

COLLUSION AS ENVIRONMENTAL PROTECTION—AN ECONOMIC ASSESSMENT

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ABSTRACT

This article examines the relationship between the environment, sustainability, and European competition law. It shows that the European Commission's decisional practice not to exempt anticompetitive agreements under Article 101(3) TFEU is because it selectively prosecutes hardcore cartels. The alleged 'sustainability gap' in EU antitrust is, therefore, more apparent than real. It is also shown that the Commission has adopted an efficient enforcement approach given the institutional and budgetary constraints it faces. On the other hand, the Commission's guidelines on Article 101 TFEU lack coherence and consistency with its overarching Treaty obligations. The pros and cons of expanding Article 101(3) TFEU to take account of the third-party environmental and public policy factors are examined.

I. INTRODUCTION

In 2019, EU outlined an ambitious 'European Green Deal'¹ to achieve net-zero greenhouse gas emissions by 2050 to be enshrined as a goal in the EU Climate Law.² The Vice President and Competition Commissioner of the European Commission (Commission) Margarethe Vestager declared that 'to succeed, everyone in Europe will have to play their part—every individual, every business, every public authority. And that includes competition enforcers.'³ But as the Commission concedes the role to be played by competition law will necessarily be limited. At the same time, there is a growing view that EU antitrust has a 'sustainability gap' because it ignores

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¹ Communication from the Commission: The European Green Deal, COM(2019) 640 final, 11 December 2019.

² Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), Brussels, 4 Mar. 2020, COM(2020) 80 final.

³ Margrethe Vestager's *The Green Deal and Competition Policy*, speech of 22 September 2020. Available at "https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en."

environmental factors and thereby prevents industry from cooperating to improve sustainability. European national competition authorities, led by the Netherlands' Autoriteit Consument en Markt (ACM)⁴ and Hellenic Competition Commission (HCC)⁵, together with the Commission,⁶ are responding by consulting on whether and how competition law can complement the evolving climate change and sustainability policies. Other commentators argue that EU competition law should not be concerned with environmental issues, climate change, and animal and worker welfare. To do so would risk 'greenwashing' anticompetitive agreements. Schinkel and Treuren are unequivocal: 'green antitrust's key premise—that restricting competition would incentivize companies to jointly take more sustainability initiatives—finds little or no ground in economics.'⁷

In this article, the relationship between European cartel law, specifically Article 101 of the Treaty on the Functioning of the European Union (TFEU), and sustainability and environmental protection are considered. It brings together the law and economics of cartels, property rights, and the environment to draw out the implications of the present law and to assess the economic case for widening Article 101(3) TFEU to take account of environmental factors.

II. SETTING THE SCENE

Those advocating a greener antitrust argue that the way the European Commission applies the law illegitimately ignores environmental concerns.⁸ The

⁴ ACM, VISION DOCUMENT ON COMPETITION AND SUSTAINABILITY (2014); ACM, Guidelines: Sustainability Agreements—Opportunities with competition law (Second Draft, July 2020) ('ACM Draft Guidelines on Sustainability Agreements'). Available at: <https://www.acm.nl/site/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>.

⁵ Hellenic Competition Commission, Draft Staff Discussion Paper on Sustainability Issues and Competition Law (2020) available at: file:///C:/Users/C/Downloads/Staff_Discussion_paper.pdf.

⁶ European Commission DG Competition, Competition Policy supporting the Green Deal—Call for contributions (13 October 2020). Available at: https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf. The Commission has also consulted on revision to its horizontal guidelines. See Evaluation Support Study on Applicable to Horizontal the EU Competition Rules Cooperation Agreements in the HBERs and the Guidelines—Final Report prepared for the European Commission by Valdani & Vacari Associati and LE Europe, 2021; Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulations {SWD(2021) 104 final}.

⁷ Maarten-Pieter Schinkel & Leonard Treuren, *Green Antitrust: Why Would Restricting Competition Induce Sustainability Efforts?* PROMARKET, March 26, 2021 Available at: <https://promarket.org/2021/03/26/green-antitrust-why-would-restricting-competition-induce-sustainability-efforts/>.

⁸ Suzanne Kingston, GREENING EU COMPETITION LAW AND POLICY (Cambridge University Press, 2011); Edith Loozen, *Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability*, 56 C.M.L.R. 1265 (2019); Giorgio Monti & Jotte Mulder, *Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives*, 42 Eu. L.R. 635 (2017); Simon Holmes, *Climate Change, Sustainability, and Competition Law*,

consumer welfare approach adopted by the Commission in the mid-2000s focuses exclusively on the adverse effects of cooperation in oligopolistic markets, and though the law makes provision for technical progress and efficiencies including noneconomic policy goals to be offset against the anticompetitive effects of industry cooperation, the Commission's decisional practice is to ignore these. No cartel or noncartel case brought under Article 101 TFEU since 2004 has led to an exemption for countervailing effects under Article 101(3) TFEU. This, argue the proponents of a greener antitrust, has deterred industry from cooperating on initiatives to improve sustainability and protect the environment. It makes the achievement of the EU's ambitious environmental targets more difficult. Further, the Commission is not complying with overriding Treaty provisions that require it to take account of EU environmental policies and goals, and that its application of Article 101 TFEU is inconsistent with the judgments of the European courts. This does not bode well for the Commission and the environment, not to mention the coherence of the EU's regulatory framework.

But here we need to pause. EU antitrust does not ban cooperation between competitors or even between competitors with market power. Since 2004, the Commission's enforcement focus has been the prosecution of hardcore cartels where the firms have colluded over prices, market shares, and customers, which thereby restrict, distort, and/or limit competition. This is a limited set of cooperative arrangements that have the most serious anticompetitive effects usually involving the larger firms in concentrated industries. The critics fail to take account of the efficiency of the Commission's enforcement strategy and the fact that many cooperative agreements are exempt under the Block Exemption Regulations (BERs) and that below the legal waterline of hardcore cartels the Commission does not commence formal proceedings against firms that cooperate to pursue 'noneconomic' goals who give commitments to remove anticompetitive restrictions.

That said, it is legitimate to reconsider whether there is a sustainability and environmental gap in the current enforcement of Article 101 TFEU.

III. WHAT IS SUSTAINABILITY?

'Sustainability or sustainable development is a broad concept, lacking a clear definition'.⁹ The UN Resolution 66/288 of 2012 defines sustainable development as 'development towards an economically, socially, and environmentally sustainable future for the earth and present and future generations. This includes the protection of the environment, biodiversity, climate, public health,

87 J. ANTITRUST ENFORCEMENT 354 (2020); Maurits Dolmans, *Sustainable Competition Policy*, 6 COMPETITION LAW & POLICY DEBATE 4 (2020); Jacques Buhart & David Henry, *Think Green Before You Apply: EU Competition Law and Climate-Change Abatement*, 44 WORLD COMPETITION 147 (2021).

⁹ ACM Draft Guidelines on Sustainability Agreements *supra* n. 4 ¶7.

animal welfare, working conditions, and fair trade.’ Julian Nowag writing for the OECD states that ‘[T]he most commonly agreed upon definition of sustainable development . . . is ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’¹⁰ The ACM Draft Guidelines on Sustainability Agreements melds these definitions with the wording of Article 101(1) TFEU to define sustainable agreements as:

‘. . . any agreements between undertakings, as well as decisions of associations of undertakings, that are aimed at the identification, prevention, restriction, or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature’.¹¹

These definitions are general, abstract, and encompass different environmental and social concerns that require different analyses. To add some structure to the analysis, three types of ‘sustainability agreements’ (together with an example) are distinguished:

- **Environmental-damage agreements (coal)** that to quote the ACM ‘aim to improve production processes that cause harm to humans, the environment, and nature.’ This includes ‘agreements aimed at reducing emissions of pollutants, and at preventing the use of pollutive raw materials in products.’
- **Sustainability agreements (chickens)** regarding animal welfare, working conditions, fair trade, and so on.
- **Open-access users’ agreements (shrimps)** between the users or producers of an open-access resource such as the ocean and other natural resources designed to control their exploitation by limiting catches, extraction, and the number of users.

It is accepted that there is not a clear distinction between these first two types of harm. One can push for the more sustainable and responsible production of meat (beef and lamb), which still results in and makes little difference to the level of methane emissions. A basic difference does, however, exist between the two. Environmental damage agreements involve mass pollution and third-party effects often outside the relevant markets identified in antitrust proceedings. Sustainability agreements predominantly involve product quality within defined relevant markets where consumer preferences can be expressed.

