EU ANTITRUST IN SUPPORT OF THE GREEN DEAL. WHY GOOD IS NOT GOOD ENOUGH

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ABSTRACT

The Dutch Authority for Consumers and Markets (ACM) and the EU Commission have published proposals to green antitrust. Based on the assumption that Article 101(3) TFEU would allow collective action, both competition agencies suggest different routes to re-interpret the consumer benefit and indispensability condition of said provision. This article finds that said re-interpretations bring competition policy outside the limiting principles that define objective and effective enforcement. Collective action is a no-go to begin with because the residual competition condition is actually meant to prioritize the protection of the competitive process over potential efficiency gains, and to protect competition in all its dimensions.

KEYWORDS: Competition policy, Sustainability, Consumer welfare, Cartel, Regulation

JEL: K21, L40, L41

I. INTRODUCTION

Green antitrust is hot. Confronted with one of the biggest crises mankind has ever faced, green antitrust proponents claim that vigorous competition enforcement falls short because it would hinder producers to invest in green production.[1] Focusing on protecting competition, straightforward antitrust would impede producers to collectively overcome so-called first mover disadvantage, a situation where none of them would initiate more sustainable production because consumers would not be

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[1] S Kingston, 'Integrating environmental protection and EU competition law: Why competition isn't special' (2010) 16 ELJ 780-805; G Monti and J Mulder, 'Escaping the clutches of EU competition law' (2017) EL Rev 635-56; A Gerbrandy, 'Solving a sustainability deficit in European competition law' (2017) 40 World Comp. 539-62; S Holmes, 'Climate change, sustainability and competition law' (2020) 8 JAE 354-405; M Dolmans, 'Sustainable Competition Policy and the 'Polluter Pays' Principle' in eds S Holmes, D Middelschulte and M Snoep, *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) 17-37; G Monti, 'Four options for a greener competition law', (2020) 11 JECL & Practice 3-4:124-32.

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willing to pay the higher prices that accompany greener production processes. In order to save the planet for future generations, green antitrusters therefore claim that antitrust enforcement must be toned down so that companies can collectively overcome such deadlocks. This puts 'private standard setting' as it is in mandatory, industry-wide standards that correct for environmental damage at the heart of the green debate.

Trailblazer for 'green antitrust' (where the promotion of green trumps the protection of competition) is the Dutch Authority for Consumers & Markets (ACM), whose draft Guidelines on sustainability agreements (Dutch Proposals) set out the contours of a so-called 'future-ready competition policy'.[2,3] Centrepiece is the use of a so-called citizen welfare standard under Article 101(3) TFEU that focuses on environmental damage-correction agreements, which would allow competition agencies to include non-consumer benefits when consumer benefits do not outweigh anticompetitive harm. Basically, ACM claims that EU antitrust allows industry to set higher standards than the regulatory standard that is and wants to widen the scope of this option. The EU Commission, on the other hand, holds that 'vigorous antitrust' (where the protection of competition trumps the promotion of green) supports the Green Deal best. Vigorous antitrust builds on the consumer welfare standard and requires full consumer compensation to be established within the confines of the relevant market.[4] Yet, also the Commission finds that green antitrust may be necessary in those situations where competition does not work.[5] Its draft Guidelines for horizontal cooperation agreements (EU Proposals) present a 'competition policy fit for new challenges' that continues *CECED*, the 1999 decision in which the Commission cleared an agreement that used a higher minimum standard to phase out less energy-

[2] ACM, Draft Guidelines on Sustainability agreements. Opportunities within competition law, second version 26 January 2021 (Dutch Proposals): www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf accessed [5 June 2022]; ACM, Legal Memo What is a fair share for consumers in Article 101(3) TFEU?, 27 September 2021: www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf accessed [5 June 2022].
[3] Dutch Proposals (n 2), [78].
[4] A Badea, M Bankov, G da Costa, J Elias Cabrera, S Marenz, K O'Connor, E Rousseva, J Theiss, A Usai, S Vasileiou, A Winterstein and M Zedler, 'Competition Policy in Support of Europe's Green Ambition' (2021) 1 – September 2021 (EU Competition Policy Brief), p 6.
[5] EU Commission, draft Guidelines on the applicability of Article 101 of the Treaty of Rome on the Functioning of the European Union to horizontal co-operation agreements (EU Proposals), C(2022) 1159 final, [546] and [584]; EU Competition Policy Brief (n 4), p 6.

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efficient washing machines.[6] To enable green antitrust, the Commission suggests that full consumer compensation may also be derived from the collective benefits an agreement brings for consumers.[7] To avoid greenwashing, the indispensability requirement is tasked to filter out 'fake' claims of first mover disadvantage (where first mover advantage competition works because consumers other than claimed actually do value green).

Now we all agree that the correction of negative externalities in terms of environmental costs improves economic efficiency, and we also agree that 'greenwashing' (where green covers for the pursuance of cartel overcharges) must be avoided.[8] The central question is whether it is a good idea to correct one market failure, a negative externality, by way of creating another, market power in terms of coercion. At this point, it is important to note that not all negative externalities constitute a market failure. This is because simple externalities, which concern a few stakeholders, can be corrected through joint arrangements that do not eliminate competition.[9] It is only in case of complex negative externalities that such arrangements fail due to high transaction costs and free riding, where one or more parties do not contribute to an arrangement but profit nonetheless. In other words, negative externalities only result in a market failure when they need coercion to be corrected. Since the green debate concerns the intersection between two market failures, this article focuses on complex negative externalities and

[6] EU Commission, *CECED* [1999] L187/47 OJ 2000. This concerns a first mover disadvantage case *avant la lettre*: the agreement guaranteed manufacturers that exclusively focus on higher-end, energy efficient washing machines "that other parties will not meet consumer demand for [lower-end, energy-inefficient] washing machines (*CECED*, [31]). R. Ahmed and K. Segerson mention that "[s]imilar agreements have been made for household dishwashers, water heaters, household refrigerators, freezers, television radios and light bulbs. In: 'Collective voluntary agreements to eliminate polluting products' (2011) 33 Resource and Energy Economics 572-88, 573.

[7] EU Proposals (n 5), [588]-[608]; EU Competition Policy Brief (n 4), p 6. The Austrian legislature implemented the concept of derivative consumer compensation in its competition law: after a recent amendment, the Austrian Cartel Act now states that "consumers shall also be considered to be allowed a fair share of the improvement of the production or distribution of goods or the promotion of technical or economic progress if the agreement significantly contributes to an ecologically sustainable and climate-neutral economy." In: Austrian Federal Law Gazette I No. 176/2021.

[8] On sustainability benefits and efficiency gains: EU Proposals (n 5), [577]-[579]. The position that agreements that correct for environmental costs improve economic efficiency as meant under Article 101(3) TFEU concurs with the standard consumer welfare approach where efficiencies also encompass "increases in product variety and quality, improvements in production or distribution processes, and increases in innovation." In: EU Commission, Guidelines on the application of Article 81(3) of the Treaty (Guidelines on Article 101(3)), OJ 2004, C101/97, [48]-[72].

[9] This represents the Coase theorem: the parties involved are incentivized to create an additional market through additional transactions.

