Antitrust’s Social “Ripple Effect”

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ABSTRACT

The relentless discussion on the value of social goals in antitrust is currently governed by two pressing concerns: rising wealth inequality and the plight for sustainability. On the one hand, the alarming upward trend in wealth concentration has been linked to issues antitrust may have the power to tackle, such as the intensification of market power. On the other hand, as the world tries to grapple with an impending environmental catastrophe, it seems unacceptable to compel companies to invest in green initiatives if there is a risk that they may incur in antitrust liability. More antitrust enforcement is usually invoked as a means to narrow the wealth gap, while less antitrust is portrayed as the best way to enable environmentally friendly collaborations. This article constructs a consistent path for competition policy to embrace non-economic goals without losing sight of its pivotal role as the guardian of well-functioning markets. It vehemently rejects calls for laxer antitrust. Instead, the article contends that robust enforcement can provide adjuvant protection to social goals, and proposes a strategy to maximize antitrust’s social “ripple effect” within the boundaries of the current competition policy.

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INTRODUCTION

Elegance does not sit well with competition law. It is not in the DNA of a discipline that is a political construct, intrinsically prone to ideological shifts, and shaped by a compound of societal variants. The boundaries of antitrust are fuzzy, yet the legal certainty imperative requires looking for ways to contain its expansive nature and develop a cogent analytical framework. Attempts to groom competition law tend to rely on neat economic premises and quantifiable data, and embrace only efficiency or consumer welfare considerations. Unfortunately, this approach has proven antithetical to the tenets of discipline. As well-intentioned as such efforts may be, they are like “[t]rying to measure a three-dimensional world with a one-dimensional yardstick”. The result could be a tidy but rather meaningless policy which fails to heed the problems it was designed to tackle.

The tensions between the messy nature of antitrust on the one hand and the need for consistency and objectivity on the other foster an intrinsic existential “permacrisis”. The discussion around whether competition policy should take non-economic goals into account is rich and prolific. It is a dispute between those who are willing to sacrifice validity for the sake

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1 See e.g. Eleanor M. Fox, Outsider Antitrust: “Making Markets Work for People” as a Post-Millenium Development Goal, in TEMBINKOSI BONAKELE, ELEANOR FOX AND LIBERTY MCNUBE (EDS), COMPETITION POLICY FOR THE NEW ERA: INSIGHTS FROM BRICS COUNTRIES 22, 27 (2017) (claiming that antitrust “has been seduced by beautiful, elegant, but unfitting economic assumptions”).
3 Ezrachi, supra note 2, at 51.
4 See e.g. Maurice E. Stucke, Should Competition Policy Promote Happiness?, 81 FORDHAM L. REV. 2575, 2580 (2012) (asserting that US “antitrust analysis over the past thirty years overstated the importance of competitive dynamics that were easier to assess (productive efficiencies and short-term price effects) and marginalized or ignored what was harder to assess (dynamic efficiencies; systemic risk; and political, social, and moral implications of concentrated economic power)”).
of reliability, and it leads to oscillations between workability and predictability. They may be opposite forces, but ultimately workability and predictability coexist in a state of mutual dependency. Competition law needs a dose of each to function. The question of which should prevail is at the heart of antitrust’s core doctrinal dispute, and one that will never be completely settled. It has spawned some of the most fascinating literature in the field, and yet much like Walter Gallie’s essentially contested concepts, it will never succumb to “a definite or judicial knock-out.”

Doctrinal excitement aside, the constant tug of war exposes some of antitrust’s vulnerabilities and contradictions. Attempts to erode it have come both from those who want minimalist (efficiency-focused) antitrust and those who consider the policy a hindrance to non-competition goals. Its political roots make it prone to be used to pursue partisan agendas, but sometimes solid investigations are unfairly put down to political interests just because the outcome is unpalatable. Importantly, the acceptance that competition law can never be fully purified triggers an intense battle of policy goals. Not only can non-economic purposes run counter to efficiency; they may also clash with one another, thus potentially affecting antitrust in opposed fashions. Two concerns of global dimensions increasingly prominent in the goal discussion illustrate this tension: rising wealth inequality and the plight for sustainability. On the one hand, the alarming upward trend in wealth concentration has been linked to issues

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8 Susan Martin, Two Models of Educational Assessment: A Response from Initial Teacher Education: If the Cap Fits..., 22 ASSESSMENT & EVALUATION IN HIGHER EDUCATION 337, 339 (1997).
9 ANDRIYCHUK, supra note 7, at 53–54.
11 See Douglas H. Ginsburg, Remarks on the Consumer Welfare Standard, on the Occasion of Receiving the John Sherman Award from the Antitrust Division Department of Justice (Oct. 23, 2020), https://www.justice.gov/opa/speech/file/1355386/download (stating that “[t]he antitrust enterprise is going to be under assault from two directions, from people who are agitating for non-consumer welfare criteria as a general matter, and by firms that are interested in collaborating on ESG in the hope of circumventing the antitrust laws”).
13 See e.g. ANTHONY B. ATKINSON, INEQUALITY. WHAT CAN BE DONE? (2015); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); Stefano Filauro, The EU-wide Income Distribution: Inequality Levels and
competition law may have the power to tackle, such as the intensification of unchallengeable market power.\(^\text{14}\) On the other hand, as the world tries to grapple with an impending environmental catastrophe,\(^\text{15}\) and pressure mounts on the business community to take action,\(^\text{16}\) it seems politically unacceptable to compel companies to invest in green initiatives if there is a risk that these might be punishable under competition law.\(^\text{17}\) From this perspective, more competition law enforcement is usually invoked as a means to help narrow the wealth gap, while less antitrust intervention is often portrayed as the best way to enable environmentally friendly collaborations.

Despite the predominance of the more antitrust / less antitrust narrative in the scholarship, it paints an incomplete picture. Wealth equality and sustainability need not, and


\(^\text{16} \text{On the importance of corporate action to tackle climate change, see generally Daina Mazutis & Anna Eckhart, Sleepwalking into Catastrophe: Cognitive Biases and Corporate Climate Change Inertia, 59 CALIF. MANAG. REV. 74 (2017).}

\(^\text{17} \text{See generally Simon Holmes, Climate Change, Sustainability, and Competition Law, 8 J. ANTITRUST ENF’T. 354 (2020); Kevin Coates and Dirk Middelschulte, Getting Consumer Welfare Right: The Competition Law Implications of Market-driven Sustainability Initiatives, 15 EUR. COMPETITION J. 318 (2019); Paul Balmer, Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change, 47 ECOLOGY L. CURRENTS 219 (2020). On the general issue of competition law and sustainability objectives, see SUZANNE KINGSTON, GREENING EU COMPETITION LAW AND POLICY (2011).}
most often do not, exert opposite forces on competition policy. There are times when antitrust enforcement will bear negative consequences on distribution. For instance, inequality has been portrayed as “a natural byproduct of a market economy”, and may be exacerbated by the selective effects of innovation. As a consequence, if antitrust policy is successful at boosting innovation, it may be inadvertently widening the wealth gap. Similarly, applying antitrust law can often curb conduct that is harmful for both competition and the environment. An obvious example is the European Commission’s 2021 decision to fine carmakers for colluding to hamper innovation in diesel car emission standards. Importantly, environmental protection and wealth equality are not conflicting but connected pursuits. The 2030 United Nations (UN) Agenda for Sustainable Development lists “reduced inequalities” among the 17 goals of sustainable development, and antitrust enforcers have acknowledged that sustainability encompasses “numerous domains”, ranging “from ecological preservation … to economic equality.” The circumstances should determine the need for enforcement on a case-by-case basis, but the interdependence of these pursuits requires coherence in the wider policy repercussions of specific decisions.

This article constructs a consistent path for competition policy to embrace non-economic goals without losing sight of its pivotal role in safeguarding the proper functioning of markets. Through a careful comparison of the US and EU regimes, and drawing on legal theory, it considers how environmental and equality considerations have shaped and influenced antitrust enforcement. The article is premised upon three demonstrable (and demonstrated)
realities. First, antitrust does not exist in a vacuum, but is “an aspect of the social and economic policy of the system to which it belongs”. It is one of the pieces of the legal system puzzle set up to protect the values of the society it serves. Since those values are not immutable, antitrust may have to adapt over time to ensure it continues to fit in that puzzle. Second, the role of competition law in pursuing non-economic goals is secondary. The discipline “cannot be all things to all people” and there are often more effective tools to attain social goals than antitrust. Third, competition law is currently woefully underenforced, particularly in the US. The prevailing ideology behind antitrust policymaking favors minimal intervention, and tends to underestimate the costs and risks of false negatives.

On the basis of these assertions and the findings of the comparative and doctrinal research hereby conducted, the article rejects calls for laxer antitrust enforcement. Instead, the article contends that the best tactic to provide adjuvant protection to non-economic goals resides in the robustness of antitrust regimes. Grounded on this premise, the article then proposes a strategy to maximize antitrust’s social “ripple effect” within the boundaries of current antitrust policy. To this end, the article ponders, in section I, whether there is any room for social pursuits in the (efficiency-focused) ideological framework that underpins contemporary antitrust policy. Thereafter, the two main routes for balancing competition and non-competition goals—less antitrust and robust enforcement—are explored in section II.

22 MAHER M. DABBABH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 230 (2010).
23 Ezrachi et al., supra note 14, at 54.
24 Ezrachi, supra note 2, at 50.
Section III conducts a critical reflection and puts forward normative and policy proposals. Finally, conclusions are drawn.

I. ANTITRUST’S “WIGGLE ROOM” FOR NON-ECONOMIC AIMS

A. The Consumer Welfare Standard in US Antitrust and EU Competition Law

Assessing the viability of initiatives pursuing non-economic purposes in competition law requires exploring whether they are compatible with the orthodox aims of antitrust. This ubiquitous reflection is nonetheless complicated by the fact that there is no definitive consensus on what those aims ought to be. The consumer welfare (CW) standard undoubtedly plays a fundamental role, but interpreting the meaning of this objective can be obfuscated by two factors: first, its connotations are far from unanimous, and second, its specific function has not been construed in a consistent manner.27

To illustrate the first of these issues, one need only consider Robert Bork’s understanding of CW as a synonym of “the wealth of the nation.”28 Whether that wealth benefits consumers or—as in the majority of cases resulting from Bork’s postulates—producers is less relevant. Such a notion however would be more aligned with the economic concept of total welfare, that is, the sum of producer and consumer surplus.29 In economics, the concept of CW refers to “anything that factors into demand”, including “price, quality,

27 See Inara Scott, Antitrust and Socially Responsible Collaboration: A Chilling Combination?, 53 AM. BUS. L.J. 97, 113 (2016) (claiming that the protection of competition, CW, and efficiency are “nearly impossible to define … without creating contradictions and inconsistencies”).
innovation, privacy”. Instead, the CW standard notion used in US antitrust policy mainly follows Bork and the Chicago School movement, and focuses solely on achieving efficient markets or wealth maximization, which translates into high output, increased choice, and low prices. It is principally (but not solely) the allocative side of efficiency that is sought. Legislative history does not lend support to this view, and Leah Samuel and Fiona Scott-Morton have denounced that the CW standard has been distorted by a school of thought to justify “a defendant-friendly antitrust standard that dismisses the benefit of quality and innovation”. Advocates of Bork’s CW redefinition claim that, in the decades before it was adopted, “[c]ourts were freely choosing among multiple, incommensurable, and often conflicting values.” Those who rabidly adhere to this view see it as the only way to ensure institutional administrability.