¹⁰ OECD, SUSTAINABILITY AND COMPETITION, OECD Competition Committee Discussion Paper, 2020. <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>; referring to WCED, OUR COMMON FUTURE: REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (Oxford University Press, 1987), 43[1]. <https://sustainabledevelopment.un.org/content/documents/5987our-commonfuture.pdf>.

¹¹ ACM Draft Guidelines on Sustainability Agreements *supra* n. 4 ¶6.

Access users' agreements fall into a separate category. Their justification is the absence of clearly defined and enforceable property rights. As a result, otherwise, hardcore restrictions on output, market shares, and entry are justified to achieve a more efficient level of conservation of natural resources, which also satisfy the fair share to (future) consumers test under Article 101(3) TFEU. They are also agreements where usual indicia of anticompetitive effects do not necessarily apply as analyzed more fully in Section VII below.

IV. DOES THE SUSTAINABILITY GAP EXIST?

Some legal commentators argue that EU anticartel law is applied too narrowly to block industry-sponsored cooperative agreements that promote sustainability. That they contend is not due to the formal law, but the way it is applied by the Commission—'it is not the law that needs to change but our approach to it.'¹²

IV.A. The Law

IV.A.1. Article 101 TFEU

Article 101(1) TFEU prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States, and which have as their object or effect the prevention, restriction or distortion of competition.' The provision specifically prohibits price-fixing, output limitations, and market sharing.

Article 101 TFEU promotes sustainability by prohibiting 'hardcore' cartels for environmental services and inputs. The European Commission has prosecuted several cartels in this area such as the sellers' cartel for the supply of waste management¹³ and the car battery recycling buyers' cartel.¹⁴ More imaginatively in 2019, it launched the *Car clean emissions technology* investigation that brings together innovation and sustainability considerations.¹⁵ The Commission's Statement of Objections alleges that BMW, Daimler, and VW Group colluded to limit the development and roll-out of emissions cleaning technology for new diesel and petrol cars over the period 2006–2014. The Commission's press release states that the 'harm' as 'restricting competition in innovation' 'and in doing so, denied consumers the opportunity to buy fewer polluting cars.' This is not a classic price-fixing cartel. The Commission has brought the action under Article 101(1)(b) as an illegal agreement 'to limit

¹² Holmes *supra* n. 8, 3.

¹³ Case/COMP 39611 Waste Management Products (2012).

¹⁴ Case AT.40018 Car Battery Recycling (2017).

¹⁵ EC Press Release, Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission technology, 5 April 2019, IP/19/2008.

or control production, markets or technical development' imposing a fine of €874 million.¹⁶

It is also the case that EU antitrust permits, or rather do not prohibit, many types of industry-initiated cooperative agreements such as R&D¹⁷ and specialized agreements,¹⁸ which are given 'block exemptions.' These list market share thresholds ('safe harbors') below which an agreement will not breach the law because there is a sufficient number of firms to guarantee competition. Nonbinding standard-setting agreements and codes of practice are exempt provided they do not impair competition by unnecessary restrictions, are applied in a transparent and nondiscriminatory way, and do not involve the exchange of commercially sensitive information.¹⁹ Agreements that are necessary to comply with domestic, EU, and international regulations are also exempt. Finally, the European Commission has exceptionally permitted cooperation between firms in an industry where there has been a crisis, such as in 2021, to deal with shortages due to the COVID-19 pandemic.

Agreements that are anticompetitive under Article 101 TFEU have a further let out. Article 101(3) TFEU exempts restrictive agreement that satisfies four cumulative conditions: the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress; consumers must receive a fair share of the resulting benefits; the restriction must be indispensable to the attainment of these objectives. Further, the agreement must not allow the parties the possibility of eliminating competition in respect to a substantial part of the products in question.

IVA.2. EU Primary Regulations

The debate over antitrust must also be read in the light of overarching Treaty obligations.²⁰ Article 11 TFEU requires that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, with a view to promoting sustainable development.' Article 193 TFEU mandates that EU policy should contribute

¹⁶ 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.

¹⁷ Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ L 335, 18 December 2010, 36.

¹⁸ Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements OJ L 335, 18 December 2010, p. 43.

¹⁹ Communications from the Commission—Guidelines on the applicability of Art 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), OJ C 11/1, 14/01/2011. ('2011 Guidelines on Horizontal Cooperation Agreements')

²⁰ Holmes, *supra* n 9; Dolmans *supra* n 9.

to ‘preserving, protecting the quality of the environment.’ Article 191(2) TFEU mandates that EU policy on environmental sustainability should be based on the ‘precautionary principle,’ which requires authorities to take appropriate measures to prevent risks to the environment ‘by giving precedence to those requirements [...] over economic interests.’²¹ Reinforcing this is the consistency principle in EU law as set out in Article 7 TFEU: ‘the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.’ The Commission’s Green Deal adds to these as the EU’s highest priority and ‘hard’ law as both primary legislation and secondary legislation. The draft Climate Law reads: ‘all EU actions and policies should pull together to help the EU to achieve a successful and just transition towards climate neutrality and a sustainable future.’ These ‘arguably even trump competition concerns identified pursuant to Article 101(1).’²²

Complementing these are the decisions of the European courts in *Albany*²³ and *Wouters*,²⁴ which could place sustainability agreements outside the scope of Article 101 TFEU. In *Albany*, the European Court of Justice exempted the agreement because the social objectives pursued by the collective agreements would be seriously undermined if prohibited by the competition rules.

The Commission’s decisional practice to date has given short shrift to these primary legal obligations and case law. The Commission’s position is that the ‘[g]oals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101](3).’²⁵

IV.B. The ‘Fair-Share-To-Consumers’ Test

The biggest stumbling block to a more permissive application of Article 101(3) TFEU is the way the Commission has applied the fair share to consumers test.

IV.B.1. What Article 101(3) TFEU Says

The Commission’s current interpretation of the fair share test is set out in its 2004 Guidelines on Article 81(3):

The concept of ‘fair share’ implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1). [...] the net effect of the agreement must at

²¹ Joined Cases T-74/00 and T-76/00, *Artegoda GmbH and others v. EC* EU:T:2002:283, ¶184.

²² Buhart & Henry, *supra* n. 9, 151.

²³ C-67/96 *Albany International BV v Stichting* [1999] ECR I-5751, EU:C:1999:430 Judgment of the European Court of Justice of September 21, 1999. Also

²⁴ Case C-309/99 *Wouters*, EU:C:2002:98. Judgment of the Court of 19 February 2002.

²⁵ European Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) OJ C 2004, 101, P97 (‘Guidelines on Article 81(3)’).

least be neutral from the point of view of those consumers directly or likely affected by the agreement. If such consumers are worse off following the agreement, the second condition of Article 81(3) is not fulfilled. The positive effects of an agreement must be balanced against and compensate for its negative effects on consumers. When that is the case consumers are not harmed by the agreement. Moreover, society benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.²⁶

According to the Guidelines on Article 81(3):

The assessment under [Article 101(3)] of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates [...] the condition that consumers must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market. Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market.

However, ‘where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.’²⁷

The ‘fair-share-to-consumers’ test is restricted to consumers who are direct and indirect purchasers of the product in the same relevant or related downstream markets who must ‘at least be compensated for any losses arising from the restriction of competition.’²⁸ Both present and future gains to consumers can be considered, the latter discounted by an appropriate discount rate.²⁹

The Commission’s guidelines explain that the benefits passed on must be such that ‘the net effect of the agreement must at least be neutral from the point of view of those consumers directly or indirectly affected by the agreement’³⁰ continuing that ‘the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers.’³¹ The guidelines allow for price increases if they are compensated by ‘qualitative benefits’ to consumers.³²

Although Article 101(3) TFEU is said to provide an ‘efficiency defense,’ it has a narrow focus and scope. A cooperative agreement that is found to be anticompetitive under Article 101(1) TFEU, but which significantly reduces

²⁶ Guidelines on Article 81(3) *supra* n. 25 ¶84. The guidelines discuss the conditions for the pass-on to consumer of any cost (sec. 3.4.2) and qualitative efficiencies (sec. 3.4.3).

²⁷ Guidelines on Article 81(3) *supra* n. 25 ¶43.

²⁸ Guidelines on Article 81(3) *supra* n. 25 ¶84.

²⁹ Guidelines on Article 81(3) *supra* n. 25 ¶88.

³⁰ Guidelines on Article 81(3) *supra* n. 25 ¶85.

³¹ Guidelines on Article 81(3) *supra* n. 25 ¶87.

³² Guidelines on Article 81(3) *supra* n. 25 ¶86.

the environmental harm to third parties would not be exempt under Article 101(3) TFEU. This is because the costs would be borne entirely by consumers at higher prices whereas the benefits dispersed among third parties many residing outside the relevant geographical market in which the anticompetitive agreement takes place.