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market power in terms of coercion. References to negative externalities therefore cover complex negative externalities. References to market power cover market power in terms of coercion.

In a previous article I advanced that market power cannot serve to correct a negative externality.[10] Four main reasons, embedded in the constitutional fundamentals of EU antitrust and argued at length in said article, indicate why. First, in market democracies like the EU and its Member States, the use of coercion is exclusively allocated to the legislature. Second, competition law concerns single purpose law that protects against market power. Third, for competition law to effectively protect the efficient workings of the market mechanism, it connects the efficiency goal of market competition to the consumer welfare standard, and builds on first mover advantage and consumer choice. Fourth, competition policy means objective competition law enforcement policy given the regulatory framework that is. The upshot is that competition agencies protect the efficiency of market competition given the regulation that is. If private arrangements cannot solve a negative externality without recourse to coercion, a prohibition decision under Article 101 TFEU may serve to signal that legislative action may be required. Economic research concurs with these findings. Schinkel and Spiegel demonstrate that competition rather than collective action on sustainability effort levels promote more sustainable production.[11] Schinkel and Treuren find on the basis of a literature review that first mover disadvantage is a "rare phenomenon" – and even when there would be a deadlock in competition preventing more sustainable production, it is by no means clear that sustainability agreements would break that impasse.[12]

This article investigates whether the new policy proposals might lead to another conclusion. To do so, it analyses private standard-setting as a multi-purpose cartel.[13] On the one hand, private standards have

[10] E Loozen, 'Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability' 2019 5 CML Rev 1265-1302.
[11] M P Schinkel and Y Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?', International Journal of International Organization, 53(2017), 371-398.
[12] M P Schinkel and L Treuren, 'Green Antitrust: Friendly Fire in the Fight Against Climate Change' in eds S Holmes, D Middelschulte and M Snoep *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) 69-88.
[13] This article defines 'cartel' in terms of a 'restriction by object'. As such, it is understood to also encompass eliminations of competition that change the structure of the market, even without limiting output or innovation (EUCOJ, *BIDS* C-209/07 EU:C:2008:643, [31]). See also other case law in which the EUCOJ reiterated that Article 101 not only protects the immediate interests of individual competitors or consumers but also the structure of the market and thus competition as such (*T-Mobile* C-8/08 ECLI:C:2009:343, [38], and *Dole Food*

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"the object of controlling a product characteristic on which there is competition in the market".[14] In *CECED*, for example, the discontinuation of lower-end, energy-inefficient washing machines eliminated the competitive pressure they exerted on higher-end, energy-efficient washing machines.[15] In doing so, the agreement lessened price rivalry, even when output was not reduced. On the other hand, they purport to correct environmental costs and thus improve economic efficiency under the first condition of Article 101(3). In accordance with both doctrine and the current debate,[16] the article thus concentrates on Article 101(3). Does this provision allow green cartels, and if so, how does it prevent greenwashing?

Article 101(3) lists four conditions that specify under what circumstances anticompetitive agreements qualify for an exemption to the cartel prohibition laid down in Article 101(1). The first states that anticompetitive agreements must improve productive efficiency and/or economic progress (efficiency condition). The second condition requires that consumers must receive a fair share of the resulting benefits (consumer benefit condition). The third condition specifies that the anticompetitive agreement at issue must be necessary to attain said benefits (indispensability condition). The fourth condition demands that anticompetitive agreements may not eliminate competition in respect of a substantial part of the products in question (residual competition condition).

The Dutch Proposals raise three issues that all concern the use of a citizen welfare standard under the consumer benefit condition. First, whether the presence of a 'public sustainability objective' is sufficient to effectively depoliticize the use of a citizen welfare standard. Second, whether the interpretation of the 'fair share' requirement under said condition in *MasterCard* allows competition

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and Dole Fresh Fruit Europe v Commission C-286/13 P EU:C-2015:184, [125]). The judgment in *Generics* C-307/18 EU:C:2020:52, where the EUCOJ held that evidenced pro-competitive effects may call into question whether an agreement constitutes a 'restriction by object' [103], does not apply here because it concerns standard consumer benefits ([21]). By contrast, the need for green antitrust arises when consumer benefits do not suffice to compensate anticompetitiove harm based on which competition agencies resort to non-consumer benefits (ACM) or collective consumer benefits (Commission)

[14] *CECED* (n 6), [33].

[15] *CECED* (n 6), [31] and [61]: the higher minimum standard enabled high-end washing machine producers to control "purchasers [with] buying power" that could otherwise "focus their orders on [low-end washing machines]".

[16] *BIDS* (n 13), [21]: "an agreement may be regarded as having a restrictive object even if it does not have the restriction as its sole aim but also pursues other legitimate objectives. It is only in connection with Article [101(3) TFEU] that matters such as relied upon by BIDS may, if appropriate be taken into consideration for obtaining an exemption […]." Likewise, EU Proposals (n 5), [548].

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agencies to take account of non-consumer benefits in those situations where consumer benefits do not fully compensate for anticompetitive harm. Third, whether the 'polluter pays' principle laid down in Article 191(2) TFEU mandates competition agencies to include non-consumer benefits in said situations considering that consumer demand creates the environmental damage in the first place. The EU Proposals raise four further issues that regard the ability of Article 101(3) to allow green antitrust but avoid greenwashing in a consumer welfare setting. First, whether the consumer benefit condition can accommodate green antitrust by way of allowing collective benefits that accrue to consumers in the relevant market to motivate full consumer compensation. Second, whether the indispensability condition can prevent greenwashing by filtering out fake first mover disadvantage. Third, whether indeed the residual competition condition allows the private sector and competition agencies to regulate competition where "public policies and regulations" do not (fully) correct market failures because it only protects competition in its most important expressions. Lastly, whether *CECED* provides a proper basis to build the green antitrust house on.

To clarify these issues, the article proceeds as follows. Section 2 discusses the latest Dutch arguments. I contend that the presence of a 'public sustainability objective' cannot justify the use of a citizen welfare standard in Article 101(3). I also advance that neither *MasterCard* nor the polluter pay's principle indicate that the 'fair share' requirement in the consumer benefit condition would mean anything less the 'full consumer compensation'. Section 3 then tackles the Commission's arguments. I argue that the re-interpretations of the consumer benefit and indispensability condition won't work. The consumer benefit condition does not allow for consumer compensation to be based on collective consumer benefits because, ultimately, also collective consumer welfare analysis resorts to a citizen welfare standard. The indispensability condition is inapt to prevent greenwashing because it cannot distinguish between real and fake first mover disadvantage. Instead, the Commission should correct its current interpretation of the residual competition condition. While the Commission mistakenly assumes that first mover disadvantages change the institutional structure underlying antitrust, this structure in fact commands this condition to protect competition in all its expressions. Lastly, I demonstrate that the objective purpose of the *CECED* agreement was not to promote green but to

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ensure cartel overcharges. In addition to the interim conclusions that summarize the findings in Sections 2 and 3, Section 4 provides a succinct, overall conclusion.

