

## The Case against Green Antitrust

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### ABSTRACT

The case for a greener antitrust is weak and flawed. It is largely abstract, hypothetical, legalistic, somewhat emotive, and lacks supporting evidence. Its proponents claim that the European Commission's enforcement of Article 101 TFEU blocks efficient industry-initiated cooperation to improve sustainability. But as is shown this more permissive approach will lead to increased market power, supra-competitive prices and greater industry profits, and is unlikely to achieve greater investment in and the faster adoption of green technologies than competition.

**Keywords:** sustainability, competition, cartel, greenwashing, anticompetitive agreements, emissions, rent seeking

**JEL Codes:** H41, K21, L40

The European Commission and many other Governments are pursuing a green agenda promoting greater sustainability and net zero carbon emissions.<sup>1</sup> This has led to a push from politicians, industry and lawyers to relax competition law to allow firms to cooperate to implement sustainability and green initiatives. The Dutch<sup>2</sup> and more recently the

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<sup>1</sup> Communication from the Commission: The European Green Deal, COM(2019) 640 final, 11 Dec. 2019; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'); Margrethe Vestager, *The Green Deal and Competition Policy* Speech of 22 Sept. 2020. [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en)

<sup>2</sup> ACM, Guidelines: Sustainability Agreements – Opportunities with competition law (2<sup>nd</sup> Draft, July 2020). <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>

Hellenic<sup>3</sup> competition authorities have proposed changes to the enforcement of their national laws.

In this note I reject the case for a greener antitrust and argue that competition law should remain focused on protecting competition. To make the discussion tractable I focus on European (and UK) antitrust, and sustainability rather than pollution and greenhouse gases.<sup>4</sup>

### **Is there a problem with antitrust?**

It has been suggested that antitrust is an obstacle to industry-initiated cooperative agreements that would promote more sustainable products and practices.<sup>5</sup> The main reason is that the law, specifically Article 101(3) of the Full treaty of the European Union (TFEU) and its national equivalents, only exempts an anticompetitive agreement if consumers receive a fair share of any benefits. They argue that this test should be modified so that the benefits of sustainability can be offset against those of consumers to allow otherwise anti-competitive agreements. Put more succinctly, they advocate a more permissive competition law that condones collusion and market power.

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<sup>3</sup> Hellenic Competition Commission, Draft Staff Discussion Paper on Sustainability Issues and Competition Law (2020). <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html>

<sup>4</sup> For a fuller and less opinionated treatment of the issues see Cento Veljanovski, *Collusion as Environmental Protection – An Economic Assessment*, 17 J. Comp. Law & Econ. (In press (2021)).

<sup>5</sup> Simon Holmes, *Climate Change, Sustainability, and Competition Law*, 7 J. ANTITRUST ENFORCEMENT 354-405 (2020); Maurits Dolmans, *Sustainable Competition Policy*, 6(1) COMPETITION LAW & POLICY DEBATE 4-23 (2020); Jacques Buhart & David Henry, *Think Green Before You Apply: EU Competition Law and Climate-Change Abatement*, 44 WORLD COMPETITION 147-68 (2021); Edith Loozen, *Strict Competition Enforcement and Welfare: A Constitutional Perspective based on Article 101 TFEU and Sustainability*, 56(5) C.M.L.R. 1265-1302 (2019); Giorgio Monti & Jotte Mulder, *Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives*, 42 Eu. L.R. 635-56 (2017); Suzanne Kingston, *GREENING EU COMPETITION LAW AND POLICY* (Cambridge University Press, 2011).

These claims are exaggerated and need to be put in perspective.<sup>6</sup> The law does not outlaw cooperation between rival firms only those that give them the market power to charge excessive prices and otherwise restrict competition. Agreements setting voluntary industry standards and cooperation over R&D are legal and exempt.<sup>7</sup> The law also exempts anti-competitive agreements if they generate sufficient efficiency gains provide that a fair share goes to consumers. The law sensibly provides that even where a fair share of the benefits goes to consumers that the proposed cooperation be objectively justified, indispensable to the attainment of the proposed benefits, and does not eliminate competition. Whatever the legal interpretation of these terms they provide a filter to ensure the alleged benefits can't be realized in other less restrictive ways. The much discussed Dutch competition authority's chicken<sup>8</sup> and coal<sup>9</sup> decisions, which are used as examples of drawbacks of antitrust, took a broader view to find that the benefits of the industry proposals were small and could be achieved better by other means.