IV.C. Modifications to Article 101(3)

IV.C.1. Proposals for a Greener Article 101 TFEU

The proponents of a greener antitrust argue (correctly) that there is nothing in the wording of Article 101 TFEU that requires the narrow consumer welfare test currently applied by the Commission.³³ This has been adopted by the Commission at its discretion and can be easily unadopted and replaced by a broader test that takes into account the economic and ‘noneconomic’ welfare of all those affected.

They support this view principally by the reference to the Commission’s decisional practice before 2004 (see next section), and the wording of Article 101(3) TFEU and the Commission’s Guidelines on Article 81(3). Recitals 13 and 33 of the guidelines state that ‘[T]he aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.’ The reference to the ‘efficient allocation of resources,’³⁴ they reason, should be read as encompassing sustainability because of its wide ambit: ‘society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.’³⁵

The Netherlands ACM has proposed such an expansive interpretation for environmental damage agreements. Its draft guidelines state that the ‘[B]enefits to both customers of producers involved as well as the rest of Dutch society can reap’ are to be considered.³⁶ It explains that it is not fair to compensate only consumers although this is restricted to policy objectives set down by national and international standards to which the Dutch government is bound.³⁷

³³ Holmes, n. 8.

³⁴ Guidelines on Article 81(3) *supra* n. 25 ¶85.

³⁵ The case law from the Court of Justice of the EU is also referred to as supporting the integration of social costs in our consumer welfare assessment. Joined-Cases T-213/01 and T-214/01 *Österreichische Postsparkasse v. Commission* EU:T:2006:151, ¶115 (‘The ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers’). Case C-52/09 *Konkurrensverket v TeliaSonera AB* [2011] EU:C:2011:83, ¶22 (reference to ‘public interest’).

³⁶ ACM Draft Guidelines on Sustainability Agreements, *supra* n. 4 ¶40.

³⁷ ACM Draft Guidelines on Sustainability Agreements, *supra* n. 4 ¶41.

IV.C.2. The Law Premodernization

The proposals for a greener antitrust are far from novel. Those pushing for reform seek a return to the Commission's premodernization application of Article 101(3) TFEU. Before 2004, the Commission was clear that 'the terms of Article [101](3) are sufficiently broad to include other policy objectives, and more specifically environmental protection objectives.'³⁸ As the then Competition Commissioner Mario Monti stated 'that environmental concerns are in no way contradictory with competition policy [. . .] provided that restrictions of competition are proportionate and necessary to achieving the environmental objectives aimed at, to the benefit of current and future generations.'³⁹ The 2001 version of the Guidelines on Horizontal Cooperative Agreements⁴⁰ provided that environmental agreements benefiting society may qualify for exemption under Article 101(3) TFEU. It devoted a chapter to environmental agreements.

There are numerous Commission decisions before 2004 that exempt anti-competitive agreements. The *cause celebre* is the Commission's CECED decision.⁴¹ In 1999, the European Commission exempted a restrictive agreement among producers and importers of washing machines with a combined market share of 90% under Article 101(3) TFEU. The agreement not to produce or import the least energy-efficient washing machines representing 10–11% of EC sales was found to adversely affect competition and would increase prices because the most polluting machines were the cheapest. But the agreement would be more than compensated by the saving in electricity and water consumption and benefit the environment. The Commission estimated savings from avoided 'greenhouse gases' (carbon dioxide, sulfur dioxide, and nitrous oxide) at more than seven times the increased purchase costs of more energy-efficient washing machines. The CECED decision was based on the view that the remaining competition would be over nonprice factors, such as brand image and technical performance. CECED was used as an example in the EC's 2001 Horizontal Cooperation Guidelines of how 'environmental agreements'—to which an entire section was dedicated—could benefit from Article 101(3).⁴²

³⁸ See European Commission, XXIIIRD REPORT ON COMPETITION POLICY (1993) ¶91.

³⁹ Competition Commissioner Monti's speech in Press Release IP/00/148 of 11.2.2000.

⁴⁰ Commission Notice—Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C3/02), OJ C 003, 06/01/2001, P. 0002–0030. ('2001 Guidelines on Horizontal Cooperative Agreements') ¶10.

⁴¹ Case IV.F.1/36.718 CECED. Commission decision of 24 January 1999, (2000) OJ L 187/47.

⁴² Case IV.F.1/36.718 CECED s. 7 and ¶193: '[e]nvironmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken'.

The CECED decision was not unusual for the period. In *Philips-Osram*,⁴³ the parties who had a high market share in the production of lead glass sought clearance for a joint venture to manufacture and sell lead glass tubing for incandescent and fluorescent lamps. The Commission concluded that the joint venture would reduce consumer choice but exempted it because it would reduce air pollution and the cost advantages would be passed on to consumers in lower lamp prices.⁴⁴

IV.D. Commission Decisional Practice Post 2004

The application of Article 101(3) was altered with the modernization of EU competition law under Regulation 1/2003, which came to be applied in 2004. The Commission changed its priorities to focus on by-object restrictions of hardcore cartels within a new consumer welfare and ‘more economic approach.’⁴⁵ It decentralized enforcement to the national competition authorities and moved to self-assessment of agreements by industry. This removed public policy factors from formal consideration⁴⁶ and to the ‘death of Article 101(3).’⁴⁷ The statistics speak for themselves. Between 1965 and 1998, the Commission exempted 141 agreements under Article 101(3); since 2004 none.⁴⁸ The other statistic to be borne in mind is that the Commission’s caseload increased substantially following modernization—it was successfully prosecuting more cartels.

However, this does not mean that that antitrust is blocking welfare-enhancing cooperative agreements. The absence of any formal published decision exempting an agreement is the result of the Commission’s almost exclusive focus on prosecuting hardcore cartels. As a recent contextual analysis of European Commission decisions⁴⁹ has shown, public policy considerations continue to influence the Commission’s enforcement actions: ‘Instead of engaging in a complex balancing of interests under the substantive analysis of Article 101(3), competition authorities may simply decide to refrain from

⁴³ Case IV/34.252 *Philips-Osram* OJ L 378/37, Commission Decision of 21 December 1994,

⁴⁴ Case IV/34.252 *Philips-Osram* ¶ 27. Also, EACEM, XXVIII REPORT ON COMPETITION POLICY 1998, 152.

⁴⁵ Anne C. Witte, *THE MORE ECONOMIC APPROACH TO EU ANTITRUST LAW* (Bloombury, 2016) 167/8.

⁴⁶ The omission of a chapter on environmental agreements from its 2011 revision of the horizontal guidelines. The Commission declared that this did not imply ‘any downgrading for the assessment of environmental agreements’. European Commission, Competition: Commission adopts revised competition rules on horizontal co-operation agreements—Frequently asked questions, MEMO/10/676 of 14 December 2010.

⁴⁷ David Bailey, *Reinvigorating the Role of Article 101 (3) under Regulation 1/2003*, 81 ANTITRUST L. J 111 (2016).

⁴⁸ The Commission removed this section from and treated environmental agreement as standardisation agreements in its 2011 Guidelines on Horizontal Cooperation supra n. 19 ¶32

⁴⁹ Or Brook, *Priority-Setting as a Double-Edged Sword: How Modernisation Strengthened the Role of Public Policy* 16 J COMP. LAW & ECON. 435 (2020).

pursuing a case against an anticompetitive agreement that promotes a public policy or to terminate the case by accepting commitments.⁵⁰ It also appears that the commitments sought by the Commission post 2004 are in the same sectors and on the same terms as those before modernization.⁵¹ Thus, although a restrictive interpretation of Article 101(3) TFEU has been taken against hardcore cartels, the Commission nonetheless applies a public interest filter to its case selection and desists from prosecuting cooperative agreements that have significant public policy benefits.

This well-documented change in the commission's enforcement priorities has a straightforward explanation and justification. Efficiency is not only relevant to the legal assessment of anticompetitive agreements but also the enforcement of the law. Competition authorities set priorities and in light of these enforce the law selectively. They do this because they have limited budgets and the discretion to determine which offenses to prosecute and select those that will yield the greatest return in light of the authority's objectives. The Commission's *modus operandi* and pattern of its enforcement are consistent with this view—it focusses on the most serious violations (hardcore cartels), using the by-object provision of Article 101(1) TFEU, which does not require it to undertake a detailed quantification of harm, and because of their anticompetitive nature preclude any realistic prospect of an efficiency defense. As part of this strategy, anticompetitive cooperative agreements with substantial public benefits are simply not pursued. To do so would consume agency resources that could be deployed more effectively in fighting hardcore cartels.

