ANTITRUST'S ENVIRONMENTAL FOOTPRINT: REDEFINING THE BOUNDARIES OF GREEN ANTITRUST*

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Antitrust policy is at a turning point. After a hiatus of over four decades, the 2020s have ushered in an attempt to restore the law's full potential to quash anticompetitive conduct. The revival is fueled by a combination of pro-enforcement leadership, disenchantment with the consumer welfare standard as the lodestar of antitrust, and a realization that market power harbors undesirable ills. At the same time, a new movement which suggests that antitrust should embrace environmental concerns is garnering support in the United States and threatening to interfere with the momentum for reinvigoration. The European-propelled "green antitrust" movement favors loosening up enforcement to allow sustainability-enhancing collaborations with anticompetitive effects.

This Article challenges the assumptions underpinning green antitrust as currently conceptualized. Through detailed doctrinal and comparative analysis, I demonstrate that the green antitrust movement ignores the theoretical foundations of corporate social responsibility, and that empirical support for antitrust's alleged sustainability problem is feeble. Moreover, implementing a laxer policy could be particularly detrimental in the United States, where antitrust underenforcement is a documented reality. On this basis, I propose an alternative path for ensuring that competition policy fosters environmental objectives, and redefine green antitrust to underline the law's potential to boost sustainability.

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INTRODUCTION

"*Climate change is the greatest market failure the world has ever seen*."[1]

Should antitrust be concerned about ecological issues? The prospective use of market-focused legislation as a tool to protect the environment may seem quixotic, yet the question is at the heart of one of the discipline's most heated debates. The complex interplay between competition and sustainability objectives brings multiple angles to the discussion. The most prominent narrative is that antitrust may be obstructing environmentally minded business collaborations.[2] This apprehension has led scholars to assert that antitrust

1. NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE, at xviii (2007).

2. *See, e.g.*, Simon Holmes, *Climate Change, Sustainability, and Competition Law*, 8 J. ANTITRUST ENF'T 354, 354–55 (2020); Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1640 (2022).

suffers from a "sustainability deficit."[3] From this standpoint, there have been calls for relaxing the application of antitrust rules to allow environmental initiatives to go ahead despite raising blatant competition concerns.[4] However, it is also possible that, by taking action against anticompetitive conduct, environmental benefits could indirectly ensue in the form of positive enforcement externalities. This could occur, for instance, if companies are punished for colluding to prevent consumers from accessing sustainable goods,[5] or for cartelizing to hamper green innovation.[6]

Flexibility advocates, often collectively referred to as the green antitrust movement,[7] are undoubtedly well intentioned. Climate change may well be "the defining challenge of our age."[8] The scientific community predicts an impending environmental catastrophe and time is running out to take action.[9] António Guterres, Secretary General of the United Nations ("UN"), recently

3. *See, e.g.*, Anna Gerbrandy, *Solving a Sustainability-Deficit in European Competition Law*, 40 WORLD COMPETITION 539, 539–40 (2017).

4. *See infra* Section II.B.

5. JULIAN NOWAG, ORGANISATION FOR ECON. COOP. & DEV. [OECD], SUSTAINABILITY AND COMPETITION, OECD COMPETITION COMMITTEE DISCUSSION PAPER 19–20 (2020) [hereinafter NOWAG, SUSTAINABILITY AND COMPETITION], https://web-archive.oecd.org/2021-10-31/567713-sustainability-and-competition-2020.pdf [https://perma.cc/NY8E-5SAL].

6. European Commission Press Release IP/21/3581, Antitrust: Commission Fines Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars (July 8, 2021) [hereinafter EC Press Release IP/21/3581], https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581 [https://perma.cc/HG8W-842E (staff-uploaded archive)]. On the potential to boost environmental objectives via antitrust enforcement, see generally Sandra Marco Colino, *Antitrust's Social "Ripple Effect*," 42 BERKELEY J. INT'L L. (forthcoming 2024) [hereinafter Marco Colino, *Antitrust's Social*] (on file with the North Carolina Law Review) (explaining that the power of antitrust law to combat environmental decline lies in the ripple effect of antitrust enforcement and markets).

7. This is the definition of green antitrust given in, *inter alia*, Edith Loozen, *Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability*, 56 COMMON MKT. L. REV. 1265, 1266 (2019); Maarten Pieter Schinkel & Leonard Treuren, *Green Antitrust: Why Would Restricting Competition Induce Sustainability Benefits?*, PROMARKET (Mar. 26, 2021), https://www.promarket.org/2021/03/26/green-antitrust-why-would-restricting-competition-induce-sustainability-efforts/ [https://perma.cc/3WQS-VPCT]; Cento Veljanovski, *The Case Against Green Antitrust*, 18 EUR. COMPETITION J. 501, 502 (2022).

8. Elisabeth Rosenthal, *U.N. Chief Seeks More Climate Change Leadership*, N.Y. TIMES (Nov. 18, 2007), https://www.nytimes.com/2007/11/18/science/earth/18climatenew.html [https://perma.cc/7CG6-Y2D9 (staff-uploaded, dark archive)].

9. *See, e.g.*, Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 SCIENCE 1686, 1686 (2005); John Cook, Dana Nuccitelli, Sarah A. Green, Mark Richardson, Bärbel Winkler, Rob Painting, Robert Way, Peter Jacobs & Andrew Skuce, *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 ENV'T RSCH. LETTERS 1, 6 (2013); Steve Cohen, *Building an American Political Consensus Behind Environmental Sustainability*, ST. OF THE PLANET (Dec. 27, 2021), https://news.climate.columbia.edu/2021/12/27/building-an-american-political-consensus-behind-environmental-sustainability/ [https://perma.cc/SDM2-8377]; World Meteorological Org., *State of the Global Climate 2023*, at iii, WMO-No. 1347 (2024), https://library.wmo.int/viewer/68835/download?file=1347_Global-statement-2023_en.pdf&type=pdf&navigator=1 [https://perma.cc/JBC3-GEYU (staff-uploaded archive)].

suggested that humanity may have "opened the gates to hell" by not taking timely measures to revert the climate crisis.[10] These grim predictions justify an impulse to throw everything—including the proverbial kitchen sink—at the problem. Antitrust might not be the best tool to tackle climate change, but if it can do something, *anything*, then it might be worth a try.[11] And if it is actually standing in the way of green business collaborations, a reconsideration of whether efficient markets are worth the environmental cost could be in order. After all, as the late conservationist David Brower is quoted as saying, "there is no business to be done on a dead planet."[12]

That said, calls for laxer antitrust enforcement tend to overestimate the detrimental effect of the rules on green initiatives.[13] Contrary to the predominant tone of the ongoing debate, the interaction between competition and sustainability is not a zero-sum game. The protection of competition can, and often does, reap environmental benefits.

Moreover, the push for a laxer approach comes at a time when the United States is reeling from decades of documented underenforcement of antitrust legislation.[14] Paradoxically, in the last decade, antitrust has regained political relevance,[15] and the Biden administration has shown a determination to make

10. Oliver Milman, *Humanity Has "Opened Gates to Hell" by Letting Climate Crisis Worsen, UN Secretary Warns*, GUARDIAN (Sept. 20, 2023, 3:41 PM), https://www.theguardian.com/world/2023/sep/20/antonio-guterres-un-climate-summit-gates-hell [https://perma.cc/P3YB-URXU].

11. *See* Maurits Dolmans, *Sustainability Agreements and Antitrust—Three Criteria to Distinguish Beneficial Cooperation from Greenwashing*, CHILLING COMPETITION (Sept. 15, 2021), https://chillingcompetition.com/2021/09/09/sustainability-agreements-and-antitrust-three-criteria-to-distinguish-beneficial-cooperation-from-greenwashing-by-maurits-dolmans/ [https://perma.cc/GS6H-BWYN] (positing that "[w]e have to use all available tools to reduce emissions, remove excess greenhouse gases, and repair the environment").

12. Annie Leonard, *Solutions Series, Part 4: Solutions in Business*, PATAGONIA (May 7, 2014), https://www.patagonia.com/stories/solutions-series-part-4-solutions-in-business/story-17959.html [https://perma.cc/8S7T-UVRV].

13. Julian Nowag, *Antitrust and Sustainability: An Introduction to an Ongoing Debate*, PROMARKET (Feb. 23, 2022), https://www.promarket.org/2022/02/23/antitrust-sustainability-climate-change-debate-europe/ [https://perma.cc/2XWE-BGVM] [hereinafter Nowag, *Antitrust and Sustainability*] (asserting that "we often see a simplistic, reductionist—one may even say sensationalist—view that reduces the debate to competition vs sustainability").

14. Thurman Arnold Project, *Modern Antitrust Enforcement*, YALE SCH. MGMT., https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement [https://perma.cc/TV56-UT76] (last updated June 22, 2020) (stating that the "bulk of the research featured in our interactive database on these key topics in competition enforcement in the United States finds evidence of significant problems of underenforcement of antitrust law"). On merger control underenforcement, see DIGIT. COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL, 2019, ¶¶ 3.42–3.59 (UK). *See also* Sandra Marco Colino, *The Antitrust "F" Word: Fairness Considerations in Antitrust*, J. BUS. L. 329, 334 (2019) (referring to how antitrust had "lost its mojo").

15. Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 714–15 (2018) (claiming that "[a]ntitrust is sexy again" and that "[n]ot since 1912 . . . have antitrust issues had such political salience").

use of all the tools antitrust offers to fight the ills associated with excessive market power.[16] From this perspective, green antitrust would seem to be at odds with the times. To make matters more complicated, recent attempts to use antitrust against environmental causes have further fanned the green antitrust flame in the United States.[17]

The above context invites a reflection on both the genuine magnitude of the problem denounced by the green antitrust movement and the risks of jeopardizing the authority of a legal discipline once said to put "bread on [a starving man's] table and opportunity under his belt."[18] This Article challenges the assumptions underpinning green antitrust as currently conceptualized. The work is premised upon a detailed doctrinal and comparative analysis of antitrust law, policy, and scholarship in the United States and the European Union. Calls for flexible enforcement, my research finds, are based on flawed assumptions about corporate social responsibility and have limited empirical support. Furthermore, the U.S. context presents specific challenges that make lax antitrust enforcement particularly undesirable. On the basis of this critique, I propose an alternative path for ensuring that competition policy fosters sustainability and attempt to redefine green antitrust so that it accurately reflects the law's potential to boost environmental protection.

Part I delves into the relationship between antitrust and environmental business cooperation, providing detailed insights into the competition policies of the United States and the European Union. Part II explores the green (flexible) antitrust movement and its main propositions. Part III expounds the shortcomings of the calls for laxer enforcement. Part IV proposes a new concept of green antitrust and recommends effective ways to ensure the law does not stand in the way of a cleaner planet. Finally, this Article concludes.

I. ANTITRUST AND ENVIRONMENTAL BUSINESS COOPERATIONS

It is hard to overstate the value of enacting laws to protect competition, once defined as "the lifeblood of strong and effective markets."[19] While antitrust does not directly safeguard the interests of consumers or trading standards, it plays a crucial role in the protection of both. It "helps consumers get a good deal"[20] and "encourages firms to innovate by reducing slack, putting downward

16. Terry Calvani & Thomas Ensign, *The New Brandeisians Are Here*, 11 J. ANTITRUST ENF'T 168, 168–69 (2023).

17. *See infra* Section III.C.

18. Eleanor M. Fox & Michal S. Gal, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience*, *in* THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW 296, 297 (Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox & David J. Gerber eds., 2015).

19. DEPARTMENT OF TRADE AND INDUSTRY, A WORLD CLASS COMPETITION REGIME, 2001, Cm. 5233, at 7 (UK).

20. *Id.* at 7.

pressure on costs and providing incentives for the efficient organisation of production."[21]

The competition-sustainability debate may be quite recent, but it is in effect the latest manifestation of a wider, perpetual deliberation on whether antitrust should pursue noneconomic goals or focus instead exclusively on economic efficiency.[22] This part places antitrust's environmental debate within this broader reflection.

A. *The Structure of Green Business Initiatives*

The scientific community insists that, unless we act now, our planet is doomed.[23] The pressure to act is principally on governments, since they have the most potential to be impactful.[24] The Organisation for Economic Co-Operation and Development ("OECD") has identified five pivotal sectors (industry, electricity, agriculture, transports, and buildings) in which governmental action could see the bulk of harmful emissions disappear.[25] The main battle lines entail "green investment, regulation, taxes and targeted subsidies, leading by example, and education."[26] Nonetheless, leaving our fate entirely in the hands of governments might not be a wise strategy. They often backtrack on their promises due to a number of pressures. For instance, some commitments are impossible to honor, and others are not palatable to the electorate. A recent example is the former U.K. Prime Minister Rishi Sunak's

21. *Id.* at 13.

22. Herbert Hovenkamp, *The Slogans and Goals of Antirust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 710 (2023) [hereinafter Hovenkamp, *Slogans and Goals*]; Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917, 917 (1987) [hereinafter Fox, *Battle for the Soul*]; Ariel Ezrachi & Maurice E. Stucke, *The Fight over Antitrust's Soul*, 9 J. EUR. COMPETITION L. & PRAC. 1, 1 (2018).

23. *See, e.g.*, Daina Mazutis & Anna Eckardt, *Sleepwalking into Catastrophe: Cognitive Biases and Corporate Climate Change Inertia*, 59 CAL. MGMT. REV. 74, 77–78 (2017); Robert E. Kopp, Radley M. Horton, Christopher M. Little, Jerry X. Mitrovica, Michael Oppenheimer, D.J. Rasmussen, Benjamin S. Strauss & Claudia Tebaldi, *Probabilistic 21st and 22nd Century Sea-Level Projections at a Global Network of Tide-Gauge Sites*, 2 EARTH'S FUTURE 383, 404 (2014); Eun-Pa Lim, Harry H. Hendon, Ghyslaine Boschat, Debra Hudson, David W.J. Thompson, Andrew J. Dowdy & Julie M. Arblaster, *Australian Hot and Dry Extremes Induced by Weakenings of the Stratospheric Polar Vortex*, 12 NATURE GEOSCIENCE 896, 896 (2019).

24. *See* Corinne Le Quéré, Robert B. Jackson, Matthew W. Jones, Adam J.P. Smith, Sam Abernethy, Robbie M. Andrew, Anthony J. De-Gol, David R. Willis, Yuli Shan, Josep G. Canadell, Pierre Friedlingstein, Felix Creutzig & Glenn P. Peters, *Temporary Reduction in Daily Global CO_2 Emissions During the COVID-19 Forced Confinement*, 10 NATURE CLIMATE CHANGE 647, 652 (2020).

25. *Climate Action: Exploring Policy Solutions by Key Economic Sector*, OECD, https://web.archive.org/web/20230613081627/https://www.oecd.org/stories/climate-action/key-sectors/ [https://perma.cc/W8VT-UDFC (staff-uploaded archive)] [hereinafter OECD, *Policy Solutions*]; *see also* Martin Borowiecki, Joaquín Calvo Giménez, Federico Giovannelli & Francesco Vanni, *Accelerating the EU's Green Transition* 8 (OECD Econ. Dep't, Working Paper No. 1777, 2023); *The Sectoral Solution to Climate Change*, UN ENV'T PROGRAMME, https://www.unep.org/interactive/sectoral-solution-climate-change/ [https://perma.cc/NHK2-6N2G].

26. OECD, *Policy Solutions*, *supra* note 25.

announcement in September 2023 that his administration would delay the implementation of the ban on sales of new petrol and diesel cars.[27] Professor Inara Scott has also pointed out that government regulation "may be too slow, too unwieldy, and systematically insufficient to create meaningful change."[28]

The corporate world's environmental impact is undoubtedly significant,[29] and companies are often called upon to implement green measures. Since the famous Berle-Dodd dialogue of the 1930s, the question of whether businesses should assume some form of social responsibility rather than focus solely on profits has been widely discussed.[30] There are times when profit-maximization strategies stand at odds with environmental objectives.[31] The extent to which corporate social responsibility ("CSR") obliges firms to adopt socially beneficial strategies that even might go against shareholders' interests is a matter of intense debate and exceeds the scope of this Article.[32] *In extremis*, there have

27. Pippa Crerar, Fiona Harvey & Kiran Stacey, *Rishi Sunak Announces U-Turn on Key Green Targets*, GUARDIAN (Sept. 20, 2023, 3:37 PM), https://www.theguardian.com/environment/2023/sep/20/rishi-sunak-confirms-rollback-of-key-green-targets [https://perma.cc/9FKM-V52M].

28. Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 AM. BUS. L.J. 97, 102 (2016).

29. *See* PAUL GRIFFIN, THE CARBON MAJORS DATABASE 8 (2017), https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772 [https://perma.cc/DS44-3B3G] (showing that since the late 1980s, 100 companies account for more than seventy percent of emissions).

30. *See generally* Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) (insisting that corporate decisions must prioritize shareholders' interests, thus needing to focus almost exclusively on profits); E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (contending that corporations have both a profit-making and a social service function).

31. M. Neil Browne & Andrea M. Giampetro, *The Socially Responsible Firm and Comparable Worth*, 25 AM. BUS. L.J. 467, 467 (1987) (stating that "[p]rofit-maximization may have negative effects on community goals such as an enhanced quality of life, full employment, and environmental protection").