Inconsistencies in the role of the CW standard—the second problem highlighted above—can be seen, for instance, in the different understandings of its purpose and meaning above.

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31 While Bork’s polarizing views more widely known, centrist Harvard School scholars also called for a single-goal policy around the same time The Antitrust Paradox was published. The influence of Philip Areeda and Donald Turner in US antitrust is highlighted by William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 476 (2020) (comparing the work of Bork with that of Areeda and Turner, Kovacic points out that the “flamboyant” and “apocalyptic” tone of the former’s writings made The Antitrust Paradox “the more memorable text and more frequently the focus of attention in contemporary debates”).
34 See generally VILFREDO PARETO, MANUALE DI ECONOMIA POLITICA (1906). For an English version, see VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY (2014).
36 Samuel & Scott-Morton, supra note 30.
held by antitrust authorities around the world. In a 2011 survey among members of the
International Competition Network (ICN), only 7 out of 57 agencies understood CW in the
way that Bork did. But discrepancies exist even within jurisdictions. The EU provides a good
example. The black letter law suggests that increases in producer welfare cannot be offset
against consumer harm, but at the same time benefits to consumers do not justify the complete
absence of competition. In practice, while at times the efficiency of markets is considered
paramount, on other occasions the competitiveness and openness of those markets appears to
be more important (though this is ultimately a way to make markets more efficient). Since
the early 2000s, and particularly since the introduction of the “more economic approach”,
the former of these views has been gaining ground. The European Commission has insisted that
the aim of EU antitrust rules is “to protect competition on the market as a means of enhancing
consumer welfare and of ensuring an efficient allocation of resources”—a view corroborated
by the European courts. This has translated, inter alia, into greater pressure on the
Commission to elaborate robust theories of harm, and more opportunities for companies to
demonstrate that their behavior might be ultimately justified.

The more economic approach may address, in part, situations where less competition
law is required. The harder it is to enforce the law, the less likely it will be for conduct pursuing
social objectives to run counter to antitrust provisions. However, the focus on allocative

40 Consolidated Version of the Treaty on the Functioning of the European Union art. 101(3), 2012 O.J. (C 326)
47 [hereinafter TFEU] (requiring that consumers be allowed “a fair share” of the compensatory benefits of any
competition restrictions in breach of 101(1) TFEU). For an analysis of this provision, see infra section II.A.3.
42 See e.g. opinion of Advocate General Kokott, Case C-23/14, Post Danmark A/S v. Konkurrencerådet,
43 Eur. Comm’n, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty,
Sept. 18, 2003).
efficiency exacerbates the risk of no intervention where taking action could help protect additional goals. This should worry those wanting to see antitrust play a more relevant role in the protection of social values, particularly in light of the flagrant underenforcement of the law.\textsuperscript{46} It is from this standpoint that commentators have asserted that the CW standard falls short, and needs to be replaced so that enforcement may be (re)invigorated.\textsuperscript{47} These claims are considered in the next subsection.

B. Breaking with the System or Change from Within? Incorporating Non-Economic Goals into Antitrust Analysis

In the US, plenty of antitrust “revitalization” proposals have been put forward by those wishing to leave behind the hegemony of wealth maximization as the main purpose of competition law. For instance, relying on behavioral economics, scholars have questioned the rational predictions relating to firms’ conduct that frequently guide neoclassical-rooted competition policy development,\textsuperscript{48} and have proposed ways to overcome “the shortcomings of relying on an effects-based legal standard built on faulty assumptions to promote an ill-defined consumer welfare goal.”\textsuperscript{49} In a similar vein, post-Chicagoans have attempted to show that “markets are much more varied and complex than Chicago theorists were willing to admit”,\textsuperscript{50} and have advocated for more intervention to quash the harmful effects of conduct that almost invariably escapes scrutiny under current policy. This intervention would be mainly achieved through improved economic tools, but without necessarily tampering with the CW standard.\textsuperscript{51}

\textsuperscript{46} See sources supra note 25.
\textsuperscript{47} See e.g. Mark Glick et al., \textit{Why Economists Should Support Populist Antitrust Goals}, UTAH L. REV. 769, 812 (2023) (describing the CW standard as being “too narrow, too biased, and too unreliable.”); Lianos, supra note 14, at 99 (noting that consumer welfare or harm “is notoriously vague, from an operational perspective”).
\textsuperscript{51} See e.g. ROBERT PITOFSKY (ED), \textit{HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST} (2008); Christopher Leslie, \textit{Antitrust Made (Too}
There have been explicit calls for abandoning Bork’s postulates, focusing instead on other objectives. Scholars have, for instance, proposed relying on welfare economics to take into account factors improving wellbeing and quality of life. This would allow enforcers to consider aspects that citizens value more than efficiency (such as cleaner air), opening the door for social, political and even moral goals in antitrust. Another popular stance is to resort to the competitive process test to replace the CW standard as the lodestar of antitrust, adopted in recent years by the progressive Neo-Brandeis movement. This young school of thought has been calling for greater focus on structural issues. Representatives include Lina Khan, current chair of the US Federal Trade Commission (FTC), and Tim Wu, former Special Assistant to President Biden for Technology and Competition Policy. According to Khan, “competition policy should promote not welfare but competitive markets”, thereby respecting Congress’ intention to protect “a host of political economic ends—including our interests as workers, producers, entrepreneurs, and citizens” via antitrust legislation.

From the Neo-Brandeisians’ originalist perspective, low prices may be harmful if they come at the expense of reduced competition (elminating competitors with higher costs) or unfair wages. They express an aversion to “bigness” and excessive market power, linking it

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52 See generally Glick et al., supra note 47; Stucke, supra note 7: TOWNLEY, supra note 7, at 50. See also Eleanor M. Fox, Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1168 (1981) (highlighting the importance of ensuring equal opportunity for those without power in the early days of US antitrust). But see Thibault Schrepel, Antitrust Without Romance, 13 NYU J. L. & LIBERTY 326.

53 Stucke, supra note 7, at 590.

54 Id. at 595.


57 See e.g. Lina M. Khan, Amazon’s Antitrust Paradox, 126 YALE L. J. 710, 737 (2017); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

58 Khan, supra note 57, at 737.

59 See also Niamh Dunne, Fairness and the Challenge of Making Markets Work Better, 84 MODERN L. REV. 230, 247 (2021) (explaining that high prices may be positive “from the perspective of suppliers seeking an

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to wealth inequality. In this regard, Wu claims that “extreme economic concentration yields gross inequality and material suffering”, and Khan, writing with Sandeep Vaheesan, argues that “market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to the few belonging to the 1% and 0.1% at the top of the income and wealth distribution.” Wealth redistribution thus becomes a valid aim of competition policy. Neo-Brandeisians are less enthusiastic about environmental pursuits. Discussing whether competition concerns can be set aside if a practice may promote sustainability, Khan stated that “antitrust laws don’t permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit.” The movement thus favors exclusively supporting the goals antitrust was designed to protect and/or those that are connected to its general pursuits.

While in the US those calling for more ambitious antitrust generally aspire to veer away from the impasse of the last four decades, in Europe a revival of non-economic concerns has been taking place from within the system. EU Competition Commissioner Margrethe Vestager’s calls for fairness, for example, have been advanced within the parameters of the more economic approach. It is not so much about disregarding price effects as it is about adequate return on investment, or the supplier’s workforce pursuing fair wages, or would-be rivals hoping to enter the market with competitive offerings, or the exchequer where the excess profits are taxed appropriately—or even the customer herself, where high prices are designed to discourage harmful competition”.

60 Wu, supra note 57, at 14.  
61 Khan & Vaheesan, supra note 14, at 236.  
62 But see Herbert J. Hovenkamp, supra note 50, at 269 (claiming that “[a]ntitrust is no good at transferring wealth away from rich to poor, … and cannot be defended on that basis in any way”).  
additionally considering other issues, including structural or innovation harm. In a 2021 Policy Brief, the European Commission insisted on the need to “ensure that antitrust enforcement remains anchored to the consumer welfare standard.” Yet in October 2022, Vestager gave a speech positing that,

“[b]y basing our policy intent and action on principles that stem directly from the Treaties, EU competition policy is able to pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy.”

As contradictory as it may seem, Vestager’s acceptance of assorted antitrust pursuits is not inconsistent with a CW underpinning. EU competition law never gave up on other goals—it could not, since it was envisaged as a means to an (integration) end. Both the black letter law and the ideology at the core of the origins of the system go beyond efficiency. The basic antitrust provisions are embedded in the Treaty on the Functioning of the European Union (TFEU), where protection of competition is only one of multiple priorities. The most prominent is the single market imperative, which remains to this day an explicit purpose of EU competition law. Other goals include: promoting employment and education; consumer protection; social cohesion; and environmental protection (a goal that needs to be integrated

69 TFEU, *supra* note 40.
71 TFEU art. 9.
72 Id. art. 12.
73 Id. art. 174(1).
into all of the EU’s policies, as discussed later). As for ideology, ordoliberalism and the Freiburg School have exerted significant influence in EU competition law and policy development from the outset. For this school, competition is not always a synonym of welfare and efficiency, and it is only beneficial when subject to certain limitations imposed by the government.

The backdrop of EU competition law thus compels policymakers to respect both the wider framework in which the core provisions are embedded and the motivation(s) of the Member States for adopting the law. It would be difficult to reconcile this setting with the laisser-faire traits of a Chicago School-infused policy.

C. The Feasibility of Implementing a Socially-Conscious Antitrust Policy

The propositions for reform discussed above are certainly appealing, and are driving a very necessary discussion. There is now overwhelming evidence that the coherence and elegance of the Chicago School and its near-blind faith in the markets’ ability to self-correct are not enough to respond to the complexities of real life. Markets tend to be messy places and thus require messy policies, or at least policies that are versatile enough to address conduct with ambiguous consequences. While the theoretical value of sophisticated, multi-goal competition policymaking may be significant, taking non-economic issues into account is easier said than done. Questions arise as to the plausibility of developing consistent bright lines while striving for potentially incompatible goals, and the enforceability of the resulting approach.