The current debate, therefore, concerns a narrow subset of potential agreements among large firms in oligopolistic industries which harm consumers. Also, relaxing antitrust laws is unlikely to contribute much to achieving green goals.

### **The law is not a Problem**

The case for green(er) antitrust is surprisingly abstract and lacks evidence. To my knowledge, the European Commission has not blocked a single cooperative agreement designed to promote more sustainable production in the last two decades. The proponents of a greener antitrust say this proves nothing because firms are deterred by the knowledge

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<sup>6</sup> Maarten Pieter Schinkel & Leonard Treuren, 'Green Antitrust: Friendly Fire in the Fight against Climate Change' 29 July 2021, <https://ssrn.com/abstract=3749147>. This is an updated version of their chapter in Simon D. Holmes, Dirk Middelschulte & Martijn Snoep (eds.), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences, 2021). Also, Maarten Pieter Schinkel & Leonard Treuren, *Green Antitrust: Why Would Restricting Competition Induce Sustainability Efforts?* PROMARKET, March 26, 2021, <https://promarket.org/2021/03/26/green-antitrust-why-would-restricting-competition-induce-sustainability-efforts/>

<sup>7</sup> European Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) OJ C 2004, 101, P97.

<sup>8</sup> ACM, *Analysis of the sustainability arrangements concerning the Chicken of Tomorrow* (in English) (2015).

<sup>9</sup> 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 Netherlands SER Energy Agreement* (in English, 2013). Erik Kloosterhuis & Machiel Mulder, *Competition Law and Environmental Protection: The Dutch agreement on coal-fired power plants*, 11(4) J. COMP. LAW & ECON. 855-80 (2015).

that the Commission won't exempt such agreements. But that claim doesn't stand up to scrutiny since many of the very same firms lobbying for green exemptions have formed cartels in the knowledge that the Commission will impose heavy fines on them e.g., Unilever. It also appears that those firms and stakeholders lobbying for the relaxation of EU antitrust can't come up with an example. The Commission's Policy Brief reporting its consultations over a greener antitrust commented that 'stakeholders appear to have difficulties providing real-life examples of sustainability initiatives that are hampered by the potential risk of the application of competition rules.'<sup>10</sup> The lobbying starts to smell like greenwashing.

The claims also fail to appreciate the way the Commission enforces antitrust. In 2004 following the modernisation of EU competition law, the Commission altered its enforcement priorities to focus on hardcore cartels.<sup>11</sup> It, therefore, does not prosecute cooperative agreements which do not involve price fixing and the like. It deals with these cases by commitments and non-enforcement which several legal scholars have pointed out give such agreements *de facto* exemption.<sup>12</sup>

### **The Mirage of Green Cartels**

Adam Smith famously warned that '[P]eople of the same trade seldom meet together ... but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices'. He did not advocate antitrust as the solution but rather that 'the law ... ought to do nothing to facilitate such assemblies; much less to render them necessary'.<sup>13</sup> Providing firms in an industry with a forum to cooperate in setting environmental standards, and indeed other cooperative arrangements, risk serious anticompetitive activity and at a minimum requires heightened antitrust vigilance.

To back up Adam Smith's observation, consider the European consumer detergent cartel.<sup>14</sup> Here three of Europe's largest producers of detergent - Henkel, P&G and Unilever - through their trade association launched a voluntary 'Code of Good Environmental Practice for

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<sup>10</sup> European Commission, Competition Policy in Support of Europe's Green Ambition, September 2021.

<sup>11</sup> David Bailey, *Reinvigorating the Role of Article 101 (3) under Regulation 1/2003*, 81(1) ANTITRUST L. J. 111-44 (2016).

<sup>12</sup> Pablo Ibanez Colomo, *THE SHAPING OF EU COMPETITION LAW* (Cambridge University Press, 2018), Or Brook, *Priority-Setting as a Double-Edged Sword: How Modernisation Strengthened the Role of Public Policy* 16(4) J. COMP. LAW & ECON. 435-87 (2020).