32. *See generally* Julia Tolmie, *Corporate Social Responsibility*, 15 U.N.S.W. L.J. 268 (1992) (explaining CSR and the debate regarding firms' obligations to the social good); Kenneth W. Wedderburn, *The Social Responsibility of Companies*, 15 MELB. U. L. REV. 4 (1985) (explaining the difference in views on CSR between the U.S. and U.K. judiciaries); Adam Lindgreen & Valérie Swaen, *Corporate Social Responsibility*, 12 INT'L J. MGMT. REVS. (SPECIAL ISSUE) 1 (2010) (surveying research literature on five CSR topics: (1) "communication" of CSR initiatives, (2) "implementation" of CSR, (3) "stakeholder engagement" with CSR, (4) measuring the degree and impact of CSR, and (5) the "effects of CSR on business performance"); N. Craig Smith, *Corporate Social Responsibility: Whether or How?*, 45 CAL. MGMT. REV. 52 (2003) (discussing whether the issue of CSR is a question of the duties of corporations or a question of logistics in answering to social responsibility); Roland Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 ECONOMICA 1 (2010) (discussing the growing literature around individual and corporate responsibility as answers to market failures); Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19 (Andrew Crane, Abagail McWilliams, Dirk Matten, Jeremy Moon & Donald S. Siegel eds., 2009) (overviewing "how the concept and practice of [social responsibility] or CSR has grown, manifested itself, and flourished" by surveying "[f]ormal writings on social responsibility"); Scott Hirst, Kobi Kastiel & Tamar Kricheli-Katz, *How Much Do Investors Care About Social Responsibility?*, 2023 WIS. L. REV. 977 (showcasing data on how much investors care about CSR).

been suggestions that companies' resources and their ability to contribute to solving social woes place an obligation on them to adopt an activist role in fixing these problems.[33]

Regardless of how far they should go, corporate initiatives can help mitigate climate change. The list of green strategies the corporations can implement is lengthy and includes allowing remote work, encouraging carpooling, switching to electric vehicles, buying used office furniture, reducing paper consumption by, *inter alia*, relying on the digital world for their transactions (like paying online), or donating and/or raising money for environmental causes.[34] None of these practices are prohibited by competition law. Businesses thinking of adopting them need not worry about antitrust liability.

In addition to unilateral conduct, there may be environmental collaborations jointly developed by various companies. There are challenges that no single company can tackle on its own,[35] and examples of successful business cooperation strategies abound.[36] Well-known global collaborative initiatives include Climate Action 100+,[37] a commitment to reduce emissions by the world's biggest polluters, and the Glasgow Financial Alliance for Net Zero, a coalition of financial institutions to accelerate the "decarbonization of the economy."[38]

Companies often argue that going green can be costly and doing it alone could bring on a "first-mover disadvantage." Since consumers can get cheaper, less environmentally friendly alternatives from competitors, they may decide not to pay extra for the new ecological version, and those pioneering sustainable production might lose out.[39] To avoid this, companies claim, it is essential to join forces and act together as an industry. But this could mean higher prices across entire markets, as well as reduced consumer choice in the event that the

33. Keith Davis, *Five Propositions for Social Responsibility*, 18 BUS. HORIZONS 19, 20–21 (1975); Browne & Giampetro, *supra* note 31, at 472.

34. Jane Marsh, *Corporate Social Responsibility Can Help Companies Go Green*, SUSTAINABILITY TIMES (Sept. 6, 2022), https://www.sustainability-times.com/sustainable-business/corporate-social-responsibility-can-help-companies-go-green/ [https://perma.cc/7GTY-HX28].

35. *See, e.g.*, Sarah Rackoff, *Room Enough for the Do-Gooders: Corporate Social Accountability and the Sherman Act*, 80 S. CAL. L. REV. 1037, 1045 (2007) (referring to Nike's incapability to end sweatshops).

36. Scott, *supra* note 28, at 103.

37. For details, see CLIMATE ACTION 100+, https://www.climateaction100.org [https://perma.cc/NPH8-GSTN].

38. For details, see GLASGOW FIN. ALL. FOR NET ZERO, https://www.gfanzero.com [https://perma.cc/NUU4-WS5N (staff-uploaded archive)].

39. Kevin Coates & Dirk Middelschulte, *Getting Consumer Welfare Right: The Competition Law Implications of Market-Driven Sustainability Initiatives*, 15 EUR. COMPETITION J. 318, 325 (2019). On the topic of first-mover disadvantage, see Johannes Paha, *Sustainability Agreements and First Mover Disadvantages*, 19 J. COMPETITION L. & ECON. 357 *passim* (2023), and Loozen, *supra* note 7, at 1266.

older, more detrimental goods are phased out.[40] At first blush, this outcome sounds very much like the scenario antitrust laws were designed to prevent, and it is precisely what triggers the concerns of the green antitrust movement.

When reflecting on antitrust's negative impact on sustainable collaborations, it should be noted that corporate environmental policies cannot be taken at face value. At times, their sustainable policies are in fact camouflaged self-serving strategies. "Greenwashing" occurs where a company focuses on visible aspects of CSR to give the appearance of caring about the environment but neglects other concealed aspects.[41] This effectively amounts to a marketing strategy rather than a commitment to save the planet. Greenwashing has been said to be "super prevalent" in some industries.[42] Such a risk suggests a cautious approach is required to ensure antitrust policymakers do not throw out the baby with the bathwater. Advocating for attenuating the force of antitrust legislation to defend corporate tactics with little or no environmental value would be counterproductive.

B. *U.S. Antitrust Law and Policy: The Extent of the Sherman Act's Prohibitions*

1. The Legal Framework

Section 1 of the United States' Sherman Antitrust Act,[43] considered "a cornerstone of U.S. economic policy"[44] and the foundation of modern antitrust regimes, condemns "[e]very contract, combination in the form of trust or otherwise, or conspiracy" that restrains interstate trade.[45] This prohibition was drafted using such vague, broad terminology that it could potentially be understood to condemn virtually all corporate conduct.[46] The courts soon took

40. *See generally* Commission Decision 2000/475/EC, Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718. CECED), 2000 O.J. (L 187) 47 [hereinafter *CECED*] (agreement by the European Committee of Domestic Equipment Manufacturers ("CECED") setting energy efficiency standards for washing machines and halting manufacture or import of washing machines that did not meet these standards, which the CECED noted was likely to increase prices of washing machines that must be upgraded).

41. Yue Wu, Kaifu Zhang & Jinhong Xie, *Bad Greenwashing, Good Greenwashing: Corporate Social Responsibility and Information Transparency*, 66 MGMT. SCI. 3095, 3095 (2020).

42. Sarah Gibbens, *Is Your Favorite 'Green' Product as Eco-Friendly as It Claims To Be?*, NAT'L GEOGRAPHIC (Nov. 22, 2022), https://www.nationalgeographic.com/environment/article/what-is-greenwashing-how-to-spot [https://perma.cc/Q66B-9X6K (staff-uploaded-archive)] (quoting Maxine Bédat, Director of the New Standard Institute: "[Greenwashing] is super prevalent. I think we're at the apex of greenwashing in the [fashion] industry.").

43. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

44. Gregory J. Werden, *How Chief Justice White Hampered Development of Limiting Principles for Section 2 of the Sherman Act and What Can Be Done About It Now*, 13 OHIO ST. BUS. L.J. 63, 63 (2019).

45. Sherman Antitrust Act § 1, 26 Stat. at 209.

46. SANDRA MARCO COLINO, COMPETITION LAW OF THE EU AND UK 7 (8th ed. 2019) [hereinafter MARCO COLINO, COMPETITION LAW].

the delineation of the law's contours in their stride. The Supreme Court clarified in 1911 that only unreasonable restraints of trade would be caught.[47] This clarification established the foundations of an essential distinction between the rule of reason and per se illegality. Most kinds of collaborations will be assessed under the former,[48] which requires ascertaining whether the restraints of trade are ancillary to a procompetitive purpose and therefore indispensable to perform a lawful contract.[49] Yet certain types of restrictions are so harmful that they are considered inherently unlawful, or illegal per se. This is the case with price fixing or price boycotts,[50] both of which will struggle to escape the clutches of Section 1. The prohibition applies even in the absence of intent to harm competition, because what is taken into account is whether there is intent to engage in the (illegal) conduct.[51]

In the event that a sustainability-enhancing collaboration is deemed to be illegal, the judiciary is unlikely to override the application of the Sherman Act on environmental grounds. The Supreme Court has insisted that noneconomic ends have no place in antitrust,[52] and according to the Third Circuit, the climate crisis is not "a problem whose solution is found in the Sherman Act."[53] Any concomitant environmental benefits could not justify the anticompetitive harm.

The legal landscape described above suggests that multifirm, environmentally guided projects that raise consumer prices or limit consumer choice (by doing away with cheaper but more harmful options) might be considered per se illegal and therefore irredeemable. In practice, however, the courts have recognized certain exceptions to per se illegality. In 1979, a joint selling agreement relating to blanket music licenses that would typically be per se illegal was held to be lawful because it was not "plainly anticompetitive,"[54] since the restrictions had a procompetitive purpose and helped attain efficiencies.[55] The Supreme Court has similarly found that restraints necessary for the availability of a product cannot be classed as per se unlawful even if they limit price competition.[56] As a consequence, it seems plausible that the courts could establish that environmental collaborations do not breach the Sherman Act even when they raise prices or reduce output, provided that they generate

47. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 42–56 (1911).

48. Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, S. CAL. L. REV. 657, 657–58 (2001).

49. United States v. Addyston Pipe & Steel, 85 F. 271, 282 (6th Cir. 1898).

50. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223–24 (1940); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212–13 (1959).

51. *Socony-Vacuum*, 310 U.S. at 221–22.

52. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 423–24 (1990).

53. Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 414 n.9 (3d Cir. 1997).

54. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979).

55. *Id.* at 21.

56. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 86 (1984).

benefits that neutralize the associated harms and they are indispensable to attain the purported advantages. However, as of February 2024, there is no judicial precedent embracing the legality of joint green initiatives that could fall within the per se category. On the contrary, the case law to date suggests an unwillingness to accept environmental exceptions.[57] This is broadly in line with the U.S. government's position that "the task of balancing the public policy goals of competitive marketplaces and environmental preservation belongs to legislators, not antitrust enforcers."[58] As things stand, therefore, it appears that if green collaborations happen to tread into per se illegal territory, they would remain almost certainly unlawful.

2. The Policy Debate

Voices insisting on the need for flexible antitrust enforcement often refer to the current efficiency-only-focused antitrust policy as the root of the problem.[59] For over four decades, U.S. antitrust has been almost entirely fixated on ensuring that markets produce an efficient result,[60] understood as a situation in which no more mutually advantageous bargains or contracts can be made.[61] This has been so since the late 1970s, when Professor Robert Bork's seminal work *The Antitrust Paradox* proclaimed that consumer welfare, understood as

57. *In re* Multidistrict Vehicle Air Pollution, 538 F.2d 231, 236 (9th Cir. 1976) (positing that antitrust laws do not grant "a broad license to the court to issue decrees designed to eliminate air pollution"); *see also* CYNTHIA HANAWALT, DENISE HEARN & CHLOE FIELD, RECOMMENDATIONS TO UPDATE THE FTC & DOJ'S GUIDELINES FOR COLLABORATION AMONG COMPETITORS 6 (2024) (positing that sustainability "is too broad and imprecise a concept to warrant special exemptions or safe harbors in antitrust law at this time").

58. Org. for Econ. Coop. & Dev. [OECD] Competition Committee, *Horizontal Agreements in the Environmental Context*, at 115, DAF/COMP(2010)39 (Nov. 24, 2011), https://www.oecd.org/en/publications/2011/11/horizontal-agreements-in-the-environmental-context_b5656601.html [https://perma.cc/LT8V-UWMM (staff-uploaded archive)] (contribution of the United States).

59. *See, e.g.*, Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 ECOLOGY L. CURRENTS 219, 220 (2020) (positing that "[b]y focusing primarily on consumer welfare—as measured by prices—antitrust regulators ignore both broader, less tangible harms to society and also potential societal benefits that might flow from anticompetitive behavior"); Miazad, *supra* note 2, at 1666 (regretting that "if collaborations begin to threaten consumer welfare, which has become synonymous with price, output, or efficiency, then antitrust law typically eschews evidence of prosocial intent or impact"); Suzanne Kingston, *Competition Law in an Environmental Crisis*, 10 J. EUR. COMPETITION L. & PRAC. 517, 517 (2019) [hereinafter Kingston, *Competition Law*] (noting that the view that competition law is only about maximizing efficiency "requires urgent revision" to factor in the climate crisis priorities); Holmes, *supra* note 2, at 364 (claiming that "consumer welfare, in the narrow sense of consumer surplus, appears nowhere in the treaties and at most should only be part of a much wider set of goals focusing on both the competitive process and the core goals of the treaty set out above, including for present purposes, sustainability").

60. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977).

61. *See generally* VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY 251–79 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley Publishers 1971) (1906) (providing a foundational theory of economic equilibrium).

"the wealth of the nation," should be the sole goal of antitrust.[62] The term stuck,[63] even though Professor Bork departed from traditional economics and understood consumer welfare as a synonym of efficiency.[64] As a consequence, consumer welfare-driven antitrust only pays attention to wealth maximization, which happens when prices are low, output is high, and consumer choice is wide.[65]

The Antitrust Paradox has proven to be a highly divisive treatise, often blamed for the deep state of underenforcement of U.S. antitrust.[66] At the time it was published, however, it struck a chord with the many who had grown weary of the "state of disarray" of competition law[67] and the difficult administrability of multigoal, excessively ambitious policymaking.[68] Even Harvard Law School Professors Phillip Areeda and Donald Turner advocated in favor of a single yardstick rooted in economic performance for measuring anticompetitive conduct[69] and discarded balancing "populist goals" against efficiency.[70] Professor Bork's ideas, and more broadly those of the Chicago school of economics, helped delineate the contours of the policy transformation, but the sentiment for reform had become rather widespread.

The doctrinal triumph of the Chicago school did not settle the dispute, or, as Professor Eleanor Fox elegantly put it, the "battle for the soul of antitrust."[71]

62. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 90 (1978).

63. Hovenkamp, *Slogans and Goals*, *supra* note 22, at 707.

64. *See, e.g.*, Leah Samuel & Fiona Scott-Morton, *What Economists Mean When They Say "Consumer Welfare Standard*," PROMARKET (Feb. 16, 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/ [https://perma.cc/LL3F-CK6A] (explaining that Bork's use of "consumer welfare" was largely equivalent with efficiency); Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, *in* THE GOALS OF COMPETITION LAW 3, 3–24 (Daniel Zimmer ed., 2012); ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE 43 (1920).

65. Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 66 (2019).

66. *See supra* Introduction; *see supra* note 14 and accompanying text.

67. Okeoghene Odudu, *The Wider Concerns of Competition Law*, 30 OXFORD J. LEGAL STUD. 599, 599 (2010).

68. On administrability issues, see 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 103–13 (1978); D. Daniel Sokol, *Antitrust's "Curse of Bigness" Problem*, 118 MICH. L. REV. 1259, 1280 (2020); Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985); Christine Wilson, Comm'r, U.S. Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019).

69. *See generally* 1–3 AREEDA & TURNER, *supra* note 68 (leading treatise on antitrust law, a central principle of which is that the primary goals of antitrust relate to economic performance).

70. 1 AREEDA & TURNER, *supra* note 68, ¶ 105.

71. Fox, *Battle for the Soul*, *supra* note 22, at 917; *see also* Ezrachi & Stucke, *supra* note 22, at 1 (asking if antitrust is "solely about promoting some form of economic efficiency (or as cynics argue, the interests of the powerful who hide behind a narrow utilitarian approach) or the welfare of the powerless (the majority of citizens who feel increasingly disenfranchised by big government and big business)").

Empirical evidence indicates that some core Chicagoan premises are flawed.[72] One of the principal strands of criticism of the overreliance on the consumer welfare standard stems from the rise of behavioral economics and the ideas of Professors Cass Sunstein and Richard Thaler.[73] The claim is that the assumption that business decisions are rational and profit focused does not always stand, and often they will be influenced by intuitive gut reactions—even errors or bias.[74] From this perspective, scholars have questioned some of the principles that typically justify the Chicago school's *laissez-faireism*.[75] In a similar vein, welfare economics has inspired the view that antitrust policy should take into account well-being and quality of life,[76] enabling antitrust agencies to weigh into their analysis factors that consumers prize above wealth maximization.[77]

The recent emergence of the New Brandeis school may be the beginning of the end of what has been described as "a prolonged pause in an enduring clash over the purpose and values of U.S. antitrust laws."[78] Neo-Brandeisians have prominently denounced the limitations of efficiency as the sole purpose of antitrust.[79] Instead, they claim that the policy is inexorably impregnated with the values of society.[80] They favor an originalist interpretation of antitrust legislation and advocate for applying the law in deference to the will of the

72. *See generally* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008) (compiling works of scholars across the political spectrum who conclude that many of the Chicago school's views contradict reality); Fox, *Battle for the Soul*, *supra* note 22, at 918–19 ("Chicagoans . . . declare that the only significant goal of the Congress that passed the Sherman Act was to enhance consumer welfare (a term that they then misdefine).").

73. *See generally* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) (discussing the importance of an individual's freedom of choice as it pertains to consumer welfare).

74. *See* Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 569–72 (2007) (arguing that rational choice theory is flawed, particularly as it applies to consumer welfare); Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1553–70 (2011) (discussing how behavioral economics can influence antitrust policy).

75. *See, e.g.*, James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J.L. ECON. & POL'Y 779, 780 (2012).

76. *See, e.g.*, Mark Glick, Gabriel A. Lozada & Darren Bush, *Why Economists Should Support Populist Antitrust Goals*, 2023 UTAH L. REV. 769, 812; Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 FORDHAM L. REV. 2575, 2578 (2012); CHRISTOPHER TOWNLEY, ARTICLE 81 EC AND PUBLIC POLICY 50 (2009).

77. Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 590 (2012).

78. Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1656 (2020).

79. *E.g.*, John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008); *see also* Miazad, *supra* note 2, at 1662–64.

