. The Commission concluded that a typical consumer would be compensated for the increased purchase costs of more energy-efficient washing machines by saving more on electricity bills in use alone.[4] While the sustainability benefits for all of Europe were valued at more than seven times the higher product price, these were additional collective benefits for which the Commission did not assess the appreciation of consumers.[5]

The green antitrust movement, however, seeks to exempt collaborating companies on decisive compensatory sustainability benefits. From allowing such 'green cartels', it seems a small step to condoning other forms of market power-based conduct on the companies' promise to switch to more sustainable production methods. A merger, for example, that leads to appreciable market power yet also promises to shift all production to low-emission plants. Performing the trade-off of expected cost synergies against the anticompetitive effects of a merger quantitatively is standard application in assessing the efficiency-defense in merger control. The Commission is already considering methods for measuring 'green merger efficiencies' in this context.[6] Also in enforcement against abuse of dominance, there is discretion to take sustainability benefits into account.[7] For example, a dominant firm that excludes a polluting rival from the market may, in the same spirit, be able to count on a friendly review. The ever more widely felt need that climate change requires immediate action to improve sustainability has created a strong urge with competition authorities to also do their bit.

The Dutch Authority for Consumers and Markets (ACM) is a forerunner of reorienting competition policy this way. In the Spring of 2014, the ACM was obliged by the Dutch Ministry of Economic Affairs to take "sustainability" into account in its application of the Dutch cartel law exemption clause, which is practically identical to Article 101(3) TFEU.[8] Up to this day very few qualifying sustainability initiatives have come forward. The two cases the ACM has publicly dealt with so far are the *Na-*

[4]This assessment appears to be based on the presumption that the prices of high-end washing machines would remain the same – for example is no compensation requirement mentioned for consumers who would have bought a more efficient washing machine anyways. Yet the coordinated elimination of a low-end product likely results in high-end product price increases – see Ahmed and Segerson (2011), which discusses the *CECED* case as lead example. The anticompetitive effects of the collaborative elimination of low-end products are not yet well understood.

[5]*CECED* (1999), recital 56.

[6]"Green merger efficiencies to be looked at by the EU 'discussion group', Régibeau says," MLEX, 18 November 2020. See Goppelsroeder et al. (2008) on assessing cost efficiencies in merger control.

[7]See, for instance, Kadar (2020).

[8]Article 6(3) Mededingingswet. The policy rule is Beleidsregel Mededinging en Duurzaamheid, nr. WJZ/14052830, 6 May 2014.

tional Energy Agreement (2013) – hereafter *Coal* (2013) – and *Chicken of Tomorrow* (2015) – hereafter *Chicken* (2015). Both initiatives were denied an exemption. After extensive investigation the ACM concluded that they provided too few sustainability benefits for the respective consumers. Subsequently, the Ministry insisted that "the benefits for society as a whole" must be considered – even though it also remained required that consumers be compensated.[9] Hoping to be able to welcome more initiatives, in July 2020 the ACM published draft *Guidelines Sustainability Agreements*. The requirements for an exemption are clarified by various hypothetical examples of agreements that ACM would not see in conflict with the cartel prohibition.[10] More importantly, the draft *Guidelines* make a landmark proposal to lower the threshold for exempting sustainability agreements: consumers of the good no longer need to be fully compensated if others benefit sufficiently.[11]

The European Commission was called upon by the European Parliament to reconsider how competition policy can best support the Green Deal.[12] Here too one of the proposals in antitrust is to relax enforcement of the cartel prohibition against horizontal sustainability agreements. Since *CECED* (1999), the Commission has been sparse with exemptions. In the complementary market for household laundry detergents, an accredited industry-wide initiative to promote more concentrated, and therefore environmentally friendlier washing powers – by jointly decreasing doses and packages – turned out to have become a cover for price collusion by the three main producers in *Consumer Detergents* (2011). In several recent cases, cartels deliberately harmed transitions to more sustainable production. In *Car Battery Recycling* (2017), by fixing lower purchasing prices for their own profits, the four main purchasers of scrap automotive batteries made recycling efforts less attractive for waste disposers, scrap dealers and collectors. Part of the collusion in *Trucks* (2017) concerned a joint delaying by the manufacturers of the introduction of new engine technology that would have given lower emissions. In *Car Emissions* (2021), main German automakers colluded to restrict competition in emission cleaning technology for their diesel cars. They jointly reduced the amount of Adblue injected in the exhaust stream to clean nitrogen oxides (NOx), making their cars more pollutive than they would have been without the illegal

[9]Letter of 23 June 2016 by the Minister of Economic Affairs of the Netherlands to the Dutch Parliament, *Duurzame ontwikkeling en beleid. Beleidsregel Mededinging en Duurzaamheid*, nr. WJZ/16145098, 30 September 2016, paragraaf 3.3. The strict compensation requirement was insisted on in a letter of 26 February 2016 by the European Commission, Competition DG, Johannes Laitenberger to Ministry of Economic Affairs of the Netherlands, Mr. Camps, concerning the "Beleidsregels mededinging en duurzaamheid".

[10]Authority Consumers and Markets (ACM), *Draft Guidelines Sustainability Agreements: Opportunities within Competition Law*, 9 July 2020. A revision has been announced for January.

[11]In the revised second draft version, published 26th January 2021 after public consultation, this proposal has been maintained.

[12]EU: *MEPs demands fundamental overhaul of competition policy*, CPI February 4, 2019; European Commission, *Competition Policy supporting the Green Deal: Call for Contributions*, Brussels, 22 September 2020. See: https://ec.europa.eu/competition/information/green_deal for the response and the conference held February 4, 2021.

cartel agreement.

Just before its 2021 summer break, the Commission made it clear that it would not ease of competition enforcement to achieve the Green Deal.[13] In response to contributions received in a public consultation and the conference *Competition Policy Contributing to the Green Deal*, hosted 4 February 2021 by Commissioner Vestager on 4 February 2021, the Commission concluded straight up in the Policy Brief:

> "Firstly, environmentally ambitious policies will only be effective if markets respond to the new regulatory signals and incentives without creating distortions to competition, and if firms are pushed to innovate by competing intensely and fairly with each other. For example, EU antitrust rules allow companies to pursue genuinely green initiatives jointly, while preventing 'greenwashing' that would harm consumers."