The real 'cost' of the proposed greening of antitrust would come from the way it would unravel the Commission's 'efficient' enforcement strategy. Put tersely, the reforms envisage a move to an effects-based prosecution policy that 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, and so forth) increasing the complexity and reducing the effectiveness of what has been an unalloyed success of DG COMP's activities over the last two decades.

⁵⁰ Brook, *supra* n. 49, 15.

⁵¹ Colomo found that the Commission's commitments are similar 'in their nature, purpose and impact' to those which have been exempted by Article 101(3) TFEU prior modernisation. Pablo Ibanez Colomo, *THE SHAPING OF EU COMPETITION LAW* (Cambridge University Press, 2018), 288.

V. AN ECONOMIC ASSESSMENT

V.A. Nature of Efficiency

A large part of the Commission's apparent inflexibility has been attributed to its adoption of the inelegantly termed 'more economic approach.' This again is an exaggeration. The prosecution of anticompetitive cooperative horizontal agreements does not involve any economic or effects analysis, or any serious consideration of consumer welfare. It relies on by-object provision of Article 101(1) TFEU, which is based on a presumption that agreements on prices, market shares, and customer allocation are by their nature anticompetitive, and therefore illegal.

It is also the case that the consumer welfare standard loosely applied in EU competition law jars with the economists' concept of allocative efficiency otherwise referred to as the 'total welfare' standard.⁵² Total welfare consists of the sum of consumers' surplus (the difference between price and willingness to pay), and producers' surplus or economic profits. It is what Robert Bork in his influential treatise on US antitrust confusingly called 'consumer welfare.'⁵³ The consumer welfare standard as it is loosely applied in EU competition law looks only at the consumer surplus and ignores producers surplus and third-party costs and benefits (externalities).⁵⁴

The consumer welfare test used in EU antitrust is a bastardized version of the economists' allocative efficiency criterion. Bork took the position that environmental externalities should be excluded because they raised prices, and their control 'is something to be done by legislatures' and not 'the stuff of antitrust litigation.'⁵⁵ This reflected Bork's arbitrary policy choice that environmental problems are best addressed by regulation not a statement about the nature of economic efficiency and how it should be applied.

Notwithstanding this, the framework set out in Article 101(3) TFEU takes account of economic efficiency in an even narrower way. It restricts offsetting 'economic efficiencies' to productive efficiencies in the direct and related relevant markets (so-called in-market efficiencies). Economists would recognize the fair share to consumers test as a version of Pareto efficiency that requires that there be no losers from a policy move. Thus, even if the other peculiarities of the consumer welfare test are ignored, an agreement that reduces third-party effects would not be Pareto efficient as consumers bear all the costs and none or little of the benefits.

⁵² Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intermarket Second-Best Tradeoffs*, 98 MICHIGAN LAW REV. 849 (2000); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMP. LAW & ECON. 133 (2011).

⁵³ Robert Bork, *THE ANTITRUST PARADOX* (Free Press, 1978).

⁵⁴ Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

⁵⁵ Bork *supra* n. 52, 115.

Economists typically use the Kaldor-Hicks' concept of allocative efficiency,⁵⁶ which would be more familiar as the standard cost-benefit test that the economic gains exceeding the losses to whomsoever they occur with no requirement to compensate the losers. The gains and losses would include externalities irrespective of the identity, wealth, and geographical location of those harmed. That is a multimarket transnational general equilibrium assessment rather than the partial comparative statics assessment of the present consumer welfare test. The third-party externalities such as environmental damages—which are often referred to as noneconomic benefits—can be rendered commensurate with the losses to consumers by standard valuation techniques developed to estimate 'true prices' used in social cost-benefit assessments (SCBA).⁵⁷ Kaldor-Hicks' efficiency would allow trade-offs between consumer, producer, and third-party welfare. Paradoxically, a Kaldor-Hicks' efficiency assessment is similar to those that claimants must undertake to obtain compensation in private damage actions for breaches of European antitrust.

The difference between Pareto and Kaldor-Hicks efficiency and the implications for antitrust can be illustrated more formally albeit simplistically by Figure 1.⁵⁸ Assume the industry has constant marginal costs of production (MC) and inflicts marginal environmental damages of MH per unit of output. The Kaldor-Hicks' efficient outcome is for Q^* sold at price P^* and uncompensated environmental harm of $F + C$. However, because marginal social costs (MSC) exceed marginal private costs, a competitive industry would produce too much, underprice its product (Q_C and P_C respectively), and generate excessive uncompensated environmental harm (areas $A + B$). A profit-maximizing cartel would contract output to Q_M and pollute less ($F < F + A + B + C$) but charge its consumers more (P_M). The choice is between two inefficient outcomes—competition with too much pollution/production and a cartel with less pollution/production. Although competition is unambiguously inefficient, it is not possible to say whether a cartel is. The greater the external environmental harm as a proportion of industry private costs, the more likely the cartel will move toward the efficient outcome, whereas the greater the environmental harm, the further the competitive outcome is pushed away from the efficient outcome.

⁵⁶ Cento Veljanovski, *Wealth Maximisation, Law and Ethics—On the limits of economic efficiency*, 1 INT'L REV. LAW & ECON. 5 (1981).

⁵⁷ ENVIRONMENTAL PRICES HANDBOOK 2017 (CE Delft). Also, CPB/PBL, GENERAL GUIDANCE FOR COST-BENEFIT ANALYSIS (CPB Netherlands Bureau for Economic Policy Analysis and PBL Netherlands Environmental Assessment Agency, 2013). Roman Inderst, Eftichios Sartzetakis, Anastasios Xepapadeas, TECHNICAL REPORT ON SUSTAINABILITY AND COMPETITION A REPORT JOINTLY COMMISSIONED BY THE NETHERLANDS AUTHORITY FOR CONSUMERS AND MARKETS (ACM) AND THE HELLENIC COMPETITION COMMISSION (HCC), Jan 2021.

⁵⁸ Stephen Smith, ENVIRONMENTAL ECONOMICS—A VERY SHORT INTRODUCTION (Oxford University Press, 2011).

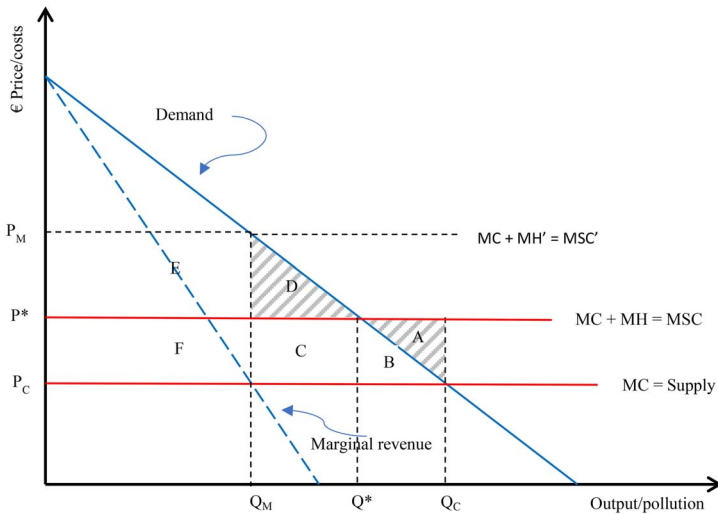


Figure 1.

The model allows several other implications to be highlighted. First, the fair share to consumer test would not exempt industry cooperation as consumers do not benefit from lower prices from the cartel’s cooperation. Even if the fair share test was expanded to include the third-party environmental benefits, then as Figure 1 is drawn, the cartel would not be exempt because the consumer losses swamp the third-party environmental benefits (consumer loss of $B + C + D + E$ versus an environmental gain of $A + B + C$).

Secondly, for those that want to move Article 101 TFEU away from consumer welfare to Kaldor-Hicks efficiency, clearance of the cartel would depend on the magnitude of the marginal harm and the elasticity of demand. If demand is relatively inelastic and the marginal harm significant, a cartel is more likely to approximate the efficient level of production and pollution. In the wholly coincidental case where the marginal social costs (MSC) equal marginal revenue (labeled ‘MSC’ in Figure 1), the ‘overcharge’ would ‘internalize’ the external costs, and the new level of output and reduced harm would be efficient.⁵⁹ This was the outcome of the ACM’s *National Energy Agreement*⁶⁰ decision that took account of the reduction of pollution that would have accrued from an industry agreement to close the five coal-fired power stations. The ACM concluded that the reductions in their CO₂ emissions

⁵⁹ James M. Buchanan, *External Diseconomies, Corrective Taxes, and Market Structure*, 59 AM. ECON. REV. 174 (1969). If a per-unit pollution tax is set equal to the MH, then a competitive industry would reduce output and pollution to Q^* , pay a tax of $F + C$ (rather than retain these as increased profits), and avoid the pollution losses equal to area $B + A$.