II. DUTCH WISHFUL THINKING

ACM considers standard antitrust adequate but for negative externalities in the context of the climate change.[17] The introduction of a citizen welfare standard must correct this and make antitrust fit to play its proper part.[18] ACM acknowledges that this proposition is rather unusual in that a citizen welfare standard makes antitrust political: "Normally [ACM is] very reluctant to allow agreements that restrict competition that lead to redistribution between users and non-users" because "it is up to the democratically elected legislature to determine who contributes to what extent to the achievement of public interest goals".[19] So, in an attempt to depoliticize the use of a citizen welfare standard, the agency limits the use thereof to environmental damage-correction agreements for which it expands current state action doctrine under Article 101(3).[20]

In parallel, ACM argues that the 'fair share' requirement in the consumer benefit condition allows competition agencies to take account of non-consumer benefits when consumer benefits do not fully outweigh anticompetitive harm.[21] In *MasterCard*,[22] the EUCOJ would have held that consumers need not be fully compensated for the anticompetitive harm they suffer. It also argues that the 'full compensation' interpretation of 'fair share' would contradict the 'polluter pays' principle laid down in Article 191(2) TFEU.[23] Considering that it is consumer demand that creates the environmental damage in the first place, 'full consumer compensation' would be all but 'fair'. Are these assumptions correct?

'Public sustainability objective' defence is deficient

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[17] For a critique of what ACM considers standard antitrust regarding other sustainability agreements: Loozen (n 10), p 1283-8.
[18] M Snoep (President ACM), speech at The Pros and Cons of Sustainability Considerations, Konkurrensverket 30 May 2022, www.acm.nl/nl/publicaties/speech-acm-what-fair-and-efficient-face-climate-change accessed [5 June 2022].
[19] M Snoep (President ACM), Keynote on competition and sustainability, 24th Annual Competition Conference IBA, 9 September 2020.
[20] Dutch Proposals (n 2), [45], [48] and [67].
[21] Dutch Proposals (n 2), [48]; ACM Legal Memo (n 2).
[22] EUCOJ, *MasterCard* C-382/12 P EU:C:2014:2201.
[23] ACM Legal Memo (n 2), [5].

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End 2019, the Supreme Court of the Netherlands (SCOTN) confirmed in the *Urgenda* case that the Dutch State is under international obligations to reduce carbon dioxide emissions by 25% of 1990 levels in 2020.[24] ACM now suggests that anticompetitive, environmental damage-correction agreements should qualify for an exemption to the cartel prohibition if they help the Dutch State meet a sustainability norm that binds the State but not the private sector, provided that two conditions are met.[25] One, the agreement at issue must pursue a 'public sustainability objective': A sustainability objective that binds the Dutch State. If so, this objective justifies the use of a citizen welfare standard under the consumer benefit condition. Second, the agreement must be 'regulatory efficient': It must be as efficient as a potential State measure would have been. The indispensability condition is tasked to do a regulatory impact assessment. But do these conditions effectively depoliticize the use of a citizen welfare standard under Article 101(3)?

As a preliminary point, I question the logic of a 'public sustainability objective' defence under Article 101(3). Current state action defences are limited to Article 101(1) because they investigate who is actually accountable for restricting competition: The parties to the agreement or the State.[26] Once the parties are accountable for the anticompetitive effects of an agreement, the benefits are also theirs (this goes for both consumer and non-consumer benefits).

ACM nonetheless suggests that state involvement in terms of a 'public sustainability objective' would justify the use of non-consumer benefits to motivate 'fair share' under the consumer benefit condition. In other words, while state action defences clear anticompetitive effects under Article 101(1), a 'public sustainability objective' helps clear anticompetitive effects under Article 101(3) based on non-

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[24] SCOTN, judgment of 20 December 2019 in *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*, ECLI:NL:HR:2019:2006 (English translation: ECLI:NL:HR:2019:2007).
[25] Dutch Proposals (n 2), [45], [48] and [67].
[26] At its core, EU state action doctrine maintains that antitrust does not prohibit anticompetitive agreements if they are required by national legislation (*Deutsche Telekom v Commission* C-280/08 P ECLI:EU:C:2010:603; *Commission and France v Ladbroke Racing* C-359/95 P and C-379/95 P ECLI:EU:C:1997:531). The *useful effect* branch adds (among others) that EU Member States must refrain from delegating the responsibility for taking decisions affecting the economic sphere to private traders (*Arduino* C-35/99 EU:C:2002:97; *Bundesanstalt für den Güterfernverkehr v Reiff* C-185/91 EU:C:1993:886). The legitimate objective branch adds that deontological rule-setting may not pose a problem under Article 101(1) insofar as the professional organisations at issue are mandated by law and the State has defined the deontological principles to be specified (*Wouters* C-309/99 EU:C:2002:98; *Meca-Medina and Majcen v Commission* C-519/04 P EU:C:2006:492; *Ordem dos Técnicos Oficias de Contas* C-1/12 EU:C:2013:127; *Consiglio nazionale dei geologi* C-136/12 EU:C:2013:489). For a more elaborate account: Loozen (n 10), at 1288-96.

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consumer benefits. To rightfully to do so, it should at least meet the conditions that apply to state action defences under Article 101(1). The following comparison is limited to core state action doctrine; also because ACM itself is uncertain whether the legitimate objective doctrine introduced in *Wouters* applies to sustainability agreements in the first place.[27]

Current state action doctrine requires the presence of a regulatory norm that binds the private sector. Thus it ensures that the State has actually been responsible for the political decision of displacing market competition with market regulation.[28] The State concerns the legislature because it is this particular state entity that represents the citizen, who is the ultimate decision-maker in the political domain.[29] This implies that current state action doctrine only legitimizes the clearance of anticompetitive effects insofar as they are caused by the State as it is in the legislature.

The weakness of the 'public sustainability objective' defence is that a regulatory norm binding the private sector is lacking. Corporations are to replace the legislature who failed to translate the norm that binds the State (a public objective) in a regulatory measure that binds the private sector (a public norm). The new defence thus purports to legitimize the clearance of anticompetitive effects that the State *should* have caused *but did not* cause based on non-consumer benefits that the State *should* have caused *but did not* cause. Such an extension to current state action doctrine makes antitrust inherently political as it allows competition agencies to intrude on the legislature's prerogative to determine what measures are necessary to attain a public objective.

Other than suggested, *Urgenda* all but justifies a new state action defence as proposed. Starting out to confirm that decisions regarding the reduction of greenhouse gasses fall within the political domain of the legislature, SCOTN determined that the role of the judiciary in constitutional democracies is to verify whether the legislature remains within the boundaries of the law when using its discretionary power to weigh relevant political considerations and make value judgements. This implies that in

[27] Dutch Proposals (n 2), [18].
[28] D Crane, 'Judicial review of anti-competitive State action: Two models in comparative perspective' (2013) 1 JAE 418-436.
[29] J M Buchanan coined the term "ultimate decision-making authority". In: 'Marginal Notes on Reading Political Philosophy' in eds J.M. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (The University of Michigan Press, Ann Arbor, [1962]) 307-22.

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situations where the legislature has abused its political power (as was held to be the case here),[30] courts may order the government to live up to its (international) obligations *but only insofar as they do not dictate specific legal measures and leave it up to the legislature to choose what measures are necessary to achieve the 25% reduction of greenhouse gas emissions*.[31] In other words, *Urgenda* confirms that lower courts may order the State to take adequate regulatory measures but does not allow them to fill in the gap.