80. *See* Kirkwood & Lande, *supra* note 79, at 197–201 (pointing out a potential moral condemnation of monopolistic behavior beyond the economic inefficiency described by Bork).

Congress that adopted it.[81] From this standpoint, the New Brandeis school's representatives express an aversion to concentrated markets,[82] prioritize controlling Big Tech companies,[83] and assert that the competitive process, not efficiency, should be the beacon of antitrust.[84] This approach would open the door for the pursuit of wider political economic goals.

It is too early to grasp the extent to which this school of thought will shape antitrust policy in the years to come. However, some of its principal representatives hold key enforcement positions in the Biden administration. Professor Lina Khan, catapulted to fame when she authored the much-celebrated and deeply divisive student note *Amazon's Antitrust Paradox*,[85] is now the chair of the Federal Trade Commission ("FTC"). The piece may have focused on Jeff Bezos's e-commerce giant, but it contains a general warning about the limitations of consumer welfare-focused antitrust.[86] Similarly, Professor Tim Wu, who acted as Special Assistant to President Biden for Technology and Competition Policy until December 2022, has advocated for breaking up big corporations to prevent them from transforming their market power into political control.[87] Recently announced lawsuits against Google, Amazon, and Apple confirm the drive for change and will test whether the courts are persuaded by the critics of the predominant approach.[88]

81. *See, e.g.*, *id.* at 201–06 (discussing the legislative history of the Sherman Act and arguing that the best explanation of congressional purpose is a desire to protect consumers from unfair pricing practices).

82. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, CPI ANTITRUST CHRON. 12, 18–19 (2018).

83. *See generally* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) [hereinafter Khan, *Amazon*] (arguing that the current antitrust framework must be modified to catch companies behaving like Amazon).

84. *Id.* at 737 (positing that "competition policy should promote not welfare but competitive markets"); *see also* Ohio v. Am. Express, 138 S. Ct. 2274, 2294 (2018) (Breyer, J., dissenting); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE 1, 6 (2015); Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 756 (2014); Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022).

85. Khan, *Amazon*, *supra* note 83; *see* David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html [https://perma.cc/LL75-CSFC (staff-uploaded, dark archive)] (describing the note as "a runaway best-seller in the world of legal treatises").

86. *See* Khan, *Amazon*, *supra* note 83, at 737–46.

87. *See generally* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (arguing for a return to the trustbusting of the 1960s and 1970s to combat economic inequality resulting from the domination of big business).

88. Press Release, U.S. Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies [https://perma.cc/B9ZC-DPQB]; Press Release, Fed. Trade Comm'n, FTC Sues Amazon for Illegally Maintaining Monopoly Power (Sept. 26, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-

While Neo-Brandeisian scholarship does not specifically consider the impact of sustainability objectives on antitrust, it is safe to say that the New Brandeis movement does *not* support loosening antitrust enforcement to enable green collaborations that would normally be prohibited. While it does invite dealing with issues beyond efficiency, the additional problems Neo-Brandeisians want antitrust to tackle all stem from the excessive accumulation of market power.[89] Professor Khan refers to protecting "a host of *political economic* ends,"[90] including fair wages or narrowing the wealth gap (worsened, according to significant scholarship, by market concentration).[91] She has expressly ruled out the consideration of environmental, social, and corporate governance ("ESG") factors to redeem anticompetitive mergers, stating that antitrust enforcers cannot allow "reduced competition in one market in exchange for some *unrelated* commitment or benefit in another."[92] As a consequence, the Biden administration is not expected to soften its stance against per se illegal practices, even when there may be associated environmental gains.[93] To date, however—unlike the Trump administration—

maintaining-monopoly-power [https://perma.cc/GFZ7-N2HJ]; Press Release, U.S. Dep't of Just., Justice Department Sues Apple for Monopolizing Smartphone Markets (Mar. 21, 2024), https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets [https://perma.cc/E8X5-A3BC].

89. *See, e.g.*, Khan, *Amazon*, *supra* note 83, at 737.

90. *Id.* (emphasis added).

91. *See generally, e.g.*, Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017) (examining how market concentration has detrimental consequences for wealth inequality); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 53–59 (2012) (blaming the accumulation of market power for increased wealth inequality and highlighting the risks for democracy); Maurice E. Stucke, *Occupy Wall Street and Antitrust*, 85 S. CAL. L. REV. POSTSCRIPT 33 (2012) (insisting on the problems of capitalisms for middle- and lower-income households, and expressing concerns that government policy favors the powerful); Ariel Ezrachi, Amit Zac & Christopher Decker, *The Effects of Competition Law on Inequality—An Incidental By-Product or a Path for Societal Change?*, 11 J. ANTITRUST ENF'T 51 (2023) (exploring the role of competition law in the reduction of the wealth gap); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015) (exploring possible antitrust policy changes that might help combat market power and inequality); Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI ANTITRUST CHRON. (2017) (reflecting on how antitrust law can affect wealth distribution); Shapiro, *supra* note 15 (discussing how competition policy might respond to increased market concentration); JONATHAN TEPPER & DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION (2018) (showing how the rise of giant corporations has affected the daily lives of American citizens); Shi-Ling Hsu, *Antitrust and Inequality: The Problem of Super-Firms*, 63 ANTITRUST BULL. 104 (2018) (highlighting the limitations of antitrust as a tool to reduce inequality).

92. Lina Khan, *ESG Won't Stop the FTC*, WALL ST. J. (Dec. 21, 2022), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135 [https://perma.cc/RWC8-WCQ3 (staff-uploaded, dark archive)] (emphasis added).

93. *See infra* Section III.B.

the Biden administration has not taken action to challenge green collaborations on antitrust grounds.[94]

Summing up, under current U.S. antitrust policy it would be rare for environmental collaborations to fall foul of Section 1 of the Sherman Act. If they do, however, their positive impact on sustainability objectives would be unlikely to suffice to exclude the application of the law.

C. *The European Union's Antitrust Uniqueness*

Europe is the doctrinal epicenter of the green antitrust discussion. But even beyond Europe's academies, sustainability concerns in fact come into play in its antitrust policymaking. In the summer of 2023, the European Commission published new European Union ("EU") Horizontal Cooperation Guidelines, an entire section of which is dedicated to sustainability agreements.[95] Various EU Member States have similarly published draft guidance on the application of antitrust to environmental cooperations,[96] and Austria has even introduced an exemption for sustainable agreements in its competition legislation.[97] Moreover, the European Commission has occasionally exempted collaborations that, despite being *a priori*

94. *See infra* Section III.B.

95. Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2023 O.J. (C 259) ¶¶ 515–603 [hereinafter EU Horizontal Cooperation Guidelines].

96. *E.g.*, AUTH. FOR CONSUMERS & MKTS., GUIDELINES SUSTAINABILITY AGREEMENTS: OPPORTUNITIES WITHIN COMPETITION LAW (2020) [hereinafter ACM, DRAFT SUSTAINABILITY GUIDELINES] (Neth.), https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf [https://perma.cc/ZS7J-KHVJ]; COMPETITION & MKTS. AUTH., DRAFT GUIDANCE ON THE APPLICATION OF THE CHAPTER I PROHIBITION IN THE COMPETITION ACT 1998 TO ENVIRONMENTAL SUSTAINABILITY AGREEMENTS (2023) (UK), https://assets.publishing.service.gov.uk/media/63fde435e90e0740de2669e7/Draft_Sustainability_Guidance_document__.pdf [https://perma.cc/GL94-MX73]; AUSTRIAN FED. COMPETITION AUTH., GUIDELINES ON THE APPLICATION OF SEC. 2 PARA. 1 CARTEL ACT TO SUSTAINABILITY COOPERATIONS (SUSTAINABILITY GUIDELINES) (2022), https://www.bwb.gv.at/fileadmin/user_upload/AFCA_Sustainability_Guidelines_English_final.pdf [https://perma.cc/9N7C-8SG7]; *see also* COMPETITION & CONSUMER COMM'N SING., GUIDANCE NOTE ON BUSINESS COLLABORATIONS PURSUING ENVIRONMENTAL SUSTAINABILITY OBJECTIVES (2023), https://www.cccs.gov.sg/-/media/custom/ccs/files/public-register-and-consultation/public-consultation-items/guidance-note-on-sustainability-for-business-collaboration-public-consult-20-jul-23/draft-environmental-sustainability-collaboration-gn-for-public-consultation_clean.ashx [https://perma.cc/K5H5-M8NW (staff-uploaded archive)].

97. KARTELL- UND WETTBEWERBSRECHTS-ÄNDERUNGSGESETZ 2021 [KAWERÄG 2021] [ANTITRUST AND COMPETITION LAW CHANGE ACT 2021] BUNDESGESETZBLATT I [BGBL I] No. 176/2021, art. 1 ¶ 7, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_176/BGBLA_2021_I_176.pdfsig [https://perma.cc/7G9A-NQPV (staff-uploaded archive)] (Austria); *see* Viktoria H.S.E. Robertson, *Sustainability: A World-First Green Exemption in Austrian Competition Law*, 13 J. EUR. COMPETITION L. & PRAC. 426, 426 (2022).

anticompetitive, were found to bear compensatory environmental benefits.[98] Unsurprisingly, proponents of green antitrust in the United States often see Europe as the touchstone for permissiveness towards environmental cooperation.[99]

Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), the equivalent of Section 1 of the Sherman Act, prohibits "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."[100] The principles underpinning both the U.S. and EU legislation might be similar, but these provisions hardly share any common ground when it comes to drafting and structure. The wording of Article 101 TFEU, as seen above, is entirely different to that of Section 1 of the Sherman Act. It reflects how EU competition law oozes a "distinctly European approach to anti-competitive conduct."[101]

To be clear, the consumer welfare standard, understood *à la* Professor Bork, also plays a pivotal role in European competition policy. This has been particularly so since the late 1990s, when the European Commission announced a policy reform aiming to adopt a "more economic approach" to antitrust.[102] The European Commission frequently reminds us of the importance that

98. *See generally CECED*, *supra* note 40 (exempting the CECED from the Article 101(1) TFEU prohibition).

99. *See* Miazad, *supra* note 2, at 1645 (stating that "European competition authorities are not only cognizant of this potential conflict, but are actively debating whether competition policy is thwarting the private sector's ability to meet the goals of the European Union's Green Deal"); *id.* at 1681 (explaining that in the European Union "there is a sense of urgency to address competition policy's potentially chilling effect on the private sector's efforts to meet ambitious Green Deal milestones"); Dailey C. Koga, Comment, *Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change*, 95 WASH. L. REV. 1989, 2007 (2020) (claiming that "the European Commission has expressed its support of the Dutch Guidelines and is even considering adding a sustainability exception to the Commission's own competition rules in 2022"). It should be noted that this is not entirely accurate. The European Union has not considered an exception. The following source simply mentions that, as of 2022, the Commission "is looking closely at including sustainability agreements into the updated Horizontal Block Exemption Regulation." SALOMÉ CISNAL DE UGARTE, RAPHAËL FLEISCHER & IVAN PICO, HOGAN LOVELLS, COMPETITION LAW AND SUSTAINABLE GROWTH: THE DUTCH COMPETITION AUTHORITY CONSULTS ON GUIDELINES THAT PAVE THE WAY FOR MORE FLEXIBILITY IN THE FIELD 1 (2020), https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2020-pdfs/2020_07_21_competition-law-and-sustainable-growth.pdf [https://perma.cc/4HSL-5VHX].

100. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Oct. 26, 2012, 2012 O.J. (C 326) 88 [hereinafter TFEU].

101. MARCO COLINO, COMPETITION LAW, *supra* note 46, at 7. *See generally* DAVID J. GERBER, LAW AND COMPETITION POLICY IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 392–417 (1998) (examining how Europe's many diverse societies and systems have shaped its competition law into its present form).

102. *Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, 1999 O.J. (C 132) 1, 30.

enforcement "remains anchored to the consumer welfare standard."[103] At the same time, the inclusion of antitrust provisions in a treaty that pursues a host of assorted objectives has undoubtedly influenced EU competition policy development. The wide purposes of the TFEU partly explain why efficiency-only antitrust policymaking was never fully adopted in Europe.[104] The competition law rules play a pivotal role in the attainment of the TFEU's miscellaneous aims. They are particularly important to support free movement across the EU and the removal of obstacles to trade.[105] Strengthening the internal market by acting as a critical spur for integration is an explicit goal of EU competition law.[106]

The TFEU refers to a range of EU goals besides integration, including the promotion of employment and education,[107] consumer protection,[108] and social cohesion.[109] For our purposes, however, the most relevant obligation can be found in Article 11 TFEU, and it is the duty to integrate "environmental protection requirements . . . into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."[110] This wording compels enforcers, first, to interpret competition law provisions in a fashion that is "consistent with environmental protection requirements,"[111] and second, to balance competition goals on par with sustainability objectives.[112]

The balancing exercise antitrust agencies must conduct can be done via various tools.[113] *In extremis*, the EU judiciary has been known to set aside the

103. Alexandra Badea, Marin Bankov, Graça Da Costa, José Elías Cabrera, Senta Marenz, Kevin O'Connor, Ekaterina Rousseva, Johannes Theiss, Andrea Usai, Sofia Vasileiou, Alexander Winterstein & Marc Zedler, *Competition Policy in Support of Europe's Green Ambition*, at 6, Directorate-General for Competition, Competition Policy Brief No. 01/2021 (Sept. 2021), https://data.europa.eu/doi/10.2763/962262 [https://perma.cc/FKW7-9U24].

104. Pablo Ibáñez Colomo, *Changing Times for JECLAP, Changing Times for Competition Law*, 8 J. EUR. COMPETITION L. & PRAC. 477, 477 (2017) (positing that the more economic approach "failed to win the hearts and minds" of EU competition law experts).

105. Case C-126/97, Eco Swiss China Time Ltd v. Benetton Int'l, ECLI:EU:C:1999:269 ¶ 36 (June 1, 1999) (stating that EU competition law is "essential for the accomplishment of the tasks entrusted to the [European Union] and, in particular, for the functioning of the internal market").

106. Joined Cases 56 & 58/64, Établissements Consten, S.A.R.L. v. Comm'n, 1966 E.C.R. 299, 327–28.

107. TFEU, *supra* note 100, art. 9.

108. *Id.* art. 12.

109. *Id.* art. 174(1).

110. *Id.* art. 11.

111. Martin Wasmeier, *The Integration of Environmental Protection as a General Rule for Interpreting Community Law*, 38 COMMON MKT. L. REV. 159, 161–62 (2001).

112. JULIAN NOWAG, ENVIRONMENTAL INTEGRATION IN COMPETITION AND FREE-MOVEMENT LAWS 30 (2016) [hereinafter NOWAG, ENVIRONMENTAL INTEGRATION].

113. In addition to Article 101(3) TFEU, discussed here, Professor Or Brook refers to such tools as block exemption regulations, the scope of the Article 101(1) TFEU prohibition, national balancing

TFEU's competition law provisions when their application precludes the implementation of a legitimate activity inherently requiring proportionate restrictions of competition.[114] But this principle—frequently referred to as the *Wouters* doctrine—has not been extended to environmental causes, and the Court of Justice of the European Union recently clarified that *Wouters* cannot apply to restrictions that have an anticompetitive object.[115] Thus far, the European Commission has been reluctant to condone anticompetitive agreements on the basis that they are essential to pursue sustainability.[116]

Fortunately, the TFEU itself contains a formal balancing mechanism. The third paragraph of Article 101 TFEU includes an escape route for collaborations deemed prohibited following an investigation but that nonetheless generate sufficient efficiencies to compensate for the harms identified. Article 101(3) TFEU applies when the parties can show that their agreement meets four requirements, namely that it (1) "contributes to improving the production or distribution of goods or to promoting technical or economic progress," (2) allows "consumers a fair share of the resulting benefit," (3) refrains from imposing "on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives," and (4) does not give the parties "the possibility of eliminating competition in respect of a substantial part of the products."[117] This exception can potentially apply to restrictions of competition by object, or inherently harmful restraints generating a presumption of detrimental competition effects. Most forms of cooperation pursuing social (including environmental) benefits are not prohibited.[118] However, price fixing and output restrictions are typical examples of cooperation with an anticompetitive object. As seen above,[119] agreements between competitors to neutralize a prospective first-mover disadvantage could have effects on price and output, so they could fall in this category.

The traditional interpretation of this provision suggests that environmental cooperation agreements falling within the Article 101(1) TFEU prohibition will usually meet the first, third, and fourth conditions of Article 101(3) with relative ease.[120] The second condition, however, is more challenging.

instruments, and enforcement discretion. OR BROOK, NON-COMPETITION INTERESTS IN EU ANTITRUST LAW 139–49, 193–205 (2022).

114. Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, ECLI:EU:C:2002:98 ¶ 110 (Feb. 19, 2002); Case C-519/04, Meca-Medina v. Comm'n ECLI:EU:C:2006:492 ¶ 42 (July 18, 2006); *see also* Case C-333/21, Eur. Superleague Co. SL v. UEFA, ECLI:EU:C:2023:1101 ¶¶ 183–88 (Dec. 21, 2023).

115. Case C-680/21, SA Royal Antwerp Football Club v. Union Royale Belge des Sociétés de Football Association ASBL (URBSFA), ECLI:EU:C:2023:1010 ¶¶ 113–17 (Dec. 21, 2023).

116. EU Horizontal Cooperation Guidelines, *supra* note 95, ¶ 518.

117. TFEU, *supra* note 100, art. 101(3).

118. EU Horizontal Cooperation Guidelines, *supra* note 95, ¶¶ 529–31.

119. *See supra* Section I.A.