⁶⁰ 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).

would be canceled by the increase in emissions elsewhere when their emission rights were sold through the European Emissions Trading Scheme (ETS).⁶¹

The cartel and competition decisions have very different distributional effects. Under a competition focus, consumers benefit from more and cheaper products. Their consumer surplus is equal to the amount of uncompensated environmental damage ($=F + C + B$). A cartel transfers consumer surplus of F plus E to the members of the cartel in greater profits and imposes an additionally lost consumer surplus of D .⁶² These transfers and losses are partially offset by the reduction in environmental damage to third parties of $A + B + C$, which is less than $F + E + D$. The unregulated cartel unambiguously harms consumers but is more environmentally friendly. These distributional effects explain why large firms in concentrated industries favor laxer sustainable-leaning antitrust. To the extent that they can cartelize the industries under the guise of a green initiative, they enhance their profits whereas a pollution tax or liability rule requiring compensation to third parties would reduce profits directly and because the industry would be prevented from cartelizing.

V.B. The Coasean Bargain

Is cooperation a sensible vehicle for environmental control? To an economist, the answer is yes. As Ronald Coase showed where there are harmful effects there are gains from trade that is the incentive for the affected parties to negotiate reductions in the amount of harm when this increases their total welfare.⁶³ The factory belching out smoke imposes external costs on the adjoining residents. If these costs exceed the costs a firm would incur in abating the smoke or relocating the factory, the residents would be prepared to pay to reduce the level of pollution provided transaction costs are negligible. The gains from trade would result in a cooperative agreement that was efficient. The same outcome would be achieved if the factory owner were required to compensate the residents or were subject to a smoke tax correctly calculated to reflect the monetary value of the harm, tradeable pollution rights, or an environmental standard backup with suitable sanctions.

The obstacle to private cooperative solutions is the absence of enforceable property rights and/or the high transaction costs of negotiating, monitoring, and enforcing agreements. Transaction costs are a function *inter alia* of the nature of the harm and the number affecting and affected by the pollutant. Cooperative agreements are generally not feasible for many large-scale environmental problems. They are unlikely for airborne pollutants because

⁶¹ Erik Kloosterhuis & Machiel Mulder, *Competition Law and Environmental Protection: The Dutch agreement on coal-fired power plants*, 11 J. COMP. LAW & ECON. 855 (2015).

⁶² The deadweight loss (DWL) is measured by the consumers' willingness to pay above the social costs of production of the output not produced

⁶³ Ronald H. Coase, *The Problem of Social Costs*, 3 J LAW & ECON. 1 (1960).

the large numbers affected by the pollutant could not organize to effectively negotiate with the polluting firms. Nor would the firms emitting the pollution have an incentive to initiate negotiations unless made liable. It requires some third-party intervention to set out a framework for pollution control, which acts as a proxy for bargaining solutions such as liability rules, environmental taxes, tradeable carbon permits, and/or regulation.⁶⁴

As Elinor Ostrom has shown private cooperative solutions to environmental problems are possible where there is a cohesive group with similar interests dealing with common property resource problems such as overfishing (discussed further in Section VII).⁶⁵ In the case where there is a contractual relationship between the parties ‘causing’ the harm and those harmed, there is the possibility for value-maximizing negotiations. It is also possible for fishing, water management, and some stationary environmental problems where there is a correspondence of interest between those who benefit and those who cause harm. Expressed differently an agreement to reduce the fishing catch benefits the fishermen who cause the overfishing problem (as explained later in Section V.B) and the effects are directly felt by the consumers of fish who stand in direct or indirect contractual relationships to the fishing trawler operators. Similar contractual nexus exists for sustainability agreements where consumers and workers can express their preferences for greater welfare-enhancing measures.

V.C. The Inherent Problem with Industry Cooperation

This points to a problem with cooperative agreements among firms in an industry. For such agreements to be welfare-enhancing, all sides affected must be represented directly or indirectly in any negotiations. Cooperation between firms in an industry to set environmental standards will not be based on the benefits/cost of those harmed. They only take account of the interests of one side of the market—the polluting firms—operating in a preexisting possibly oligopolistic industry. Further, those cooperating firms will not have continuing pressures to take account of the damage to those harmed. If the polluting firms band together without the threat of environmental regulation or liability, it must be assumed to be motivated by self-interest and rent seeking, rather than altruism. The reason for this pessimistic view is that unlike the Coasean bargain the interests and valuations of consumers and the others harmed are not represented. Because any good intentions by cooperating firms in the industry will be costly, the suspicion is that by agreeing to environmental standards they are erecting barriers to entry that facilitate

⁶⁴ W. Kip Viscusi, Joseph E. Harrington, Jr., & David Sappington, *ECONOMICS OF REGULATION AND ANTITRUST* (5th edn., MIT Press, 2018).

⁶⁵ Elinor Ostrom, *GOVERNING THE COMMONS—THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (Cambridge University Press, 1990); Eleanor Ostrom, ed *THE FUTURE OF THE COMMONS—BEYOND MARKET FAILURE AND GOVERNMENT REGULATION* (Institute for Economic Affairs, 2012).

the cartelization of the industry with the usual attendant harmful effects and distortions to competition. Even seemingly consumer-friendly nonprice regulation promoted by industry can have anticompetitive effects by selectively burdening one section of an industry with higher fixed compliance costs, for example, food and environmental standards used as nontariff barriers to entry to small firms.⁶⁶

There are numerous examples where firms have used environmental standards as a smokescreen for naked price-fixing, for example, consumer detergent⁶⁷, power exchanges⁶⁸, and flat glass⁶⁹ cartels. The European Commission's consumer detergents decision⁷⁰ illustrates this. This involved the three largest European producers of detergent, which through their trade association launched a voluntary 'Code of Good Environmental Practice for Household Laundry Detergents' to promote more sustainable consumption of laundry detergents. This led to dosage and weight reductions of heavy-duty detergent powder and a corresponding reduction in packaging material. So far so good. Unfortunately for the three, the European Commission found that their 'ultimate aim . . . was to achieve market stabilization as well as to coordinate prices at European level'.⁷¹ 'Henkel, P&G, and Unilever 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).'⁷² The three members of the cartel engaged in a number of anticompetitive practices: held prices constant despite smaller packets and fewer scoops per wash, and agreed not to pass on cost-savings; restricted their promotional activities; agreed on price increases; and exchanged sensitive information on prices and trading conditions.⁷³ This increased prices (at least in Germany), and it all stemmed from the smokescreen of setting environmental standards.⁷⁴

The Commission's consumer detergent decision has been criticized for making it impossible for firms to cooperate over sustainability standards 'while still making a profit.' This is a mischaracterization of the decision. Had the three detergent manufacturers confined their cooperation to their voluntary code to implement more sustainable products and packaging, they would not

⁶⁶ Robert Gulotty, *THE POLITICS OF REGULATORY PROTECTION IN INTERNATIONAL TRADE* (Chicago University Press, 2020).

⁶⁷ Case COMP/39.579—*Consumer Detergents* Commission decision of 13 April 2011.

⁶⁸ Case COMP 39.952—*Power Exchanges* Commission decision of 2014.

⁶⁹ Case COMP/39/165—*Flat Glass* Commission decision of 2007.

⁷⁰ COMP/39579—*Consumer Detergents*, Commission decision of 13 April 2011.

⁷¹ COMP/39579—*Consumer Detergents* ¶21.

⁷² COMP/39579—*Consumer Detergents* ¶24.

⁷³ COMP/39579—*Consumer Detergents* ¶25.

⁷⁴ Ulrich Laitenberger & Florian Smuda, *Estimating Consumer Damages in Cartel Cases*, 11 J COMP. LAW & ECON 955 (2015).

have been prosecuted. They did not need to agree on ‘ideal pricing.’⁷⁵ They could have competed based on the agreed environmental standards, or by choosing to adopt standards at a higher level than those agreed upon so that the agreed standard was a base line.

Much of the pressure for a laxer antitrust comes from large firms and their legal advisors.⁷⁶ The fact that the industry says it has been blocked from undertaking cooperative environmental initiatives is unsubstantiated. Even if it were shown to be significant, the question remains as to the underlying commercial motives and more pertinently the commercial consequences. Increases in sustainability can be costly and these costs are differentially spread across the industry by firm size and product mix. These can act as nonprice barriers to competition and have adverse effects often concentrated on poorer consumers while increasing corporate profit margins and market power. The effects can often be subtle and hard to detect. Ironically, the lobbying cuts across the more populist concerns that lax antitrust has fostered increased market power that has been responsible for rising wealth inequality, lower productivity growth, and consumer harm.