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74 Id. art. 11. See infra section II.B.1.
77 Eleanor M. Fox, The Battle for Reform of Antitrust, 11 J. ANTITRUST ENF’T. 179, 184 (2023) (contending that the progress achieved in recent years “would not have been made but for the NeoBrandeis movement”).
78 Hovenkamp, supra note 50, at 258. See also Dunne, supra note 59, at 259 (describing as “uncontentious” the fact that current US antitrust is inadequate).
A first issue is that delineating the contours of non-economic purposes can be tricky, and yet this would seem to be the necessary starting point of any discussion on how to incorporate these considerations into antitrust policy. From this perspective, it is not hard to understand the advantage of thinking exclusively of efficiency, a quantifiable concept producing “an unambiguous public benefit (it enhances the size of the pie available to all).”\textsuperscript{79} The competitive process alternative does not do much beyond shifting the attention from the outcome to the process of attaining that (efficient) outcome. It has been described by skeptics as a “mercurial”\textsuperscript{80} and “toothless” concept vague enough lend support to conflicting ideologies.\textsuperscript{81} The CW standard was meant to be “a method to resolve deep ambiguities about what ‘competition and the competitive process’ means”, not a substitute.\textsuperscript{82} This all shows that “[t]o destroy is easier than to create”,\textsuperscript{83} and to date critics have been better at demonstrating the shortcomings of efficiency-driven policymaking than at putting forward a workable action plan.\textsuperscript{84} The words of Einer Elhauge when discussing whether CW is the optimal standard spring to mind: “Perhaps it is not, though I have not seen so far a better one.”\textsuperscript{85}

A second challenge is the aptness of competition law as a vehicle to attain these goals. The limitations of the tools available in antitrust, which are designed to examine specific actions of particular companies over a limited amount of time, complicate taking the bigger picture into account.\textsuperscript{86} Competition enforcers cannot be expected to predict the repercussions

\begin{thebibliography}{999}
\bibitem{dunne2022a} Dunne, \textit{supra} note 59, at 248-9.
\bibitem{hovenkamp2023} Herbert J. Hovenkamp, \textit{The Slogans and Goals of Antitrust Law}, 25 NYU J. LEGIS. & PUB. POL’Y 705, 746 (2023). See generally Glick et al., \textit{supra} note 47.
\bibitem{dunne2022b} Dunne, \textit{supra} note 59, at 259 (arguing that Neo-Brandeian antitrust “is not a constructive movement” and lacks a “detailed blueprint for reform”).
\bibitem{elhauge2022} Elhauge, \textit{supra} note 82.
\bibitem{dunne2022} Dunne, \textit{supra} note 59, at 248.
\end{thebibliography}
of their decisions on all public policies and societal objectives. This would force them to take into account a reality of unmanageable breadth.

A third general problem can be identified, and it is an institutional one. Multi-goal policy development is complex to implement and almost inevitably increases enforcers’ discretionary potential.87 The prerequisite for embracing broader objectives, according to Ioannis Lianos, would be that “the authorities in charge of competition law are rules-based … rather than offered wide policy discretion which may lead to arbitrary decision-making.”88 And yet it is hard to see how this could be effectuated if the power to take several abstract goals into account is bestowed upon enforcers. Concerns of this nature have been highlighted across jurisdictions.89

From a European perspective, these institutional woes may be less conspicuous. The historical prominence of public over private enforcement implies that highly specialized administrative bodies have been, and often still are, in charge of applying competition law in the first instance. But this comes with its own challenges. The European Commission’s multiple hats as “law-maker, policeman, investigator, prosecutor, judge, and jury” raise procedural fairness concerns.90 While formal Commission decisions can be reviewed (and ultimately quashed) by the EU judiciary,91 informal settlements would be difficult to challenge.92 Importantly, since EU competition law enforcement was “decentralized” back in

87 On the administrability of a multi-goal policy, see PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, VOL. 1 ¶¶ 103–13, 7–33 (1978).
88 Lianos, supra note 14, at fn. 66.
89 See e.g. Hovenkamp, supra note 50, at 269 (asserting that there is a risk “antitrust tribunals will be confronted with antitrust solutions that they are not capable of administering”); ANGELA HUYUE ZHANG, CHINESE ANTITRUST EXCEPTIONALISM 36 (2021) (highlighting the wide discretion of Chinese antitrust agencies and the limited judicial review of their decisions).
92 Dunne, supra note 59, at 262.
2004, 90% of its application currently happens in the Member States. A recent study by Or Brook found that national competition authorities do in fact take assorted non-economic goals into account when applying (or not applying) EU competition law. They enjoy wide latitude to exercise their decisional discretion, since the EU judiciary has yet to provide any meaningful clarifications. The national agencies’ (at times inconsistent) standpoints pose a threat to both the uniform development of antitrust policy and the legal certainty imperative.

In the US, the appointments of Neo-Brandeisians to key antitrust positions in the Biden administration signals a desire to implement changes, and notable progress has been made. However, recent attempts to invigorate enforcement have at times hit a judicial brick wall, and concerns that the current conservative tilt of the Supreme Court will maintain a non-interventionist stance and delay any meaningful improvements are justified. The courts have long been the driving force behind US antitrust policy, but they have not always been up to the mark. The jury system has taken part of the blame, but even the judges’ ability to grasp intricate antitrust concepts has been called into question. There is thus the risk that “the subtleties of strategic behavior in complex markets” may be overlooked.

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94 See generally BROOK, supra note 7. See also Jurgita Malinauskaite, Competition Law and Sustainability: EU and National Perspectives, 13 J. OF EUR. COMPETITION L. & PRAC. 336 (2022).
95 BROOK, supra note 7, at 403.
98 Hovenkamp, supra note 50, at 273.

Electronic copy available at: https://ssrn.com/abstract=4681461
More worryingly, it has been suggested that judicial inactivism may be the result of covert corporate lobbying.\textsuperscript{99} Think tanks heavily subsidized by big companies (often at the center of antitrust investigations) train judges in economics while actively promoting minimal intervention.\textsuperscript{100} The strategy would appear to be paying off, as research suggests that after receiving such training judges tend to “render conservative votes and verdicts, rule against regulation, are somewhat more permissive on antitrust, and mete out harsher criminal sentences.”\textsuperscript{101} Incidentally, they are also more likely to vote against environmental rules and restrictions.\textsuperscript{102} If true, these tactics would further complicate the reconciliation of antitrust with social concerns.

II. PATHS TO CONSIDER NON-ECONOMIC OBJECTIVES IN ANTITRUST

The foundations of contemporary antitrust regimes, discussed above, might allow sufficient leeway to enable nurturing an equality-enhancing and/or environmentally-friendly competition policy. The specific route for achieving this would depend on whether, in each particular context, these goals and antitrust’s general pursuits are aligned or run counter to each other. Borrowing Simon Holmes’ terminology in his analysis of the role of sustainability benefits in antitrust, non-competition goals could act as a “shield” (sparking otherwise unlawful conduct from illegality) or as a “sword” (prodding competition law enforcement to combat behavior


\textsuperscript{100} Eric Cortellessa, The Conservatives Out to Stop the New Bipartisan Antitrust Movement. WASHINGTON MONTHLY (May 25, 2021), https://washingtonmonthly.com/2021/05/25/the-conservatives-out-to-stop-the-new-bipartisan-antitrust-movement/ (explaining how a center financially supported by Big Tech is lobbying to neutralize bipartisan efforts to “attack corporate monopolies”).


\textsuperscript{102} Id. at 4.
that harms non-economic objectives). This section refers to the shield option as the “less antitrust” route, whereas the sword would require enhanced enforcement. Below, the theory and practice of implementing these alternatives in the US and the EU are explored, with a view to ascertaining the aptitude of the current antitrust legal framework to respond to wider societal problems.

A. The “Shield”: Less Competition Law and Its Discontents

1. Premise and Roots

In the event that an anticompetitive act may conceivably enhance sustainability or equality, one obvious way to make room for non-economic aims in antitrust would be to refrain from applying the law. Predictably, this strategy finds significant support among legal practitioners, eager to find ways of defending their clients’ behavior. But scholars have equally defended this route. Amelia Miazad, for instance, argues that the risk of being punished under antitrust laws hampers environmental improvements in the private sector, while Daniel Crane posits that antitrust enforcement could, in some cases, aggravate inequality and social injustice. Both conclude, albeit from different perspectives, that less competition law could help protect non-economic goals. In Europe, the so-called “green antitrust” movement has been said to

103 Holmes, supra note 17, at 355. See also TOWNLEY, supra note 7, at 21 (claiming that the pursuit of CW “can affect other policy goals both positively and negatively”).

104 See e.g., Pierre Zelenko & Nicole Kar, Sustainability Goals: Is Competition Law Cooperating?, LINKLATERS (2020), https://www.linklaters.com/en-hk/insights/publications/2020/january/competition-outlook-for-2020/sustainability-goals-is-competition-law-cooperating (questioning 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.”); Holmes (a former practitioner), supra note 17, at 405 (suggesting competition law should “cease to be ‘part of the problem’ and become ‘part of the solution’”) and at 357 (positing that “important initiatives that could help combat climate change are stifled or stillborn” (357)); Coates & Middelschulte, supra note 17, at 319 (explaining 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]”).

105 Amelia Miazad, Prosocial Antitrust, 73 HASTINGS L. J. 1637, 1640 (2022).


107 Id. (stating that “a significant set of antitrust interventions actually impede voluntary efforts to secure a more equitable and just society”); Miazad, supra note 105, at 1690 (calling for any “collaboration which seeks to address a systematic [social or environmental] risk should always be analyzed under a rule of reason” even if it bears impact on price or output).
be pushing for a revision of competition law, “as far as [its rules] may stand in the way of companies contributing to sustainability factors and a climate-neutral economy.”\(^{108}\) This suggests its proponents would want less enforcement. Edith Loozen considers the movement extends to all scholars who prioritize sustainability over the protection of competition.\(^{109}\)

The less antitrust approach might not, in fact, be tantamount to the recognition of multiple valid competition law pursuits. Rather, it might be a case of suspending the law’s application (and the pursuit of its purposes) for something considered more valuable.\(^{110}\) From a doctrinal perspective, the strategy is akin to the principle of double effect, the origins of which can be traced back to the 13\(^{\text{th}}\) century and Thomas Aquinas’ justification of self-defense. Aquinas claimed that “[n]othing hinders one act from having two effects, only one of which is intended, while the other is beside the intention”.\(^{111}\) The first of these acts would be beneficial and desirable, while the second would be harmful and unwanted.

Aquinas was thinking of the classic scenario where someone’s life is saved by killing the aggressor. In antitrust, double effect would entail situations where wealth maximization is sacrificed in order to protect more pressing non-economic objectives. Sustainability initiatives are particularly prone to such justifications, since they often enter into conflict with economic efficiency—particularly when the environmental benefits have not been factored into the economic assessment. For example, airlines may decide to cooperate and use bigger aircrafts (a practice known as “upgauging”) and reduce the number of flights they offer, with a view to

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\(^{110}\) This remark was made by Giorgio Monti in the conference *Hipster Antitrust, the European Way?*, European University Institute (Oct. 25, 2019). See https://cadmus.eui.eu/handle/1814/65747.

cutting greenhouse gas emissions (first positive act).\textsuperscript{112} The downside is that this would almost certainly imply less consumer choice—fewer flights available and a more rigid schedule—and higher prices (second negative act). Equality-related conflicts may also arise. An industry may decide to implement a policy resisting automation and refraining from replacing routine jobs with computers, with the purpose of protecting low-wage jobs and income equality (first positive act).\textsuperscript{113} The problem here is that innovation could be stifled and prices could rise (second negative act).