120. EU Horizontal Cooperation Guidelines, *supra* note 95, ¶¶ 559–93.

For consumers to get a "fair share" of the benefits of the arrangement, those benefits must materialize either in the relevant market affected by the anticompetitive conduct or in a related market that encompasses the same group of consumers.[121] Crucially, full compensation of the (present or future) consumers harmed by the restriction is paramount.[122] This renders almost impossible taking into account social advantages like improved environmental circumstances when the arrangements do not additionally purport compensatory benefits for the affected consumers.

The new EU Horizontal Cooperation Guidelines try to fill this lacuna by referring to three kinds of environmental benefits that may be considered. The first, individual use value benefits, are the traditional direct benefits for the affected consumers. The second, individual nonuse value benefits, are benefits for others that the harmed consumers are aware of and are willing to pay for.[123] These may be calculated by assessing consumers' willingness to pay.[124] The third, collective benefits, ensue "irrespective of the consumers' individual appreciation of the product" and "accrue to a wider section of society than just consumers in the relevant market."[125] It is possible to take into account these social gains "provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same."[126] This requires a considerable overlap between the consumers paying for the efficiencies and their beneficiaries. The EU Horizontal Cooperation Guidelines also require that the gains are enough to *compensate* these consumers for the harms suffered,[127] and that the favorable impact on consumers is "clearly identifiable."[128] It is the parties who bear the (colossal) onus of demonstrating that their agreement meets these conditions.

The revised Guidelines show a determination to protect the effectiveness of antitrust. The European Commission is reluctant to abandon the orthodox interpretation of the consumer compensation requirement of Article 101(3) TFEU but acknowledges the importance of wider environmental benefits. The Commission thus tries to find a route to weigh social benefits within the boundaries of the consumer welfare standard. It is willing to accept that consumers are fully compensated if either those consumers are aware of the

121. Commission Notice, *Guidelines on the Application of Article 81(3) of the Treaty*, 2004 O.J. (C 101) 97 ¶ 43 (Apr. 27, 2004).

122. *Id.* ¶ 85; EU Horizontal Cooperation Guidelines, *supra* note 95, ¶ 569 (establishing that redeeming sustainability improvements "must accrue to the consumers of the products covered by that agreement").

123. EU Horizontal Cooperation Guidelines, *supra* note 95, ¶¶ 571–81.

124. *Id.* ¶ 578.

125. *Id.* ¶ 582.

126. *Id.* ¶ 583.

127. *Id.* ¶ 584.

128. *Id.* ¶ 589.

nonrecoverable costs and are happy to cover them, or if they will enjoy the associated advantages even though they are not eager to pay. This approach might seem like a reasonable way to balance antitrust and sustainability objectives, but it does raise a number of important issues. The most notorious is the danger that comes with leaving social benefits in the hands of consumers. Studies indicate that consumers are increasingly aware of the climate crisis and willing to do (and pay for) their part to reduce environmental harm.[129] Yet, the data available as of late 2023 suggest there is still a long way to go.[130] Consumers do not always understand the importance of sustainable consumption, and even when they do, some cannot afford to pay the extra price.[131] Furthermore, the Guidelines' strategy raises a serious ethical concern. It is not uncommon for multinationals to house their production in developing countries. According to the Guidelines, any environmental measures benefiting the population in these countries would not suffice to offset anticompetitive harm if the consumers of the goods, principally sited in higher income regions, are not willing to pay.

As expounded in this section, therefore, the European Commission has been rather quick to attempt to deal with the potential clash of sustainability and antitrust goals. It has expanded, albeit modestly, the interpretation of the second condition of the Article 101(3) TFEU exception (the most challenging for environmental collaborations between competitors). In the event that an agreement is prohibited, and an environmental agreement can only be saved by Article 101(3), consumers can be considered compensated even if they do not recover the costs. They would need to be willing to pay for the benefits or able to enjoy the purported efficiencies. Despite this modest concession, the European Commission is otherwise committed to healthy competition law enforcement and refuses to give up on the benefits of its antitrust policy. The

129. Piet Eichholtz, Nils Kok & John M. Quigley, *Doing Well by Doing Good? Green Office Buildings*, 100 AM. ECON. REV. 2492, 2493 (2010) ("Evaluations of the social responsibility of private firms have become an investment criterion for some investors . . . ."); Ramon Casadesus-Masanell, Michael Crooke, Forest Reinhardt & Vishal Vasishth, *Households' Willingness to Pay for "Green" Goods: Evidence from Patagonia's Introduction of Organic Cotton Sportswear*, 18 J. ECON. & MGMT. STRATEGY 203, 227 (2009) (showing that Patagonia's customers were willing to pay substantial price premiums for green goods); Christoph Herrmann, Sebastian Rhein & Katharina Friederike Sträter, *Consumers' Sustainability-Related Perception of and Willingness-to-Pay for Food Packaging Alternatives*, 181 RES. CONSERVATION & RECYCLING, Feb. 9, 2022, at 1, 11 (showing there is a willingness to pay among consumers for packaging alternatives that consumers perceive to be sustainable).

130. *See, e.g.*, Fiona Harris, Helen Roby & Sally Dibb, *Sustainable Clothing: Challenges, Barriers and Interventions for Encouraging More Sustainable Consumer Behaviour*, 40 INT'L J. CONSUMER STUD. 309, 312–13 (2016); William Young, Kumju Hwang, Seonaidh McDonald & Caroline J. Oates, *Sustainable Consumption: Green Consumer Behaviour when Purchasing Products*, 18 SUSTAINABLE DEV. 20, 25–28 (2010); Ninh Nguyen & Lester W. Johnson, *Consumer Behaviour and Environmental Sustainability*, 19 J. CONSUMER BEHAV. 539, 539–40 (2020).

131. Katherine White, David J. Hardisty & Rishab Habib, *The Elusive Green Consumer*, HARV. BUS. REV. (July–Aug. 2019), https://hbr.org/2019/07/the-elusive-green-consumer [https://perma.cc/7DK7-RDY4].

EU judiciary appears to support this view, more recently with the exclusion of object restrictions from the *Wouters* principle.[132]

The existence of an efficiency exception potentially applicable to all kinds of restrictions of competition in the EU legal framework makes it somewhat easier to consider environmental benefits under the TFEU's antitrust provisions than under the Sherman Act. That said, the U.S. federal antitrust agencies have been almost too silent on the topic at a time when many of their counterparts around the world are trying to tackle the issue head on.

II. THE DOCTRINAL FOUNDATIONS OF THE GREEN ANTITRUST MOVEMENT

The law may have boundaries when it comes to assessing sustainability matters in antitrust, but the scholarly community does not. There have been attempts to label and define the movement that explores how antitrust can best serve environmental purposes. The existing literature suggests that neither the terminology to refer to this trend nor the frontiers of the discussion have been definitively settled. This part explores the concept of green antitrust (the most commonly used term) as well as the alternative labels for the concept that commentators have floated. I consider the works of those scholars, practitioners, legislators, and policymakers that have been included under the green antitrust umbrella and discuss what—if any—common ground unites them. The purpose of this analysis is to establish the extent to which it is possible to talk about a homogenous movement emerging. I also look at additional authors focusing on antitrust and sustainability that have not been classified as "green antitrust" scholars, either because their works are too recent or because their views do not fit within the orthodox definition of the movement.

A. *Terminology Issues: Green Antitrust, Prosocial Antitrust, Flexible Antitrust*

The tag "green antitrust" may evoke positive connotations, but it was coined by some of the most fervent opponents to the movement. According to Professors Maarten Pieter Schinkel and Leonard Treuren, green antitrust advocates push for a revision of antitrust, "as far as [its rules] may stand in the way of companies contributing to sustainability factors and a climate-neutral economy."[133] This conceptualization suggests the movement supports less, or flexible, enforcement. Similarly, for law firm partner Cento Veljanovski, green antitrust pushes for "more permissive competition law that condones collusion and market power" in the event that the anticompetitive conduct pursues

132. Case C-680/21, SA Royal Antwerp Football Club v. Union Royale Belge des Sociétés de Football Associations ASBL (URBSFA), ECLI:EU:C:2023:1010 ¶¶ 113–17 (Dec. 21, 2023).

133. Maarten Pieter Schinkel & Leonard Treuren, *Green Antitrust: (More) Friendly Fire in the Fight Against Climate Change* 2 (Amsterdam Ctr. for L. & Econ., Working Paper No. 2020-07, 2021) [hereinafter Schinkel & Treuren, *Green Antitrust*].

environmental objectives.[134] Edith Loozen, a former practitioner and antitrust researcher, explains how green antitrust defenders posit that the "strict enforcement of Article 101 TFEU obstructs [sustainable consumption and production]."[135] Loozen also uses green antitrust as a synonym for flexible antitrust, which she defines as a situation in which "the promotion of sustainability may prevail over the protection of competition."[136]

Despite the predominance of this conception, it is unfortunate that it equates green antitrust to lighter enforcement. Environmentally friendly antitrust need not be lax. When Professor Giorgio Monti expounded possible routes to make competition law greener, he found that the "deepest green" option would be to use antitrust legislation to punish environmentally harmful conduct.[137] This would mean more, rather than less, enforcement would be required to boost the law's environmental potential. Yet Professors Schinkel and Treuren's definition of green antitrust has caught on and is quite often relied on in related literature.[138] An alternative term used to describe a competition policy that can "accommodate this rising tide of prosocial collaboration" is "prosocial antitrust," coined by Professor Amelia Miazad.[139] It is broader than green antitrust, as it would encompass other social purposes as well as environmental issues. To be prosocial, Professor Miazad claims, antitrust needs to be loosely applied, since in her view the law "currently prevents or discourages companies from working together to address systematic environmental and social risks, leading to an impasse."[140] Therefore, much like green antitrust, the meaning of prosocial antitrust is akin to flexible enforcement. Research grounded on Professor Miazad's work has gone as far as describing antitrust as an "environmental problem."[141]

134. Veljanovski, *supra* note 7, at 502.

135. Loozen, *supra* note 7, at 1266.

136. *Id.*

137. Giorgio Monti, *Four Options for a Greener Competition Law*, 11 J. EUR. COMPETITION L. & PRAC. 124, 130 (2020).

138. *See, e.g.*, Jignesh Tanwar, *Rethinking Green Antitrust: The Double-Edged Opportunities in Pursuit of a Circular Australian Economy*, U.N.S.W. L.J.F., Nov. 2023, at 1, 2 (supporting Professors Schinkel and Treuren's definition of green antitrust and explaining that collusion would be allowed when it has "discernible environmental benefits"). In addition, Professor Viktoria Robertson calls the exemption recently introduced in Austria's competition law for environmental agreements a "green antitrust provision." Viktoria H.S.E. Robertson, *The World's First Green Antitrust Provision Shows that Climate Action Is the Newest Antitrust Frontier*, PROMARKET (Mar. 10, 2022), https://www.promarket.org/2022/03/10/the-worlds-first-green-antitrust-provision-shows-that-climate-action-is-the-newest-antitrust-frontier/ [https://perma.cc/28DQ-GMT3].

139. Miazad, *supra* note 2, at 1644.

140. *Id.* at 1696.

141. Ajay Culhane-Husain, *Reframing Antitrust Law as an Environmental Problem*, YALE ENV'T REV. (Nov. 17, 2023), https://environment-review.yale.edu/reframing-antitrust-law-environmental-problem [https://perma.cc/F5Y7-AQYW].

B. *The Assorted Perspectives of Green Antitrust Proponents*

1. A (Predominantly) European Discussion

One of the earliest works considered part of the green antitrust movement is by Professor Christopher Townley. In 2009, Professor Townley's treatise *Article 81 EC and Public Policy* argued in favor of protecting noneconomic (including environmental) concerns via competition law, partly on the grounds that antitrust might be the only tool in the arsenal of the enforcer to protect these objectives.[142] In his view, a jurisdiction "may not have the legal capability to achieve the end by other means."[143] This would happen, for instance, if the EU wanted to take action in an area in which it had no express competence to act.[144] His position was subject to criticism and spawned a famous debate with Professor Okeoghene Odudu.[145] For Professor Odudu, "whether efficiency should be set aside in order to promote socially responsible drinking, reduce consumption of tobacco, or promote a sustainable environment is a question for the legislature," not antitrust agencies.[146]

Professor Townley may be considered one of the propellers of green antitrust, but the most detailed work to date focusing specifically on sustainability and competition law is *Greening EU Competition Law and Policy*, by University College Dublin law professor and EU General Court Judge Suzanne Kingston.[147] At first blush, Judge Kingston's work seems to largely support less antitrust, yet in reality, she takes a more nuanced view.[148] She considers both making exceptions to EU competition law to allow for green collaborations and the possibility of punishing anticompetitive behavior that bears negative environmental consequences.[149] Ultimately, she finds it "unacceptable" that environmental benefits are excluded from competition assessment, but asserts that "companies should not, of course, be allowed to use environmental reasons as a pretext for collusion."[150]

Defenders of flexible enforcement include multiple practitioners. Rather conveniently, a sustainability defense could provide an opportunity to further

142. TOWNLEY, *supra* note 76, at 39.

143. *Id.*

144. *Id.* In this regard, it should be noted that the European Union can only take action in those areas in which the Treaties (be it the TFEU or the Treaty on the European Union) confer on it competence to do so. *See* PAUL CRAIG, EU ADMINISTRATIVE LAW 367–99 (2012).

145. *See generally* Odudu, *supra* note 67 (responding to Professor Townley's view of competition law as a tool to promote general well-being).

146. *Id.* at 609.

147. *See generally* SUZANNE KINGSTON, GREENING EU COMPETITION LAW AND POLICY (2011).

148. *See generally, e.g.*, Kingston, *Competition Law*, *supra* note 59 (showcasing Judge Kingston's nuanced views on antitrust).

149. *Id.* at 517.

150. *Id.* at 517–18.

insulate their clients' arrangements from antitrust liability. Simon Holmes, now at the Competition Appeals Tribunal and previously head of King Wood & Malleson's competition law practice, is perhaps the green antitruster *par excellence*. His article *Climate Change, Sustainability, and Competition Law* has become referential in the debate.[151] Holmes claims that competition law should "cease to be 'part of the problem' and become 'part of the solution.'"[152] A result of the fear of antitrust liability, he argues, is that "important initiatives that could help combat climate change are stifled or stillborn."[153] From this perspective, he proposes a palette of solutions that range from policy statements to law (including TFEU) reform.[154] This sentiment is echoed by several other well-known antitrust practitioners.[155]

As seen in the previous section, the conventional definition of green antitrust points to a preference for loosening up the application of competition law.[156] Yet the ongoing discussion on the interaction between antitrust and sustainability is much broader and richer. Multiple other scholars have focused on the impact of sustainability in antitrust from various standpoints, contemplating a range of ways to consider the environmental benefits of collaborations in antitrust policy and enforcement. Professor Monti, for instance, has put forward various proposals, ranging from a *Wouters*-like exception that would exclude sustainability agreements from the scope of the competition law provisions, to the use of "competition law to punish conduct that harms the environment."[157] Professor Anna Gerbrandy favors adjusting competition policy to make it more sustainability minded.[158] She grounds her solutions on a revision of the goals of antitrust to embrace a more ambitious

151. *See generally* Holmes, *supra* note 2.

152. *Id.* at 405.

153. *Id.* at 357.

154. *Id.* at 402–05.

155. *See, e.g.*, Pierre Zelenko & Nicole Kar, *Sustainability Goals: Is Competition Law Cooperating?*, LINKLATERS (2020), https://s3.amazonaws.com/documents.lexology.com/08613f12-1702-4981-ad21-d5fe7e3f1c9f.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1727447828&Signature=Zx67HzIn9geT2d3otijQvJhn%2FOE%3D [https://perma.cc/8E2V-QA44 (staff-uploaded archive)] (pondering whether competition law may be "a major obstacle to achieving sustainability objectives" and speculating that "competition enforcement may have prevented many [green] agreements getting off the ground"); Coates & Middelschulte, *supra* note 39, at 319 (claiming that antitrust may be seen as "an obstacle for competitors to cooperate in order to scale-up their contribution to deliver on the [UN Sustainable Development Goals]"); Dolmans, *supra* note 11 (contending that in the event that consumers are unwilling or unable to pay for environmental benefits, "cooperation should be allowed, as a complementary tool [to competition], to spread the costs [of environmental initiatives], reduce the risks, and speed up reduction of greenhouse emissions").

156. *See supra* Section II.A.

157. Giorgio Monti, *supra* note 137, at 130.

158. *See generally* Gerbrandy, *supra* note 3 (providing a "succinct evaluation . . . of several options for solving the sustainability deficit").

approach beyond consumer welfare.[159] Professor Gerbrandy is nonetheless concerned that expecting antitrust to solve environmental issues could resuscitate the legal uncertainty that the "more economics" reform of the early 2000s attempted to overcome.[160]

Another powerful voice in the discussion is Professor Julian Nowag.[161] Competition and sustainability, Professor Nowag insists, need not be in conflict.[162] In some cases, sustainability and antitrust enforcement may also have positive environmental consequences, and the law will not normally stand in the way of green collaborations since "not every restriction of commercial freedom is considered to be a restriction of competition."[163] When there is a harmful competitive impact resulting from environmental projects, more often than not, the agencies have tools to balance the goals in conflict.[164] My own research has shown that, indeed, antitrust enforcement can bear beneficial social (including environmental) repercussions.[165]

Other recent works have focused on specific aspects of competition law. Elias Deutscher and Stavros Makris propose designing new merger theories of harm that would enable agencies to take into account sustainability aspects when assessing business concentrations.[166] Emanuela Lecchi, also writing on mergers, warns about the risks of an overly ambitious antitrust policy but acknowledges that it might be possible to give more weight to sustainability issues in merger appraisal.[167] Professor Marios Iacovides and Christos Vrettos's research finds a link between market power and business conduct that harms the environment.[168] On this basis, they claim that competition law's real "sustainability gap" actually resides in the limited enforcement and scholarship that has explored the

159. Rutger Claasen & Anna Gerbrandy, *Rethinking EU Competition Law: From a Consumer Welfare to a Capability Approach*, 12 UTRECHT L. REV. 1, 14–15 (2016).