A regulatory impact assessment under the indispensability condition of Article 101(3) cannot help to correct the democratic deficiency of the 'public sustainability objective' defence. The reason is simple: Article 101(3) does not do regulatory impact assessments but examines the alleged positive effects of an anticompetitive agreement on their own merits. Hence, the efficiency condition requires that an anticompetitive agreement improves efficiency given the market regulation that is, while the indispensability condition compares the anticompetitive agreement with the potential alternative of another, lesser restrictive agreement rather than a potential regulatory measure the State should have taken.[32]

***MASTERCARD* does not help out**

Current competition policy holds that the 'fair share' requirement laid down in the second condition of Article 101(3) means that "the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article [101(1)]."[33] In other words, 'fair share' equates *full consumer compensation*.[34] This position concurs with the traditional view that consumer welfare is the better standard to enforce competition law because it precludes 'unfair' welfare transfers from consumers to producers. 'Unfair' refers to those

[30] Article 2 and 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) oblige contracting states to take measures that are actually suitable to avert environmental hazards like dangerous climate change as much as reasonably possible. In 2011, the Dutch State had lowered the emission reduction target from 30% to 20% of 1990 levels by 2020. In so doing, it had not explained how the lower target could still provide an actually suitable measure to prevent a 2° C temperature increase. See *Urgenda* (n 24), [8.3.1]-[8.3.5].
[31] *Urgenda* (n 24), [8.2.1]-[8.2.7].
[32] Guidelines on Article 101(3)(n 8), [73]-[82].
[33] Guidelines on Article 101(3) (n 8), [84]-[85].
[34] Consumers are the buyers of the products in the relevant markets at issue.

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welfare transfers that producers are able to extract from consumers by way of their market power.[35,36] ACM argues that the *MasterCard* case implies otherwise.[37] Is that so?

In *MasterCard*, the EUCOJ discussed the matter of compensation in a two-sided market where banks provide credit-cards to cardholders (consumers on the issuing side of the market) but also deal with merchants who accept payments with those cards (consumers on the acquiring side of the market). The *MasterCard* payment system posed a problem under Article 101(1) as the multilateral fallback interchange fee [MIF] restricted competition. As for the application of Article 101(3), the EUCOJ observed that, "should the General Court have found that there were appreciable objective advantages flowing from the MIF for merchants, even if those advantages did not in themselves prove sufficient to compensate for the restrictive effects identified [under Article 101(1)]", also the advantages for cardholders "could, if necessary, have justified the MIF if, taken together, those advantages were of such character as to compensate for the restrictive effects of those fees."[38]

One cannot derive from this consideration that the EUCOJ finds that 'fair share' means something else than *full consumer compensation*. For one because the court did not discuss this issue.[39] When answering the question as to which markets may be regarded as generating the objective advantages that may be taken into account for the purposes of the analysis under the first condition laid down in

[35] R Pittman, 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' (2007) 3-2 CPI 205; S Salop, 'Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard' (2010) 22 Loyola Consumer Law Review 337; E Loozen, 'The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unravelled through the Economic Approach' (2014) 1 EL Rev 91-110.
[36] As for the use of 'unfair' in this context: see R Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Criterion Challenged' (1982) 34 Hastings L.J. 65-151.
[37] ACM Legal Memo (n 2); Monti and Mulder (re *MasterCard*; n 1); Dolmans (re *MasterCard* and 'polluter pays' principle; n 1).
[38] *MasterCard* (n 22), [241].
[39] This concurs with prior case law that is often referred to when motivating an activist interpretation of the 'fair share' requirement laid down in the second condition of Article 101(3). In *Consten and Grundig*, the Court of Justice noted, when discussing the first condition, that the economic efficiency improvement must show such appreciable objective advantages (56 and 58/64 ECLI:EU:C:1966:41, p 348). In *Compagnie Générale Maritime*, the Court of First Instance elaborated that said appreciable objective advantages "regard the advantages arising from the agreement in question, not only for the relevant market, […], but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement." (T-86/95 ECLI:EU:T:2002:50, [343]). Quite tellingly, the court, when discussing the 'fair share' requirement, it only referred to benefits that accrue to users on the relevant market ([370]).

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Article [101(3)],[40] the court stuck to the question asked and only discussed the first condition of Article 101(3), not the second.[41] Meanwhile, the General Court (GC) and AG Mengozzi (AG) had addressed the meaning of 'fair share'.[42,43] The GC had emphasized that, while the advantages under the efficiency condition may arise "not only for the relevant market but also for every other market on which the agreement […] might have beneficial effects" as well as "for any service the quality or efficiency of which might be improved by the […] agreement", the "very existence of the [consumer benefit] condition necessarily means that the existence of […] advantages attributable to the MIF must also be established in regard to [merchants, i.e. those consumers that suffer anticompetitive harm]."[44] The AG then further specified that because the consumer benefit condition relates to direct and indirect consumers of the goods or services of an agreement, the obligation of full compensation addresses those consumers (in this case, merchants).[45] This is because taking account of benefits enjoyed by consumers other than those suffering anticompetitive harm from the agreement "would amount to allowing [one] category of consumers to be favoured to the detriment of [another]."[46] According to the AG, that kind of "distributive logic" has "no connection with the practical scope of competition law."[47] The UKSC underwrites this reasoning in *Sainsbury's Supermarkets v. Visa/MasterCard*.[48] Stressing that the consumer benefit condition is only useful when it has something to add to the efficiency condition, it underscores that these conditions are "essentially different" in that the consumer benefit condition adds a different kind of "fairness", which rules out that aggregate efficiency gains across different markets could motivate 'fair share'.[49]

In other words, 'fair share' really does mean *full consumer compensation*.

[40] *MasterCard* (n 22), [228].
[41] *MasterCard* (n 22), [228]-[247]. See the UK Supreme Court (UKSC) that pointed out that "the way in which the "fair share" requirement should be applied […] ha[s] not received any consideration [in the MasterCard judgment]." In: UKSC, Sainsbury's Supermarkets Ltd (Respondent) v Visa Europe Services LLC and others (Appellants), Sainsbury's Supermarkets Ltd and others (Respondents) v Mastercard Incorporated and others (Appellants) [2020] UKSC [169].
[42] GC, *MasterCard* T-111/08 EU:T:2012:260.
[43] AG Mengozzi, *MasterCard* C-382/12 P EU:C:2014:242.
[44] General Court (n 40), [228].
[45] AG Mengozzi (n 43), [155]-[157].
[46] AG Mengozzi (n 43), [158]
[47] AG Mengozzi, (n 43), [158].
[48] UKSC, (n 41).
[49] UKSC, (n 41), [170].