It is stressed (on page 6) that a cartel law exemption can only be given if the users of the products concerned appreciate the sustainability benefits that it promises to bring about, and are willing to pay the extra price for it, that would result from the agreement. The Commission thus refuted ACM's wide interpretation of the consumer compensation criterion under Article 101(3) TFEU, to the disappointment of proponents of green cartels.[14]

Green antitrust appears very sympathetic: a fast transition to more sustainable production and consumption is essential to the future of our planet, and corporations must certainly take their responsibility for it. Where government coordination fails to nudge the balance from grey to green equilibria – because of lack of information, legal options, political will, or otherwise – perhaps private coordination can come to the rescue. After all, polluting companies will typically know best how to reduce their own externalities. And indeed, green CEOs increasingly stand up for good causes. For some time now, passionate competition law scholars have been hammering home the importance of sustainability.[15] But is contributing to the fight against climate change truly a nail in this case? Or is it rather a screw? Deciding this first is essential when selecting the right tool to use to fix the problem – all the more so when it is urgent. The central question here, therefore, is whether it can be expected that undertakings will take more corporate social responsibility when they compete less. The key premise of the green antitrust movement is that tensions between competition and sustainability can be eased with less competition. But is that premise true?

[13] See Commissioner Vestager's keynote speech "Competition policy in support of the Green Deal" delivered 10 September 2021 at the 25th IBA Competition Conference and the accompanying September 2021 Competition policy brief "Competition Policy in Support of Europe's Green Ambition" (European Commission, 2021).

[14] According to De Brauw Blackstone Westbroek (2021), Commission moves Sustainability Discussion forward by Releasing Competition Policy Brief: "...it remains frustrating that the Commission still emphasizes that consumers should continue to be fully compensated, as opposed to receiving a "fair share" (the latter being the wording of the law and therefore in the ACM's – and our view – [sic] the correct benchmark)."

[15] See Holmes (2020), Dolmans (2020) and Karr et al. (2021).

In this paper we review the available economic literature to find that it provides little to no ground for believing that restrictions of competition would incentivize companies to take more sustainability initiatives. On the contrary, it appears that competition induces companies to produce more sustainably, also if they are in part intrinsically motivated to so do. Even if first-mover disadvantage, a concept to which the proponents of green antitrust policy point, would lead to a deadlock preventing more sustainable production, sustainability agreements create no incentive to break that impasse. The rare genuine sustainability agreement cannot justify relaxing general competition rules. It seems proper, therefore, to regard the corporate cheers for green antitrust policy with some skepticism and suspicion. That is also the attitude that we should expect our competition agencies to have. After all, they are tasked first and foremost with the protection of competition.

We warn against two major risks of green antitrust policy. One risk is cartel greenwashing. Competitors who are allowed to coordinate their trade, have an incentive to provide minimal sustainability benefits for maximum price increases. The more accommodating the competition authority, the less green will be delivered. Competition authorities will have to strictly demand sufficient compensatory sustainability benefits, and then constantly monitor exempted agreements. This task requires a staggering amount of information that these agencies cannot reasonably be expected to have. It will tie up a lot of their resources at the expense of other enforcement and advocacy priorities. The second risk is that being able to point to corporate self-regulation gives the part of government that should promote sustainability further excuses to shun their responsibility for designing proper regulation. The green antitrust movement may thus exacerbate the very government failure it seeks to correct.

This paper is structured as follows. In Section 2, we set out the conditions for exempting anticompetitive sustainability agreements from the cartel prohibition in the European Treaty. In Section 3, we briefly discuss their application in the landmark Dutch *Coal* (2013) and *Chicken* (2015) cases. Section 4 then turns to the relevant economic literature. Section 5 considers the notion of first-mover disadvantage. Enforcement issues are discussed in Section 6, and the argument of crowding out government regulation in Section 7. Section 8 returns to the pioneering Dutch draft guidelines to discuss the risks of the proposed stretching of the compensation criterion. Section 9 concludes.

2 Conditions for exempting sustainability agreements

A horizontal sustainability agreement in restriction of competition can be exempted from the cartel prohibition if four cumulative conditions specified in Article 101(3) TFEU are satisfied. Together they provide an assessment framework that can be applied using standard economic methods of analysis. The first requirement is that the agreement indeed generates concrete and objectively measurable sustainability benefits. It is well known that people typically have an appreciation for greener products that generate fewer or less-damaging side-effects, such as environmental pollution, and are manufactured under fairer conditions – such as no child labor, good safety at the workplace, no cruelty to farm animals, and above subsistence level wages.[16] These values can be identified and quantified, for example by marketing econometrics or techniques from environmental economics.[17]

The second requirement is that consumers of the products concerned receive a "fair share" of the sustainability benefits. For operationalization of this condition, micro- and welfare economics provide a firm conceptual and practical framework.[18] In essence, the appreciation of buyers for a more sustainably manufactured product – be it derived directly from consuming a higher quality good or from appreciation of its positive or less negative externalities – needs to be balanced against the downsides of the anticompetitive agreement made to obtain it, which typically is higher product prices. Not each and every buyer is to be compensated, but "the overall impact on consumers of the products within the relevant market" on average.[19] This introduces the need for interpersonal utility comparison, which is somewhat tricky to do, but nevertheless a weighing that economics can help make concrete. The policy has some leeway, because no strict Pareto-criterion is applied – which would give each consumer veto-power. The working interpretation of "fair share" is a share large enough to fully compensate the representative consumer of the product, who should not be worse off with the agreement in place.