160. Gerbrandy, *supra* note 3, at 544.

161. *See generally* NOWAG, ENVIRONMENTAL INTEGRATION, *supra* note 112 (discussing the intersections between TFEU environmental protection requirements, competition law, state aid law, and free-movement law and suggesting approaches for their balanced integration); *see also* NOWAG, SUSTAINABILITY AND COMPETITION, *supra* note 5, at 3.

162. Nowag, *Antitrust and Sustainability*, *supra* note 13.

163. *Id.*

164. *See* NOWAG, ENVIRONMENTAL INTEGRATION, *supra* note 112, at 215–23 (discussing agency tools to balance competition and sustainability); NOWAG, SUSTAINABILITY AND COMPETITION, *supra* note 5, at 17.

165. *See generally* Marco Colino, *Antitrust's Social*, *supra* note 6 (expanding on the beneficial repercussions antitrust enforcement can lead to).

166. *See* Elias Deutscher & Stavros Makris, *Sustainability Concerns in EU Merger Control: From Output-Maximising to Polycentric Innovation Competition*, 11 J. ANTITRUST ENF'T 350, 381–82 (2023).

167. Emanuela Lecchi, *Sustainability and EU Merger Control*, 44 EUR. COMPETITION L. REV. 70, 80 (2023).

168. Marios C. Iacovides & Christos Vrettos, *Falling Through the Cracks No More? Article 102 TFEU and Sustainability: The Relation Between Dominance, Environmental Degradation, and Social Injustice*, 10 J. ANTITRUST ENF'T 32, 38–40 (2022).

potential use of the law condemning abuses of market power "as a sword to strike down unsustainable business practices."[169]

2. How Green Antitrust is Permeating U.S. Scholarship

The works referenced above cover issues of global relevance, but mainly focus on the impact of sustainability on the application of EU competition law.[170] Since the late 2010s, a growing body of scholarship has pondered how environmental concerns should affect the enforcement of the Sherman Act. Much like in Europe, the American discussion is somewhat skewed towards situations in which competition and sustainability objectives clash—fitting, therefore, in the conventional conception of green antitrust. There is, however, noteworthy multidimensional research. One of the most complete articles is Professor Sarah Light's *The Law of the Corporation as Environmental Law*.[171] It explores how antitrust can both "mandate or prohibit environmentally positive behavior by firms."[172] In the mandate category are those situations in which a positive environmental outcome is achieved via antitrust enforcement.[173] Conversely, when there is a clash between the promotion of competition and the protection of conservation, Professor Light reckons that antitrust could prohibit or discourage green business initiatives.[174]

More recently, a group of scholars at Columbia Law School's Sabin Center for Climate Change Law and the Columbia Center on Sustainable Investment has been attempting to "identify the boundaries of competition and collaboration in markets as they impact non-economic benefits, particularly with respect to sustainability initiatives."[175] In a 2023 report on the topic, Denise Hearn, Cynthia Hanawalt, and Lisa Sachs argued that antitrust's environmental role should complement, rather than replace, regulatory solutions.[176] Governments, not businesses, should be laying down the rules, but private actors are "important secondary tools" for sustainability, and therefore clarity

169. *Id.* at 45.

170. For a comparative analysis, see generally Marco Colino, *Antitrust's Social*, *supra* note 6.

171. *See generally* Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137 (2019).

172. *Id.* at 171.

173. *Id.* at 175.

174. *Id.* at 176–77.

175. Cynthia Hanawalt & Denise Hearn, *Antitrust Reading List: Competitor Collaborations and Sustainability*, CLIMATE L.: SABIN CTR. BLOG (July 11, 2023), https://blogs.law.columbia.edu/climatechange/2023/07/11/antitrust-reading-list-competitor-collaborations-and-sustainability/ [https://perma.cc/XZT9-X8JH].

176. *See* DENISE HEARN, CYNTHIA HANAWALT & LISA SACHS, COLUMBIA CTR. ON SUSTAINABLE INV. & SABIN CTR. FOR CLIMATE CHANGE L., ANTITRUST AND SUSTAINABILITY: A LANDSCAPE ANALYSIS 56 (July 2023), https://ccsi.columbia.edu/sites/default/files/content/docs/Antitrust-Sustainability-Landscape-Analysis.pdf [https://perma.cc/Y6QZ-BB59].

from antitrust enforcement agencies is critical.[177] Beyond the impact of antitrust on green collaborations, the authors highlight the crucial role antitrust could play in fostering sustainability by, for instance, "[r]evamping merger policy to address concentrations of corporate power which may undermine environmental aims," or using consumer protection mandates "to address greenwashing and deceptive marketing."[178] In May 2024, the Center published a set of recommendations[179] for the FTC and the Department of Justice ("DOJ") to update their joint *Antitrust Guidelines for Collaborations Among Competitors*.[180] The recommendations do not favor sustainability exceptions to the law. Rather, they advocate for greater clarity via the inclusion of "sustainability-related examples of permissible collaborations"[181] and, in general, a willingness on the part of the antitrust agencies to engage in "good faith discussion with groups who have genuine questions about how to structure their collaborations."[182]

Despite these excellent studies, the bulk of the U.S. literature supports flexible enforcement. This is in part because it echoes the concerns articulated by Professor Inara Scott in her 2016 article *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*,[183] one of the earliest pieces on the topic in the United States. Professor Scott worried that "until there is some signal that courts will not reject collaborations affecting price without further examination, such cooperative arrangements among producers are unlikely to exist."[184] Following a similar logic, Professor Miazad asserts that the rule of reason should always apply to collaborations between competitors addressing societal or environmental risks, "even if the collaboration will necessarily increase price or reduce output."[185] Paul Balmer has expressed concerns that, "[a]s corporations pursue socially responsible strategies—whether on climate change or other social causes—the threat of antitrust enforcement looms."[186] For Dailey Koga, the "appropriate channel for change would be a congressional exemption for sustainability agreements."[187] While they make some valid points,

177. *Id.*

178. *Id.* at 15.

179. *See generally* HANAWALT ET AL., *supra* note 57 (outlining several recommendations to the FTC and DOJ).

180. FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 1 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [https://perma.cc/H2UL-4EDK].

181. HANAWALT ET AL., *supra* note 57, at 5.

182. *Id.*

183. *See generally* Scott, *supra* note 28.

184. *Id.* at 133.

185. Miazad, *supra* note 2, at 1690.

186. Balmer, *supra* note 59, at 223.

187. Koga, *supra* note 99, at 1992.

these authors may be overlooking the advantages of competitive markets and the importance antitrust plays in protecting them.

3. Green Antitrust Legislators and Policymakers

Some legislators and enforcers have also displayed a readiness to embrace flexibility. The Hungarian competition legislation, introduced in the 1990s, contemplates the possibility of redeeming an anticompetitive agreement when it "contributes to . . . the improvement . . . of the protection of the environment."[188] China's Anti-Monopoly Law has also contained an exemption for environmental agreements since its enactment in 2007.[189] Austria introduced a similar exemption in 2021,[190] yet to date neither country has applied the saving clause in practice. Antitrust agencies in the Netherlands, U.K., Austria, and Singapore have recently published guidance on sustainable cooperation.[191] The European Commission's new EU Horizontal Cooperation Guidelines cover sustainability agreements at length,[192] and the Commission has also published specific guidelines for sustainability-oriented cooperation between agricultural producers.[193]

In practice, the European Commission has exempted environmental agreements from Article 101(1) TFEU, but not on the basis of sustainability benefits. In its *CECED* decision,[194] it found that an agreement between washing machine producers to make more expensive, energy-efficient appliances and remove the cheaper alternatives from the market was justified.[195] The European Commission did mention that the advantages for society, measured in terms of the reduced damage from carbon emissions, would be "more than seven times greater than the increased purchase costs of more energy-efficient washing

188. 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices), art. 17(a) (Hung.).

189. Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 24, 2022, effective Aug. 1, 2022), art. 20, https://www.samr.gov.cn/zw/zfxxgk/fdzdgknr/fgs/art/2023/art_f0fae9eb3a684fc39e84d89eabfc2caa.html [https://perma.cc/BN6L-KPGK].

190. KARTELL- UND WETTBEWERBSRECHTS-ÄNDERUNGSGESETZ 2021 [KAWERÄG 2021] [ANTITRUST AND COMPETITION LAW CHANGE ACT 2021] BUNDESGESETZBLATT I [BGBL I] No. 176/2021, art. 1 ¶ 7, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_176/BGBLA_2021_I_176.pdfsig [https://perma.cc/7G9A-NQPV (staff-uploaded archive)] (Austria); *see* Robertson, *supra* note 97, at 426.

191. *See supra* note 96 and accompanying text.

192. *See* EU Horizontal Cooperation Guidelines, *supra* note 95, ¶¶ 515–603.

193. Commission Guidelines on the Exclusion from Article 101 of the Treaty on the Functioning of the European Union for Sustainability Agreements of Agricultural Producers Pursuant to Article 210(a) of Regulation 1308/2013, 2023 O.J. (C 1446) 1.

194. Commission Decision 2000/475/EC, Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718. CECED), 2000 O.J. (L 187) 47.

195. *Id.* ¶ 48.

machines,"[196] which would "allow consumers a fair share of the benefits *even if no benefits accrued to individual purchasers of machines*."[197] Nonetheless, consumers would also be compensated, since, according to the investigation, their energy bill savings would recoup the increased costs "within nine to 40 months."[198] Therefore, the decision ultimately adhered to the usual principle that the affected consumers be fully compensated.[199]

The Dutch Authority for Consumers & Markets ("ACM") has been a sustainability forerunner among enforcers. It has shown a willingness to take into account social benefits when deciding whether an agreement might escape the prohibition of Article 101(1) TFEU.[200] To this end, it has favored departing from the traditional interpretation of the legal exception of Article 101(3) TFEU.[201] In 2021, the ACM published a revised draft of a set of Sustainability Agreement Guidelines, advocating for greater flexibility in the application of the Article 101(3) TFEU exception.[202] In practice, however, the ACM has not always succeeded in redeeming environmental collaboration.[203] In 2022, it did condone an agreement between Shell and TotalEnergies to store CO_2 in offshore abandoned gas fields that included setting a joint price and adopting a joint marketing strategy.[204] The findings suggested that consumers (CO_2 emitters) would not see an increase in price or a reduction of choice, thereby not really suffering any negative consequences.[205] This would suffice to meet the second requirement of Article 101(3) TFEU,[206] but the ACM insisted on additionally considering the benefits of cleaner air, saying that even if emitters had been worse off by the deal, the social gains would have likely been compensatory.[207] The ACM thus appears to favor weighing in social justice considerations even when there is an uncompensated cost for the affected

196. *Id.* ¶ 56.

197. *Id.* (emphasis added).

198. *Id.* ¶ 52.

199. *See supra* Section I.C (discussing the concept of fully compensating consumers).

200. *See, e.g.*, ACM, DRAFT SUSTAINABILITY GUIDELINES, *supra* note 96, at 15.

201. *See supra* Section I.C (describing the traditional interpretation of the Article 101(3) TFEU exception).

202. ACM, DRAFT SUSTAINABILITY GUIDELINES, *supra* note 96, at 15.

203. *See infra* Section III.B.

204. Press Release, ACM, Shell and TotalEnergies Can Collaborate in the Storage of CO2 in Empty North Sea Gas Fields (June 27, 2022), https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields [https://perma.cc/5DTP-68BR] [hereinafter ACM, Shell and TotalEnergies Press Release]; *see also* Press Release, ACM, Banks Are Allowed to Collaborate with Regard to Sustainability Reports (Aug. 15, 2024), https://www.acm.nl/en/publications/acm-banks-are-allowed-collaborate-regard-sustainability-reports [https://perma.cc/V87T-NA57].

205. ACM, Shell and TotalEnergies Press Release, *supra* note 204.

206. *See* TFEU, *supra* note 100, art. 101(3); *see also supra* Section I.C (discussing the requirements of Article 101 TFEU).

207. ACM, Shell and TotalEnergies Press Release, *supra* note 204.

consumers, but has in fact respected the stance adopted by the European Commission and only found Article 101(3) to be applicable in situations where consumers were fully compensated for the costs.[208] Following the publication of the EU Horizontal Cooperation Guidelines, the ACM issued a new policy rule referring to two specific scenarios which are safe from antitrust rules: where companies agree to comply with a legal sustainability-related obligation that is not yet fully enforceable, and where consumers receive an "appreciable and objective" benefit as a consequence of the business initiative.[209]

To conclude this part, the scholarship exploring sustainability issues in antitrust is so diverse that it is difficult to speak of a unitary movement advocating for a clear strategy. Limiting the notion of green antitrust to the works calling for laxer enforcement does not do justice to the richness of the literature. Moreover, to date, the practical impact of the discussion has been modest. Sustainability exemptions are rarely, if ever, applied, and competition authorities take environmental benefits with a grain of salt. They only serve to defend corporate agreements if they also have a positive impact on competition aims.

III. THE SHORTCOMINGS OF FLEXIBLE ANTITRUST

The urgent need to adopt measures to mitigate climate change suggests that environmental issues will continue to pervade policy discussions. The competition-sustainability debate is already leaving a visible mark on both antitrust policy and legislation in multiple jurisdictions, with concomitant benefits. It is unfortunate, however, that the green antitrust scholarly conversation has been mainly fixated on the clash between efficiency and sustainability instead of exploring potential synergies that could both foster a more environmentally friendly policy and boost antitrust enforcement.[210] Importantly, there are significant holes in the arguments put forward by flexible antitrust proponents in the United States which call the validity of their suggestions into question. In this part, I expound the main problems that pervade green antitrust when it is understood as a synonym of flexible antitrust and discuss the exportability of this vision into the United States.

208. *See supra* Section I.C; *see also supra* Section III.B.

209. Beleidsregel Toezicht ACM op duurzaamheidsafspraken [Policy Rule on ACM's Oversight of Sustainability Agreements], Document No. ACM/UIT/596876 (Oct. 4, 2023) (Neth.) [hereinafter ACM's Oversight], https://www.acm.nl/system/files/documents/beleidsregel-toezicht-acm-duurzaamheidsafspraken_0.pdf [https://perma.cc/6GFX-QZAT], *translated in* https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf [https://perma.cc/QK33-CD4J].

210. *See supra* Section II.B.

A. *Corporate Social Responsibility: A Reality Check*

While exploring the antitrust goal dispute, this Article discussed the influence of behavioral economics and how it has incited looking beyond rational, profit-oriented motivations for business decisions.[211] The ongoing debate about the extent to which irrationality should impact the analytical framework used to draw the line between lawful and unlawful conduct in antitrust is certainly valuable and necessary. However, even passionate defenders of the relevance of behavioral economics in antitrust acknowledge that its role would complement, not substitute, neoclassical economic assumptions.[212] Professors Yue Wu, Kaifu Zhang, and Jinhong Xie refer to firms' "mixed motives" when investing in CSR.[213] They distinguish between profit maximizers (driven only by returns) and socially responsible firms (focused also on social purposes).[214] Profit maximization may not explain every business choice. Still, it remains the driving force behind many—if not most—of the decisions in the corporate world.

With this in mind, it would be reckless to disregard the profit motivation that could drive companies to engage in "greenwashing"—presenting an environmentally friendly façade while failing to achieve actual sustainability objectives. And there is extensive doctrinal and practical evidence that firms engage in such greenwashing.[215] Readers might recall the infamous FTC case against Volkswagen's "Clean Diesel" campaign. The carmaker deceitfully installed devices that masked harmful emissions in cars it sold as being "low-emission, environmentally friendly, [meeting] emission standards," and capable of maintaining "a high resale value."[216] It is one of ninety cases (as of writing) brought by the FTC to combat environmental marketing since the 1990s.[217]

These problems are widespread and exceed national borders. On the other side of the Atlantic, the European Commission recently published draft

211. *See supra* Section I.B.

212. Reeves & Stucke, *supra* note 74, at 1570 (positing that "[t]he behavioral economics literature . . . can help the antitrust agencies explore which of their assumptions premised on neoclassical theory are sheltering anticompetitive conduct and increasing the costs of false negatives").

213. Yue Wu et al., *supra* note 41, at 3095.

214. *Id.*

215. For discussion of greenwashing, see *supra* Section I.A.

216. Press Release, Fed. Trade Comm'n, FTC Charges Volkswagen Deceived Consumers with Its "Clean Diesel" Campaign (Mar. 29, 2016), https://www.ftc.gov/news-events/news/press-releases/2016/03/ftc-charges-volkswagen-deceived-consumers-its-clean-diesel-campaign [https://perma.cc/G6ZQ-QF4S]. The case was eventually settled when Volkswagen agreed to compensate consumers. *See* Press Release, Fed. Trade Comm'n, In Final Court Summary, FTC Reports Volkswagen Paid More than $9.5 Billion to Car Buyers Who Were Deceived by the "Clean Diesel" Campaign (July 27, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/07/final-court-summary-ftc-reports-volkswagen-repaid-more-95-billion-car-buyers-who-were-deceived-clean [https://perma.cc/2CQR-3JT2].