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Still, the EUCOJ might disagree in a future judgment. Would ACM's proposition profit therefrom? I don't think this is very likely to happen. The reason is that *MasterCard* discusses different in-market effects (in-relevant-market effects and out-of-relevant-market effects), while ACM wants to bring in out-of-market effects. Differently put, *MasterCard* considers the relevancy of benefits to consumers other than those who suffer anticompetitive harm, while ACM wants to include the benefits of non-consumers. This dissimilarity is crucial because the positions of consumers and non-consumers differ widely in antitrust. The reason is that individuals in market democracies have two identities that correspond with their position in, on the one hand, the market place and, on the other, the legislative state. The market place is a system within which individuals in their capacity as consumers and producers can act freely and make their own choices. The legislative state provides a vehicle that individuals of a polity use to determine whether, and if so, how, one should limit their individual autonomy and freedom to act to better promote the common good. In the commercial arena, consumers are the ultimate decision-makers. Adam Smith and Ludwig von Mises, succinctly summarized by Vanberg, have already explained why: "because we only produce in order to consume", it is "only as a consumer" that "man [...] can command".[50] In the political arena, citizens (a notion that encompasses consumers and non-consumers) are the ultimate decision-makers because limitation of said liberties requires acquiescence by all (which is then safeguarded in the democratic decision-making process). Important to emphasize is that individuals in their capacity as citizens determine how much decision-making power their consuming alter egos have. Differently put, it is in the process of regulating markets more or less stringently, that citizens cede less or more decision-making power to consumers. Apolitical antitrust follows suit in that it enforces competition given the market regulation that is.

It becomes apparent from the above that, given the institutional role of antitrust, the EUCOJ will most likely agree that non-consumer benefits cannot help to compensate for anticompetitive harm. Consumers constitute the 'we the people' in the market place, and it is therefore that competition law

[50] V Vanberg, 'Consumer welfare, total welfare and economic freedom – on the normative foundations of competition policy' in eds J Drexl, W Kerber and R Podszun *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar, Cheltenham UK/Northampton USA, 2011), [44-71], p 56.

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protects consumers against welfare transfers to producers that result from market power in terms of private coercion. It follows logically that 'fair share' must thus equate *full consumer compensation*.

'Polluter pays' principle and the 'fair share' requirement

The last argument concerns the 'polluter pays' principle. ACM suggests that 'fair share' cannot possibly equate *full consumer compensation* because this would mean that consumers escape the 'polluter pays' principle laid down in Article 191(2) TFEU.[51] This suggestion is misplaced because the 'polluter pays' principle works differently.

Article 191(2) TFEU is part of EU environmental policy, one of so-called cross-sectional policies that specify rules for the making of public policy within the EU and its Member States. Cross-sectional policies do not instruct competition agencies however.[52] The reason is that competition policy does not concern the making of public policy but the enforcement of public policy already made: competition law *is* the public policy and the institutional expectation is that competition agencies stick to the making of objective competition *law enforcement* policy, which precludes anything else than protecting consumers against market power given the market regulation that is.[53] This institutional set-up is not without reason. The cross-sectional 'polluter pays' principle instructs the legislative government to effectively internalize environmental costs to make sure that polluters bear the costs of pollution. This happens through regulation. Efficient regulation ensures that operational costs also include the negative external costs as a cost item included in the price. The *fair* result then is that, while non-consumers no longer suffer environmental harm, producers and consumers carry the same burden: producers bear higher production costs and consumers pay higher prices resulting from those higher production costs.

Clearly, green antitrust aspires to correct situations of inefficient regulation. That is, situations where the legislature failed to effectively make firms internalize relevant environmental costs. Green antitrusters believe that market power somehow makes firms internalize environmental costs. That

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[51] ACM Legal Memo (n 2), [5]; Dolmans (n 1).
[52] Loozen (n 10), p 1275-81; O. Odudu, 'The wider concerns of competition law' (2010) 30 Oxford Journal of Legal Studies 599-613.
[53] Loozen (n 10), p 1279.

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consumers pay anticompetitively higher prices as a result would concur with the 'polluter pays' principle in that it makes them pay for the pollution they cause when consuming products that harm the environment. This belief builds on a misunderstanding. Fact of the matter is that consumers would no longer pollute in the situations green antitrusters pursue. After all, the objective of a mandatory environmental damage-correction agreement is that consumers can no longer purchase the polluting products. If the products consumers can purchase no longer cause negative external effects, the evident consequence thereof is that consumers no longer cause pollution for which they would have to pay. A second fact of the matter is that, insofar as consumer benefits nonetheless do not outweigh anticompetitive harm, the producers apparently charge a higher price than necessary to produce the greener product. The unfair result thus is that producers overprofit while consumers overpay. In short, green antitrust turns the 'polluter pays' principle into a 'producer profits' principle. Antitrust is meant to prevent this outcome.

The upshot is that, while market failures point at the legislature to act, government failures do not point at competition agencies to act. Confined to apolitical enforcement, antitrust agencies cannot substitute for the inefficiency of the regulation that is.[54]

Interim conclusion

It turns out that the latest Dutch propositions are not "[o]pportunities within competition law" as the subtitle of the Dutch Proposals suggests.[55] Instead they are very much based on wishful thinking. The 'public sustainability objective' defence is deficient in that it fails to depoliticize the use of a citizen welfare standard under the consumer benefit condition. In its attempt to replace the 'public norm' requirement by a 'public objective' requirement, ACM overlooks that the very act of translating a 'public objective' into a 'public norm' concerns political *per se*. Nor do *MasterCard* and the 'polluter pays' principle call for a reboot of the 'fair share' requirement in that non-consumer benefits can be used to compensate anticompetitive harm under the consumer benefit condition. The EUCOJ did not

[54] J.M. Buchanan, 'Rights, Efficiency and Exchange: The Irrelevance of Transaction Cost' in *Liberty, Market and State. Political Economy in the 1980s* (Wheatsheaf Books Ltd – Brighton, 1986), 92-107. Buchanan explains that the efficiency of market outcomes is inherently limited by the efficiency of the market regulation that is.
[55] Dutch Proposals (n 2).

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touch on the consumer benefit condition in *MasterCard*. It is also all but obvious that the EUCOJ, when asked, would come to the conclusion that non-consumer benefits should be taken into account when determining 'fair share'. The reason is that, while citizens in the political arena determine the fairness of market outcomes in that they set the efficiency level of the market regulation that is, the 'fair share' requirement protects consumers in the market place against welfare transfers that producers extract based on market power in terms of coercion. It follows that 'fair share' is really meant to mean *full consumer compensation*. The 'polluter pays' principle does not make this any different. This principle does not instruct competition agencies because the correction of negative externalities involves political decision-making *per se*. Applying it nonetheless poses a problem. Consumers no longer pollute once the polluting products are no longer offered. If, in that situation, consumer benefits do not outweigh anticompetitive harm, this means that producers overcharge consumers. It is this kind of unfairness antitrust is meant to prevent.

III. THE EU PROPOSALS ARE NOT GOOD ENOUGH

The Commission seems to be in two minds as to how antitrust best supports the Green Deal. It will "continue to enforce Articles 101 and 102 TFEU vigorously" and proclaims that the consumer welfare standard, "which pertains not only to price reduction, but also to quality and innovation, remains at the heart of competition policy."[56] Yet it also intends to permit green antitrust in case of "residual market failure" and "self-interested consumers".[57] Holding on to *CECED*,[58] the Commission suggests it is possible to enable green antitrust and avoid greenwashing at the same time based on a re-interpretation of the second and third exemption condition. The consumer benefit condition would allow full consumer compensation to be based on collective benefits and still meet the consumer welfare standard as long as those benefits accrue to consumers in the relevant market.[59] The indispensability condition would be able to determine whether the primary purpose of a green cartel is to promote

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[56] EU Competition Policy Brief (n 4), p 5-6.
[57] EU Proposals (n 5), [546], [584] and [605].
[58] EU Proposals (n 5), [621].
[59] EU Proposals (n 5), [588] and [601]-[608]. Note that the Commission does not refer to 'full consumer compensation' but observes that the "overall effect [resulting from benefits and harm caused by the agreement] on consumers in the relevant market [must be] at least neutral" [588].