VI. SUSTAINABILITY AGREEMENTS

Sustainability agreements raise two questions—(a) whether the fair share to consumers test deals with any perceived market failure; and (b) whether an anticompetitive agreement is necessary to achieve greater sustainability. These two questions are considered in turn.

VI.A. Nature and Approach

Sustainability agreements are cooperative agreements aimed at improving product quality, work conditions, wages, fair trade, and animal welfare that do not neatly fall into the environment damages category. They concern the qualitative aspects of goods and services traded in markets that may or may not involve third-party external effects. These have an inherent internalization mechanism in the form of price adjustments based on the willingness to pay off consumers or workers who are the principal beneficiaries of improved sustainability.

⁷⁵ Paul Balmer, *Colluding to Save The World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 *ECOLOGY LAW QUART.* 219, 226/7 (2020).

⁷⁶ International Chamber of Commerce, *COMPETITION POLICY AND ENVIRONMENTAL SUSTAINABILITY* 26 November 2020. Available at <file:///E:/competition%20and%20environment/New%20references%202021/ICC%202020-compolicyandenviroinmsustainability%202020.pdf>; *SUSTAINABILITY COOPERATION BETWEEN COMPETITORS & ART. 101 TFEU—UNILEVER SUBMISSION TO DG COMP.*

There will be problems surrounding misperceptions of the risks, losses and/or benefits by consumers, and third-party effects that may result in a suboptimal level of sustainability. Take the example of packaging. Consumers may demand more environmentally friendly packaging of soap and be willing to pay for this. But there will be waste disposal issues surrounding the packaging and pollution associated with the use of the detergent. Thus, the consumer willingness to pay for more environmentally friendly packaging would not take account of these third-party effects. At the same time, there is a direct link between the consumer and environmental harm, unlike airborne pollution where the consumer does not bear any of the harm or the benefits from reductions in the level of harm. Packaging is supplied as part of a market transaction, valued by the consumer, and disposed of by the consumer. Thus, making the packaging more expensive will confront the consumer with a choice and the producer with incentives to adopt more sustainable packaging, and better recycling and disposal.

Improving animal welfare can be treated as an increase in product quality. An industry standard on animal welfare will generate both benefits and costs for consumers of the affected products. There will be a market for more sustainable food production as reflected in the consumers' willingness to pay. This was how the matter was dealt with by the ACM in its *Chicken of Tomorrow*⁷⁷ decision. This concerned a proposed cooperation agreement between poultry farmers, broiler meat processors, and Dutch supermarkets to replace battery-produced broiler chickens with more sustainable alternatives that improved animal welfare. The ACM's survey found that consumers were willing to pay on average €0.82/kilo for more sustainable chicken meat but that this would have led to an average price increase of €1.46/kilo, so they would not have benefitted from the initiative. The ACM felt that there were less far-reaching measures that could lead to more sustainable chicken available in supermarkets such as improved consumer education.⁷⁸ The ACM followed and has stated it will continue to follow the basic principle that consumers must be fully compensated by the benefits of the sustainability agreements for the harm that they suffer caused by a restriction of competition.⁷⁹

Although there is a basic logic to adhering to the fair-share-to-consumers test, it begs the question why cooperation is required to achieve what must be a profitable increase in sustainability if the test is satisfied. In the *Chicken of Tomorrow* decision, the test was not satisfied with the implications that even

⁷⁷ ACM, *Analysis of the sustainability arrangements concerning the Chicken of Tomorrow* (in English) (2015).

⁷⁸ The United Kingdom competition authority rejected the claim that a cartel of model agencies would improve the working conditions of fashion models, mainly because no evidence was given to support it—Case CE/9859–14 Conduct in The Modelling Sector, Decision of the (UK) Competition and Markets Authority, 2017.

⁷⁹ ACM Draft Guidelines on Sustainability Agreements, *supra* n. 5 ¶61.

if there was broad industry agreement to implement the proposed standard among those in the poultry supply chain it would not have been implemented without collusive price hikes (assuming the ACM's quantification of willingness to pay was correct).

VI.B. Is There a Conflict between Competition and Sustainability?

Those advocating a greener antitrust often assume that there is a conflict, or trade-off, between competition and sustainability. This is based on a naïve market failure model together with the untested claim that allowing more market power achieves greater sustainability.⁸⁰

The academic and official publications increasingly refer to the problem of 'first-mover disadvantages' as a significant market failure. This is the claim that firms in an industry will typically be reluctant to be the first to invest in sustainability initiatives because their higher costs (not offset by any increased market appeal and thus demand) will put them at a competitive disadvantage to their competitors that do not. If all firms reason in this way, so the argument goes, the industry will not voluntarily adopt otherwise welfare-enhancing sustainable initiatives and investments. Again, there is little evidence to support this claim. It is not explained why otherwise unattractive sustainability initiatives become more appealing if collectively agreed since the net gains to any one firm would be reduced. That is unless such cooperation is accompanied by collusive price increases.

There is emerging evidence that competition is a major driver for greater corporate social responsibility (CSR), sustainability, and environmental protection. CSR can give a firm a competitive advantage⁸¹ and competition can have a positive effect on a firm's commitment to CSR.⁸² For example, one study found that firms in more competitive industries have better social ratings. It showed that (i) different market concentration proxies were negatively related to widely used CSR measures; (ii) that an increase in competition due to higher import penetration leads to superior CSR performance; and (iii) that firms in more competitive environments have

⁸⁰ Cf Maarten Pieter Schinkel & Yossi Spiegel, *Can Collusion Promote Sustainable Consumption and Production?* INTERNATIONAL J. INDUS. ORG. 371(2017). (Duopoly model which indicates that allowing the firms to coordinate their sustainability efforts leads to the lowest sustainability levels).

⁸¹ Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility-Response*, 85 HARV. BUS. REV. 39 (2006); Thomas Roulet & Joel Bothello, *why "De-Growth" Shouldn't Scare Businesses*, 89 HARV. BUS. REV. 14 (2020).

⁸² Daniel Fernández-Kranz & Juan Santaló, *When Necessity Becomes a Virtue: The Effect of Product Market Competition on Corporate Social Responsibility*, 19 J ECON. & MANAGEMENT STRATEGY 487 (2010); Caroline Flammer, *Does Product Market Competition Foster Corporate Social Responsibility? Evidence From Trade Liberalization*, 36 STRATEGIC MANAGEMENT J. 469 (2015).

a superior environmental performance, measured by firm pollution levels. Another study⁸³ using data for thousands of facilities across hundreds of industries in the United States over five years found that competition reduced toxic releases at the facility level. Specifically, on average, each percentage-point reduction in the Hirschman-Herfindahl Index led to around a two-percent reduction in a facility's toxic releases. The study's authors concluded that 'competition may be good, at least for public health in areas near polluting facilities, and fail to provide support for the hypothesis that competition leads to more socially undesirable behavior.' Ding et al.⁸⁴ found evidence that stricter competition law regimes are positively associated with CSR, and that this link is stronger in countries where consumers indicate stronger proenvironment attitudes. This suggests that as proenvironment attitudes become more common over time, the role of competition in fostering green innovation increases.⁸⁵ Aghion et al.⁸⁶ found a positive relationship between consumers' stated sustainability preferences and the probability that a firm engages in green innovation increases with the degree of product market competition. (It is worth noting that some of the worst polluting industries are and have been state-owned monopolies.) There is also evidence that shows that competition is better than monopoly in fostering greater worker welfare.⁸⁷

VII. CONSERVATION CARTELS

An exception to the general line of analysis so far advanced in this article is cooperative agreements among users of open-access resources such as fisheries (the 'open-access resources'). These provide a more clear-cut case for exemption. Competition in the absence of private property rights leads to excessive entry, overexploitation, degradation, the dissipation of the economic rents, and possible threats to biodiversity and species extinction. The agreement has the usual indicia of a hardcore cartel but increases allocative efficiency

⁸³ Daniel H. Simon & Jeffrey T. Prince, *The Effect of Competition on Toxic Pollution Releases*, 79 J ENVIRON. ECON. & MANAGEMENT 40 (2016). Note the authors test and dismissed suggestions that their findings may have been due to consumer aversion to pollution, regulations changing with competition, or technologies introduced by new firms.