217. *Cases Tagged with Environmental Marketing*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/terms/1408 [https://perma.cc/GXN2-DEW8] (collecting cases).

legislation to stop companies from issuing misleading environmental claims.[218] The studies conducted by the European Commission prior to the enactment of the bill showed that over half of the purported environmental benefits of multiple products were "vague, misleading or unfounded," and that forty percent of the claims were "unsubstantiated."[219]

While scholars on the left have questioned the veracity of corporate commitment to CSR, right-leaning scholars have questioned the propriety of the concept itself. Professor Milton Friedman asserted that executives chasing goals other than profit maximization were "unwitting puppets of the intellectual forces that have been undermining the basis of a free society."[220] Professor Friedman took "willingness to pay" analysis to another level.[221] For him, investing in the pursuit of other objectives was like stealing from the shareholders, the customers, and the employees, who are paying (through their profits, prices, and wages) but may not want the benefits.[222]

It will come as no surprise that Professor Friedman's ideas have been subject to criticism.[223] Professor Karthik Ramanna, for instance, has reflected on the perils associated with leaving social problems in corporate hands.[224] He finds that they could, and often do, take the opportunity to increase their returns.[225] Lindsay Owens, former economic policy advisor in Senator Elizabeth Warren's office, has referred to three factors that companies need to "commit the perfect crime."[226] The first—the means—is current policy, which grants

218. *Commission Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive)*, at 3, COM (2023) 166 final (Mar. 22, 2023).

219. *Id.*

220. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/9EJX-5T59 (staff-uploaded, dark archive)].

221. For discussion of the "willingness to pay" analysis, see *supra* notes 129–31 and accompanying text.

222. *See* Friedman, *supra* note 220.

223. Steve Denning, *The Origin of 'the World's Dumbest Idea': Milton Friedman*, FORBES, https://www.forbes.com/sites/stevedenning/2013/06/26/the-origin-of-the-worlds-dumbest-idea-milton-friedman/?sh=37654176870e [https://perma.cc/T3RU-DF6X (staff-uploaded, dark archive)] (last updated Apr. 14, 2022, 2:05 PM) (stating that "[o]ne might think that intellectual nonsense of this sort would have been quickly spotted and denounced as absurd. And perhaps if the article had been written by someone other than the leader of the Chicago school of economics and a front-runner for the Nobel Prize in Economics that was to come in 1976, that would have been the article's fate").

224. *See* Karthik Ramanna, *Friedman at 50: Is It Still the Social Responsibility of Business to Increase Profits?*, 62 CAL. MGMT. REV. 28, 28–29 (2020).

225. *See id.*

226. Lindsay Owens, *People and Profits: Strengthening Antitrust Policy for Fairer Economic Outcomes*, OECD F. NETWORK (Mar. 4, 2023), https://web.archive.org/web/20230912204641/https://www.oecd-forum.org/posts/people-and-profits-strengthening-antitrust-policy-for-fairer-economic-outcomes?badge_id=651-competition [https://perma.cc/7R7Y-JFK9 (staff-uploaded archive)].

corporate giants the power to "corner markets with impunity."[227] The second factor is profits, and the third is opportunity: a crisis, used as a "convenient scapegoat," allowing companies to increase consumer prices and boost returns on the pretense of covering the costs of the calamity.[228] And this is precisely the rationale by which companies defend the costs of their "socially responsible" collaborations to fight climate change. Not every such claim will be bogus, but advocating for *not* enforcing the law that could punish corporations attempting to make money out of a looming global catastrophe is concerning.

This is not to suggest, of course, that companies act only out of callous selfishness. Naturally, they do implement candid, socially minded strategies, and even when they do not, their motives may be understandable. The incentives of capitalism, which reward "short-term gains over long-term sustainability," often put pressure on businesses to sacrifice "fair labor and fair trade practices, human rights, and our planet's delicate ecosystems."[229] Unfortunately, government intervention to date has not gone far enough. According to climate change expert and blogger Sultan White, "our corporations are ultimately beholden to no other stakeholder than their own shareholders."[230]

To be fair, a significant part of the green antitrust literature acknowledges the financial motivation and discusses its repercussions on green collaborations.[231] But some scholars barely contemplate,[232] or even ignore entirely,[233] the possibility that the companies might try to abuse the benevolence they favor towards the lucrative arrangements once described as "cancers on the open market economy."[234] It is clear, therefore, that arguments ignoring the greenwashing problem are grounded on incomplete and easily challengeable assumptions.

B. *The (Limited) Empirical Support for Flexible Antitrust*

One of the main shortcomings of the green antitrust movement is the absence of solid empirical support showing a need for diluting the law's

227. *Id.*

228. *Id.*

229. Sultan White, *What's the State of Shareholder Activism?*, MEDIUM (Aug. 8, 2022), https://medium.com/fennelapp/whats-the-state-of-shareholder-activism-fcbe396f5f29 [https://perma.cc/E2VM-2MKL].

230. *Id.*

231. This is the case with most of the European literature. *See supra* Section II.B.1.

232. *See, e.g.*, Scott, *supra* note 28, at 131–32.

233. *See generally, e.g.*, Miazad, *supra* note 2 (omitting any discussion on the financial motivations of companies behind green collaborations).

234. Mario Monti, Eur. Comm'r for Competition, Fighting Cartels—Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?, Speech at the 3rd Nordic Competition Policy Conference, Stockholm (Sept. 11–12, 2000), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_00_295 [https://perma.cc/66EF-RMZE (staff-uploaded archive)].

authority. Proponents discuss the theoretical risk that competition legislation may strike down industry-wide initiatives to adopt greener standards eschewing the first-mover disadvantage.[235] Nonetheless, they have struggled to find real-life examples of environmental collaboration actually forbidden by antitrust laws. A few cases often appear in the literature advocating for laxer enforcement. However, upon closer look, their depiction tends to be incomplete, misleading, or inaccurate.

An investigation that is omnipresent in flexible antitrust scholarship in the United States is a 2019 attempt by the DOJ to challenge a deal between four car manufacturers and the State of California to reduce vehicle emissions.[236] The Trump administration likely saw the business initiative as an attempt to defy its shy environmental commitments,[237] and California regulators presented the DOJ inquiry as a possible retaliation strategy against carmakers "voluntarily making cleaner, more efficient cars and trucks" than the government required.[238]

The DOJ eventually desisted,[239] but the case was likely doomed from the start.[240] First, the DOJ would have needed to demonstrate the existence of an agreement between the carmakers.[241] That would require showing some discussion among them and a favorable vote.[242] Second, the state action

235. *See supra* Section I.A.

236. Press Release, Stanley Young & Dave Clegern, Cal. Air Res. Bd., Framework Agreements on Clean Cars (Aug. 17, 2020), https://ww2.arb.ca.gov/news/framework-agreements-clean-cars [https://perma.cc/WQ49-QFMF]; CAL. AIR RES. BD., TERMS FOR LIGHT-DUTY GREENHOUSE GAS EMISSIONS STANDARDS (2019), https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf [https://perma.cc/8RNB-Y7MS]; *see* Balmer, *supra* note 59, at 220 (referring to the inquiry as "an example of the disconnect between the more recent role of corporate collaboration in society and traditional antitrust enforcement"); Koga, *supra* note 99, at 1990 (highlighting that the investigation "raises questions for agreements involving moral or social considerations—specifically those aimed at addressing environmental problems").

237. *See, e.g.*, Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact that Embarrassed Trump*, N.Y. TIMES (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html [https://perma.cc/896Q-66FN (staff-uploaded, dark archive)].

238. Juliet Eilperin & Steven Mufson, *Justice Dept. Launches Antitrust Probe of Automakers over Their Fuel Efficiency Deal with California*, WASH. POST (Sept. 6, 2019, 5:34 PM), https://www.washingtonpost.com/climate-environment/justice-dept-launches-antitrust-probe-of-automakers-over-their-fuel-efficiency-deal-with-california/2019/09/06/29a22ee6-d0c7-11e9-b29b-a528dc82154a_story.html [https://perma.cc/AKS9-VXAG (staff-uploaded, dark archive)].

239. Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers that Sided with California on Emissions*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html [https://perma.cc/9UM2-6WNQ (staff-uploaded, dark archive)].

240. *See* Herbert Hovenkamp, *Are Regulatory Agreements to Address Climate Change Anticompetitive?*, REGUL. REV. (Sept. 11, 2019), https://www.theregreview.org/2019/09/11/hovenkamp-are-regulatory-agreements-to-address-climate-change-anticompetitive/ [https://perma.cc/4END-4HTU].

241. *Id.*

242. *Id.*

exemption, by virtue of which antitrust laws do not affect conduct approved by the state, would have to be inapplicable.[243] Third, the agreement would need to be in breach of Section 1 of the Sherman Act, but this kind of (standard-setting) cooperation tends to be "lawful . . . unless it facilitates collusion."[244] Fourth, the presence of market power would be considered, and the companies involved controlled less than thirty percent of the U.S. automobile market for new car sales.[245] Had the investigation not been abandoned, therefore, the government's chances of successfully challenging the arrangement would have been close to zero.

Baffled by the DOJ's stance, Professor Herbert J. Hovenkamp concluded that the most likely explanation behind the inquiry is that it was "an attempt to placate an Administration angered by California's insistence on more stringent emission standards than the federal government requires."[246] This, Professor Hovenkamp resolved, amounted to "another waste of public resources for a harmful purpose."[247] Indeed, the case seems to have been a bad, possibly politically motivated move. The U.S. House of Representatives even considered investigating the DOJ for possible abuse of authority for launching the probe in the first place.[248]

The case is *not*, however, an illustration of how antitrust may stand in the way of green business initiatives, or of how the law "falsely assumes that collaboration on social and environmental goals is anti-competitive.'"[249] It is an anomaly that an investigation was opened in the first place.[250] Yet the U.S. green antitrust literature describes it as underscoring "antitrust's false dichotomy between economic and non-economic goals."[251] It is cited to show the dangers of the "mere threat of antitrust scrutiny"[252] by scholars who simultaneously acknowledge the investigation's lack of justification and its

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Rebecca Beitsch, *DOJ Whistleblower: California Emissions Probe Was 'Abuse of Authority*,' HILL (June 24, 2020, 4:40 PM), https://thehill.com/policy/energy-environment/504384-doj-whistleblower-california-emissions-probe-was-abuse-of-authority/ [https://perma.cc/237G-LQWK]; Leah Nylen, *DOJ Inspector General Investigating Trump-Era Car Emissions Case*, POLITICO (Oct. 6, 2021, 3:49 PM), https://www.politico.com/news/2021/10/06/trump-car-emissions-investigation-515437 [https://perma.cc/N6H5-J8Z2].

249. Culhane-Husain, *supra* note 141.

250. Mark A. Lemley & David McGowan, *Trump's Justice Department's Antitrust 'Investigation' of California's Deal with Car Makers Is an Abuse of Power*, CALMATTERS, https://calmatters.org/commentary/auto-investigation/ [https://perma.cc/8EE2-F889] (last updated Oct. 22, 2019) (asserting that "[f]ederal antitrust law provides no basis for the Department of Justice investigation").

251. Miazad, *supra* note 2, at 1666.

252. Balmer, *supra* note 59, at 228.

distinct political flavor.[253] If anything, the case's failure proves that the guarantees to avert unjustified antitrust interventions work.

Another case that has been used to advocate for flexible antitrust is a DOJ lawsuit from the 1960s, also against carmakers, scrutinizing possible collusion in the course of joint efforts to develop emission-cutting technology.[254] The cooperation had initially received the government's blessing, but after a decade of collaborating, the producers were found to be "deliberately retarding the progress of [pollution control device] development."[255] This hardly suggests that they were acting out of genuine environmental concern, but it has been described as a "textbook example of collusion in violation of antitrust law" in fact geared at removing the first-mover disadvantage.[256]

The 1960s were not the last time the car industry stood in the way of green innovation,[257] and we should celebrate that, occasionally, antitrust can help. As recently as 2021, Daimler, BMW, and the Volkswagen group had to pay fines totaling €875 million in the EU for agreeing not to compete to implement emission reductions beyond legal requirements, even if the technology to go further already existed.[258] A few years earlier, in 2016 and 2017, truck manufacturers were similarly penalized for colluding on prices on the back of low emissions regulation.[259] It seems, therefore, that antitrust may actually have the potential to punish and dissuade attempts to block the development and implementation of environmental technology.[260]

Perhaps the most glaring misrepresentation of the facts of a case is the discussion of the EU *Consumer Detergents* cartel investigation.[261] It is, we are told, proof of "the challenges facing firms that try to raise sustainability standards while still making a profit."[262] In 2011, the European Commission imposed fines totaling €315 million on detergent producers Henkel, Unilever,

253. Miazad, *supra* note 2, at 1666 (acknowledging the investigation was "partisan and not grounded in antitrust doctrine"); Balmer, *supra* note 59, at 228 (saying that the "probe was widely denounced as political retribution, with no legitimate antitrust case to be made").

254. United States v. Auto. Mfrs. Ass'n, 307 F. Supp. 617, 618 (C.D. Cal. 1969).

255. Bennett H. Goldstein & Howell H. Howard, Comment, *Antitrust Law and the Control of Auto Pollution: Rethinking the Alliance Between Competition and Technical Progress*, 10 ENV'T L. 517, 525 (1980).

256. Miazad, *supra* note 2, at 1679. On the first-mover disadvantage, see *supra* Section I.A.

257. *See supra* note 216 and accompanying text.

258. EC Press Release IP/21/3581, *supra* note 6.

259. Commission Decision of 19 July 2016, Relating to a Proceeding Under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement (AT.39824 - Trucks), ¶ 2, C(2016) 4673 final.

260. *See generally* Marco Colino, *Antitrust's Social*, *supra* note 6 (describing the beneficial effects of antitrust enforcement).

261. Commission Decision of 13 April 2011, Relating to a Proceeding Under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/39579 – Consumer Detergents) [hereinafter *Consumer Detergents*], ¶¶ 24–26, C(2011) 2528 final.

262. Balmer, *supra* note 59, at 226; Miazad, *supra* note 2, at 1682–83.

and Procter & Gamble for fixing prices in the context of what started out as a joint plan to reduce the dosage and weight of heavy-duty laundry detergents (for washing machines) and their packaging.[263] Some scholars contend that laudable, sustainability-oriented cooperation ended up with the cooperating firms being punished under Article 101(1) TFEU. Flexible antitrust scholarship in the United States asserts that the companies agreed *not* to raise prices in order to avoid the risk that "consumers would not pay the same price for a product sold in smaller quantities."[264] Moreover, some have claimed that the companies actually defended their conduct "on sustainability grounds" during the investigation, to no avail.[265]

The (extensively documented) reality of what happened is virtually the opposite of this depiction. In 1997, the companies did devise a perfectly lawful initiative to reduce dosage and weight of heavy-duty detergent powder and its packaging material.[266] The European Commission subsequently analyzed whether the targets had been met and issued a favorable report in 2002.[267] Unbeknownst to the agency, the discussions between the parties had gone well beyond implementing the plan.[268] Although the scheme actually *saved* the companies money, they agreed not to decrease prices.[269] This agreement was not necessary to attain positive environmental benefits,[270] and was harmful and anticompetitive. At no point did the companies attempt to defend their conduct on any grounds, let alone sustainability.[271] In fact, it was Henkel itself who confessed to the European Commission that it had been unlawfully colluding with its competitors.[272] Henkel approached the agency to apply for leniency from punishment in exchange for blowing the whistle.[273] The other companies involved also admitted to infringing the law.[274]

The events serve as a stark reminder that companies can take every opportunity, even noble environmental collaborations, to increase their profits

263. *Consumer Detergents*, *supra* note 261, ¶ 20.

264. Miazad, *supra* note 2, at 1682; *see also* Scott, *supra* note 28, at 132 (explaining that since consumers might be dissuaded by the costlier, smaller products, the companies "agreed to maintain prices while making the transition"); Balmer, *supra* note 59, at 226 (asserting that the companies broke the law "by trying to mitigate—not exploit for profit—the effects of the new products").

265. Miazad, *supra* note 2, at 1682.

266. *Consumer Detergents*, *supra* note 261, ¶¶ 20–21.

267. *Id.*

268. *Id.* ¶¶ 22–26.

269. *Id.* ¶ 25.

270. *Id.* ¶ 22 (saying the initiative "neither foresaw nor necessitated price discussions").

271. *See id.* ¶¶ 92–97.

272. *Id.* ¶ 92.

273. *Id.* ¶ 22. For the current leniency policy, see *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, 2006 O.J. (C 298) 17.

274. *Consumer Detergents*, *supra* note 261, ¶¶ 95–99, 99 tbl.3.

at the expense of consumers.[275] Flexible antitrust advocates have described this case as "infamous,"[276] but for the wrong reasons. It does not, as they claim, illustrate antitrust's potential to crush environmental initiatives. Discussing the investigation, Professor Monti rightly condemned the "deliberate effort to undermine passing on the full benefits of an environmental agreement negotiated with the Commission" and argued in favor of considering it "to either count as a factor to assess the seriousness of the fine or as an aggravating circumstance."[277] For Professor Gerbrandy, the case is an example of greenwashing.[278] The reason why some scholars have a distorted picture of the facts is unclear, but the actual facts clearly do not justify calls for lax enforcement. On the contrary, using environmental objectives to collude should be condemned in the strongest terms, and it should be reassuring that such conduct is indeed within the realms of antitrust legislation.