<sup>13</sup> Adam Smith, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776) bk. 1, ch. X, pt. II.

<sup>14</sup> Case COMP/39579 Consumer Detergents, Commission decision of 13 April 2011.



Household Laundry Detergents' to promote more sustainable consumption of laundry detergents. This set out dosage and weight reductions for heavy-duty detergent powder and less packaging. So far so good. Unfortunately, the European Commission found that the three firms 'ultimate aim ... was to achieve market stabilization as well as to coordinate prices'. They 'sought to achieve market stabilization by ensuring that none of them would use the environmental initiative to gain a competitive advantage over the others and that market positions would remain at the same level as before actions taken within the environmental initiative (in particular the compaction of products).'<sup>15</sup> The three also agreed to keep prices constant despite smaller packets and fewer scoops per wash, not to pass on cost-savings; restrict their promotional activities; agreed on price increases and exchange sensitive information on prices and trading conditions. These restrictions served to increase retail prices (at least in Germany).<sup>16</sup> Note that the Commission did not outlaw the voluntary code on producing and packaging more sustainable detergent. Indeed, it welcomed the code. It was the parties' attempt to rig prices and restrict competition that was illegal.<sup>17</sup>

The Commission's consumer detergents case is not an isolated example. There is ample evidence that when antitrust is relaxed to promote social goals the supposed benefits have failed to materialized because, as Adam Smith warned, firms have used it as an opportunity to engage in cartel behaviour. The most researched example is the National Industrial Recovery Act 1933 (NIRA) which exempted some sectors of industry from US federal antitrust law. Firms in some industries were free to collude over prices and quantities provided they raised wages and accepted collective bargaining with independent labour unions.<sup>18</sup> This led to collusive bidding which increased steel and wholesale prices, stifled product innovation (almost no new products were introduced in the late 1920s and 1930s), unrealistic wage demands, and greater unemployment. It has been estimated that it lengthened the Great Depression by seven years.<sup>19</sup>

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<sup>15</sup> Case COMP/39579 Consumer Detergents ¶24.

<sup>16</sup> Ulrich Laitenberger & Florian Smuda, *Estimating Consumer Damages in Cartel Cases*, 11(4) J. COMP. LAW & ECON 955-73 (2015).

<sup>17</sup> Tomaso Duso, Lars-Hendrik Röller & Jo Seldeslachts, *Collusion through Joint R&D: An empirical assessment*, 96 REV. ECON. & STAT. 349-370 (2014) (shows that large networks between direct competitors, created through firms being members in several RIVs at the same time, are conducive to collusive outcomes in the product market that reduce consumer welfare. RIVs among noncompetitors are efficiency enhancing).

<sup>18</sup> John Harkrider, *Lessons from the Great Depression*, 23 ANTITRUST 6-11 (2009).

<sup>19</sup> Harald L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A general equilibrium analysis*, 122 J POLIT. ECON. 779-816 (2004); Gauti B. Eggertsson, *Was the New Deal Contractionary?* Federal Reserve Bank of New York Staff Report No. 264 (2006); Christina D. Romer, *Why Did Prices Rise in the 1930s?* 59(1) J. ECON.

Another example is the German high-voltage power-cable cartel which operated between 1958 to the 1990s.<sup>20</sup> While prosecuted at various times, it was exempt from German anti-cartel law and therefore operated legally between 1975 to 1984 to enable the industry to rationalise in the face of declining demand and excess capacity. The industry failed to rationalise but was able to increase its profits.

Now consider the ‘green’ credentials of antitrust consistent with its competition goal. The Commission has prosecuted several cartels that rigged the market for environmental inputs such as the supply of water management services<sup>21</sup> and car battery recycling.<sup>22</sup> In 2021 it fined BMW, Daimler, and VW Group €874 million (which would have been over €2 billion without leniency) for colluding to limit the development and roll-out of emissions cleaning technology for new diesel and petrol cars between 2006 and 2014 thereby denying consumers the opportunity to purchase less-polluting cars.<sup>23</sup> Here the law was used not to outlaw price fixing but industry cooperation ‘to limit or control production, markets or technical development’ under Article 101(1)(b) TFEU. As the EU competition commissioner and Executive Vice President Margrethe Vestager said:

The cartel took place within what was otherwise perfectly legal, even beneficial, technical cooperation. The companies were developing a new cleaning technology that used an additive, which they called AdBlue, to remove harmful nitrogen oxides from car exhausts. And they needed to cooperate to tackle the practical challenges – to set up a network of AdBlue filling stations, for example, or to design a standard pump nozzle that would fit any car.