⁸⁴ Wenzhi Ding, Ross Levine, Chen Lin & Wensi Xie, *Competition Laws, Norms and Corporate Social Responsibility*, Working Paper 27493 (National Bureau of Economic Research, 2020).

⁸⁵ Leonard Treuren & Maarten P. Schinkel, *Can Collusion Promote Sustainable Consumption and Production? Not Beneficially Beyond Duopoly*. Working Paper No. 2018-01 (Amsterdam Center for Law and Economics, 2018).

⁸⁶ Philippe Aghion, Roland Bénabou, Ralf Martin & Alexandra Roulet, *Environmental Preferences and Technological Choices: Is Market Competition Clean or Dirty?* Working Paper w26921 (National Bureau of Economic Research, 2020).

⁸⁷ 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 (2008).

and arguably satisfies the fair share to (future) consumers' test under Article 101(3) TFEU.

VII.A. Open-Access Resource Users' Agreements

The problem of open-access resources was first recognized by the Danish economist Warming⁸⁸ over a century ago, developed by Knight⁸⁹, Gordon,⁹⁰ and Cheung⁹¹, and popularized in Garrett Hardin's article 'The Tragedy of the Commons.'⁹² They and other resource economists have shown that where there is competition in the use of an open-access resource—such as the ocean or an oil field—the outcome is inefficient.⁹³ A cartel, club, cooperative, or association of users, or what has been termed a 'conservation cartel,'⁹⁴ can improve the situation by restricting access to and exploitation of the resource by imposing quotas, setting market shares, and restricting entry. Such a users' association is a way of asserting de facto property rights over the resources, the absence of which is the root cause of the inefficiency and overexploitation. These are all actions in direct violation of Article 101(1) TFEU.

Figure 2 gives a simplified representation of the open-access resource problem using the example of open sea fishing. Without property rights in this segment of the seabed or the fish stock, competition among fishermen would lead to overexploitation (at Q_C) of the fishing grounds. The only way that the fisherman can assert property over the otherwise 'fugitive' fish is by catching as many as possible. They individually gain nothing from exercising restraint to conserve fishing stock because if they act alone others will catch the fish. As a result, open-access resources are overexploited—too many boats chasing too few fish—under competitive conditions. The premise that competition is good and cooperation bad does not hold.⁹⁵

One way of husbanding open-access resources is to control output and entry. A fishermen's association that set quotas to limit the catch to Q^* would maximize the aggregate profits of its members. It would also raise prices to

⁸⁸ Jens Warming, *Om Grendrente af Fiskegrunde ten*, NATIONALOKONOMISK TIDSSKRIFT 151 (1911) reprinted in English as *On Rent of Fishing Grounds*, 15 HISTORY POLIT. ECON. 391 (1983).

⁸⁹ Frank H. Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 QUART. J. ECON. 582 (1924).

⁹⁰ Scott H. Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POLIT. ECON. 124 (1954).

⁹¹ Steven N.S. Cheung, *The Structure of a Contract and the Theory of a Non-exclusive Resource*, 13 J. LAW & ECON. 49 (1970).

⁹² Gareth Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

⁹³ Thrainn Eggertsson, *ECONOMIC BEHAVIOR AND INSTITUTIONS* (Cambridge University Press, 1990).

⁹⁴ Jonathan H. Adler, *Conservation through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3 (2004); Jonathan H. Adler, *Conservation Cartels*, 27 REGULATION 38 (2004).

⁹⁵ This 'cost' is not trivial—the World Bank has put the global loss due to the overexploitation of ocean fisheries at US\$83 billion in 2012. World Bank, *THE SUNKEN BILLIONS REVISITED: PROGRESS AND CHALLENGES IN GLOBAL MARINE FISHERIES* (2017).

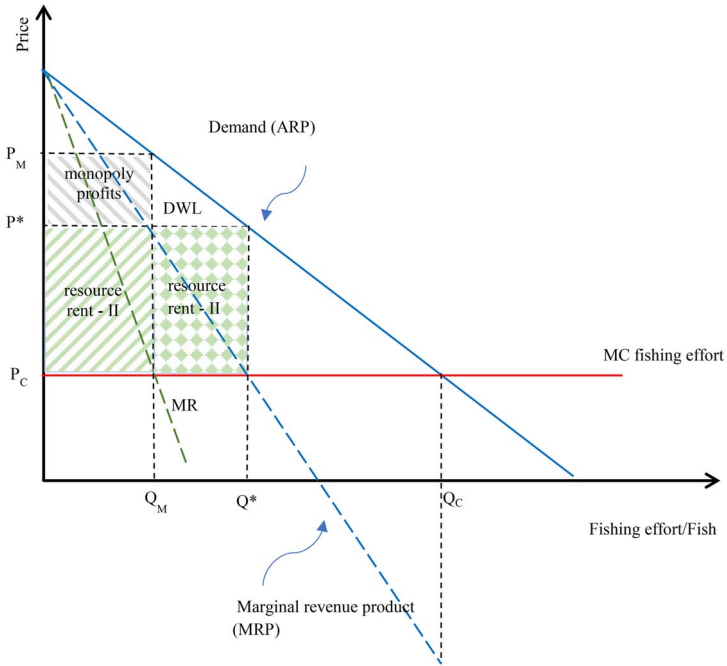


Figure 2.

p^* , which exceeds observed marginal costs. However, the difference between observed costs and the higher profit maximizing price is not monopoly profits but a ‘resource rent’ (labeled ‘resources rent I and II in Figure 2), which is a factor payment for the use of an unpriced scarce input.⁹⁶ Indeed, a license fee equal to $P^* - P_C$ per unit catch would generate an efficient level of fishing with no monopoly return. Yet such restrictions imposed by a users’ cooperative have all the telltale signs of a hardcore cartel—agreements on market shares, output, inputs—and the predicted consequences—higher prices, high price–cost margins, and reduced output. The outcome is not a second-best one like the pollution case. The higher prices, higher profit margins, smaller catches, industry quotas, and entry barriers are all potentially Kaldor-Hicks efficient.

Arguably, the Commission’s current interpretation of Article 81(3) should exempt such ‘conservation cartels.’ It is true that such a ‘conservation cartel’ unambiguously makes present consumers worse off. However, the major beneficiaries are future consumers who benefit from the availability of a sustainable supply of fish. Where the fishermen’s cooperative acts to conserve

⁹⁶ On property rights solutions, see Michael DeAlessi, *FISHING FOR SOLUTIONS* (Institute of Economics Affairs, 1998); Hannes H. Gissurason, *OVERFISHING: THE ICELANDIC SOLUTION* (Institute of Economic Affairs, 2000). Eleanor Ostrom, ed., *THE FUTURE OF THE COMMONS—BEYOND MARKET FAILURE AND GOVERNMENT REGULATION* (Institute of Economic Affairs, 2012).

the fishing stock, this benefits future consumers thus satisfying the ‘fair-share-to-consumers’ test. Moreover, the usual indicia of market power—reduced output and high price–cost margins—are no longer reliable. The exercise of market power cannot be detected by high price–cost margins but requires the trickier investigation of markups exceeding the dynamic opportunity cost of the resource inclusive of the resource rents.

One should not get carried away with these seemingly benign observations. A user’s association also has the potential to exercise market power to restrict the catch and entry beyond the efficient level. This is shown in Figure 2 where the users’ association exercises market power to reduce the catch below Q^* to Q_M and raise prices to P_M . This generates monopoly profits given by the area so labeled and a deadweight loss given by the triangle labeled DWL. Several aspects are evident from Figure 2. First, the exercise of market power to obtain an additional monopoly profit would be offset by a loss of resource rent (aggregate profits) to members of the users’ association labeled as ‘resources rent – II,’ which as Figure 2 is drawn exceeds the monopoly profits. Thus, no market power abuse would occur. Secondly, the ability to exercise market power will depend on the degree of substitutability between the catch with other fish species and other foods.

VII.B. US Antitrust and Fishermen’s Unions

Adler⁹⁷ and others⁹⁸ have argued that US antitrust interventions have led to overfishing. There have been numerous actions against fishermen’s cooperatives. In the 1930s, shrimpers and oyster fishers along the Mississippi River coast increased their revenues by controlling catches and limiting entry, and by contracting with packers. The Gulf Coast Shrimpers and Oysterman’s Association was also successful in limiting the harvest to larger shrimps in Mississippi waters.⁹⁹

Beginning in the 1930s, antitrust actions were commenced against these ‘fishermen’s’ unions. The ‘union’ agreements were dismantled as violations of the Sherman Act¹⁰⁰ following complaints from excluded fishermen and canneries, the latter who did not want to negotiate with the greater bargaining power of unions in fixing prices. Often, the courts acknowledged the environmental benefits of the union agreements but were constrained to find them illegal. There were exemptions as the Department of Justice allowed producer

⁹⁷ Alder, *supra* n 96.