The third condition in Article 101(3) TFEU is that the restriction of competition must be necessary for reaping the sustainability benefits. While this may suggest a broad duty of the competition authority to consider and give priority to alternative ways in which the projected sustainability benefits could be achieved – in particular government regulation – in practice the interpretation is narrow. The agreement must not go beyond what is necessary to generate the projected sustainability increase compared with competition. The actual improvement only needs to be marginal to pass the third condition. Government failure has been called on as a justification for green antitrust policy, including by the competition authorities advocating the policy. Yet it does not seem to be the case that the giving of an exemption from cartel law is seen by its proponents as a measure of last resort, that is only to be taken after all the different ways to push government to take regulatory responsibility have been probed. For doing that, competition authorities also lack the mandate and instruments. Whether narrowly or widely interpreted, economic analysis can help assess the necessity condition.

The fourth requirement is that the agreement to be exempted does not 'eliminate' all competition around the product concerned. Competition must remain on dimensions such as price, brand image or technological development – with which the European Commission was content in *CECED* (1999). It does not seem too difficult to argue

[16] See Kitzmueller and Shimshack (2012).

[17] See, for instance, Hanley and Barbier (2009).

[18] A particularly accessible textbook is Stiglitz and Rosengard (2015).

[19] European Commission (2004), recital 85.

some dimensions of remaining competition in any case in practice. In particular, a sustainability agreement may involve only the larger companies, excluding small or less efficient producers also active in the relevant market. Such a competitive fringe may be interpreted as remaining competition sufficient for meeting the fourth condition. Economic analysis of oligopoly models in industrial organization can bring out the anticompetitive effects of partial collusion, which can be harmful.[20]

Only agreements on sustainability parameters are meant to be considered for an exemption, the ACM insists in its proposal: coordination should not also extend to prices or production. Yet since a transition to more sustainable ways of manufacturing typically implies higher production costs, prices will have to increase with them. It should not be necessary to make price agreements for this, since those costs can be passed through in competition on prices. Yet, under cover of the inevitable price increases, allowing competitors to make sustainability agreements also provides them with opportunity to raise prices by more than what is necessary. They certainly have the incentive for this. It is well known that meeting can easily tempt competitors to talk about prices as well. Frequently, perfectly legitimate coordination between competitors, for example over the implementation of anti-terrorism regulation, product quality standards or R&D, has led to malignant collusion.[21] This happened in *Consumer Detergents* (2011). It is quite questionable whether a competition authority will be able to enforce that agreements are limited to sustainability factors alone – however firmly it is stated that exemptions can only be given for the latter. Ultimately, the balancing will have to be between the green advance supplied and the total price increase demanded for it.

3 *Coal* (2013) and *Chicken* (2015) fell short

The effective application of the assessment framework by the Dutch competition authority in *Coal* (2013) and *Chicken* (2015) is insightful. The first was an agreement among electricity producers to close five coal-fired electricity plants five years ahead of the regulated schedule. This meant a reduction of approximately 10% of total electricity production capacity in the Netherlands. The ACM calculated that the resulting price increases would give the Dutch, all consumers of electricity, higher electricity costs totaling 75 million euro a year. The benefits would be reductions in emissions. Using quite sophisticated environmental economics, ACM valued these at 30 million euro a year.[22] The benefits were much lower than the harm, mostly because ACM recognized that the prominently claimed CO2 emissions reductions were not actually there. The reason was that the parties did not intend to take their unused CO2 emis-

[20] See Bos and Harrington (2010) and Inderst et al. (2014).

[21] See Duso et al. (2014) and Veljanovski (2021).

[22] ACM, *Analysis of the planned agreement on closing down coal power plants from the 1980s as part of the Social and Economic Council of the Netherland's SER Energieakkoord*, 26 September 2013. See also Kloosterhuis and Mulder (2015).

sions rights out of the EU Emissions Trading System, so that the emissions were merely relocated, presenting no benefit to the Dutch consumers. Offered the option to take a compensating amount of emission rights off the market, the electricity companies refused, claiming that this would make the deal too expensive for them. The closures were later brought forward by regulation.

In *Chicken* (2015), the ACM also concluded that the sustainability benefits were too small compared with the anticompetitive harm. In this initiative, poultry farmers and supermarkets responded jointly to protests of animal rights activists against the poor living conditions of so-called "plofkippen" – 'exploding chicken'. Farmers promised to improve the welfare of broiler chicken held for this cheapest type of chicken meat for the Dutch market – only about 30% of poultry in the Netherlands, the rest was bred for export. The supermarkets pledged not to import competitive cheap chicken substitutes. The ACM investigation showed that prices would increase by Euro 1.46 per kilogram of chicken meat, while Dutch consumers valued the better living conditions for chicken at only Euro 0.82 per kilogram.[23] The insufficient willingness to pay reflected that the proposed agreement would achieve only a minimal increase in cage space, and only for a minority of chicken reared for the domestic market. The ACM disallowed the agreement. In 2020, the ACM's own follow-up research found that the restriction of competition had indeed not been necessary: 'plofkip' has virtually disappeared from the supermarkets without agreements.[24]

4 Not less but more competition leads to greater sustainability

The central question of whether it should be expected that firms will produce more sustainably in an anticompetitive agreement than in competition squarely falls on economics to answer. It is reasonable to base the analysis on two standard premises. The first is that (potential) consumers care about sustainability. Eichholtz et al. (2010) document a higher willingness to pay for office buildings with sustainability labels. Casadesus-Masanell et al. (2009) report a higher willingness to pay for T-shirts made with organic cotton. In a survey of the literature Kitzmueller and Shimshack (2012) conclude that willingness to pay depends in general positively on the degree of corporate social responsibility a firm engages in.[25] More recently, Aghion et al. (2020) find that green innovation is positively correlated with consumers' stated sustainability preferences.

A second premise is that, no matter how noble the initiatives may appear, firms are ultimately driven by profit motives. Rate of return incentives can certainly lead

[23]ACM, *Analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'*, 26 January 2015.

[24]ACM, *Welfare of today's chicken and that of the 'Chicken of Tomorrow'*, 1 September 2020.