The double effect principle cannot justify \textit{all} harmful unintended actions. Important boundaries to the acceptability of the negative consequences of conflicts between good and bad acts have been acknowledged.\textsuperscript{114} Four requirements have been identified for the harmful action to be defensible. First, the act that justifies the bad deed must be good, or at least neutral. Second, the damaging effects may be anticipated but not intended. Third, they cannot be the means to achieve the benefits. Fourth, the positive consequences must be proportional to the ends sought.\textsuperscript{115} If these conditions are not fulfilled, in Aquinas’ words, “though proceeding from a good intention, an act may be rendered unlawful”.\textsuperscript{116}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112} \textsc{Peter Paul Fitzgerald}, \textit{A Level Playing Field for “Open Skies”: The Need for Consistent Aviation Regulation} (2016). See also Jae Woon Lee’s review of Fitzgerald’s book, \textit{8 Asian J. Int’l L.} 300 (2018).
\item \textsuperscript{116} \textsc{Aquinas}, supra note 111.
\end{enumerate}
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In our context, while most collaborations with socially beneficial purposes between competitors would in principle not breach antitrust law, it is plausible that some initiatives could fall within the realms of its prohibitions. The textbook example would be industry-wide projects entailing sustainability costs (leading to a price increase), and/or which involve taking the cheaper, less environmentally-friendly products out of the market (thereby reducing consumer choice). Taking industry-wide action is imperative, companies argue, to avoid the “first mover disadvantage”: if a green initiative is costly to implement, the first company to adopt it might lose out to competitors producing less sustainable but cheaper alternatives.

2. The “Shield” Option in US Antitrust

Double effect-like considerations are plausible in both US antitrust and EU competition law. In the US, the rule of reason is the default standard for conduct falling under Section 1 of the Sherman Act. It requires individual scrutiny in order to establish whether restraints are “ancillary”, or secondary “to the main purpose of a lawful contract” and thus necessary to ensure adequate execution. Yet there would be little leeway for such considerations if the arrangements in question are per se illegal, and therefore irredeemably unlawful (for instance, if they are tantamount to price fixing or price boycotts). From this standpoint, Miazad contends that the rule of reason should always apply to collaborations between competitors

117 Scott, supra note 27, at 142 (positing that “antitrust continues to chill arrangements that would receive traditional per se treatment”).
120 Coates & Middelschulte, supra note 17, at 325. On the topic of first mover disadvantage, see Johannes Paha, Sustainability Agreements and First Mover Disadvantages, J. COMPETITION L. & ECONOMICS (forthcoming 2023), and 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).
122 United States v Addyston Pipe & Steel, 85 Fed. 271 (6th Cir. 1898).
addressing societal or environmental risks, “even if the collaboration will necessarily increase price or reduce output.” 124

Indeed, escaping the Section 1 prohibition may be challenging for some socially-minded forms of horizontal cooperation. It would even be hard to claim lack of intent to engage in the illegal conduct, since what needs to be demonstrated is intention to engage in the practice, not to harm competition. 125 As Makan Delrahim, former Assistant Attorney General of the Department of Justice’s (DOJ) Antitrust Division has pointed out, “[t]he loftiest of purported motivations do not excuse anti-competitive collusion among rivals.” 126 The Supreme Court has similarly asserted that there is no room for considering non-economic aims in antitrust, 127 and judges have taken the view that environmental issues do not seem to be “a problem whose solution is found in the Sherman Act.” 128 This would ostensibly rule out giving any weight to cooperation with sustainable purposes that has a negative impact on prices, consumer choice, or output.

Notwithstanding the foregoing, there have been instances where the judiciary has been prepared to make exceptions to the per se rule. In Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI), the Supreme Court defended a joint selling arrangement that, 129 although falling into the “literal” price-fixing category, would not be “plainly anticompetitive”. 130 The price restrictions were found to 1) be a means to achieve broader procompetitive aims, and 2) attain efficiencies. 131 In a similar vein, the Court has argued that

124 Miazad, supra note 105, at 1690.
125 310 U.S. 150 (1940).
129 The case dealt with blanket licenses, which allow “music users the immediate use of all musical compositions” of the copyright holder. Ivan L. Pitt, DIRECT LICENSING AND THE MUSIC INDUSTRY 127 (2015).
131 Id., at 21.
it would lack sense to class as per se illegal horizontal restraints that are “essential if the product is to be available at all”, even when price and output competition is reduced.\textsuperscript{132} This assertion effectively recognized a new category of restrictions that are neither per se illegal nor subject to the rule of reason, but rather a double effect-style “intermediate standard” which “presumes competitive harm, and thus forces the defendant to assert some competitive justifications for the restraint.”\textsuperscript{133}

Thus, it would thus not be inconceivable for the courts to spare environmentally- or equality-motivated restrictions from per se illegality, provided that they were found to have some “redeeming virtue”.\textsuperscript{134} The case law suggests that there must be procompetitive efficiencies that outweigh the harm, and/or the restraints should be indispensable for the beneficial purposes of the arrangements. However, to date environmental considerations have not been accepted by the judiciary. It does not help that, despite the scientific consensus on climate change,\textsuperscript{135} tackling it has become a partisan issue,\textsuperscript{136} often portrayed as a “bastion of the left”.\textsuperscript{137} The federal bench, said to have been packed “at all levels by conservatives” since

\textsuperscript{135} See, e.g., John Cook et al., Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature, 8 ENVIRONMENTAL RESEARCH LETTERS 024024 (2013); Naomi Oreskes, The Scientific Consensus on Climate Change, 306 SCIENCE 1686 (2004).
the Reagan era, has been disinclined to embrace environmental causes.\textsuperscript{139} The reluctance to justify severe restrictions of competition on social or environmental grounds may be wrongly grounded, but it is in line with the boundaries of the principle of double effect and defensible on at least three grounds. The first is the importance of preserving the authority of antitrust systems for the attainment of the field’s main purposes as well as additional goals—a point that will be stressed in the next section of this article.\textsuperscript{141} The second would be the practical difficulties, previously sketched, of implementing a multi-goal policy.\textsuperscript{142} The third issue is that the concerns voiced about the harm antitrust enforcement may inflict on non-competition objectives find very limited support in the real world. Most of the apprehensions articulated by those advocating for less competition law have thus far been mainly theoretical or based on anecdotal evidence that does not, in fact, support the case for diluting enforcement.

The investigation that best exemplifies the weak empirical substantiation of the case for less antitrust is perhaps the DOJ’s 2019 scrutiny of the efforts of four major automakers and the state of California to reduce harmful emissions.\textsuperscript{143} The inquiry was eventually abandoned, as there was no evidence of an agreement between the competing car

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\item[140] See \textit{West Virginia and others v. Environmental Protection Agency and others}, 597 U.S. ___ (2022), in which the Supreme Court limited the powers of the Environmental Protection Agency (EPA) to curb carbon emissions. See also \textit{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”.
\item[141] See infra section II.B.
\item[142] See supra section I.C.
\end{footnotes}
manufacturers.\footnote{Coral Davenport, \textit{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.} However, the fact that this initiative was checked at all led commentators to argue for a reconsideration of the little that is left of the per se rule in the name of environmental protection.\footnote{See, e.g., Balmer, supra note 17, at 220, referring to the investigation as “an example of the disconnect between the more recent role of corporate collaboration in society and traditional antitrust enforcement.”; Dailey C. Koga, \textit{Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change}, 95 WASH. L. REV. 1989 (2020), positing that the inquiry “raises questions for agreements involving moral or social considerations—specifically those aimed at addressing environmental problems.”; Miazad, supra note 105, at 1666, saying that it “underscores antitrust’s false dichotomy between economic and non-economic goals”; despite admitting that it has been considered “partisan and not grounded in antitrust doctrine”.

This view not only overlooks that ultimately there were no consequences for the subjects of the inquiry; it also conflates an arguably misguided enforcement move with systemic problems in the legal discipline. The proceedings came under intense fire for being politically motivated,\footnote{Mary Nichols, chair of the California Air Resources Board, said that the DOJ was attempting to frighten Carmakers “out of voluntarily making cleaner, more efficient trucks and cars than [the EPA] wants”, while the then Speaker of the House of Representatives Nancy Pelosi put it down to an attempt to “weaponize law enforcement for partisan political purposes”. Juliet Eilperin and Steven Mufson, \textit{Justice Dept. Launches Antitrust Probe of Automakers over their Fuel Efficiency Deal with California}, WASHINGTON POST (Sept. 6, 2019) 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.} and for disregarding the \textit{Noerr-Perrington} doctrine that protects companies from antitrust liability in the event that they are cooperating to influence government policy.\footnote{Named after \textit{Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.}, 365 U.S. 127 (1961), and \textit{United Mine Workers of America v. Pennington}, 381 U.S. 657 (1965).} Rather than an antitrust problem, the issue seems to stem from the documented polarization of political elites and of the judiciary.\footnote{See sources supra notes 138 and 139.} In fact, an ongoing inquiry is looking into whether the DOJ’s case might have constituted an abuse of authority.\footnote{Leah Nylen, \textit{DOJ Inspector General Investigating Trump-Era Car Emissions Case}, POLITICO (Oct. 6, 2021), https://www.politico.com/news/2021/10/06/trump-car-emissions-investigation-515437 (accessed Aug. 20, 2023).} It is not an illustrative case of sound enforcement, and does not justify weakening the application of the legislation designed to curb problems associated with excessive market power. It seems both counterproductive and equally partisan.
Other cases cited to support the case for less competition law are similarly misleading. In the 1960s, automakers' attempts to jointly develop technology to curb vehicles' emissions were the subject of a (settled) DOJ lawsuit.\textsuperscript{150} For Miazad, this constitutes a “textbook example of collusion in violation of antitrust law” despite having noble intentions.\textsuperscript{151} The facts paint a very different picture. The automakers’ cooperation had been originally greenlighted, and was in place for over a decade. Yet instead of making improvements, carmakers were found to be “deliberately retarding the progress of [pollution control device] development.”\textsuperscript{152} In a similar vein, Crane portrays the antitrust case against various top universities that fixed the financial aid packages offered to students admitted to multiple schools\textsuperscript{153} as an inquiry into a policy designed “to increase educational diversity.”\textsuperscript{154} This view obviates concerns that the scheme was designed to eliminate competition and raise the price of university degrees.\textsuperscript{155} He further sees the challenge to the NCAA’s practice of not paying athletes, deemed contrary to Section 1 by a unanimous Supreme Court in 2021,\textsuperscript{156} as a potential obstacle to subsidizing “women’s athletic programs and other less popular sporting programs”.\textsuperscript{157} This is despite the women’s Division I basketball team acting as plaintiffs, and there being no evidence to suggest that carving out a remuneration for athletes from the NCAA’s succulent USD 4 billion revenue would prevent cross-subsidization.\textsuperscript{158}

\textsuperscript{151} Miazad, supra note 105, at 1679.
\textsuperscript{152} Bennett H. Goldstein and Howell H. Howard, Antitrust Law and the Control of Auto Pollution: Rethinking the Alliance between Competition and Technical Progress, 10 ENVIRONMENTAL L. 517, 525 (1980).
\textsuperscript{154} Crane, supra note 106, at 1175.
\textsuperscript{156} NCAA v Alston 141 S Ct 2141 (2021).
\textsuperscript{157} Crane, supra note 106, at 1175.
3. Less Competition Law Enforcement, the EU Way

In the EU, joint business conduct with an anticompetitive object or effect may fall foul of Article 101 TFEU.\(^{159}\) In the event that negative affects do accrue, these must be appreciable.\(^{160}\) The European Commission has insisted that most initiatives pursuing non-economic benefits will not be caught.\(^{161}\) Nonetheless, when a joint arrangement (including one intending to improve sustainability or equality) bears an impact on price or consumer choice, it may be considered to have an anticompetitive object. In that case, a presumption of appreciability applies,\(^{162}\) and the agreement will most likely be illegal. Restrictions with an anticompetitive object differ from per se illegal restraints\(^{163}\) in that there is a prospective path to absolution for the former. If the parties can demonstrate that the scheme meets the conditions of Article 101(3) TFEU, their arrangement could be spared. Nonetheless, as will be seen later in this section,\(^{164}\) defending their activity would be an uphill battle. The interpretation of the (cumulative) conditions required for the conduct to be excepted is narrow, and it is rare for object restrictions pass the test.