⁹⁸ Gary D. Libecap, *CONTRACTING FOR PROPERTY RIGHTS* (Cambridge University Press, 1989) Chap. 5; Bruce Yandle, *Antitrust and the Commons: Cooperation or Collusion?* 3 *THE INDEPENDENT REV.* 37 (1998).

⁹⁹ Libecap *op cit*, *supra* n. 100; Ronald N. Johnson & Gary D. Libecap, *Contracting Problems and Regulations—The case of fisheries*, 72 *AM. ECON. REV.* 1005 (1982).

¹⁰⁰ *The Gulf Coast Shrimpers’ and Oysterman’s Association v US* 236 F.2d 658 (1956).

cooperatives that allocated market shares where government regulation limited total catch.¹⁰¹

On the other hand, some types of producer cooperatives have been exempted from US antitrust laws. The Fishermen's Collective Marketing Act (FCMA) 1934 partially exempts fishermen from the Sherman Act to enable them to bargain for better prices from downstream processors. Under the FCMA, fishermen could coordinate the 'catching, producing, preparing for market, processing, handling, and marketing' of fish provided they did not compel or deny membership on 'anticompetitive grounds.'¹⁰² In 2009, these exemptions were extended to recreational fishermen. The terms of FCMA were restrictive as the cooperatives were prohibited from boycotting or refusal to deal with noncooperating packers and only those associations that qualified under the Act were exempt.

VII.C. Shrimp Cartels in Europe

The 'efficiency' of a cartel for open-access resources can be considered by considering two cartel infringement decisions affecting the North Sea shrimp fishing.

In 2003, the Dutch competition authority fined four Dutch shrimp product organizations (fishermen's cooperatives) and a Dutch wholesalers' organization (Vebege) a total of €13.8 million for operating a cartel between November 1997 and December 2000.¹⁰³ The cartel involved two layers of the supply chain—shrimp fishermen and a wholesaler with horizontal and vertical agreements. The producer market was highly concentrated with a two-firm concentration ratio (CR2) of 85–90% and an HHI 3962 (highly concentrated according to the EU merger guidelines) of North Sea Shrimp supplied to the

¹⁰¹ *Columbia River Packers Association v. Hinton*, 34 F.Supp. 970 (D. Ore. 1939); *Columbia River Packers Association v. Hinton*, 315 U.S. 143 (1942); *Commonwealth v. McHugh*, 93 N.E.2d 751 (Mass. 1950); *Commonwealth of Massachusetts v. McHugh*, 71 F. Supp. 516 (D. Mass. 1947); *Hawaiian Tuna Packers Ltd. v. Int'l Longshoremen's & Warehousemen's Union*, 72 F. Supp. 562 (1947); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Local 36 of Int'l Fishermen & Allied Workers of America v. United States*, 177 F.2d 320 (9th Cir. 1949); *Manaka v. Monterey Sardine Industries*, 41 F. Supp. 531 (1941); *McHugh v. United States*, 230 F.2d 252 (1st Cir. 1956); *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *Sea Watch Int'l v. Mosbacher*, 762 F.Supp. 370 (D.D.C. 1991); *United States v. Sealy*, 388 U.S. 350 (1967); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Topco Associates*, 405 U.S. 596 (1972).

¹⁰² Andrew W. Kitts & Steven F. Edwards, *Cooperatives in US Fisheries: Realizing the Potential of the Fishermen's Collective Marketing Act*, 27 *MARINE POLICY* 357 (2003); Gunnar Knapp, *The Chignik Salmon Cooperative: A Case Study of Allocation to a Voluntary Self-Governance Organization* (Institute of Social & Economic Research, Univ. Alaska, Working Paper, 2007).

¹⁰³ MNa Case No. 2269/330. Cartels seeking to control overfishing have existed in the Netherlands as early as the 17th century. Andre E. Sayous, *Cartels and Trusts in Holland in the Seventeenth Century*, 17 *POLIT. SCIENCE QUART.* 381 (1902).

Netherlands and imported from Germany and Denmark. The retail market was unconcentrated.

A study sought to estimate the output effect of the Dutch shrimp cartel using the ARIMA autoregressive statistical technique.¹⁰⁴ It found that the cartel (as represented by a dummy for the cartel period) reduced the quantity of shrimps coming to auction in the Netherlands by on average 16 and 12 percent per year compared with after the cartel period. Using an elasticity estimate of -0.63 , the study estimated a 19% increase in prices (at an average of €3.33/kg during the cartel period compared with the average postcartel price of €2.80/kg). Based on a quantity reduction of 12%, the annual overcharge in wholesale prices was estimated at around €4.84 million annually together with a small deadweight loss of about €330 k equal to 7% of the overcharge.¹⁰⁵

The central issue is not the reliability of the data or estimation technique used by the study but what these ‘illustrative calculations’ measured. The study claims to have measured the overcharge and DWL arising from the cartel, that is, the reduction in output from Q^* to Q_E in Figure 2. However, it is equally plausible that what was being measured was the reduction in output between Q^* and Q_C , which would recharacterize the overcharge as an efficient increase in factor rents with the estimated DWL being a gain rather than loss. Whether these calculated ‘losses’ indicated inefficiency or loss of consumer benefits is therefore far from clear. The North Sea shrimp fishermen received a lot of political support for their claim when it was appealed that the extra profits had allowed them to invest in new shrimp fishing technology that was less damaging to the seabed—to which neither the authority nor the courts were receptive.¹⁰⁶

The European Commission’s *Shrimps*¹⁰⁷ decision of 2014 imposed fines of €28 million on four ‘specialized shrimp traders’ (wholesalers) for agreeing on quotas and prices, market sharing, and exchanges of sensitive commercial information over the period June 2000 to January 2009. This cartel differed from the Dutch shrimp cartel as the traders were downstream of the shrimp producers’ associations and their actions were aimed at increasing the wholesale prices of shrimps. According to the European Commission’s infringement decision, the traders also ‘tried to influence the price level at the auctions or exercised pressure on other traders to keep them away from the auctions.’¹⁰⁸

¹⁰⁴ OXERA, COSTS AND BENEFITS OF MARKET REGULATORS—PART II, REPORT FOR NETHERLANDS MINISTRY OF ECONOMIC AFFAIRS, 3–12 (2004).

¹⁰⁵ The authors of the study assumed linear demand and supply thus enabling the DWL to be estimated at 50%, that is, $DWL = 0.5 \Delta P \times \Delta Q = 0.5 \times \text{€}0.33 (= \text{€}3.13 - \text{€}2.80) \times 1.244 \text{ m kg}$ (= 10.368 m kg—9.124 m kg).

¹⁰⁶ Josien Steenbergen, et al., *The Commons Tragedy in the North Sea Brown Shrimp Fishery: How Horizontal Institutional Interactions Inhibit a Self-Governance Structure*, 74 ICES J. MARINE SCIENCE 2004 (2017).

¹⁰⁷ Case COMP/39633 *Shrimps* (2013).

¹⁰⁸ Case COMP/39633 *Shrimps* ¶53.

They directly or indirectly exchanged information on prices and rebates paid to their contract fishermen. Had this purchasing cartel been effective, it would have had the effect of increasing wholesale prices and profits while at the same time depressing the auction prices (and profits) paid to the shrimp producers with the effect of reducing shrimp sales to near the monopoly level Q_m . However, if the shrimp traders were able to corner the auction market and wholesale trade, then they were able to further reduce the quantity of shrimp for sale to generate additional profits. That is downstream market power was being exploited and suggesting that some of the increased prices were overcharges rather than scarcity rents.

VIII. CONCLUSION

The Commission selectively prosecutes hardcore anticompetitive cooperative agreements that do not warrant exemption under Article 101(3) TFEU. The proponents of green antitrust use this as evidence that the Commission would not clear an anticompetitive agreement that otherwise generates substantial environmental benefits. The reality is quite different. The fact that the Commission has not in the last two decades prosecuted such a case indicates either that such agreements do not exist or what is more likely a deliberate strategy of the Commission not to prosecute such cases. The one area where the Commission's enforcement strategy could potentially be too restrictive is its treatment of conservation cartels. However, because it has only prosecuted one such cartel, it is difficult to tell whether antitrust is deterring cooperative solutions to natural resources problems. At the other end of the spectrum, there is little evidence that EU antitrust has deterred industry initiatives that promote suitability and environment protections that are not greenwashing collusion, or that condoning anticompetitive agreements leads to the more rapid take-up of sustainability and environmental protection.