[25]See also Gomez-Martinez et al. (2019).

to intricate and forward-looking firm behavior, for instance investing in a good public image in order to attract more consumers. Running up short term losses with a CEO passionate about corporate social responsibility can therefore still be consistent with long term profit maximization. Yet under pressure of shareholders and investors, firms are interested in sustainability initiatives first and foremost to increase their profitability, in particular through buyers' higher willingness to pay.[26] The latter are the revenue returns to sustainability investments, which are costs. Therefore, companies will strive for profit-maximizing price increases and sustainability advances, for which cost-minimization is a necessary condition. That these incentives lead to little green is reflected in the literature on greenwashing. Firms certainly like to have a "green" public image, but when consumers cannot assess the true extent of their sustainability investments, they only undertake the minimum.[27] In general, we should expect no less, and no more, from for-profit enterprises, both in competition and in coordination.

The relationship between competition and sustainability is studied in a limited but recently growing literature. The current consensus is that competition increases investments in sustainability, with firms investing in sustainability because it lowers their costs or allows them to stand out to consumers. Green, in other words, is a dimension of product differentiation. Bansal and Roth (2000), Porter and Kramer (2006), and Roulet and Bothello (2020) point out that corporate social responsibility (CSR) can be a strong competitive advantage. Graafland (2016) finds in survey data that price competition does not influence companies' environmental performance ratings. Simon and Prince (2016) show that a reduction in industrial concentration in the United States is associated with a reduction in toxic releases at the factory level. Fernández-Kranz and Santaló (2010) and Flammer (2015) find that competition has a positive effect on CSR at the firm level, in studies of variation in import duties and concentration. Aghion et al. (2020) show that the positive relation between consumers' stated sustainability preferences and the probability that a firm engages in green innovation increases with the degree of product market competition. This suggests that as pro-environment attitudes become more common over time, the role of competition in fostering green innovation will only increase. Ding et al. (2020) link antitrust policy to sustainability by showing that stricter competition law regimes are positively associated with CSR, and that this link is stronger in countries where consumers indicate stronger pro-environment attitudes.

Few papers study the relationship between horizontal agreements and sustainability directly. They relate to the literature on exempting research joint-ventures, which can increase R&D investments above competitive levels if spillovers of innovations are so large that unilateral investments are discouraged.[28] For this reason, there is a broad exemption clause available for R&D joint-ventures, including for research into more sustainable production methods. However, with limited spill-overs, competition is the

[26]In addition, in the presence of regulatory failure, firms may benefit from reducing environmental externalities through workers' willingness to accept a lower wage. See de Bettignies et al. (2020).

[27]See Ramus and Montiel (2005) and Delmas and Montes-Sancho (2010).

[28]See d'Aspremont and Jacquemin (1988).

stronger driver of R&D. There is concern, therefore, that mergers reduce innovation.[29] Importantly, sustainability initiatives of the kind considered for exemption, such as investments in cleaner technology or better quality of live for farm animals, have little or no spillover from one company to another. These cases, and the current green antitrust debate about advancing a transition to more sustainable ways of manufacturing, are primarily about the implementation of existing cleaner technologies, rather than about innovation.

Schinkel and Spiegel (2017) analyze the link between anticompetitive agreements and sustainability in a two-stage duopoly model where firms first select investments in sustainability and subsequently compete on the product market. They find that allowing the firms to coordinate their sustainability efforts leads to the lowest sustainability levels. Sustainability is a product attribute that consumers care about, and hence is used by firms to compete and attract each other's customers. Schinkel and Treuren (2021) generalize these findings to more firms, remaining competition, varying willingness to pay for sustainable products, and firms' intrinsic motivation to do good. Note that when firms coordinate prices and sustainability investments, sustainability levels are still lower than in competition. This means that if coordinating their sustainability investments allows the companies to collude on prices as well, a risk we noted above, sustainability does not benefit from coordination.

Proponents of green antitrust policy point out that today's corporate leadership increasingly pledges allegiance to take responsibility for stakeholders more widely, including for their environment.[30] They view profit-driven firm analysis as outdated, and Friedman's appeal to it as an ancient belief.[31] Green CEO's may not even be controllable by shareholders anymore if they wanted to. Importantly, however, if firms operate with an intrinsic motivation to produce more sustainably too, investments typically remain higher in competition than with sustainability agreements, and the difference may even become larger. In Schinkel and Treuren (2021), the level of sustainability investments features directly in each firm's objective function, besides in the profits part. Since intrinsically motivated investments are independent of the competitive regime, they are higher in absolute value in both competition and coordination. Moreover, coordination reduces the additional intrinsically motivated green investments, since the loss of profit due to increasing sustainability beyond the normal profit maximizing level is larger for firms who jointly decide on sustainability. That an intrinsic motivation to do green makes anticompetitive agreements not more, but rather even less suitable to promote sustainability investments underlines our warning not to lean too far in sympathies for initiatives to take corporate social responsibility jointly.

[29] Federico et al. (2018).

[30] See, for example, the reception of the initiative *Business Roundtable, Statement on the Purpose of a Corporation*, 19 August, 2019. Henderson (2020) contains many other examples.

[31] See Friedman (1970).

5 The first-mover disadvantage is a rare phenomenon

With the evidence pointing towards more, not less, competition increasing sustainability, on what basis do proponents of green antitrust build their trust of coordinated sustainability initiatives? A term that is often used in this context is 'first-mover disadvantage': no single firm would be able to make investments in sustainability because they come with cost increases that necessitate price increases, and consumers would not be willing to pay such price increases.[32] Unilateral initiatives would (temporarily) worsen a firm's competitive position and profitability. This is seen as an obstacle that only the whole sector could manage to overcome together with coordinated sustainability investments.