Other noteworthy examples are two investigations by the Dutch ACM. As seen in the previous part, the agency has been willing to take into account environmental social benefits when deciding whether an agreement might escape the Article 101(1) TFEU prohibition.[279] In practice, however, only arrangements attaining efficiency in the orthodox sense, where the affected consumers were fully compensated by the harms, have been found to be lawful.[280] The latest policy rule announced by the ACM takes a step further than the EU Horizontal Cooperation Guidelines and expressly acknowledges two scenarios to which competition law will not apply.[281] However, these are consistent with the principles laid down by the European Commission in its Guidelines.[282]

The first Dutch investigation often mentioned in green antitrust literature relates to an agreement for the early closure of five coal plants in the Netherlands to cut emissions, which was eventually deemed unlawful.[283] The

275. Former EU Competition Commissioner Mario Monti has pointed out that various cartels have been detected stemming from collaborations that were initially presented as environmental initiatives. Mario Monti, President, Bocconi Univ., Keynote Speech at Luiss School of Law Conference: Competition Law and Sustainable Development: Overcoming the Dilemma? (Nov. 13, 2020), https://www.luiss.edu/evento/2020/11/13/competition-law-and-sustainable-development-overcoming-the-dilemma [https://perma.cc/957P-8W8X].

276. Miazad, *supra* note 2, at 1682.

277. Giorgio Monti, *supra* note 137, at 127.

278. *See* Gerbrandy, *supra* note 3, at 543 & n.19. *See generally* Yue Wu et al., *supra* note 41 (providing a general description of greenwashing).

279. *See supra* Section II.B.

280. ACM, Shell and TotalEnergies Press Release, *supra* note 204.

281. ACM's Oversight, *supra* note 209, ¶¶ 7–9.

282. *Id.* ¶¶ 5, 11.

283. Memorandum from 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 Energieakkoord* 6–7 (2013) (Neth.), https://www.acm.nl/sites/default/files/old_publication/publicaties/

problem was that CO_2 emissions would not be reduced, but relocated,[284] and savings from the drop in emissions of other gases were modest compared to the significantly higher electricity bills consumers would get.[285]

The second and better-known case is *Chicken of Tomorrow*,[286] where the ACM had to assess the compatibility of an agreement between chicken meat producers to make healthier, more sustainable meat produced according to higher animal welfare standards with Article 101 TFEU.[287] The arrangement, supported by the government and national supermarkets, would see the cheaper meat (produced subject to lower standards) removed from the market.[288] The expert study the ACM relied on showed that the cost increase was too high, the benefits were too modest, and consumers were unwilling to pay for the extra cost.[289] In particular, the study found that the unambitious measures proposed, which included limiting the number of animals per square meter and increasing uninterrupted hours of darkness, would only marginally improve chickens' wellbeing.[290] According to the calculations, consumers would be prepared to pay up to €0.68 extra per kilo of meat for the benefits,[291] but the cost for these measures would amount to an additional €1.46 per kilo.[292] The benefits were quantified according to various methodologies, and ranged from €0.25 to €0.92 for animal welfare, €0.14 for the environment, and nil for public health.[293]

12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf [https://perma.cc/NLS3-B6R3].

284. *Id.* at 4.

285. *Id.* at 5.

286. ACM, ACM/DM/2014/206028, ACM'S ANALYSIS OF THE SUSTAINABILITY ARRANGEMENTS CONCERNING THE 'CHICKEN OF TOMORROW' (2015) (Neth.), https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf [https://perma.cc/7NBH-5HSZ] [hereinafter *Chicken of Tomorrow*].

287. *Id.* at 1–2. The case has attracted significant scholarly attention. *See, e.g.*, Jacqueline M. Bos, Henk van den Belt & Peter H. Feindt, *Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow*, 8 ANIMAL FRONTIERS 20, 20–21 (2018); Giorgio Monti & Jotte Mulder, *Escaping the Clutches of EU Competition Law: Pathways to Assess Sustainability Initiatives*, 42 EUR. L. REV. 635, 639–41 (2017); María Campo Comba, *EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements*, 15 ERASMUS L. REV. 190, 190–91 (2022).

288. *Chicken of Tomorrow*, *supra* note 286, at 2–3.

289. MACHIEL MULDER, SIGOURNEY ZOMER, TIM BENNING & JORNA LEENHEER, ECONOMISCH BUREAU [ECONOMIC BUREAU], ACM, ECONOMISCHE EFFECTEN VAN 'KIP VAN MORGEN': KOSTEN EN BATEN VOOR CONSUMENTEN VAN EEN COLLECTIEVE AFSPRAAK IN DE PLUIMVEEHOUDERIJ [ECONOMIC EFFECTS OF 'CHICKEN OF TOMORROW': COSTS AND BENEFITS FOR CONSUMERS OF A COLLECTIVE AGREEMENT IN POULTRY FARMING] 26 (2014), https://www.acm.nl/sites/default/files/old_publication/publicaties/13759_onderzoek-acm-naar-de-economische-effecten-van-de-kip-van-morgen.pdf [https://perma.cc/F54W-JMWJ].

290. *Id.* at 8.

291. *Id.* at 17.

292. *Id.* at 26.

293. *Id.*

Therefore, the net effects of the arrangement were negative according to all parameters, and the scheme was deemed unjustifiable.[294]

Three key takeaways stemming from these two cases merit further reflection. The main issue is that the faith placed in willingness to pay has been subject to some debate, centered partly on the concerns surrounding the parameters that this Article highlighted earlier.[295] Professor Gerbrandy, for instance, has criticized the rigorous monetization of social benefits,[296] while Professor Monti and attorney Jotte Mulder have suggested that both the ACM and the European Commission have been "unnecessarily timid" when applying exemptions.[297] As a method to determine the value of environmental benefits, willingness to pay is far from ideal. When ecological advantages are significant, they should not depend on individuals who may not have enough information to determine whether they should be paying for them, or for whom the extra cost might be a luxury they cannot afford.[298]

Thankfully, research suggests willingness to pay for environmental benefits is on the rise. A 2021 study conducted by consultancy firm Simon-Kucher & Partners found that about one-third of consumers worldwide are prepared to pay more for sustainable alternatives, and up to eighty-five percent of people have made changes to their consumption habits to increase sustainability.[299] In the United States, the outlook is even more positive, and 2022 data suggest more than two-thirds of adults would pay extra for environmentally friendly products.[300] The percentage increases to nearly eighty percent in the eighteen to twenty-six age bracket.[301] Moreover, recent economic

294. *Chicken of Tomorrow*, *supra* note 286, at 8.

295. *See supra* Section I.C.

296. *See generally* Gerbrandy, *supra* note 3, at 553 (explaining that "[n]ot all effects lend themselves . . . to monetization," and that this "should not mean discarding them from an assessment immediately").

297. Giorgio Monti & Mulder, *supra* note 287, at 650.

298. According to data from the consultancy firm Simon-Kucher & Partners, sixty-eight percent of the population is still reluctant to pay more for environmentally friendly products, with barriers such as lack of affordability, availability, and trust still looming large. Shikha Jain & Olivier Hagenbeek, *2022 Global Sustainability Study: The Growth Potential of Environmental Change*, SIMON-KUCHER & PARTNERS BLOG (Oct. 23, 2022), https://www.simon-kucher.com/en/insights/2022-global-sustainability-study-growth-potential-environmental-change [https://perma.cc/GS4S-5MNB].

299. Press Release, Simon-Kucher & Partners, Recent Study Reveals More than a Third of Global Consumers Are Willing to Pay More for Sustainability as Demand Grows for Environmentally-Friendly Alternatives (Oct. 25, 2021), https://www.simon-kucher.com/en/who-we-are/newsroom/recent-study-reveals-more-third-global-consumers-are-willing-pay-more [https://perma.cc/EV9S-Q3R2].

300. *See* PDI TECHS., 2023 BUSINESS OF SUSTAINABILITY INDEX 3 (2023), https://pditechnologies.com/resources/report/2023-business-sustainability-index/ [https://perma.cc/M5FJ-2V2X (staff-uploaded, dark archive)] (discussing, in particular, consumers' willingness to pay more for environmentally friendly gas).

301. *Id.* at 5.

research has focused on finding ways of computing the willingness to pay of future customers.[302]

A second takeaway from these cases is that the first-mover disadvantage, frequently cited to justify calls for flexible antitrust enforcement, has been overstated.[303] The problems related to the coal-fired energy plants eventually led the Dutch government to adopt a law in 2019 for the progressive closure of the plants by 2030.[304] The beneficial objective of the anticompetitive deal—reducing pollution—was considered important enough to merit being implemented via legislation. This is a possible route for similar initiatives unable to clear the Article 101 TFEU hurdle. Even more interestingly, the ACM conducted a follow-up study of the chicken market after the *Chicken of Tomorrow* collaboration was deemed to be contrary to competition law.[305] It found that the advantages of the project had been achieved even without coordination, with meat producers taking individual rather than collective action.[306] This outcome lends support to recent research suggesting that the first-mover disadvantage is a "rare occurrence."[307]

A third takeaway is the need for environmental measures that go beyond corporate collaboration, propelled mainly via governmental action. This is partly illustrated by the shortcomings of willingness to pay.[308] Since consumers are not always prepared to bear the costs of beneficial initiatives, public funding could help to implement them while reducing the economic impact on consumers. Impact-limiting measures could include subsidizing environmental projects so that the costs are not passed on to consumers, or granting tax or other financial benefits either to the companies developing the beneficial programs or directly to the consumers purchasing them. Some such initiatives are already underway. By virtue of the Inflation Reduction Act, for instance, the U.S. government has pledged to invest nearly $369 billion in the development of clean energy.[309] Governments are also in the best position to

302. Roman Inderst & Stefan Thomas, *Prospective Welfare Analysis—Extending Willingness-to-Pay to Embrace Sustainability*, 18 J. COMPETITION L. & ECON. 551, 552 (2021).

303. *See supra* Section I.A (discussing the first-mover disadvantage).

304. Wet van 11 december 2019, houdende Regels voor het produceren van elektriciteit met behulp van kolen (Wet verbod op kolen bij elektriciteitsproductie) [Act of 11 Dec. 2019, Containing Rules for Producing Electricity Using Coal (Prohibition of Coal in Electricity Production Act)] Stb. 2019, 493, 493 (Neth.).

305. *Welfare of Today's Chicken and That of the 'Chicken of Tomorrow*,' AUTH. FOR CONSUMERS & MKTS. (Sept. 1, 2020) (Neth.), https://www.acm.nl/en/publications/welfare-todays-chicken-and-chicken-tomorrow [https://perma.cc/9T5V-QFTW].

306. *Id.*

307. Schinkel & Treuren, *Green Antitrust*, *supra* note 133, at 12–13; *see* Paha, *supra* note 39, at 365–66; Loozen, *supra* note 7, at 1266.

308. *See* Inderst & Thomas, *supra* note 302, at 551–52.

309. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (codified as amended in scattered sections of 7, 23, 26, 30, 42, 43, and 49 U.S.C.).

determine what the most pressing issues are and to understand the full consequences of environmentally motivated measures. By way of example, the Dutch coal phase-out strategy implemented via the 2019 legislation has been challenged by affected foreign companies,[310] who argue that the law is in breach of the controversial Energy Charter Treaty.[311] Thus far, Dutch courts have denied plaintiffs the compensation (of billions of euros) they claim to be entitled to.[312] An antitrust authority is not suitably positioned to predict these noncompetition implications of environmental measures.

C. *The Challenges of Importing Green Antitrust into the United States*

U.S. scholarship frequently refers to the European Union as a beacon of sustainable antitrust.[313] There is unquestionable value in examining the discussion and policy developments taking place in Europe. However, the peculiarities of the EU regime must be fully taken into account. As explained above, Europe's competition laws are consciously dissimilar to those adopted in the United States.[314] Above all, the EU rules are a means to an (integration) end. They cannot ignore the wider goals of the treaty in which they are contained. In addition to the TFEU's obligation to incorporate environmental protection issues in competition policy,[315] it is necessary to take the European Green Deal into account.[316] Signed in 2019, the Deal is an ambitious project with a determination to eliminate greenhouse emissions by 2050 while ensuring that the European economy is sustainable.[317] It is no surprise, therefore, that the European Union has placed so much emphasis on ecological issues in all of its endeavors, including antitrust policy.

310. Stan Putter, *The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations*, KLUWER ARB. BLOG (Aug. 24, 2021), https://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/ [https://perma.cc/ADY6-7T8B].

311. *See generally* THE INTERNATIONAL ENERGY CHARTER CONSOLIDATED ENERGY CHARTER TREATY WITH RELATED DOCUMENTS (2016), https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf [https://perma.cc/X7S8-YWZA (staff-uploaded archive)].

312. Bart Meijer & Mark Potter, *Dutch Court Denies RWE and Uniper Compensation for Closure of Coal Plants*, REUTERS (Nov. 30, 2022, 6:27 AM), https://www.reuters.com/markets/commodities/dutch-court-denies-rwe-uniper-compensation-closure-coal-plants-2022-11-30/ [https://perma.cc/667X-LCW3 (staff-uploaded archive)].

313. *See, e.g.*, Culhane-Husain, *supra* note 141 (using the *Consumer Detergents* case as an example of sustainable antitrust law).

314. *See supra* Section I.C.

315. TFEU, *supra* note 100, art. 11.

316. *Communication from the Commission to the European Parliament, the European Council, the Council, the European Social and Economic Committee and the Committee of the Regions: The European Green Deal*, COM (2019) 640 final (Dec. 11, 2019).

317. *Id.* at 1–2; *see supra* Introduction; Regulation 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'), 2021 O.J. (L 243) 1, 8–9 (EU).

U.S. legislation lacks such heavy environmental luggage. Importantly, since the triumph of the consumer welfare standard,[318] U.S. antitrust laws have been more leniently applied than antitrust laws in Europe. In light of the wide consensus that current enforcement levels in the United States are nowhere near optimal,[319] it is hard to fathom that U.S. antitrust rules could be causing or worsening any social problems—other than those they were designed to resolve and have been failing to address. In recent years, however, there have finally been attempts to overcome the impasse. Merger control has been invigorated,[320] and a set of revised Merger Guidelines[321] adopted in 2023 suggests "a shift toward more aggressive enforcement."[322] There are currently bipartisan efforts to rein in Big Tech.[323] The U.S. government is fighting historic lawsuits against Google, Amazon, and Apple for illegal monopolization.[324] In October 2022, the DOJ secured the first conviction under Section 2 of the Sherman Act in forty years.[325] And in August 2024, it obtained a significant win in its antitrust suit against Google.[326]

Two conclusions can be drawn from the above analysis. First, the feeble enforcement of antitrust until the early 2020s suggests that the law's potential interference with environmental collaborations would be unlikely to cause any

318. *See supra* Section I.B.

319. *See supra* Introduction; William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 687–88 (2014) (providing specific examples of areas of antitrust that have been barely enforced in the past 40 years).

320. *See supra* Introduction.

321. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 1–4 (2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [https://perma.cc/ZX79-LWEN].

322. Michael Lindsay, F. Matthew Ralph, Jaime Stilson, Anthony Badaracco & Alyssa Schaefer, *Back to the Future: 2023 Merger Guidelines Reach into History to Support Enlarged Antitrust Enforcement Agenda*, DORSEY & WHITNEY LLP (Dec. 21, 2023), https://www.dorsey.com/newsresources/publications/client-alerts/2023/12/2023-merger-guidelines [https://perma.cc/Q2Z9-9EUK].

323. Diane Bartz & Andrew Heavens, *Bipartisan US Lawmakers Introduce Bill Aimed at Google, Facebook, Ad Clout*, REUTERS, https://www.reuters.com/world/us/bipartisan-us-lawmakers-introduce-bill-aimed-google-facebook-ad-clout-2023-03-30/ [https://perma.cc/N2CJ-MZCJ (staff-uploaded archive)] (last updated Mar. 31, 2023, 4:01 PM).

324. Press Release, U.S. Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Feb. 2, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies [https://perma.cc/LYV4-9EKP]; *see also* Miles Kruppa & Jan Wolfe, *Google's Antitrust Trial to Set 'Future of the Internet,' DOJ Says*, WALL ST. J., https://www.wsj.com/tech/googles-antitrust-trial-gets-under-way-in-washington-de1725b6 [https://perma.cc/S3N6-TNK7 (staff-uploaded, dark archive)] (last updated Sept. 12, 2023, 4:18 PM); Press Release, Fed. Trade Comm'n, FTC Sues Amazon for Illegally Maintaining Monopoly Power (Sept. 26, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power [https://perma.cc/2W7S-EJVX].

325. *See* United States v. Zito, No. CR 22-113-BLG-SPW, 2022 WL 16549305, at *1 (D. Mont. Oct. 31, 2022).

326. *See* United States v. Google LLC, __ F. Supp. 3d __, 2024 WL 3647498, at *134 (D.D.C. Aug. 5, 2024) ("Google's exclusive dealing agreements have anticompetitive effects in two relevant markets.").

real issues. Second, opening the door for more exceptions or further widening the scope of the rule of reason would not only aggravate the underenforcement woes, it would also be at odds with the Biden administration's attempts to allow antitrust to make a meaningful comeback.

There is a further United States-specific problem which could exacerbate the concerns sparked by the competition-sustainability debate in America. We are witnessing attempts, led mainly by Republican politicians, to block ESG initiatives (which they label "woke capitalism") on multiple legal grounds, including antitrust.[327] By way of example, in October 2022, twenty-one state attorneys general tried to challenge the Climate Action 100+[328] commitment to reduce emissions.[329] Writing in the *Wall Street Journal*, former Arizona Attorney General Mark Brnovich sensationally described the environmental initiative as "[t]he biggest antitrust violation in history."[330] The opposition of the attorneys general was mainly due to the coordinated efforts to close coal plants and is part of a wider, ongoing anti-ESG strategy.[331] The merits of these antitrust cases are easily disproven,[332] and unsurprisingly no such action has ever prospered.