Restrictions of competition by object are inherently harmful. More often than not, they involve hardcore cartels and the imposition of minimum resale prices. But the case law suggests it is not so much about labels as it is about repercussions. A “negative impact on competition” is the decisive factor for an anticompetitive object to exist.\(^{165}\) Three aspects need to be considered to infer an agreement’s purpose: its content, objectives, and the “legal and economic context”.\(^{166}\) What matters is whether an analysis of these aspects suggests that

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159 TFEU art. 101(1).
161 Eur. Comm’n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, ¶¶ 529–531 2023 O.J. (C 259) 1 (June 1, 2023) [hereinafter EU Horizontal Cooperation Guidelines].
162 Id., ¶ 13.
163 On per se illegality, see supra section II.A.2.
164 See infra.
166 Id., ¶ 31.
“competition on [the] market would be eliminated or seriously weakened”. On the basis of this premise, arrangements that do not amount to collusion nor minimum resale price maintenance have occasionally been considered object restrictions. Conversely, in the landmark Cartes Bancaries case the Court of Justice ruled that certain pricing measures jointly adopted by competitors effectively fixing some of their fees might not be anticompetitive by object, since they could plausibly pursue a legitimate aim.

But just how much flexibility is afforded to arrangements between competitors that lead to restrictive behavior akin to collusion? The ongoing discussion around the application of Article 101 TFEU to joint sustainability-oriented initiatives suggests not much. Following the adoption of the European Green Deal in 2019, the European Commission pondered over making concessions for green agreements within the boundaries of the existing legal framework. In July 2023, it adopted a revised set of EU Horizontal Cooperation Guidelines with an entire chapter on sustainability agreements. They set a soft safe harbor for sustainability standardization agreements—those by which competitors agree to comply with certain sustainability standards (such as halting the production of harmful products or adopting the same environmentally-friendly packaging materials). These will be lawful provided that the standards are developed following a transparent procedure open to all competitors, and they impose no obligations on those unwilling to comply. The parties, whose market share cannot exceed 20%, must remain free to adopt higher sustainability standards, but they will not

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170 European Green Deal, supra note 15.
171 EU Horizontal Cooperation Guidelines.
172 Id. ¶ 538.
exchange commercially sensitive information, and will allow non-participating companies to have “effective and non-discriminatory access” to the results of the standards developed. As a reminder of the prevalence of the CW standard, the Guidelines insist that prices should not increase nor should quality decrease as a result.\textsuperscript{173} The new guidance, therefore, mainly confirms that the Article 101(1) prohibition will continue to be stringently applied to inherently harmful conduct affecting CW, regardless of any potentially redeeming beneficial purposes.

In the event that Article 101(1) TFEU does catch a socially-driven joint corporate initiative, there is a clearly-defined “saving clause” which could be used to weigh in non-market benefits. Article 101(3) TFEU establishes the parameters according to which conduct which would normally be prohibited might be justified by the compensatory benefits it can generate. To benefit from this exception, the companies would need to show that their joint conduct meets four cumulative conditions: 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) does not impose “on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives”, and 4) does not afford them “the possibility of eliminating competition in respect of a substantial part of the products”.\textsuperscript{174} As Or Brook has noted, these four conditions provide competition authorities “a wide margin of discretion to decide if to take non-competition interests into account, \textit{what types of benefits} to take into account, and \textit{how.”}\textsuperscript{175}

The EU Horizontal Cooperation Guidelines suggest that 101(3) TFEU can only be successfully used to defend an otherwise prohibited arrangement in cases where the outcome is efficient and therefore in line with antitrust’s broad ambit. To meet the first condition of Article 101(3), the companies must demonstrate “objective, concrete and verifiable”

\textsuperscript{173} \textit{Id.} ¶ 549.
\textsuperscript{174} TFEU art. 101(3).
\textsuperscript{175} \textsc{Brook}, \textit{supra} note 7, at 93 (emphasis in original).
sustainability benefits.\footnote{EU Horizontal Cooperation Guidelines, ¶ 559. This is consistent with the case law of the EU Court of Justice. See eg Case T-528/93 Métropole Télévision SA v. Eur. Comm’n ECLI:EU:T:1996:99, ¶ 118 (July 11, 1996); and case T-168/01, GlaxoSmithKline Services Unlimited v. Eur. Comm’n ECLI:EU:T:2006:265 ¶ 244 (Sept. 27, 2006). For a discussion, see Christopher Townley, The Relevant Market: An Acceptable Limit to Competition Analysis?, 10 EUR. COMPETITION L. REV. 490, 491 (2011).} They must also show that the restrictions are “reasonably necessary for the claimed sustainability benefits to materialise, and that there are no other economically practicable and less restrictive means of achieving” them—thereby complying with the indispensability requirement (third condition).\footnote{EU Horizontal Cooperation Guidelines, ¶ 561 \textit{See supra H.A.1.}} Some leeway is afforded for arrangements designed to overcome first mover disadvantage,\footnote{EU Horizontal Cooperation Guidelines, ¶ 567.} acknowledging that restrictions might be necessary “to cover the fixed costs of setting up, operating and monitoring’ the initiative, to “ensure that [the parties] concentrate their efforts on the implementation of the agreement”,\footnote{Id. ¶ 586.} or to deal with situations where consumers are not appreciative of future benefits.\footnote{Competition Policy Brief, supra note 66, at 6.} However, the Commission had previously stated that it would expect companies to preferably “offer [more expensive but sustainable] products independently rather than by cooperating.”\footnote{EU Horizontal Cooperation Guidelines, ¶ 593.} Competition will not be considered to have been eliminated (fourth condition) if the parties continue to compete vigorously “on at least one important parameter”, such as price or quality.\footnote{101(3) Guidelines, ¶ 43.}

The main bone of contention when it comes to accepting otherwise prohibited conduct resides in calculating whether consumers get a “fair share” of the returns—the second condition of Article 101(3) TFEU. It is the European Commission’s long-held view, reflected in the 2004 Guidelines on the Application of Article 101(3) TFEU (hereinafter 101(3) Guidelines) that those benefits must be generated either in the relevant market suffering the anticompetitive consequences of the conduct, or in a related market affecting the same group of consumers.\footnote{101(3) Guidelines, ¶ 43.}
Moreover, those consumers ought to be, on average, fully compensated for the harm suffered. They may be future rather than present consumers, but the calculation of future gains must be adjusted taking into account factors such as inflation and lost interest.

In its 2000 CECED decision, the Commission appeared to open the door to wider social considerations. It exempted an agreement between washing machine producers by virtue of which they would make more expensive, energy-efficient appliances, and remove the cheaper alternatives from the market. The advantages for society, measured in terms of the reduced damage from carbon emissions, were estimated to be “more than seven times greater than the increased purchase costs of more energy-efficient washing machines”, which for the Commission would “allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.” Nonetheless, consumers would also be compensated, since according to the investigation energy bills savings would mean recovering the increased costs “within nine to 40 months”. Therefore, the decision ultimately adhered to the principles of the 101(3) Guidelines.

There has been a recent push to deviate from the requirement of full compensation of the consumers in the relevant market, provided that others benefit as a consequence of the conduct. The draft Sustainability Agreements Guidelines published by the Dutch Competition Authority (ACM) contemplate this possibility under certain circumstances. However, in practice the ACM itself has had trouble accepting exceptions. In its assessment of the Chicken

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184 Id. ¶ 85.
185 Id. ¶ 88.
186 CECED, supra note 119.
187 Id. ¶ 48.
188 Id. ¶ 56.
189 Id. (emphasis added).
190 Id. ¶ 52.
of Tomorrow initiative in 2014, the agency found that an industry-wide, government-supported attempt to develop healthier, more sustainable chicken meat improving animal welfare standards was anticompetitive and could not be justified. The investigation revealed that consumers were not willing to pay the significant price increase the measures entailed. The strict monetization of non-economic benefits has been subject to criticism. It should be noted however that expert studies indicated that the animal wellbeing enhancement derived from the scheme would be minimal. In a similar vein, an agreement for the early closure of five coal plants in the Netherlands was deemed contrary to competition law and unredeemable based on efficiency considerations. Since CO₂ emissions were relocated rather than eliminated they could not be computed, and savings stemming from reducing other emissions were a fraction of the increased electricity costs for consumers.

In both of the above cases, the fact that individual consumers were not fully compensated truncated the legality of the arrangements. By contrast, an agreement between competitors Shell and TotalEngeries to store CO₂ in offshore abandoned gas fields that included setting a joint price and adopting a joint marketing strategy was greenlighted by the ACM in 2022. Here, the findings suggested that consumers (CO₂ emitters) would not see an

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193 Chicken of Tomorrow decision, supra note 192.

194 Anna Gerbrandy, Solving a Sustainability-Deficit in European Competition Law, 40 WORLD COMPETITION 539 (2017).

195 Chicken of Tomorrow decision, supra note 192.


197 Id., at 5.

increase in price nor a reduction of choice, thereby not really suffering any negative consequences. This would suffice to meet the second requirement of Article 101(3) TFEU, 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. The inclusion of this speculative statement is quite baffling. It suggests that the ACM only begrudgingly accepts the European Commission’s orthodox understanding of the fair share requirement. The ACM remains willing, it seems, to adopt a more social justice-inspired approach that considers general benefits as a redeeming feature even when there is a cost for the affected consumers.

In the new EU Horizontal Cooperation Guidelines, the European Commission doubles down on the reluctance to abandon the contentious full compensation requirement, but acknowledges the need for certain concessions. As a general rule, any sustainability improvements “must accrue to the consumers of the products covered by the agreement”.\(^{199}\) This would include not only direct benefits for the consumers bearing the cost of the restrictive deal (individual use value benefits), but also benefits for others provided that the affected consumers appreciate them and accept the cost (individual non-use value benefits).\(^{200}\) The latter may be determined by examining consumers’ willingness to pay—similar to the ACM’s *Chicken of Tomorrow* investigation—by *inter alia* conducting surveys.\(^{201}\) One of the main reasons for the reticence to adopt greater flexibility is the risk that even well-intentioned joint initiatives might eventually turn into collusive behavior. And this is not merely a theoretical possibility. In 2011, in the course of implementing a joint scheme to reduce heavy duty detergent and packaging material, three major laundry powder producers ended up agreeing to fix prices and to reduce competition between them.\(^{202}\) These measures were not related to nor

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199 EU Horizontal Cooperation Guidelines, ¶ 569.
200 Id. ¶¶ 571–581.
201 Id. ¶ 578.
required for the execution of the original cooperation, and consequently the European Commission fined the companies involved for breaching Article 101 TFEU.\(^{203}\)

A thornier issue is what happens when the consumers simply do not wish to pay for what could be important sustainability gains only achievable through a restrictive agreement. These are termed “collective benefits” in the Guidelines, defined as occurring “irrespective of the consumers’ individual of the product” and accruing “to a wider section of society than just consumers in the relevant market.”\(^{204}\) The European Commission had previously accepted the merits of “sustainability benefits that accrue for the benefit of society as a whole”,\(^{205}\) but had not outlined a path for assessing these. The new Guidelines open the door, albeit ever so slightly, for the consideration of collective gains, “provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same.”\(^{206}\) This would require a significant overlap between the consumers paying for the efficiencies and their beneficiaries. It could occur, for example, that competing producers agree to use more expensive but less polluting energy, and a large part of the customers of their products is among those breathing the improved air.\(^{207}\) Said overlap could be determined with relative ease, but the Guidelines also require that 1) the gains are enough to compensate these consumers for the harms suffered,\(^{208}\) and 2) the positive impact on consumers is “clearly identifiable”.\(^{209}\) The burden of proof placed on the parties to agreements wishing to claim this exception is thus anything but light.