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HIST. 167–97 (1999); Daniel A. Crane, *Antitrust Enforcement during National Crises: An unhappy history*, GLOBAL COMPETITION POLICY (Dec. 2008); Gerald Bittlingmayer, *Output and Stock Prices when Antitrust Is Suspended: The effects of the NIRA* in Fred S. McChesney & William F. Shughart II, eds, *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE* 287–318 (University of Chicago Press, 1982); Jason E. Taylor, *The Output Effects of Government Sponsored Cartels During the New Deal*, 50(1) J. INDUS. ECON. 1-10 (2002).

<sup>20</sup> Hans-Theo Normann & Elain S. Tan, *Effects of Different Cartel Policies: Evidence from the German power-cable industry* 23(4) INDUSTRIAL & CORPORATE CHANGE 1037–57 (2014). Also, the same approach in Jonathan B. Baker, *Identifying Cartel Policing under Uncertainty: The U.S. Steel industry 1933-1939*, 32(2) J. LAW & ECON. 47-76 (1989); Andrew R. Dick, *If Cartels Were Legal, When Would Firms Fix Prices?* in Peter Grossman, ed. *HOW CARTELS ENDURE AND HOW THEY FAIL: STUDIES OF INDUSTRIAL COLLUSION* 144-73 (Edward Elgar, 2004).

<sup>21</sup> Case/COMP 39611 Water Management Products, Commission decision of 1 November 2012.

<sup>22</sup> Case AT.40018 Car Battery Recycling, Commission decision of 23 November 2017.

<sup>23</sup> Case AT.40178 Car Emissions, Commission decision of 8 July 2021 (not published). European Commission, Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars, Press Release, 8 July 2021.



But they crossed the line into illegal collusion when they indicated to each other that they wouldn't aim at cleaning beyond the level required by the legal standard. They knew they could remove even more pollution than the law required, by injecting more AdBlue into the exhaust. So, they could have competed to attract environmentally-conscious consumers, by making even cleaner cars. But instead, they chose not to compete for the best possible cleaning performance.<sup>24</sup>

To reinforce the point, consider the recent record of cooperation in the European automobile sector. In the face of potentially severe penalties the sector has been riddled with cartels. The European Commission has prosecuted no less than 12 cartels. Add to this the conspiracy by European car producer just discussed and their other illegal attempts to delay and prevent the implementation of environmental standards and mislead the consumers. Is it now credible that the same firms would now initiate new effective green standards?

### **Is there a conflict between sustainability and competition?**

All this begs the key question – Is there a conflict between competition and sustainability that can be resolved by allowing anticompetitive industry cooperation?

The proponents of a greener antitrust believe there is. They draw much of their approach from economics. This usually consists of textbook comparisons between unfettered competition in the presence of significant externalities with cooperation among firms that is assumed to internalise these third party losses to show that competition does greater environmental harm. But this is a misleading static comparison between hypothetical examples that does not address let alone establish the cooperation generates greater sustainability.

It is an irrelevant comparison for two reasons.

First, cooperation does not make investment in sustainability any more attractive. If more sustainable products are demanded by consumers, then there is little reason to believe that they will not be supplied in a competitive market. Those firms supplying more sustainable products will at first be niche, and then this will spread across the market. We

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<sup>24</sup> Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference – “A new era of cartel enforcement”, 22 Oct. 2021.  
[https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en) .

see this daily. If, however, the more sustainable products are too costly so that consumers won't pay the higher price, then they will not be supplied, cooperation or not, unless of course firms are allowed to get together to charge super-competitive prices.

Secondly, cooperation is unlikely to lead to greater innovation for the simple reason that cooperation reduces each firm's expected profits.<sup>25</sup> This is one of the points forcefully made by Professor Maarten Pieter Schinkel and his colleagues'. The core of Schinkel et al's modelling is that cooperation among rival firms with market power does not produce the correct incentives for welfare-enhancing sustainability. Why? Because they are under-incentivised to make sustainable investments and over-incentivised to charge excessive prices relative to a more competitive market.