We note that the first-mover disadvantage argument assumes that either (potential) consumers have no willingness to pay for sustainable products, that consumers fully free ride on the sustainable consumption of others, or that firms cannot credibly signal that their products are sustainable – or a combination of such conditions. As the empirical literature shows, however, firms can differentiate their products as more sustainable, and consumers do, in general and increasingly, have a willingness to pay for them that is great enough to make unilateral sustainability investments profitable. The first-mover disadvantage therefore seems a rather special case. If, nonetheless, going alone would be loss-making, it is unclear why firms would increase sustainability investments when acting jointly. After all, in that case their joint profitability would still be higher with lower investments. In order to increase sustainability above competitive levels, joint sustainability initiatives will therefore require price increases above and beyond mere cost recoupment in order for their profitability not to decline – while price agreements are explicitly not the aim of green antitrust policy.

It seems that agreements on sustainability in response to a first-mover disadvantage are only likely to increase sustainability if willingness to pay for more sustainable products increases *as a result of the agreement*. This requires consumers to be willing to pay for sustainability, but *only* if sustainability is delivered by coordinated sustainability agreements. It is unclear why this would be the case in general. Two possibilities come to mind, both rather peculiar. One is the case of full freeriding, in which no consumer would buy the greener product, despite having a willingness to pay for it, as long as a grey substitute remains available. This case seems extreme, and where it may exist a candidate for government regulation without the need to reduce competition. The other possibility is that a green corporate cooperative can "educate" consumers on their preferences by forcing them to consume more sustainably manufactured products. That idea may imply a theory of 'green experience good'. If made to consume more sustainably produced goods really helps to cultivate a willingness to buy them, the kind paternalism required would be more appropriately provided by the government, acting on democratic mandate, than by a cooperative of corporate interests.

The rare occurrence of a first-mover disadvantage appears to be a weak foundation

[32] See, for example, ACM draft guidelines (2020), page 15.

on which to base a general revision of competition law. In fact, the common term in the literature is 'first-mover *advantage*'.[33] If a good or service can truly only be developed in coordination, an assessment as joint venture seems the more obvious route for progress, avoiding Article 101 TFEU altogether. After all, if green really cannot be a dimension of competition, and no firm would provide a more sustainably manufactured product on its own, it is not clear how competition is restricted by an agreement to offer it, and so why the cartel law would apply at all. All the complexities and stretches of law to obtain exemption possibilities can then be avoided. If not, we note that consumers must have at least some willingness to pay for more sustainably produced commodities in order to be able to enjoy any sustainability benefit at all, which does not appear to be a "fair share" of those benefits by any standard. Without it, the compensation criterion for exemption under Article 101(3) TFEU cannot be met. All in all, it seems that even if the first-mover disadvantage would hold up sustainability initiatives in rare extreme cases, cartel exemptions are not the way to break the impasse.

6 Green antitrust requires permanent surveillance against cartel greenwashing

In view of the incentives that companies face, competition authorities are advised not to put too much trust in the coordinated green promises of corporates. They are likely to fall short of their efforts in competition, so that consumer compensation condition needs to be strictly monitored and enforced, which in turn reduces incentives to invest – as in *Coal* (2013). Since coordination creates a deadweight loss, full compensation of consumers typically leaves the firms with a loss.[34] By their decision to purchase the original unsustainable product, consumers reveal a low willingness to pay for the sustainability benefits, which makes compensating them particularly expensive – as in *Chicken* (2015).[35] Also with competition remaining on some dimension, as required by the fourth exemption condition, these pessimistic findings continue to hold.[36] Maybe this explains why green initiatives are rarely proposed: there simply are few, if any, that can create a welfare increase for consumers while not be loss-making for the businesses. A competition authority that is able to enforce consumer compensation, therefore, will deter most initiatives.

Companies that still do apply for exemption with a sustainability agreement, despite the unattractive conditions, have all the incentives to establish the largest possible price increase for the lowest possible sustainability benefits required to compensate consumers. They may be rare exceptions, or they may count on being able to pass the exemption-test of an imperfectly informed competition authority with less than full consumer compensation. In any case, competition authorities will need to bargain

[33] See, for example, Przychodzen et al. (2020).
[34] See Schinkel and Spiegel (2017).
[35] See Schinkel and Tóth (2019).
[36] See Schinkel and Treuren (2021).

with corporate cooperatives for sustainability on behalf of consumers. The initiative will seek to choose a sustainability-price combination on the representative consumer's indifference curve, in order to meet the compensation-requirement. As long as the sustainability-level is higher than in competition – and the agreement at least does not explicitly appear to be on prices – this will satisfy the competition authority in its narrow interpretation of the necessity condition. Importantly however, after exempting such a sustainability agreement in restriction of competition, the welfare objective of the competition authority remains permanently opposed to the profit-objective of the cooperative. The competition authority must therefore strictly and constantly supervise the agreement to ensure that sustainability is in fact being delivered, and that price increases do not exceed what is needed to cover the cost of the sustainability increase.

Proper assessment and surveillance require a staggering amount of knowledge and resources for a competition authority. Even though the burden of proof lies with the firms, the competition authority will need to verify the firms' claims, which essentially requires information about the preferences of all consumers (or even all citizens, see Section 7) – not only on the willingness to pay for private goods, but also for public goods and broader environmental concerns such as clean air and biodiversity.[37] Acquiring this information, keeping it constantly up-to-date and processing it, appears to be a near impossible task for any competition authority. Green antitrust policy will therefore be extremely demanding on time and budget, crowding out other important competition enforcement objectives. Any information asymmetry in these market oversight games presents a high risk of abuse of the green antitrust policy for cartel greenwashing. Moreover, once an industry has been allowed to make agreements for some time, the higher "but-for" sustainability levels, that could have been had if competition had been preserved instead, become increasingly difficult know, to the point of no longer being knowable. Competition authorities' resources could be better spent than on permanently and imperfectly controlling sustainability agreements to do enough green, when the firms involved would have almost always done more in competition.