The Guidelines’ attempts to find a route for the viability of restrictive sustainability-guided initiatives within the confines of the CW standard are a true juggling act, and suggest

\(^{203}\) Id.
\(^{204}\) EU Horizontal Cooperation Guidelines, ¶ 582.
\(^{205}\) Competition Policy Brief 2021-01, supra note 66, at 6.
\(^{206}\) EU Horizontal Cooperation Guidelines, ¶ 583.
\(^{207}\) Id., ¶ 585.
\(^{208}\) Id., ¶ 584.
\(^{209}\) Id., ¶ 589.

Electronic copy available at: https://ssrn.com/abstract=4681461
that the European Commission’s defense of the EU’s sturdy antitrust system remains hermetic. The contentious interpretation of the consumer compensation requirement has not been fundamentally altered, but now it is possible to compute benefits for others provided that the consumers are willing to foot the bill, and even general benefits consumers do not want to pay for but which ultimately benefit them too. These principles stem from the traditional interpretation of the conditions of Article 101(3) TFEU, which does not leave too many other options when it comes to consider collective gains. Yet leaving societal benefits up to the preferences of individual consumers is problematic. Studies suggest that some are indeed willing to accept the added costs of sustainable alternatives, and it is probable that consumers’ appreciation of sustainability will improve in the years to come.\textsuperscript{210} As things stand however, consumer behavior towards sustainable products is not always as positive as one would hope.\textsuperscript{211} Significant barriers hamper sustainable consumption, including incomplete knowledge and the difficulties for low-income consumers to afford more expensive sustainable options.\textsuperscript{212} Crucially, a very unfortunate, ethically questionable consequence of the focus on consumer compensation and willingness to pay is the impossibility to save green agreements if the affected consumers do not want to pay for improvements they will not themselves enjoy. The obvious example would be cleaner air thousands of miles away in the developing countries housing the factories that produce their goods.

\begin{footnotesize}
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  \item \textsuperscript{212} Katherine White, David J. Hardisty and Rishab Habib, \textit{The Elusive Green Consumer}, 97 HARVARD BUS. REV. 124 (2019).
\end{itemize}
\end{footnotesize}
There could be a way, within the current EU legal framework, to circumvent the strict requirements of Article 101(3) TFEU. The primacy of non-economic aims over competition law objectives in specific circumstances has recognized by the EU courts, leading to certain derogations in the application of Article 101(1) TFEU purely because “other things matter more than competitive markets.”\textsuperscript{213} The classic example is \textit{Wouters}, where the Dutch Bar Association’s restrictions of partnerships between member of the Bar and accountants was held to be anticompetitive but “necessary for the proper practice of the legal profession”, and therefore outside the scope of Article 101.\textsuperscript{214} Building on this premise, in \textit{Meca-Medina} the Court of Justice suggested that competition law can be set aside if 1) an arrangement has a legitimate (non-economic) objective, 2) the restrictive effects on competition are inherent to that objective, and 2) the proportionality test is respected.\textsuperscript{215} The facts here concerned a doping ban in sport competitions to ensure these were “conducted fairly” and protected “equal chances for athletes, athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport.”\textsuperscript{216}

Scholars have defended the potential applicability of the \textit{Wouters} doctrine to other non-economic benefits, particularly environmental issues.\textsuperscript{217} This prospect would be supported by a “holistic reading of the Treaty” according to Monti.\textsuperscript{218} At the same time, both scholars concede that important limitations exist. The existing case law suggests that a public authority would need to be involved in the agreement,\textsuperscript{219} and the EU courts have trodden with extreme

\textsuperscript{216} Id., ¶ 43.
\textsuperscript{217} Holmes, \textit{supra} note 17, at 371 (seeing “no reason why [the Wouters] approach should not be taken in the case of sustainability agreements”); Gerbrandy, \textit{supra} note 194, at 556 (considering this a “promising” option).
\textsuperscript{218} Monti, \textit{supra} note 213, at 129-30.
\textsuperscript{219} Gerbrandy, \textit{supra} note 194, at 556.
caution when developing derogations.\textsuperscript{220} For instance, in December 2023, the Court of Justice clarified in the much-anticipated \textit{European Super League} case that FIFA and UEFA’s prior approval requirement for new football competitions is anticompetitive. Their powers, the Court found, lack “a framework of substantive criteria and detailed procedural rules which are suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate, so as to limit the discretionary powers of FIFA and UEFA.”\textsuperscript{221}

The European Commission seems reluctant to accept the \textit{Wouters} path for environmental causes. In the draft of the EU Horizontal Cooperation Guidelines, a clarification had been included stating that anticompetitive agreements could not be defended solely because “they are necessary for the pursuit of a sustainability objective.”\textsuperscript{222} This sentence does not appear in the final version of the Guidelines, most likely because the European Commission realized that this would ultimately be something for the judiciary to decide.

B. The “Sword”: The Effect of Antitrust Enforcement on Non-Economic Goals

1. Origins and logic

In a study on the link between antitrust and inequality, Ariel Ezrachi, Amit Zac and Christopher Decker refer to the “external effects” of competition law enforcement.\textsuperscript{223} These occur when an unrelated favorable outcome is achieved by promoting greater competitiveness. When additional benefits ensue in the pursuit of antitrust’s conventionally accepted goals, enforcing the law would be the “sword” slashing behavior that threatens non-competition values, and could be seen as a means to promote these objectives. This strategy requires that there be no

\begin{footnotesize}
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  \item \textsuperscript{220} Monti, \textit{supra} note 213, at 129-30.
  \item \textsuperscript{221} Case C-333/21 \textit{European Superleague Company SL v UEFA and FIFA} ECLI:EU:C:2023:1101 ¶ 39 (CJ, Dec. 21, 2023).
  \item \textsuperscript{223} Ezrachi et al., \textit{supra} note 14, at 53.
\end{itemize}
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conflict between efficiency and societal purposes: the protection of the latter would be a desirable by-product of safeguarding the former. It presupposes that there is some form of anticompetitive harm stemming from the conduct. Otherwise, antitrust intervention would not be justified. In the presence of such harm, it could be possible to make a case for invigorating the application of antitrust, or redirecting enforcement efforts to prioritize acts that carry some form of social detriment.\textsuperscript{224}

Unlike in other jurisdictions,\textsuperscript{225} there is no express duty under US antitrust or EU competition law to give weight to environmental or equality considerations. Yet the TFEU’s goals weigh heavily upon antitrust policy development.\textsuperscript{226} Crucially, Article 11 TFEU contains an obligation to integrate “[e]nvironmental protection requirements … into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”\textsuperscript{227} This naturally applies to EU competition policy, but does not require the introduction of derogations or exceptions to the general rules. Sustainability would not take precedence over the goals of competition law.\textsuperscript{228} Rather, the wording of Article 11 simply suggests that the law ought to be “interpreted in a way that renders it consistent with environmental protection requirements.”\textsuperscript{229} According to Julian Nowag, in cases of conflict the Treaties can be interpreted as mandating a balancing exercise between environmental protection and competition interests “on equal footing.”\textsuperscript{230}

\textsuperscript{224}Monti, \textit{supra} note 213, at 132.
\textsuperscript{226}See supra section I.B.
\textsuperscript{227}TFEU art. 11.
\textsuperscript{228}JULIAN NOWAG, \textit{ENVIRONMENTAL INTEGRATION IN COMPETITION AND FREE-MOVEMENT LAWS} 48 (2016)
\textsuperscript{230}NOWAG, \textit{supra} note 228, 30.
When assessing the positive externalities of antitrust enforcement, the impact of the application of the laws on wealth inequality presents a particularly useful example, given the extensively documented impact of market power on the (growing) wealth gap.\footnote{See sources \textit{supra} note 14.} At its most basic, the logic would be that powerful companies may collude, merge or exclude rivals to “extract greater wealth from the public than would be possible were they subject to stronger competitive forces”.\footnote{Khan & Vaheesan, \textit{supra} note 14, at 246.} The potential market power has to increase inequality is yet another reason, according to Joseph Stiglitz, to use antitrust policy to attack it.\footnote{Stiglitz, \textit{Towards a Broader View… supra} note 14.}

But what exactly can antitrust do to help? Studies suggest the law can improve equality “of income, consumption, and wealth”, both directly and indirectly.\footnote{Ezrachi et al., \textit{supra} note 14, at 53.} Directly, because 1) better prices and increased choice would increase the wealth of consumers, and 2) well-functioning markets can “slow the decline of living standards and opportunities of those on the lowest incomes and, at the same time promote social mobility which enlarges the size of the middle-income groups.”\footnote{\textit{Id}. at 55.} The indirect effects include the promotion of the transfer of wealth from producers to consumers due to competitive pressure, and the prevention of the transfer of income from employees to employers by tackling monopsony market power.\footnote{\textit{Id}. at 55-56.}

It would be equally feasible to enhance environmental aims, provided that they are complementary to antitrust’s goals.\footnote{Note by the Delegation of the United States, Roundtable on Horizontal Agreements in the Environmental Context, OECD Directorate for Financial and Enterprise Affairs, Competition Committee (Oct. 21, 2010) DAF/COMP/WD(2010)96. See also Sarah E. Light, \textit{The Law of the Corporation as Environmental Law}, 71 \textit{Stan. L. Rev.} 137, 175 (2019) (describing the DOJ’s lawsuit against Carmakers in the 1960s (\textit{supra} note 150) and the European Commission’s \textit{Consumer Detergents} decision (\textit{supra} note 202) as examples of antitrust law serving “as a mandate to promote environmental goals”).} This could be done by paying particular attention to schemes that “harm the competitive process in a manner that [additionally] harms sustainability or frustrates initiatives to promote sustainability.”\footnote{Monti, \textit{supra} note 213, at 126.} The new EU Horizontal Cooperation
Guidelines highlight that competition law promotes sustainable development “by ensuring effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare.”

As a consequence of the above, healthy enforcement, even when limited to pursuing CW, ought to spontaneously reap some social benefits. To boost this positive impact, enforcers would be required to make adequate use of all the tools at their disposal, and tackle anti-competitive joint conduct, abuses of dominance, and harmful mergers. Social positive externalities may arise from any investigation, but certain sectors naturally bear a marked impact on specific goals. For instance, the automobile industry and energy systems have a significant environmental footprint, while healthcare, pharma or telecoms might be particularly important from a wealth inequality perspective. Adequate enforcement in these industries could contribute towards the attainment of these additional pursuits. This section scrutinizes the extent to which current US and EU policies maximize their social potential, while the following section proposes tactics to expand antitrust’s ripple effect.