If confirmation of this were required, then review the Commission's car emissions decision discussed above where the colluding car manufacturers went out of their way to introduce the minimum level of emissions technology (as predicted by Schinkel et al). But more generally the weight of the empirical evidence shows the more competitive the industry the more it is likely to firms are to invest in sustainable and ESG actions.<sup>26</sup> As a group of leading growth economists has found:

While the direct impact of competition on the environment is always negative – lower prices induce more mass consumption and therefore more pollution – the dynamic incentive can mitigate and even reverse it. Indeed, what matters here is not so much the effect of competition on the level of innovation, but rather how it affects its direction, namely the extent to which firms' R&D and product mix become more, or less, environmentally friendly.<sup>27</sup>

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<sup>25</sup> Maarten Pieter Schinkel & Leonard Treuren, 'Corporate Social Responsibility by Joint Agreement, 8 October 2021 Available SSRN: <https://ssrn.com/abstract=3878784>.

<sup>26</sup> See for example: Daniel Fernández-Kranz & Juan Santaló, *When Necessity Becomes a Virtue: The Effect of Product Market Competition on Corporate Social Responsibility*, 19(2) J. ECON. & MANAGEMENT STRATEGY 453-87 (2010); Caroline Flammer, *Does Product Market Competition Foster Corporate Social Responsibility? Evidence From Trade Liberalization*, 36(10) STRATEGIC MANAGEMENT J. 1469-85 (2015); Daniel H. Simon & Jeffrey T. Prince, *The Effect of Competition on Toxic Pollution Releases*, 79 J ENVIRON. ECON. & MANAGEMENT 40-54 (2016); Wenzhi Ding, Ross Levine, Chen Lin & Wensi Xie, *Competition Laws, Norms and Corporate Social Responsibility*, Working Paper 27493 (National Bureau of Economic Research, 2020); Christopher S. Decker & David T. Flynn, *Work-Related Accidents and the Level of Market Competition: An Analysis of Worker Injury Rates at U.S. Steel Corporation, 1907–1939*, 46 ECON. INQUIRY 438-53 (2008).

<sup>27</sup> Philippe Aghion, Roland Bénabou, Ralf Martin & Alexandra Roulet, *Environmental Preferences and Technological Choices: Is Market Competition Clean or Dirty?* NBER Working Paper 26921, 2020. <http://www.nber.org/papers/w26921>.

Their claim is supported by empirical research using panel data for 8,562 firms from the automobile sector that patented in 42 countries between 1998 and 2012 which found that greater exposure to environmental attitudes has a significant positive effect on the probability for a firm to undertake 'clean' innovation, which is greater the higher the degree of product market competition.<sup>28</sup>

### **Market Failure due to First Mover disadvantages**

Still not convinced some argue that competition does not encourage greater sustainability because of 'first mover *disadvantage*'.<sup>29</sup> The idea behind this is simple - investment in sustainable products is costly and is deterred by the prospects that a firm's competitors will continue to offer cheaper less sustainable products. Faced with this fear firms do not invest in sustainable products.

But again, this unconvincing and lacks evidence. Let's begin with the obvious observation that if first mover disadvantages are a significant factor, then it applies to all markets and undermines the case for competition and antitrust. As has just been discussed competition generally leads to greater pressures to innovate and adopt new technologies. Moreover, if first mover disadvantage was a significant problem it would justify the cartelisation of whole swaths of industry; something no one has yet advocated. Even if it were correct that innovation would only take place when all or most of the firms in an industry agreed that it should, giving them market power to overcharge their customers is not a defensible policy proposal.

### **Who should Pay – Consumers or Firms?**

The advocates of a greener antitrust say that the law's 'fair share to consumers' test blocks and deters cooperation over sustainability that is in the public interest. They correctly point out that where there are significant externalities consumers pay less than the full social costs, and benefit from cheaper goods at the expense of those third parties that suffer adverse effects. The polluter and their consumers should therefore pay because otherwise they are being 'subsidised' at the expense of the environment. In antitrust terminology,

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<sup>28</sup> The relationship between market structure and innovation is more subtle and likely nonlinear in competition. See Philippe Aghion, Celine Antonin & Simon Bunel, *THE POWER OF CREATIVE DESTRUCTION – ECONOMIC UPHEAVAL AND THE WEALTH OF NATIONS* (Harvard University Press, 2020).