7 Green antitrust excuses government failure to regulate

In the classical economic approach, damaging side-effects of market interactions are seen as externalities. The solution is to force market participants to internalize these externalities. The social costs of pollution, for example, then become part of the production costs to be expressed in the product prices. Higher prices decrease demand and thereby environmental damage, while higher costs incentivize firms to look for more sustainable production methods. This way, market forces are harnessed to benefit the

[37] See Schinkel and Tóth (2019) and Peeperkorn (2020).

environment. Through competition, an optimal allocation of production and consumption will result, based on a society's preferences for the climate relative to consumption goods. The efficient allocation of scarce resources over alternative means then remains firmly based on consumer sovereignty, i.e. the preferences of the people.[38] Care for the future has a prominent place in this framework. Welfare of future generations is taken into account, for instance through the intergenerational altruism and bequest motives of the current population.[39] This is also how the future can consistently enter into competition authorities' assessments of green efficiencies.

It is first and foremost a government task to ensure that the social costs of production are reflected in the private costs of manufacturers. This can be done through taxation, or by ensuring that private property rights for climate-related issues are well defined, such that private parties will ensure that the costs of their use will be priced in. Where this is hard to achieve, for instance because the source of pollution remains disputed, governments can use direct regulation to force firms to produce in a more sustainable way. Unsustainable production, like under-provision of public goods, is a well-understood market failure, but it is a government failure that well-known solutions have only been sparingly used in the last several decades. Trying to remedy this government failure by creating a market failure – market power – seems a response that is itself doomed to fail.

To begin with, trying to have private market power advance public interests is orthogonal to key lessons of classical public economic theory. One way of seeing this green antitrust policy is as mandating private companies to increase their prices by an overcharge, i.e. "tax" a private good, and to use that money to finance a compensating public good; sustainability. Samuelson's rule prescribes that public good provision should be increasing with the utility that people derive from the public good. But for an anticompetitive sustainability agreement, the higher the willingness to pay for sustainable products, the *less* sustainability the corporate cooperative needs to deliver to compensate consumers for a given product price increase. After all, consumers with a high appreciation for green can be made indifferent with less of it, compared with consumers that appreciate green little. There is no reason for a green corporate cooperative to invest more of its extra revenue in sustainability than it is minimally required to do: the rest it can pocket as profit. Government, though certainly imperfect, at least strives for optimal taxation and break-even public good provision. Companies with market power instead have an incentive to maximize their margin.

In addition, green antitrust policy runs the risk of exacerbating government failure. That governments keep failing to live up to their mandate to guarantee the public interest has many reasons, including public choice incentives ranging from regulatory laziness to outright corruption. Being able to point to industry self-regulation, in the form of sustainability agreements in restriction of competition, is another perfect excuse for governments not to take up their regulatory responsibility. Why the effort

[38]See on a related legal argument Loozen (2019).
[39]See, for instance, Galperti and Strulovici (2017).

to regulate, after all, if government officials can simply rely on private initiatives to help meet sustainability goals? This is exactly how *Chicken* (2015) entered the stage: the Dutch cabinet did not want to improve by regulation the abysmal circumstances in which poultry is reared, because it would apply to all chicken, including the vast majority bred for export purposes. Yet there was strong public pressure to act. The problem was conveniently redirected towards the ACM, which was subsequently reproached for refusing to exempt the meagre initiative. The green antitrust movement therefore insists on a turn that, once taken, risks leading us down a path where competition authorities are accused of standing in the way of sustainability initiatives, behind which accusations firms can hide as an excuse for not becoming more sustainable. That is barking up the wrong tree: where there is a need for coordinated implementation of more sustainable production, government should regulate it, and firms with such green initiatives should lobby the designated public authority for effective regulation, rather than the competition authorities for protection from competition.

8 A citizens' welfare standard weakens competition authorities' ability to bargain for green

Even though, after careful investigation, the ACM said "no: too little sustainability" to the initiatives *Coal* (2013) and *Chicken* (2015), the Dutch competition authority seems keen to exempt one sometime. The ACM is leading the way in green antitrust with its recent Draft Guidelines. They importantly relax the compensation requirement by proposing that it can be satisfied if the harm to consumers is exceeded by sustainability benefits for *all* Dutch citizens, consumers *and* non-consumers. The benefits to others than the consumers of products concerned are also referred to as 'out-of-market-efficiencies' or 'externality benefits'.[40] The approach implies a fundamental change in the interpretation of the exemption conditions of Article 101(3) TFEU. The ACM interprets "a fair share" as not having to be a fully compensating share for actual consumers.[41] With this interpretation of the European Treaty, the Dutch competition authority single-handedly proposes to replace the common consumer welfare standard in European competition policy by a 'citizens' welfare standard'. The consequence of this that consumers may end up worse off, the ACM justifies by opining that: "their demand for the products in question essentially creates the problem for which society needs to find a solution."[42] ACM disposes; the polluter pays.

At first sight, this may appear reasonable. After all, the polluter pays principle is well-established and appropriate for internalizing externalities – even though it is certainly not implied by the Coase Theorem. Also, reductions in negative externalities as a result of more sustainable production will typically be appreciated more broadly

[40] Lambertini and Mantovani (2008) find such benefits from a cartel restricting output.
[41] ACM draft guidelines (2020), recital 38.
[42] ACM draft guidelines (2020), recital 41.

by more than just the buyers of the product. As said, consumers of a polluting product, by their very choice of buying it, typically value the sustainability benefits least. The full consumer compensation requirement can therefore be seen as discriminating against externality benefits. By no longer requiring full consumer compensation, it becomes possible to exempt more sustainability agreements, which carry lower compensation costs for the corporate cooperative, so may be profitable and thus proposed more. In *Coal* (2013), all Dutch citizens were already taken into account as electricity consumers, so the ACM decision in that case should be the same under the stretched compensation requirement. Yet *Chicken* (2015) probably could have been exempted under the citizens' welfare standard: counting on the benefits-side vegetarians' appreciation for improvements in living conditions of industrial broiler chicken as well should make it easily weigh up against the price increases paid by actual consumers of chicken.