239 EU Horizontal Cooperation Guidelines, ¶ 544.
240 The Environmental Impact of Cars, Explained, NATIONAL GEOGRAPHIC (Sept. 4, 2019) https://www.nationalgeographic.com/environment/article/environmental-impact (highlighting the environmental footprint of producing a car, extracting the fuels it consumers, the emissions it generates, the junk left behind once it is taken out of circulation, and the infrastructure needed for its use).
241 See, e.g., About the Electricity System and Its Impact on the Environment, EPA https://www.epa.gov/energy/about-us-electricity-system-and-its-impact-environment (last visited Aug. 23, 2023) (citing environmental effects such as greenhouse emissions, water use and pollution, solid waste, or land use).
2. Social Antitrust Enforcement in the US (or Lack Thereof)

The present-day policy in the US, explained above, is to rarely look past pricing, output and consumer choice issues in antitrust cases. This position does not entirely preclude the attainment of non-competition benefits. An example of a direct impact on societal goals would be the Section 1 lawsuit filed against automakers in 1969, previously discussed, for conspiring to eliminate competition in the research, development and manufacturing of equipment to reduce air pollution. Encouraging companies to innovate to reduce emissions could candidly improve environmental standards, and since the conduct at stake affected prices, there is no reason why such a case not be brought under the current policy. Nonetheless, this case was brought before the recognition of the CW standard as antitrust’s lodestar.

In recent years, a string of judgments from the Supreme Court and other branches of the judiciary have missed the mark, squandering unique opportunities to promote both competition and non-competition goals. The focus here is on three illustrative cases. In the first, FTC v. Actavis, Inc. (Actavis), the Supreme Court had to rule on the legality of reverse payments in the pharma sector. These are arrangements between a drug originator holding a valid patent and manufacturers of the generic version of the drug by which the former pays the latter a sum to settle litigation challenging the validity of the patent. They tend to include a “pay-for-delay” clause, with the generics producers agreeing not to enter the market for some time—on occasions even after the patent has expired—thereby extending the branded drug’s monopoly and preventing price competition. The case in question related to the lucrative hormone medication AndroGel, produced by Solvay Pharmaceuticals. Generics producers

245 See supra section I.A.
246 See supra section II.A.2.
248 1223 S. Ct. 2223 (2013).
249 Between 2000 and 2007, Androgel’s sales were around USD 1.8 billion. In re AndroGel Antitrust Litig. (No. II), 687 F. Supp. 2d at 1371, 1373.
filed motions to have the patent annulled, and were on course for victory. Faced with the prospect losing about US $125 million per year in profits, Solvay agreed to make annual payments to the patent challengers ranging between $10 and $30 million. According to the FTC, this ensured that generics would not enter the market until 2015 (Solvay’s patent was due to expire in 2020), and amounted to an unreasonable restraint of trade contrary to Section 1 of the Sherman Act.

The Court thankfully rejected the argument sanctioned by some of the lower courts that, since the anticompetitive effects fell within the scope of the patent, the agreement was immune from antitrust law. The monopoly granted by the patent was under litigation, and this placed a question mark on its lawfulness. However, the Court did not find pay-for-delay arrangements to be per se illegal. This is a regrettable stance on a practice that, according to the FTC, costs consumers $3.5 billion a year, and denies them the generic drug for years. Delaying the benefits typically derived from competition, including lower prices and greater choice, appears to be at odds with the orthodox goals of antitrust. Declaring them presumptively harmful would have helped to advance competition and non-competition aims.

The second significant case is Ohio v. American Express Co. (hereinafter Amex).

Here, the issue at stake was a practice known as “steering”, described by Herbert Hovenkamp

250 Id. at 1305.
253 Id.
254 Id., at 2237.
256 Fialkoff, supra note 255, at 546.
257 Sandra Marco Colino et al., The Lundbeck Case and the Concept of Potential Competition, CONCURRENCES REV. 18 (2017).
as being “fundamental to competition of any kind”. It involves merchants telling their customers to use cards with lower fees, possibly offering them a discount or gift when using an alternative. Amex precluded merchants from steering customers toward cheaper payment methods, and the DOJ filed a lawsuit for breach of Section 1 of the Sherman Act. When the case reached the Supreme Court however, it ruled that the conduct was lawful because there was no direct evidence of “reduced output, increased prices or decreased quality in the relevant market”. This conclusion was based on the fact that the DOJ had not defined the relevant market nor shown the existence of market power in that market. But this approach is hard to reconcile with judicial precedent. As Justice Breyer noted in his dissent, “proof of actual adverse effects on competition is, a fortiori, proof of market power.” It is clear that Amex “had enough power in that market to cause that harm”, and therefore there should be “no reason to require a separate showing of market definition and market power under such circumstances.”

The Amex “regressive, anti-economic” judgment is hard to justify on any grounds. It has faced severe scholarly criticism, including from those defending the CW standard, and has been described as possibly “the worst antitrust decision in many decades.” Steering is beneficial for competition as it can improve quality and lower prices. Simultaneously,

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263 Id.
264 Hovenkamp, supra note 259, at 46.
266 Salop et al., supra note 261, at 883.
267 Hovenkamp, supra note 259, at 91.
Amex’s payment system has been described as rewarding “the wealthy while penalizing the poor”:268 those who have access to more expensive cards like Amex get (untaxed) rewards such as cash back or hotel/flying points, while lower income households do not have access to these perks and will bear some of the cost merchants incur when wealthy customers use these costlier cards.269 It defies belief that the Supreme Court could get it so wrong. Incidentally, in support of its arguments and conclusions the Court extensively cites the work of scholars who have acted as consultants for financial services corporations offering payment cards.270 It begs the question of whether the Court may have been swayed by lobbying efforts masqueraded as independent research,271 or at the very least a philosophy based on personal experiences that could affect the impartiality of the views held in relation to antitrust intervention.272

The third case is US v. UnitedHealth Group, Inc. and Change Healthcare, Inc., relating to one of the latest mergers in a string of consolidation deals affecting the healthcare industry.273 In February 2022, the DOJ filed a lawsuit to prevent healthcare giant and insurance provider UnitedHealth from purchasing Change, a supplier of technology to process health insurance claims.274 Since rivals of UnitedHealth also used Change’s system, the DOJ worried that the former could gain access to competitors’ sensitive data, enabling it “to co-opt its rival insurers’ innovations and their competitive strategies and reduce their incentives to pursue

268 Aaron Klein, Why the Supreme Court’s Decision in Ohio v. AmEx Will Fatten the Wealthy’s Wallet (at the Expense of the Middle Class), BROOKINGS (June 25, 2018) https://www.brookings.edu/research/ohio-v-amex/ (accessed Aug. 20, 2023).
269 138 S. Ct. 2274 (2018), at 2297 (Breyer, J., dissenting).
270 David Evans, whose work is cited 30 times, thanks Visa for “financial support” in his article The Antitrust Economics of Multi-Sided Platform Markets, 20 YALE J. ON REG. 324 (2003). Also, in an article cited 15 times in the judgment, the authors acknowledge that they have “served at various times as consultants to Visa”. See Benjamin Klein et al., Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 ANTITRUST L. J. 571 (2003).
271 See supra section I.C.
272 This point is made by Kovacic in relation to Justice Lewis Powell. Powell came from private practice, and according to Kovacic “Chicago School literature probably did not make him a market-oriented, antitrust skeptic” but rather he “quite possibly acquired his doubts about antitrust and other forms of economic regulation independently before he joined the bench.” Kovacic, supra note 31, at 469–70.
those innovations and strategies in the first place.”275 Moreover, owning Change could allow UnitedHealth to raise rivals’ costs and prevent them from accessing Change’s products.276 This would affect consumer welfare, since it would potentially result in “higher cost, lower quality, and less innovative commercial health insurance for employers, employees, and their families.”277 It could equally have a negative impact on equality. Insurers’ thirst for health data—often the driver of these acquisitions—could be worrying for high-risk consumers. Theodosia Stavroulaki’s research into healthcare mergers has revealed that those with bad diet and lifestyle habits might struggle to be offered a good deal on their health insurance, potentially facing a barrier to entry.278 Unfortunately, those living in poverty statistically have more health issues, so they would be the most affected.279

Following a two-week trial, the district court threw out the DOJ’s claims and allowed the merger to go ahead. The judge required divestiture of UnitedHealth’s own claims processing technology, but apart from this remedy aimed at resolving horizontal issues, no other conditions were imposed. The judge did not believe that the misuse of data would materialize, thanks to the existence of firewalls and contractually-afforded consumer protection.280 Additionally, in the judge’s view the DOJ did not provide sufficient proof of the innovation-stifling, exclusionary potential of the deal.281 Stavroulaki has lamented the court’s

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275 Id., at 2.
276 Id.
277 Id., at 3.
281 Id.
overestimation of the reputational damage of breaching firewalls, and underestimation of the huge gains UnitedHealth would stand to make from such breaches.\textsuperscript{282}

The above may be punctual developments, but the big picture is equally disheartening. The FTC has only attempted to enforce the Robinson-Patman Act (which prohibits price discrimination) twice since the 1980s, and has brought no vertical price restraints cases in more than two decades.\textsuperscript{283} Section 2 of the Sherman Act, which prohibits monopolization and is fundamental to combat misuses of market power, has been similarly dormant since the 2000s.\textsuperscript{284} To make matters worse, a study by Michael Carrier found that, in 97\% of cases where the rule of reason applies, the plaintiff fails to demonstrate the existence of an anticompetitive effect.\textsuperscript{285} The many voices decrying underenforcement may thus have a very valid point.\textsuperscript{286}

Under the current (Neo-Brandeisian) leadership of the federal agencies,\textsuperscript{287} there have been invigoration attempts. In October 2022, the DOJ announced a conviction under Section 2 of the Sherman Act—the first in 40 years.\textsuperscript{288} Only three months later, it sued Google for monopolizing digital advertising technologies\textsuperscript{289} in a case described as being “about the future of the Internet.”\textsuperscript{290} In the two-year period between 2021 and 2023, the FTC managed to block three horizontal mergers in court, and a further 13 transactions (including two non-horizontal

\begin{footnotes}
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\item Kovacic, \textit{supra} note 12, at 688.
\item Despite the federal impasse, some states attorneys general have been quite active in pursuing antitrust violations even when little was done at the federal level. See Theodore Bolema & Eric Peterson, \textit{The Proper Role for States in Antitrust Lawsuits} (Policy Paper, Pelican Institute for Public Policy, Dec. 2, 2021) https://iseg.wichita.edu/publications/the-proper-role-for-states-in-antitrust-lawsuits/.
\item See \textit{supra} section I.C.
\end{enumerate}
\end{footnotes}
mergers) were abandoned. In July 2023, the DOJ and the FTC published a draft set of revised Merger Guidelines aimed at energizing the scrutiny of such deals. The possibility of challenging mergers before an administrative court has also been revived, and FTC’s chair Khan has hinted at the possibility of applying the Robinson-Patman Act once again.