<sup>29</sup> Nicole Rosenbloom & Timo Klein, *When to give the green light to green agreements*, OXERA AGENDA, 13 September 2021.



they want Article 101(3) TFEU to move from a consumer to a public welfare standard that allows consumer welfare to be traded against public welfare.

While all the points made above are legitimate criticisms of the way Article 101(3) TFEU is framed, widening it to take account of third party effects does not implement the polluter pay principle, does not generate prices that reflect (marginal) social costs (which the Dutch refer to as 'true prices'), and/or provide firms in the industry with the proper incentives to adopt more sustainable products and processes.

To appreciate this recall how exemption under Article 101(3) TFEU works. A new public welfare test would exempt anticompetitive agreements that generates public benefits in excess of the consumer harm. For firms in an industry to agree to a more sustainable product standard they must perceive that this will increase their profits or arrest the decline in their profits, otherwise they would have no incentive to cooperate. Widening the test to take into account third party benefits will make it easier to exempt such agreements. But the incentive for firms to cooperate is not governed by these third party benefits or harm imposed. The cooperating firms only incur the costs of implementing greater sustainability offset by the ability to charge super-competitive prices, which only coincidentally will reflect the marginal social costs of less sustainable products. And, as was shown above, the firms in the industry will seek to spend the minimum on improving sustainability to achieve the maximum profit generated by imposing super-competitive prices on their customers. The consumer pays; the polluter profits; the environmental damage goes uncompensated. Widening the grounds for exemption is not a polluter pays but the polluter profits principle that generates inflationary pressures which will hit poorer consumers hardest.

### **The Reality of Green Inflation**

The proponents of a greener antitrust must tackle the prospect of green inflation which has so far been ignored. Increases in sustainability and environmental controls will inevitably lead to increased prices unless accompanied by increased productivity and innovation. Sustainability, decarbonisation of the economy, and the various ambitious Green Deals will raise industry costs. It is therefore imperative that there be safeguards to ensure that the price rises are not excessive compared to the sustainability gains thereby unnecessarily contributing to further inflationary pressures. The best safeguard is competition which can bear down on excessive prices and ensure that cost-effective measures can be adopted to meet green policies and regulations.

Ironically, those lobbying for green antitrust cut across the populist concern that lax antitrust enforcement has been responsible for increased market power, rising wealth inequality, lower productivity growth, and consumer harm.<sup>30</sup>

### Where is this all coming from?

I do not doubt that many who have written and lobbied for greater sustainability are passionate about it. But much of the pressure for a more permissive exemption regime comes from large firms in environmentally sensitive industries and their legal advisors.<sup>31</sup> This lobbying has an obvious explanation when the alternatives looming on the horizon are environmental taxes and regulation. Cooperation increases profits (as described above) while making it difficult for the regulator to ensure that the industry is honouring its commitments and raising the non-price barriers to competition. It is an example of rent seeking - industry lobbying for more or laxer regulation that appears in the public interest but is primarily designed to restrict competition to enhance industry profitability. This type of lobbying has been said to have emasculated US antitrust.<sup>32</sup> Again, I willingly draw on the (even harsher) counsel of Adam Smith:

To widen the market and to narrow the competition, is always the interest of the dealers. [...] The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the public,

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<sup>30</sup> Thomas Philippon, *THE GREAT REVERSAL – HOW AMERICA GAVE UP ON FREE MARKETS* (Harvard University Press, 2019); Jonathan Baker, *THE ANTITRUST PARADIGM – RESTORING A COMPETITIVE ECONOMY* (Harvard University Press, 2019).