The ACM tries to avoid having to revise its decision in *Chicken* (2015), by distancing itself in the Guidelines from sustainability gains other than environmental externalities. It focusses on the prevention of environmental damages, in particular reductions in CO2 emissions that the Netherlands is bound to by the Paris Agreement, presumably to be on firmer ground for valuing benefits and legitimizing its role as redistributor of wealth. Yet such a distinction between externalities related to environment and other sustainability factors is conceptually weak. Just like air pollution or rising sea levels, cruelty to animals or antibiotic resistance are negative externalities that affect many. Without a good conceptual reason to allow the reduction of the one but not the other to count as sustainability benefits, stretching the compensation criterion is bound to have wide implications for many types of external effects and corporate agreements. Moreover, by merely giving greater weight on the benefit side to the projected sustainability efforts, the stretch of the compensation criterion does not increase sustainability investments. On the contrary: the citizens' welfare standard just makes more agreements with *the same or fewer* sustainability advances eligible for a cartel law exemption, while allowing the companies involved to charge consumers larger price increases. In addition, the proposal increases the information required by the competition authority to properly assess sustainability agreements by necessitating knowledge of the preferences of all citizens, rather than just the consumers – which, as said, is a tall order already.

There is a political side to the proposal too.[43] The citizens' welfare standard implies that the competition authority makes political decisions on redistribution. This is not the case under the common compensation requirement that consumers cannot be worse off. It asks from firms proposing an anticompetitive cooperation with benefits to at least be able to compensate their own customers.[44] Any benefits beyond that minimum standard are welcome welfare surplus. Under the citizens' welfare standard, however, the competition authority needs to make value-judgements in each and every specific

[43] See also Peeperkorn (2021).

[44] Salop (2009) approves of the consumer compensation requirement as: "[T]he consumer welfare standard ... means that anticompetitive conduct is not permitted to redistribute wealth away from consumers. Antitrust law instead involves giving them a property right in the competitive outcome."

case about the net harm to consumers that the authority finds acceptable in exchange for achieving the benefit for non-buyers. "How much more is it reasonable for the Dursleys to pay for their chicken breast fillet, to the well-being of all pescatarians?" Moreover, this redistribution that competition authorities would engage in is broadly from the poor to the rich, because of the nature of the products that are particularly eligible for a cartel law exemption: primarily cheap and unsustainably produced goods, such as grey electricity, battery chicken, and low-end washing machines. Affluent non-consumers with the means already to be self-sufficient with solar-panels, eat free-range chicken and own an A-label washer, will obtain the environmental benefits from forcing more expensive sustainable consumption on others for free. In between are the cooperating firms trying to retain a profit margin for their shareholders.

The stretched compensation criterion substantially lowers the standard for justifying an anticompetitive sustainability agreement. After all, a few non-consumers who are sufficiently passionate about the benefits of a sustainability agreement can easily tip the balance against any net harm to consumers. The consumer compensation criterion is typically a high bar, for it would take quite a lot of green to compensate consumers with a low willingness to pay for it. The citizen compensation criterion, on the other hand, can be met with a little bit of green for enough non-buyers against a high price increase. Just like it is expensive to compensate consumers with a low willingness to pay, it is cheap to compensate non-consumers with a high willingness to pay. Less ambitious in demanding green, the proposal aggravates the risk of abuse by cartel greenwashing. The stretched compensation criterion weakens a competition authority's bargaining position to ask for more green. After all, the more people with an appreciation for a given increase in sustainability are counted on the benefit size, the smaller the required compensating increase in sustainability can be. The result is a less strict test that is likely to deliver less green.[45] It also requires substantial additional information to assess benefits to others than the consumers, that is even less readily available than information on the preferences of just the consumers, making

[45]In the context of merger control, the consumer compensation requirement, being a higher standard to meet, has been shown to can induce firms to propose mergers with efficiencies that deliver higher total welfare, depending on the distribution of potential mergers that parties could propose. See Lyons (2002), Farrell and Katz (2006) and Armstrong and Vickers (2010). Nevertheless, the tougher consumer welfare standard may also deter mergers that would have higher total welfare but hurt consumers a little while benefiting the merging parties much more. Merger control lacks instruments to make the merging parties share this surplus post-merger, so that consumers are not worse off. In the case of sustainability agreements, however, where the exempting competition authority already needs to strictly police the compensatory sustainability efforts, it seems possible to require the cooperating firms to shift some of their gain to increase consumer benefits – and the level of green – if the cooperation proposed does indeed generate a surplus in the form of additional profits and green appreciation by consumers and others – possibly also intrinsically by the firms themselves. Note that the fact that the firms are unable to monetize the sustainability benefits to non-consumers, to use those to compensate their consumers, may indeed block certain sustainability agreements that would have increased extended total welfare, that is, including non-consumers. The complexity goes to show that this cumbersome form of 'private taxation' on the consumers of just some specific products is inferior to regular wide and targeted government taxation.

it that much harder to spot the greenwasher. Easier exemptions also tempt further government shirking. All-in-all, there appears to be a lot of collateral damage for welcoming corporate agreements that are unlikely to lead to greater sustainability than their participants would achieve in competition.

9 Concluding remarks

The task of competition authorities is to protect competition. There is strong indication that competition is also the main force to induce firms to deliver more sustainably produced goods – along with other desired properties, high quality of service, efficient production, low prices, and an optimal allocation of scarce resources. Whenever consumers have at least some willingness to pay for more sustainably manufactured products, corporations are incentivized to deliver them in competition more than when they are allowed to conclude sustainability agreements. The drive to green can be expected to be stronger in competition than in collusion, still when firms have some intrinsic motivation to promote sustainability in addition to their profit motive. The crucial insight is that the difference in sustainability investments between competition and cooperation is positive. That competition, and therefore competition authorities, would somehow be in the way of a more sustainable future is an idée-fixe of corporate lawyers mainly – a false self-image, in the case of the ACM.