However, these cases do feed the narrative that antitrust could be standing in the way of beneficial environmental initiatives. For instance, Professor Thomas Hale advocated in favor of regulatory reform when he was warned that a set of criteria laid down by a group of experts he chaired in the context of the

327. James Surowiecki, *The War on "Woke Capitalism" Is Backfiring*, ATLANTIC (Jan. 31, 2024), https://www.theatlantic.com/ideas/archive/2024/01/republicans-woke-capital-esg-investment/677294/ [https://perma.cc/N8z8-NWRD (dark archive)].

328. *See* CLIMATE ACTION 100+, *supra* note 37.

329. Letter from Austin Knudsen, Jeff Landry, Sean Reyes, Steve Marshall, Tim Griffin, Christopher Carr, Raúl Labrador, Theodore Rokita, Brenna Bird, Kris Kobach, Daniel Cameron, Lynn Fitch, Andrew Bailey, John Formella, Dave Yost, Alan Wilson, Jonathan Skrmetti, Ken Paxton, Jason Miyares, Patrick Morrisey & Bridget Hill, State Att'ys Gen. (Mar. 30, 2023), https://ago.mo.gov/wp-content/uploads/2023-03-30-asset-manager-letter-press-final.pdf [https://perma.cc/8A6Z-6RMB].

330. Mark Brnovich, *ESG May Be an Antitrust Violation*, WALL ST. J. (Mar. 6, 2022, 4:40 PM), https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807 [https://perma.cc/W4BH-3T74 (staff-uploaded, dark archive)].

331. *See, e.g.*, CONNOR GIBSON & FRANCES SAWYER, PLEIADES STRATEGY, 2023 STATEHOUSE REPORT: RIGHT-WING ATTACKS ON THE FREEDOM TO INVEST RESPONSIBLY FALTER IN LEGISLATURES 3, 37 (2023), https://drive.google.com/file/d/1VJ82mMNupoFSZPQ98nLcW7AtcyBQWB18/view [https://perma.cc/EFL7-TZLQ (staff-uploaded archive)] (describing a "coordinated legislative effort" to restrict "[ESG] investment criteria," with (mostly unsuccessful) attempts to introduce 165 anti-ESG pieces of legislation in 2023 alone).

332. *See generally* Hovenkamp, *Slogans and Goals*, *supra* note 22 (reporting that the Dutch court held that the government acted in line with European climate goals when they decided to close coal-fired energy plants by 2030); Cynthia Hanawalt & Denise Hearn, *The Slippery Notion of Boycotts in the Anti-ESG Movement*, CLIMATE L.: SABIN CTR. BLOG (June 14, 2023), https://blogs.law.columbia.edu/climatechange/2023/06/14/the-slippery-notion-of-boycotts-in-the-anti-esg-movement/ [https://perma.cc/2ZMS-GKCL] (describing how the fossil fuel industry has brought frivolous and meritless cases in an attempt to attack antitrust).

UN Race to Zero Campaign[333] could be in breach of antitrust law.[334] In particular, legal advisors were concerned about an ambiguous reference to limiting coal production.[335] The matter was easily solved with a mere clarification,[336] but it reflects just how pervasive the idea of a conflict between antitrust and sustainability has become.

To complete this part, it is worth noting that when interpreting European doctrinal developments, U.S. scholars have at times missed the mark. For instance, explaining the potential clash between consumer welfare-focused antitrust and social cooperation, Professor Miazad claims that "European competition authorities are not only cognizant of this potential conflict, but are actively debating whether competition policy is thwarting the private sector's ability to meet the goals of the European Union's Green Deal."[337] There is certainly a debate happening in Europe, but this is not an accurate reflection of its terms. Professor Miazad cites two sources to support her claim. The first is the European Commission's website.[338] On it, the ongoing discussion is said to focus on whether "we can do more . . . to apply our rules in ways that better support the Green Deal."[339] The website also includes a link to a call for contributions,[340] inviting views on how to nurture an environmentally conscious competition policy. Its drafting suggests that the principal focus is on more, not less, enforcement[341]:

> EU antitrust rules already contribute to the Green Deal objectives by sanctioning restrictive behaviour, such as restrictions in the development or roll-out of clean technologies or foreclosing access to essential

333. The Race to Zero is a campaign by which nonstate actors have committed to adopting measures to halve emissions by 2030. CLIMATE CHAMPIONS, https://climatechampions.unfccc.int [https://perma.cc/U6VQ-QAH4].

334. Thomas Hale, *Corporate Pushback Against Climate Action Is Getting Desperate*, CLIMATE HOME NEWS (Sept. 28, 2022, 2:36 PM), https://www.climatechangenews.com/2022/09/28/corporate-pushback-against-climate-action-is-getting-desperate/ [https://perma.cc/D88M-LHQ3].

335. *Id.*

336. Press Release, Michael R. Bloomberg, Mark Carney & Mary Schapiro, Co-Chairs & Vice Chair, Glasgow Fin. All. for Net Zero, Statement on "No New Coal," https://www.gfanzero.com/press/statement-on-no-new-coal-from-michael-r-bloomberg-mark-carney-and-mary-schapiro/ [https://perma.cc/QT8X-JEZJ (staff-uploaded archive)] (last updated Sept. 14, 2022).

337. Miazad, *supra* note 2, at 1645 (emphasis added).

338. *Id.* at 1645 n.41.

339. *Competition Policy Contributing to the European Green Deal*, EUR. COMM'N, https://competition-policy.ec.europa.eu/about/green-gazette/conference-2021_en [https://perma.cc/ZK4K-494N].

340. *Id.* (to access my contribution, as well as all others, download the .ZIP file under the subheading "Call for Contributions").

341. *See* EUR. COMM'N, DIRECTORATE-GEN. FOR COMPETITION, COMPETITION POLICY SUPPORTING THE GREEN DEAL: CALL FOR CONTRIBUTIONS 1 (2020) [hereinafter CALL FOR CONTRIBUTIONS], https://competition-policy.ec.europa.eu/system/files/2021-08/2021_green_deal_conf_call_for_contributions_en.pdf [https://perma.cc/9TYV-H95Y].

> infrastructure, such as power transmission lines, which is key for the roll-out of off-shore wind parks and other renewable energy sources. EU antitrust rules also contribute to Green Deal objectives by facilitating energy flowing freely across borders based on competition between energy operators and a more efficient use of natural resources. Enforcement action relating to transport can also contribute to the greening of the industry and economy.[342]

The second source Professor Miazad refers to is the European Commission's policy brief *Competition Policy in Support of Europe's Green Transition*.[343] The brief mentions that companies have flagged fears about antitrust liability, but in fact insists 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."[344] The brief does mention the need for further reflection and guidance,[345] which translated into the revision of the EU Horizontal Cooperation Guidelines.[346] As seen above however, the new Guidelines barely broaden the scope of the Article 101(3) TFEU exemption.[347] As a consequence, the results of the reflection suggest that the Commission has not found a major obstacle to sustainability collaboration in the competition law rules, and intends to continue to apply the prohibition contained in Article 101(1) TFEU to these arrangements if they bear unjustified anticompetitive consequences.

To sum up, importing green antitrust ideas into the United States comes with significant challenges. U.S. antitrust enforcement is already widely taken to have been lax for more than forty years. At the same time, politically motivated antitrust lawsuits against environmental initiatives send the wrong message. Baseless as they may be, they make headlines and stoke fear, reinforcing the message that antitrust trumps action against climate change.

IV. PROPOSALS

How the times have changed. In the 1990s, the OECD warned about the potential anticompetitive effects of environmental legislation.[348] Among the problems identified, the OECD mentioned the possibility that

342. *Id.* at 3.

343. Miazad, *supra* note 2, at 1645 n.41.

344. Badea et al., *supra* note 103, at 2.

345. *Id.* at 5–6.

346. EU Horizontal Cooperation Guidelines, *supra* note 95.

347. *See supra* Section I.C.

348. OECD, *Competition Policy and Environment*, at 5–6, OCDE/GD(96)22 (1996), https://one.oecd.org/document/OCDE/GD(96)22/en/pdf [https://perma.cc/T4TH-7UK5 (staff-uploaded archive)].

> [t]he sharing of information on technology or costs . . . could simplify co-ordination among rivals. Or, the close co-operation required for the operation of the pollution control scheme could spill over into competitive activities. Collusion could also be facilitated by environmental regulations which limit the number of competitors, either in the pollution control market itself or in the downstream market. Finally, collusion should be more stable to the extent that competitors succeed in raising barriers to entry or expansion through environmental regulation.[349]

Fast forward twenty years, and the apprehension has switched to the harm competition law enforcement could inflict on the environment. Now the OECD is concerned about the "chilling effect" of the fear of antitrust liability on sustainable business practices.[350]

The reversal is certainly a necessary one, both because of the urgency of the climate crisis and because of the impact the ongoing discussion may have on the effectiveness of competition law. Professor Carl Shapiro put it best when he said that "the role of antitrust in promoting competition could well be *undermined* if antitrust is called upon or expected to address problems not directly relating to competition."[351] Competition and competitive markets derive multiple societal benefits, ranging from equal opportunity for those without power,[352] to increased wealth equality,[353] to well-supported innovation,[354] to improved general welfare. We could undermine these objectives by fixating on a purpose antitrust was not designed to achieve. The stakes could not be higher. Four priorities ought to be explored to boost sustainability while protecting healthy antitrust enforcement. They are not alternatives. They could be adopted simultaneously.

One recommendation is to focus on public intervention, which can do much more than corporate collaboration. Governments should not privatize the protection of our planet.[355] There are superior methods for achieving this goal, and most of them go through the state. For example, we may admire a company

349. *Id.* at 6.

350. OECD Secretariat, Directorate for Fin. & Enter. Affs. Competition Comm., *Environmental Considerations in Competition Enforcement*, at 5, DAF/COMP(2021)4 (Nov. 19, 2021), https://one.oecd.org/document/DAF/COMP(2021)4/en/pdf [https://perma.cc/6UWM-WXE2 (staff-uploaded archive)].

351. Shapiro, *supra* note 15, at 716.

352. Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1180 (1981).

353. *See supra* notes 90–91 and accompanying text.

354. CALL FOR CONTRIBUTIONS, *supra* note 341, at 1 (asserting that competition policy encourages companies to "invest efficiently and to innovate and adopt more energy-efficient technologies").

355. *See* Schinkel & Treuren, *Green Antitrust*, *supra* note 133, at 6.

that raises millions for the community through charitable giving initiatives.[356] However, when that same company goes to extraordinary lengths to set up a complex tax scheme to dodge paying billions worth of taxes,[357] then it is hard to believe that its (tax-deducting) donations are genuinely intended to help the underprivileged.[358] From this standpoint, adequate taxation, sector-specific rules, and investment remain far superior options than green business collaborations.[359]

The second priority is to remember that antitrust need not, and should not, be diluted for the sake of the environment. This Article has shown that, despite claims to the contrary, there is no significant evidence that competition law has prevented genuinely beneficial initiatives.[360] As Professor Schinkel has asserted, "The rare genuine sustainability agreement cannot justify relaxing general competition rules."[361] Even Holmes, who has fiercely advocated for radical changes (including TFEU reform),[362] admits that in practice "very few cases [have] been brought against environmental or sustainability agreements."[363]

Although some supporters of looser enforcement claim that current antitrust policy leaves no room for environmental considerations, there is *some* leeway to consider the legality of truly beneficial social cooperation even when it carries negative externalities on competition. When the conduct at stake is considered inherently harmful, admittedly it will be very difficult to defend. Antitrust tools struggle to provide an adequate yardstick to measure benefits when they do not coincide in space and time with the affected markets. This is a limitation we may have to come to accept, and it is not necessarily an undesirable one. The risk of benevolent collaborations turning into hardcore collusion is very real, as exemplified by the *Consumer Detergents* investigation.[364] It is evidently tempting for corporations to use environmental protection objectives as a front to engage in lucrative but very harmful illegal conduct.

356. *Across the Globe, Apple and Its Team Find New Ways to Give*, APPLE (Dec. 8, 2022), https://www.apple.com/hk/en/newsroom/2022/12/across-the-globe-apple-and-its-teams-find-new-ways-to-give/ [https://perma.cc/N37Z-YKJ9].

357. *See, e.g.*, Commission Decision 2017/1283 of 30 August 2016, on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) Implemented by Ireland to Apple, 2017 O.J. (L 187) 1, ¶¶ 51–52 (EU).

358. Noah Buhayar, Sophie Alexander & Ben Steverman, *Wealthy Use Loophole to Reap Tax Breaks—And Delay Giving Away Money*, BLOOMBERG (Oct. 2, 2022, 8:00 PM), https://www.bloomberg.com/news/features/2022-10-03/rich-use-tax-loophole-to-get-deductions-now-for-donating-later [https://perma.cc/P8BD-BN9N (staff-uploaded, dark archive)].

359. The European Commission acknowledges that at times "existing (environmental) regulation already incentivises companies to produce in a sustainable manner and therefore obviates the need for cooperation." Badea et al., *supra* note 103, at 6.

360. *See supra* Section III.B.

361. Schinkel & Treuren, *Green Antitrust*, *supra* note 133, at 6.

362. Holmes, *supra* note 2, at 405.

363. *Id.* at 402.

364. *See supra* Section III.B.

The third proposal, which considers strengthening rather than weakening enforcement, with a view toward punishing conduct that is simultaneously anticompetitive and environmentally harmful, ought to be carefully explored. It would not require any meaningful changes. At most, agencies would have to adjust their priorities and select cases where the allegedly anticompetitive conduct may also have negative consequences for the environment,[365] and possibly elaborate new theories of harm allowing enforcers to take into account a wider range of externalities in the assessment of the impact of conduct or mergers.[366] This appears necessary not just to boost the protection of social goals but also to address the underenforcement problem in the United States.

As a fourth line of action, some professors have floated a radical suggestion: the consumer welfare standard should be completely abandoned. Professor Light, for instance, believes that increasing the liability antitrust places on companies would discourage them from colluding and entice them to pay attention to the broader consequences of their actions. She claims that "[i]f firms had a broader mandate beyond profit maximization, including to contribute to the public interest, perhaps they would have been more willing to incur a short-term cost disadvantage, even in a competitive market, rather than enter into an agreement to limit competition."[367] The limitations of Professor Bork's consumer welfare standard are extensively documented, and a tectonic shift is certainly not out of the question. The difficulty in this strategy resides in the ongoing struggle to come up with a new standard that could optimally guide antitrust policy. At this moment, the most plausible alternative would be to shift the attention to the competitive process, but this concept also has documented shortcomings.[368]

While we continue to mull over a better standard, two simpler lines of action could help shift the perspective of the current debate and take the above suggestions on board. The first would require federal antitrust agencies to issue guidance to dispel the myths about the alleged frictions between antitrust and sustainability. The authorities should carefully explain how green collaborations will not typically breach the law and explain what could make cooperation tread over the Section 1 line of lawfulness. This could reassure the many who are increasingly weary as a consequence of the prevailing narrative, and could also reduce the chances of frivolous antitrust challenges to perfectly lawful ESG-oriented cooperation. In light of the global trend to adopt guidelines, it is regrettable that the FTC and the DOJ remain almost completely silent. While

365. Ezrachi et al., *supra* note 91, at 68.

366. Deutscher & Makris, *supra* note 166, at 350–51.

367. Light, *supra* note 171, at 174.

368. *See, e.g.*, John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 514–15 (2019) (noting that the term competitive process is ill-defined and what constitutes a harm to the competitive process is not clear).

the courts would not be bound by the guidance provided, it would be helpful for companies to understand the circumstances under which their initiatives might be challenged by the administrative agencies.

The second suggestion is for the scholarly community, and it relates to the concept of green antitrust. As this Article has shown, the current definition does not reflect the complexity of the relationship between competition and environmental goals, and instead focuses solely on the conflict. Instead of equating green to flexible antitrust, we should use the label to refer generally to the efforts to look for ways to maximize antitrust's potential to advance sustainability. In some cases, this may require very specific, isolated exceptions, but the evidence to date suggests vigorous enforcement is likely to be much more beneficial. Robust antitrust can be green antitrust, and should be considered as such.

CONCLUSION

In a recent interview, Professor Scott Shapiro asserted that "[c]ompanies do only what they are forced to do."[369] Corporations might at times behave irrationally, but both theory and practice reflect that they are, more often than not, moved mainly by profits and legal obligations. Flexible antitrust proponents tell us to defy that logic and put our faith in the business community's noble intentions when implementing sustainability-geared projects. As this Article has shown, calls for lax enforcement overstate the threat antitrust liability poses for companies wishing to implement genuine environmental arrangements. In the current climate of underenforcement, that threat would be negligible. Calls for lax enforcement also understate the pivotal role antitrust plays in society and the direct and indirect, economic and noneconomic benefits that may be reaped from competition and competitive markets.

Antitrust was not designed to save the Earth, and judging it for its inability to do so is, as the saying goes, like judging a fish for its inability to climb. An overly flexible antitrust policy could gravely diminish the system's potency and encourage greenwashing. Conversely, a healthy antitrust system could have the potential to reap indirect environmental benefits while preserving antitrust's arc of progress. To promote sustainability, antitrust need not go soft on harmful

369. Nabiha Syed, *Living in a World of Cyber Threats and God Bots*, MARKUP (Oct. 7, 2023, 8:00 AM), https://themarkup.org/hello-world/2023/10/07/living-in-a-world-of-cyber-threats-and-god-bots [https://perma.cc/TFF6-6D73] (interviewing Professor Scott Shapiro).

anticompetitive behavior. The green antitrust movement must be reconceived to encapsulate the versatile solutions required to ensure competition policy develops in harmony with environmental priorities. Instead of focusing only on the possibility that antitrust may pose an obstacle to green initiatives, scholars and policymakers ought to be reflecting on ways in which the law's enforcement could bear positive effects on the environment.