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green or to pursue cartel overcharges.[60] Meanwhile, the current interpretation of the residual competition condition remains unchanged.[61] That is, producers may regulate competition as long as they do not eliminate competition in its most important expressions. Is the Commission right?

The consumer benefit condition is not meant to accommodate collective consumer benefits

To enable green cartels, individual consumer welfare analysis will be expanded with collective consumer welfare analysis to evidence *fair share* in terms of full consumer compensation. While the first method builds on the individual preferences of consumers in the relevant market, the second makes use of collective consumer benefits that, even though they occur "irrespective of the consumers' individual appreciation of the product", nonetheless "objectively accrue to the consumers in the relevant market if the latter are part of the larger group of beneficiaries".[62,63] To illustrate, the Commission refers to the example of car drivers who purchase less polluting fuel. [64] Since drivers are also citizens, they also benefit from cleaner air, if less polluting fuel is used. So, as long as driving consumers substantially overlap with the benefitting citizens, these out-of-market effects can be taken into account to demonstrate full consumer compensation.

Also the Commission refers to *MasterCard* to justify collective consumer welfare analysis.[65] Following its earlier observation (Section II), the EUCOJ noted that in the "absence of any proof of […] appreciable objective advantages" flowing from the MIF to consumers suffering anticompetitive harm in the relevant market", advantages flowing to consumers on a separate but connected market cannot motivate consumer compensation, "in particular […] where the consumers on those markets

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[60] EU Proposals (n 5), [580]-[587]; EU Competition Policy Brief (n 4), p 6.
[61] EU Proposals (n 5), [610]-[614].
[62] EU Proposals (n 5), [601].
[63] This alternative method to evidence full consumer compensation is not entirely new. Collective consumer benefits were first introduced in *CECED*, where the Commission held that "even if no benefits accrued to individual purchasers of machines", collective benefits, which were estimated to be "more than seven times greater than the increased purchase costs of more energy-efficient washing machines", would "adequately allow consumers a fair share of the benefits" (Ceced (n 6), [56]. After the introduction of the Guidelines on Article 101(3)(n 8), this part of the clearance decision has been downplayed however (Monti, n 1). For example, DG Comp officials argued against a citizen welfare interpretation of CECED because collective benefits would not carry the exemption. See M. Jaspers, Sustainability and Competition Policy: Bridging Two Worlds to Enable a Fairer Economy Conference, Global Competition Law Centre, Brussels, 24 October 2019; and L. Peeperkorn, Competition and sustainability: What competition policy can do?, Concurrences (2020) 4:40-52.

[64] EUP proposal (n 5), [604].
[65] EU Proposal, (n 5), [602].

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are not substantially the same."[66] By analogy, the Commission claims that collective benefits may motivate full consumer compensation as long as confined to consumers in the relevant market.

As pointed out earlier, however, *MasterCard* did not touch on the 'fair share' requirement nor on out-of-market effects. It only discussed the relevancy of in-market effects consumers enjoyed in other markets than the relevant market under the efficiency condition. So, again, the question is whether collective consumer welfare analysis avoids political decision-making.

The Commission reasons that collective consumer welfare analysis is apolitical because, other than ACM, it only takes account of out-of-market effects that accrue to consumers in the relevant market. This restriction does not ensure objective enforcement, however. For in antitrust, objective allocation of benefits requires voluntary choice. The reason is that consumers only get to be ultimate decision-makers insofar as they are able to individually decide whether the sustainability benefits a greener product brings outweigh the anticompetitive harm they suffer. Put differently, it is the voluntary purchase that evidences full consumer compensation.[67] By definition, this then implies that only those benefits count that individual consumers themselves think relevant. Collective consumer welfare analysis does the opposite. Since the benefits that can be derived from individual consumer choices do not suffice to outweigh anticompetitive harm, it resorts to the preferences other consumers have over their choices.[68] The result it that antitrust forces sustainability benefits upon consumers that they themselves do not appreciate. This is inherent political decision-making: collective consumer welfare antitrust limits the choices of non-appreciating consumers in the market place, while, as part of the larger polity, citizens overall agreed that these were legitimate choices to make.[69]

It follows that the limitation of collective benefits to consumers in the relevant market does not depoliticize green antitrust.

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[66] *MasterCard* (n 22), [242].
[67] Buchanan (n 54).
[68] R. Inderst, "Incorporating Sustainability into an Effects-Analysis of Horizontal Agreements", Expert advice on the assessment of sustainability benefits in the context of the review of the Commission Guidelines on horizontal cooperation agreements, 1 March 2022, p 41.
[69] See also Inderst (n 69), p 41: "By undertaking a collective consumer welfare analysis and clearing an agreement on this basis, consumers may be deprived of their preferred choices based on the 'vote' of other consumers, which, however, took place outside the political process."

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The indispensability condition cannot filter out greenwashing

The indispensability condition has a straightforward task to fulfil under Article 101(3). It must rule out that an efficiency improvement claimed under the efficiency condition can be attained by a lesser restrictive agreement and thus cause less anticompetitive harm than the one up for clearance.[70] In other words, to maximize the efficiency improvement under the first condition, the third condition sets out to minimize anticompetitive harm. The Commission now adds that the indispensability condition must also make sure that the agreement at issue does not amount to greenwashing. To do so it must ascertain that the first mover disadvantage the agreement claims to correct is real. First mover disadvantage claims are considered 'real' when "the free interplay of market forces" is insufficient to achieve sustainable benefits because consumers are "unwilling to pay" a higher price for greener products.[71] They are considered 'fake' when consumer demand for sustainable products shows that competition works.[72] When first mover disadvantage is real, the promotion of green constitutes the primary purpose of the agreement and market power the legitimate means to achieve that purpose. When first mover disadvantage is fake, the pursuance of cartel overcharges constitutes the primary purpose and green the cover-up.

This reset is doomed to fail. The reason is that the indispensability condition compares agreements that use more restrictive coordination to improve efficiency with agreements that use less or non-restrictive coordination. This procedure is unfit to distinguish between real and fake first mover disadvantage because both disadvantages require coercion to be corrected. The correction of real first mover disadvantage requires coercion because consumers generally do not value green. The correction of fake first mover disadvantage requires coercion because some consumers do not value green. Differently put, a first mover disadvantage claim may be fake in terms of overall consumer demand but coercion is nonetheless necessary to correct the environmental damage at issue.

This means that the indispensability condition cannot filter out greenwashing.

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[70] Guidelines on Article 101(3)(n 8), [73].
[71] EU Proposals (n 5), [584] and [601].
[72] EU Competition Policy Brief (n 4), p 6.