The European Commission did not fall for the idea, and stressed that: "it's competition that actually transmits those pressures [to find more sustainable ways to do business] to the boardroom."[46] The debate continues, however. Criticism focuses on the Commission's requirement that a "fair share" for consumers is a "fully compensating share", which several legal scholars claim is too strict.[47] This is a matter of interpretation of the European Treaty, that is for legal scholars and the European courts. Our plea in favor of the strict interpretation is that it offers the best protection against cartel greenwashing. It may be wise to make sustainability cartel exemptions more difficult to obtain than by just insisting on full consumer compensation. For should the meaning of "fair share" in the European Treaty sometime be found not to need to be a fully compensating share, this defense line against greenwashing would break and open the floodgates for thinly green-coated collusion. Additional protection could come from asking more under the indispensability requirement. In particular that there is no way to achieve the projected benefits that is less restrictive of competition – for example by vertical implementation, including government regulation.[48] The Commis-

[46]Commissioner Vestager's keynote speech "Competition policy in support of the Green Deal" delivered 10 September 2021 at the 25th IBA Competition Conference.

[47]See, for example, the ACM Legal Memo, "What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?" of 27 September 2021, in which the authority argues there is ground for its interpretation of the text of Article 101(1) TFEU on this point in case law.

[48]The benefits should, in other words, be 'horizontal agreement-specific', in analogy to the requirement in merger control that any efficiencies to be weighed against the anticompetitive effects of a merger are 'merger-specific'. See Goppelsroeder et al. (2008).

sion has announced to issue revised guidelines on the application of Article 101 TFEU to sustainability agreements soon.[49]

We are not claiming, of course, that the sustainability level in competition is always likely to be socially optimal: when there are externalities it typically is not. This is exactly why there is a clear role for government. The much-needed environmental protection requires a strong government that assigns property rights, levies taxes, grants subsidizes and regulates. But it is a mistake to think that market power would make firms internalize externalities. The trust put by the green antitrust movement in anticompetitive agreements is also peculiar in light of several important cartel cases in which the objective of the colluding firms was in fact to eliminate competition in the sustainability dimension. These cases range from the *Phoebus* conspiracy in the 1920's to reduce the design life of light bulbs, to the recent collusive hindering of car battery recycling, and the cartel members in *Trucks* (2017) and *Car Emissions* (2021) jointly delaying the introduction of lower emissions technologies.[50] Competitors that are allowed to set minimum sustainability standards in cooperative self-regulation have all the incentives to set that standard lower and slower than would have been in competition.

Conceptually, the green antitrust movement attempts to solve one market distortion – due to the persistence of externalities – by creating another market distortion – market power. In the general theory of second best, two or more market distortions may counteract each other and so improve upon the efficiency of the situation with only the original distortion.[51] It implies that if there exists an uncorrectable market failure, the optimal government intervention may be in another direction than the first best solution. In the case of competition policy, allowing anticompetitive conduct may be welfare enhancing if regulation is not feasible. A straightforward example would be allowing a merger or a cartel that increases prices that do not reflect the full social costs of production, thereby reducing negative externalities.[52] The benefits do not go beyond a mere volume effect, however. As we have shown, more market power does not counteract too little investments in more sustainable production technologies – which the green cartel policy aims to stimulate. Furthermore, second best theory reinforces our warnings. It reveals the staggering amount of information required to determine

[49] European Commission, Competition policy brief "Competition Policy in Support of Europe's Green Ambition", September 2021, page 7.

[50] On the Phoebus cartel, see Krajewski (2014).

[51] See Lipsey and Lancaster (1956).

[52] The example is given in Hammer (2000), page 860 as a "provocative" illustration of the second best principle. Hammer (2000) advocates a 'second best-defense' for anticompetitive conduct within individual markets in isolation – which is the standard partial equilibrium approach in competition policy – to be based on a total welfare standard. Posner (2001) disapproves of the idea, based on his classic argument that rent seeking cost should be included in the social cost of market power and his assessment that it would make antitrust enforcement "completely unworkable" (page 13, footnote 5). The concept of 'conservation cartels', see Adler (2004), is another example. The second best approach was recently called upon by Krugman (2014) to be creative about environmental public policies in the face of politically infeasible better solutions – without suggesting private market power buildup.

the second best. The social engineering involved in balancing anticompetitive conduct against externalities would overwhelm any competition authority – as well as being at odds with the nature of their task, which is to protect the competitive processes. Done imperfectly, the supposedly counteracting market powers can easily lower welfare and create further inefficiencies. Moreover, the problem of externalities is not an uncorrectable market imperfection, but one that can be directly addressed with far superior solutions than excusing collusion.

Green antitrust is a sympathetic but counterproductive attempt to solve the global climate crisis. Fighting one market failure with another market failure will mostly make matters worse. There is huge potential for welfare improvement by preventing negative externalities and pursuing the positive, public goods. Giving firms market power does not create incentives to tap into that potential, however. On the contrary: growing awareness of the vital importance of a sustainable planet, the rise of civil society, and an increasing willingness to buy from and invest in companies that take a more socially and environmentally responsible stance are ever stronger motivators for firms to offer more sustainable produced goods and services in competition. These hopeful gathering forces for green should be given free rein, rather than be allowed to be suppressed by collaborations that risk collusion. Relaxing the strict competition law enforcement criteria in order to better accommodate generally ineffective sustainability agreements in restriction of competition is not, therefore, a good policy. Such a rule of reason approach invites abuse cartel greenwashing.[53] Instead, governments should be held accountable for their failure to adequately address damaging production externalities. The right response of competition authorities to a corporate cartel exemption request for its sustainability initiative is referral to the part of government best placed to assess the idea and possibly implement it through proper regulation – rather than stepping in and become an excuse for government failure. However well-intended, the green antitrust movement risks doing damage to both competition and sustainability.

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[53]Whinston (2006) on page 18 explains how the per se rule against collusion is justified by the high social cost of listening to and evaluating claims of firms caught in price fixing that somehow their cartel was socially beneficial, despite this being theoretically possible. He quotes George Stigler noting: "Economic policy must be contrived with a view to the typical rather than the exceptional, just as all other policies are contrived. That some drivers can safely proceed at eighty miles per hour is no objection to a maximum-speed law."

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