<sup>31</sup> International Chamber of Commerce, *Competition Policy and Environmental Sustainability* 26 November 2020.

file:///E:/competition%20and%20environment/New%20references%202021/ICC%202020-comppolicyandenvironmsustainability%202020.pdf; SUSTAINABILITY COOPERATION BETWEEN COMPETITORS & ART. 101 TFEU - UNILEVER SUBMISSION TO DG COMP. Competition law needs to cooperate - companies want clarity to enable climate change initiatives to be pursued, Linklaters, April 2020. [https://lpscdn.linklaters.com/-/media/files/document-store/pdf/uk/2020/april/linklaters\\_competition-law-needs-to-cooperate\\_april-2020.ashx?rev=2c2c8c7d-91a8-496f-99fb-92a799c55cb2&extension=pdf&hash=6641BEDB36EC877CA43C7D995BD6EEDA](https://lpscdn.linklaters.com/-/media/files/document-store/pdf/uk/2020/april/linklaters_competition-law-needs-to-cooperate_april-2020.ashx?rev=2c2c8c7d-91a8-496f-99fb-92a799c55cb2&extension=pdf&hash=6641BEDB36EC877CA43C7D995BD6EEDA)

<sup>32</sup> Thomas Philippon, *THE GREAT REVERSAL – HOW AMERICA GAVE UP ON FREE MARKETS* (Harvard University Press, 2020).

who have generally an interest to deceive and even oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.<sup>33</sup>

### **The Limits and Purpose of Antitrust**

This brings the discussion to questions about the purpose and limits of antitrust. Antitrust is not a mirror for all society's environmental and social problems. Antitrust is a specialized area of law with the clear purpose to protect competition because competition is the best guarantee of a free society and economic wellbeing. Littering competition law with social and green goals is fundamentally wrongheaded. Just because there is a threat to the environment does not mean that every law must become hydra headed.

Antitrust can concern itself with social and environmental welfare but it would not be the best way of achieving these, and most importantly would require the competition authority to trade myriad objectives with the result of fuzzy law and muted enforcement. Lawyers and businesses who seek legal certainty would regularly confront the question of whether this or that arrangement is legal or illegal and be faced with the answer that it depends on the regulator's discretion, priorities, and a cost-benefit scenario which may or may not persuade the regulator. There are more direct market, fiscal and legal responses, though not perfect, which are better equipped to achieve these tradeoffs.

The real 'cost' of a greener antitrust would come from the way it would unravel the Commission's fight against cartels. Put tersely, the reforms envisage a move to an effects-based prosecution policy which would increase the evidential burden on the Commission and reduce its caseload unless its budget was substantially increased. It would also open the gateway to other offsetting factors (employment, worker welfare, industrial policy, etc.) to excuse anti-competitive agreements increasing the complexity and reducing the certainty and effectiveness of what has been an unalloyed success of DG COMPs activities over the last two decades.

Fortunately, the European Commission and many other competition authorities have not been convinced of the need to radically overhaul their competition rules.<sup>34</sup> Where the proponents of green antitrust have a point is the need for greater clarity over the application of the law, and this is happening.

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<sup>33</sup> Adam Smith, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776) bk. 1, ch. VIII, pt. xi.

<sup>34</sup> European Commission, *Policy in Support of Europe's Green Ambition*, COMPETITION POLICY BRIEF 1/2021, Oct. 2021.

## Summary

So where does this leave the case for green antitrust?

First, the case for green antitrust is vastly exaggerated. It addresses the narrow question of whether firms in an oligopolistic industry with market power should be allowed to engage in anticompetitive cooperation over standards on sustainable products and processes. It is not about cooperation between firms which is perfectly legal provided it does not cross the line into price fixing and restricting competition.

Secondly, there is no evidence that EU antitrust has blocked or generally deterred industry-initiated sustainability efforts. The debate is largely abstract, hypothetical, legalistic, somewhat emotive, and lacks supporting evidence.

Thirdly, there is no evidence that oligopolies engaged in anticompetitive practices will generate more innovation and adopt sustainable technology and processes faster than when acting independently. The hard evidence suggests that sustainability is greater if there is competition.

Fourthly, a more permissive exemption regime is unlikely to generate significant increases in sustainability but will generate unnecessary inflationary price increases which are likely to affect the poorer sections of society the most.

Finally, what is needed is a more realistic approach to the issue of antitrust's contribution to the environment and sustainability. Declaring that we face an existential environmental and human crisis is not a licence to propose bad laws and bad policies.