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An additional critique is that the EU Proposals are inconsistent in that they wish to filter out fake first mover disadvantage but nonetheless accept phasing out agreements and common minimum standards. (In practice, the latter two often come together because phasing out agreements are often defined as a common minimum standard.) The Commission contends, for example, that phasing out agreements may be necessary to discontinue polluting technology,[73] and considers common minimum standards bona fide as long as they allow participants to innovate and produce above that standard.[74] In doing so, the Commission overlooks, however, that the first mover disadvantages that phasing out agreements claim to correct are typically fake. This point is well illustrated by *CECED*, *Chicken for Tomorrow* and *Ancient Power Plants*. In *CECED*, 90% of consumers already purchased higher-end washing machines.[75] In *Chicken for Tomorrow,* consumers did value higher quality chicken meat, while broiler supermarkets urged broiler farmers producing low quality chicken meat to catch up with competitors already offering higher quality chicken meat.[76] In *Ancient Power Plants*, the five coal-fired power plants listed to be closed based on their high pollution rate covered about 10% of the production capacity.[77] In other words, if one wants the indispensability condition to filter out situations where competition works, it does not make sense to support phasing out agreements and common minimum standards.

The residual competition condition is the one that should be reset

Meanwhile, the Commission persists that the residual competition condition, which states that an agreement may not "afford [the] undertakings [concerned] the possibility of eliminating competition in respect of a substantial part of the products in question", does not protect competition in all its expressions but only in its most important ones.[78] This interpretation facilitates green antitrust as it

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[73] EU Proposals (n 5), [601] and [605].
[74] EU Proposals (n 5), [585].
[75] *CECED* (n 6), [13] and [66].
[76] ACM, Assessment of the sustainability agreement "Chicken of Tomorrow", ACM/DM/2014/206028, January 2015, www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow accessed at [5 June 2022].
[77] ACM, Analysis of the "Planned Agreement on Closing Down Coal-Fired Power Plants from the 1980s as Part of the SER Energy Accord", 26 September 2013, www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM-over-sluiting-5-kolencentrales-in-SER-Energieakkoord accessed at [5 June 2022].
[78] EU Proposals (n 5), [611].

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allows producers to educate consumers by force and competition agencies to substitute for the regulation that is. But is it lawful and effective?

The position of the Commission traces back to the Guidelines on Article 101(3). While Paragraph 105 states that the last exemption condition prioritizes the protection of the competitive process over potential efficiency gains, Paragraph 110 mentions that "it is also relevant to examine [an agreement's] influence on the various parameters of competition."[79] The latter observation corresponds with *CECED* where the Commission had held that a "restriction in one product dimension, energy consumption, may increase competition on other product characteristics, including price".[80] Paragraph 110 continues that agreements do not fulfil Article 101(3) if they "eliminate "competition in one of its most important expressions", which particularly includes "price competition or competition in respect of innovation and development of new products." To enable private regulation in situations where consumers need to be educated because "public policies and regulations [do not] take care of negative externalities",[81] the Commission now sticks to the protection of competition in its most important expressions, and underlines that eliminations of competition for one or some product variants are not necessarily prohibited.[82]

I don't think this is the right choice. First, the Commission mistakenly assumes that first mover disadvantages change the institutional setting that underlies antitrust. They don't. At best, claimed first mover disadvantages result from a 'residual negative externality' – a negative externality the legislative government did not (fully) correct.[83] Institutionally, however, residual negative externalities do not differ from their non-residual counterparts. Relevant is that a negative externality constitutes a market failure because the correction of the underlying coordination problem requires coercion, a tool only the legislature can resort to. At worst, claimed first mover disadvantages precede a cartel – a

[79] Guidelines on Article 101(3)(n 8).
[80] *CECED* (n 6), [53].
[81] EU Proposals (n 5), [583].
[82] EU Proposals (n 5), [612].
[83] 'Residual negative externalities' compare to 'residual market failures', situations that according to the EU Proposals occur when public policies and regulations do not (fully) address a market failure (EU Proposals (n 5), [546], [583] and [584]).

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situation where private actors face a single action problem and simply want to avoid competition.[84] Here, the legislative government did act already: competition law prohibits restrictions of competition when they lead to coercion.[85] So, one way or the other, first mover disadvantage claims are alien to antitrust.

Next, the Commission forgets that Paragraph 105 of the Guidelines on Article 101(3) rightfully states that Article 101(3) "[u]ltimately" prioritizes the protection of the competitive process over potential efficiency gains. The reason is that competition law protects the means that pushes producers to improve efficiency – competition.[86] The residual competition condition fulfils a crucial role in protecting that means effectively: It must ensure that consumers can exercise their ultimate decision-makership. Based thereupon, the text of the residual competition condition does not limit the protection of competition to its most important expressions. If the market "is the institutional embodiment of the voluntary exchange processes that are entered into by individuals",[87] the protection of ultimate decision-makership by definition regards all product dimensions except those that are regulated by public norms.[88] In short, it falls upon the residual competition condition to not only ensure ongoing innovation but also protect all legitimate consumer choice given the regulation that is.[89]

This functional interpretation of the residual competition condition precludes 'compensatory competition', where a restriction in one competition dimension may increase competition on other product characteristics, like the elimination of one or some product variants.[90] In *CECED*, for example, the Commission argued amongst other that the phasing out of lower-end washing machines

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[84] See also: E van Damme, 'Goede marktwerking en overige publieke belangen' (2017) 1 Markt & Mededinging 5-17, 7.
[85] Loozen (n 10), p 1277-8.
[86] Loozen (n 10), p 1284. Regarding US antitrust: A B Lipsky Jr., 'The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?' (2017) 115th Cong, 1st Sess., Hearing before the Subcommittee on Antitrust, Competition and Consumer Rights of the Senate Committee on the Judiciary (Dec. 13); G Werden, 'Back to School: What the Chicago School and New Brandeis School Get Right' (2018); https://ssrn.com/abstract=3247116 accessed [5 June 2022].
[87] J M Buchanan, 'What Should Economists Do?' in eds R D Tollison and V J Vanberg *Economics Between Predictive Science and Moral Philosophy* (Texas A&M University Press College Station, 1987 [1964]) 21-34, 29.
[88] In case product dimensions are partly regulated, the non-regulated part is part of the competitive process.
[89] Loozen (n 10), p 1287.
[90] EU Proposals (n 5), [611]-[612].

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did not 'eliminate competition for a substantial part of the products in question' because these product variants only accounted for about 10% of the market.[91] This argument is incorrect however. Crucial is that lower-end washing machines are in competition with higher-end washing machines. Whether or not the agreement covers a substantial part then depends on the market position of the parties to the agreement. Since *CECED* covered all or almost all lower- and higher-end manufacturers in the relevant market (around 90%),[92] it clearly 'eliminate[d] competition for a substantial part of the products in question'.

It follows that the residual competition condition is the one that is in urgent need of a reboot. First mover disadvantage claims are alien to antitrust because only the legislature can resort to coercion to correct negative externalities, while the protection of competition in its most important expressions fails to protect legitimate consumer choice given the regulation that is.

CECED*: greenwashing *avant la lettre

The above shows that the concept of green antitrust is not well thought out. This begs the question whether *CECED* set a good example in the first place. To reduce energy consumption and, based thereupon, pollution from electricity generation (CO_2, SO_2 and N_2O emissions),[93] the participating undertakings introduced a higher minimum standard that phased out less energy-efficient washing machines (cat. D to G washing machines).[94] The agreement thus pursued two objectives. One was to restrict competition by "controlling one important product-characteristic on which there is competition in the relevant market".[95] The other was to reduce energy consumption and pollution. This means that the Commission had to sort out whether the reduction of energy consumption and pollution constituted the primary purpose of the agreement or covered for greenwashing. It concluded that there was no

[91] *CECED* (n 6), [66].
[92] *CECED* (n 6), [8].
[93] *CECED* (n 6), [47]-[51].
[94] Not all of cat. D washing machines were phased out. Machines with a loading capacity lower than 3 kg and machines with a spin speed lower than 600 rpm (revolutions per minute) were not discontinued (*CECED* (n 6, [19]).
[95] *CECED* (n 6), [33].

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greenwashing: consumers were not hurt because individual consumer benefits outweighed anticompetitive harm.[96] Is that so?

Consumers would benefit from the agreement because savings on electricity bills allowed them to recoup the higher initial purchase costs of more energy-efficient washing machines within a reasonable pay-back period. However, individual consumer benefits only motivate consumer compensation if the restriction at issue is indispensable to attain those benefits.[97] Based on a comparison with non-restrictive alternatives, the Commission found that the higher minimum standard was indispensable indeed. Crucially, it dismissed information campaigns because they would be "plainly less effective than a standard" because "the provision of information is not sufficient to realize the agreement's environmental benefits to their fullest extent" as "external costs are not fully reflected in consumer's calculations when contemplating a purchase".[98]

This argument is incorrect because timely savings on electricity bills directly incentivize consumers to purchase energy-efficient washing machines, and in so doing they realize the collective environmental effects. A challenge obviously is that consumers with insufficient means may not be able to pay the higher price upfront. To get these consumers on board, the manufacturers could have set up a payment system that linked instalment payments to the period within which the savings on electricity bills allowed consumers to recoup the higher purchase costs.[99]

The above shows two things. First, that the higher minimum standard was not indispensable to attain the individual consumer benefits and collective benefits claimed. Individual cost recoupment incentivized consumers to purchase more energy-efficient washing machines *independent* of the agreement, and in so doing individual cost recoupment helped realise the collective benefits

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[96] *CECED* (n 6), [52]-[54]. See also Jaspers and Peeperkorn (n 63).

[97] EU Proposals (n 5), [580]. See also *Generics* (n 13), where the EUCOJ explained in the context of Article 101(1) that the taking into account of pro-competitive effects requires that those effects "are not only demonstrated and relevant, but also specifically related to the agreement concerned" ([105]).

[98] *CECED* (n 6), [62].

[99] Information campaigns were also dismissed because the campaigns focused on the user conditions of washing machines and thus allowed for further reduction of the electricity consumption in addition to reductions based on the technical efficiency ratio of the machine. This argument is irrelevant. The reason the information campaign did not include technical efficiency information was that the EC energy label already ensured that consumers could easily access cost-effectiveness information of different washing machines. Meanwhile the new minimum standard curtailed the EC energy label by way of phasing out the lower segment washing machines.

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independent of the agreement. Second, that the *CECED* agreement did not objectively aim to promote green.

The finding that anticompetitive harm would be small poses a problem as well. The Commission did not evidence its primary presumption that "the restriction of competition regarding one product dimension, energy consumption, *may* increase competition on other product characteristics, including price" (italics added).[100] In lieu of substantiating that the elimination of *actual* competitive pressure of lower-end washing machines would be compensated by a *potential* increase of competitive pressure amongst higher-priced washing machines, it merely stated that "it *cannot be ruled out* that [higher-end washing machines] may become available at a lower price" and that "*were these effects to take place*", the narrowing of the price range and the increase in average selling prices would be "less pronounced than would otherwise be foreseeable" (italics added).[101]

At the same time, the Commission forgot that manufacturers of higher-end washing machines faced "a stagnant market with strong competitors and research of sales opportunities",[102] in which the higher minimum standard enabled them to control "purchasers [with] buying power" that could otherwise "focus their orders on machines below category C".[103] Differently put, manufactures discontinued lower-end washing machines to improve their profitability, which, absent the restriction of competition, would have required intensified price rivalry. The EUCOJ condemns this kind of behaviour because, even if it does not limit total output, it does change the structure of the market, in this case by eliminating a few product variants, which means that it hurts consumers *per se*.[104]

The upshot is that the *CECED* decision condoned greenwashing *avant la lettre*. The higher minimum standard was not meant to promote green but to cover for a cartel.

Interim conclusion

[100] *CECED* (n 6), [53].
[101] CECED (n 6), [53]-[54].
[102] *CECED* (n 6), [31].
[103] *CECED* (n 6), [61].
[104] *BIDS* (n 13), [31]; *T-Mobile* (n 13), [38].

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It seems the Commission wants to have its cake and eat it. Proclaiming that vigorous enforcement based on a consumer welfare standard remains at the heart of antitrust, it contends that antitrust can also turn green. It cannot because the accommodation of green antitrust unavoidably leads to political decision-making. It is incorrect to assume that the consumer benefit condition meets the consumer welfare standard if based on collective consumer welfare analysis. Even if limited to consumers in the relevant market, collective consumer welfare antitrust limits the choices of non-appreciating consumers, while as citizens consumers and non-consumers agreed that these were legitimate choices to make. The indispensability condition will not stop greenwashing. The procedure that distinguishes between more and less restrictive coordination is unfit to also differentiate between real and fake first mover disadvantage because both disadvantages require coercion to be corrected. The intention to filter out fake first mover disadvantage is also at odds with the positive attitude towards phasing out agreements and common minimum standards that are typically used in situations where competition works. Meanwhile, the Commission continues to limit the protection of competition under the residual competition condition to its most important expressions. This obviously facilitates green antitrust. In principle, however, this condition is meant to protect competition in all its expressions. If interpreted correctly, it protects effectively against greenwashing – the risk competition agencies are meant to protect against. A revisit of *CECED* shows that the quest for green antitrust has been based on a false narrative all along. The higher minimum standard was not indispensable to attain the collective benefits, which implies that the participating undertakings did not objectively aim to promote green. Instead, they aimed to improve their profitability by eliminating competitive pressure from lower-end washing machines.

IV. CONCLUSION

The above shows that the Commission and ACM resort to an over-creative interpretation of open-textured competition norms that brings their competition policies outside the limiting principles that define objective and effective law enforcement. Such policies do not best support the Green Deal.

The central error is the belief that market power can be used as a means to correct for environmental costs. It cannot. Negative externalities, and the first mover disadvantages resulting therefrom, that

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require coercion to be corrected fall within the legislative domain. Competition law underlines this assignment. Instead of allowing collective action to correct for external costs, it ultimately prioritizes the protection of the competitive process over potential efficiency gains, and protects competition in all its expressions. This makes green antitrust a principled no-go.

To better support the Green Deal, the Commission is well-advised to, instead, bring its interpretation of the residual competition condition in line with its proper institutional role, which is to not only protect ongoing innovation but also legitimate consumer choice.[105]

[105] Loozen (n 10), p 1287.

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