This strategy has not been exempt from criticism. Predictably, opponents of Neo-Brandeisian policies have accused Khan of politicizing antitrust to wage a war against Big Tech and corporate America. Regardless of where one stands on the discussion, the revitalization of the law is a much-needed step not just for the prospective protection of non-competition goals, but also for a system that adequately protects antitrust’s traditional objectives. Moreover, it is unlikely that any reform will be excessively far-reaching, since there are plenty of checks and balances in the system. This may be music to the ears of those worried about radical reform or unnecessary intervention, but it also casts doubt on the effectiveness and durability of any improvements. The current administration’s actions will often be scrutinized by a bench still captured by “neo-liberal ideology”, and a conservative Supreme


295 Mary Yang, Republicans attack FTC Chair and Big Tech Critic Lina Khan at House Hearing, THE GUARDIAN (Jul. 13, 2023).

296 Tim Wu, supra note 56, at 2 (positing that any meaningful reform will depend on “whether change reaches the enforcement agencies in lasting form, the judiciary and ultimately, the law”).

297 Fox, supra note 77, at 180 (2023).
Court that, without legal reform, will likely not tamper with the late Justice Antonin Scalia’s antitrust legacy.298

3. The Social Dimension of EU Competition Law Enforcement

In the EU context, as previously posited, a holistic reading of the Treaty in which the main competition law provisions are embedded would suggest that taking other TFEU objectives into account is compulsory in antitrust policy development.299 This could lend support to a doctrine akin to the principle of indirect effect of EU law when applying Articles 101 and 102 TFEU.300 According to this principle, national courts must try to interpret national “as far as possible, in the light of the wording and purpose” of EU law provisions that lack direct effect and cannot, therefore be invoked by individuals before their national courts.301 Transposing this logic into the context of antitrust, antitrust enforcers could be compelled, where possible, to interpret the Treaty’s competition law provisions in a way that is coherent with other TFEU obligations including environmental protection and equality-inducing purposes such as social cohesion and the promotion of employment or education.

It is not difficult to find examples of socially beneficial competition law enforcement in Europe. Relying on Article 101(1) TFEU, the European Commission has targeted anticompetitive practices that had an environmental angle. In 2021, the European Commission

298 Id., at 184.
299 See supra I.B. See also 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, 34 (2022) (arguing for the consideration of environmental degradation and social injustice as abuses of dominant position contrary to Article 102 TFEU).
301 Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentación SA, ¶ 8. On indirect effect, see, e.g., M. Elvira Méndez-Pinedo, The Principle of Effectiveness of EU Law: A Difficult Concept in Legal Scholarship, 11 JURIDICAL TRIBUNE 5 (2021); Asif Hameed, UK Withdrawal from the EU: Supremacy, Indirect Effect and Retained EU Law, 85 MODERN L. REV. 726 (2022); Federico Casolari, Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation, in INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION 395 (ENZO Cannizzaro et al. eds., 2011).
imposed fines totaling €875 million on car manufacturers Daimler, BMW, and the Volkswagen group. In the course of a lawful cooperation to curb nitrogen oxide exhaust emissions, they had agreed not to compete to clean the air beyond legal requirements, despite having the technology to go further. In 2016 and 2017, record fines adding up to more than €3 billion were slapped on trucks producers for using low emissions regulation to collude on prices, and pass on to consumers the costs of complying with the law. Recent examples of enforcement with “green” repercussions include an investigation into a cartel between companies involved in the treatment of end-of-life cars considered waste, and penalties for participation in a cartel in the ethanol market (a biofuel with beneficial environmental impact). In the latter, Vestager emphasized the importance of pursuing cartels “relevant for the Green Transition”.

Enforcement levels in the EU are generally more encouraging than in the US. For comparison, whereas pay-for-delay agreements are subject to the rule or reason in the US, the EU Court of Justice has confirmed the European Commission’s position that they constitute a restriction of competition by object under EU law. In addition, the European Commission regularly brings abuse of dominance cases under Article 102 TFEU (the equivalent of Section 2 of the Sherman Act). The US lawsuit against Google was only launched in 2023, but in Europe the company has already been hit with three major fines, including a record €4.34 billion for abuses related to its Android operating system, and it is being further investigated.

306 See supra section II.B.2.
307 See supra section II.A.2.
310 See supra section II.B.2.
for favoring of its own online advertising technology.\textsuperscript{311} There have also been inquiries relating to vertical restraints. In 2018, the European Commission fined four electronics manufacturers for imposing minimum resale prices via, \textit{inter alia}, pricing algorithms.\textsuperscript{312} The Court of Justice also confirmed, in 2011, that banning the resale of luxury products on the Internet would be anticompetitive by object.\textsuperscript{313}

The EU enforcement system does come with its own problems. For instance, the European Commission’s merger control policy needs to be looked at on its own merits.\textsuperscript{314} From a sustainable development perspective, the inability to block two recent agrochemical mergers (Dow/Dupont and Bayer/Monsanto) was rather unfortunate.\textsuperscript{315} Critics pointed out how the consolidation of the sector is leaving farmers at the mercy of global conglomerates and could negatively impact “environmental protection, food safety, food security, biodiversity, and marginalize more sustainable models of agriculture.”\textsuperscript{316} Elias Deutscher and Stavros Makris have proposed changes to merger analysis so that, besides considering the status quo, the European Commission also takes into account the future, particularly the impact of the concentration on “diversity, quality, and direction of innovation paths”.\textsuperscript{317}

Another important problem is the colossal evidentiary burden imposed on enforcers following the more economic approach of the last two decades. Even when companies possess significant market power and/or where the conduct at stake is highly likely to be harmful,

\textsuperscript{313} Pierre Fabre case. See also case C–230/16 Coty Germany GmbH v Parfümerie Akzente GmbH ECLI:EU:C:2017:941, allowing the prevention of Internet sales on third-party websites for luxury cosmetics.
\textsuperscript{316} Deutscher & Makris, \textit{supra} note 313.
\textsuperscript{317} \textit{Id.}
agencies and plaintiffs often have to prove negative effects to an impossibly high standard.\footnote{See e.g. Cartes Bancaires or Maxima Latvija.} As a result, the European Commission is losing key cases, and some of the big abuse of dominance investigations take decades (and substantial resources) to be resolved.\footnote{As an illustrative example of lengthy proceedings, a case against Intel which took off in 2006 still remains unresolved as of August 2023. The latest appeal is pending before the Court of Justice. See Case C-240/22 P, European Commission v. Intel Corp. (nyd).} There have been calls for speeding up the shift of the burden of proof to the companies (in cases where the facts point to a likely violation) to justify their behavior,\footnote{Kwoka & Valletti, \textit{supra} note 314.} and even for imposing limits on judicial review.\footnote{Jason Furman et al., \textit{Unlocking Digital Competition: Report of the Digital Competition Expert Panel} (March 2019) \url{https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf}.} While understandable, these proposals may be difficult to reconcile with due process requirements and the rule of law.

### III. Proposals for a Coherent, Socially-Conscious Policy

In a speech delivered in October 2020, Judge Douglas Ginsburg listed a number of “other goals” of antitrust embraced by recent scholarship,\footnote{Ginsburg, \textit{supra} note 11.} warning his audience to hold their laughter. Among those goals were “countering income inequality” and “safeguarding the environment”.\footnote{Id.} The year 2020 might not seem very far away, yet the vertiginous pace of developments suggests Ginsburg’s remarks have been overtaken by events. Since the speech, antitrust agencies in the Netherlands, UK, Austria and Singapore among others have published guidance on sustainable cooperation.\footnote{See generally ACM Sustainability Guidelines; UK Competition & Markets Authority, Draft Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Environmental Sustainability Agreements, CMA177 (Feb. 28, 2023); Austrian Federal Competition Authority, Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines), (Sept. 2022);} The new EU Horizontal Cooperation Guidelines
devote 25 pages to sustainability agreements, and new draft guidelines for sustainability-oriented cooperation between agricultural producers has been published. Austria’s competition law now includes a sustainability exemption for agreements promoting cooperation with genuine environmental purposes.

These developments show that discussion of the impact of environmental and equality goals on antitrust is clearly being taken much more seriously than Ginsburg’s remarks suggest. This section embraces the importance of these concerns and expounds on the optimal route to coherent socially-aware antitrust policymaking.

A. Antitrust’s Supporting Role in the Protection of Social Goals

Despite the fervor of the antitrust goals dispute, there is consensus that the main role of the discipline is not the pursuit of a social agenda. The European Commission has been unambiguous in that “[t]here are better, much more effective ways” to strive for sustainable development. Taxation, sector-specific rules, investment and other government-led initiatives constitute far superior routes, because the protection of these objectives is much too important to be left in the hands of the corporate world. This was precisely the impetus

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behind the conception of the welfare state: that it would do “things that markets would do badly or not at all.”

The view that corporations may act as “powerful voices for social and political change, flexing lobbying muscle and changing their own behaviors to create policy impact on issues like … and climate change” might be appealing, but it overlooks that they are also notoriously profit-driven. Adam Smith put it best when he said “[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.” The benefits of corporate social responsibility have been questioned since the 1970s and Milton Friedman’s famous assertion that businesses’ only duty should be to maximize shareholders’ returns. More recently, it has been suggested that corporate attempts to solve societal problems typically backfire, since “evidence suggests that corporations will simply use such political engagement as an opportunity to extract more profit.” From this perspective, competition authorities’ reluctance to accept green corporate initiatives without thorough scrutiny is entirely justified. Enforcers cannot take purported non-economic benefits for granted when an initiative may also lead to anticompetitive harm. Otherwise, businesses will have a clear escape route from antitrust liability.

As a consequence of the above, three detrimental consequences can be said to derive from overemphasizing the role of the business community in the attainment of social goals. First, it is recipe for flouting those fundamental purposes. Second, it could give governments an excuse “to shun their responsibility for designing proper regulation”. Third, the resulting

331 Balmer, supra note 17, at 219.
332 ADAM SMITH, WEALTH OF THE NATIONS IV.II.2 (1776).
333 See Milton Friedman, A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits, N.Y. TIMES (Sept. 13, 1970) (suggesting that corporations should not have social responsibility, only with shareholders).
335 Schinkel & Treuren, supra note 108, at 6.
antitrust policy would be almost unanimously unpalatable.\textsuperscript{336} Excessive subjectivity and legal uncertainty would translate into unduly powerful enforcers and a policy too broad to be implementable.

B. The Weak Case for Less Enforcement

The voices calling for laxer antitrust policy to defend otherwise prohibited horizontal cooperation in the name of sustainable development are struggling to find empirical support for their arguments, less so at times of blatant antitrust underenforcement. This article has shown that, despite claims to the contrary, there is no significant evidence that competition law has prevented genuinely beneficial initiatives.\textsuperscript{337} As Schinkel has asserted, “[t]he rare genuine sustainability agreement cannot justify relaxing general competition rules.”\textsuperscript{338} Even Holmes, who has fiercely advocated for radical changes (including TFEU reform),\textsuperscript{339} admits that in practice “very few cases [have] been brought against environmental or sustainability agreements”.\textsuperscript{340} Moreover, recent studies suggest that the first-mover disadvantage is a rare phenomenon, and its occurrence may have been grossly exaggerated.\textsuperscript{341} By way of example, a follow-up study to the \textit{Chicken of Tomorrow} ACM decision discussed above\textsuperscript{342} revealed that the benefits of the project had been attained without coordination, with the competitors acting independently.\textsuperscript{343}

Although supporters of looser enforcement claim that current policy leaves no room for social considerations, the fact is that there is \textit{some} leeway to consider the legality of genuinely

\textsuperscript{336} Ezrachi, Zac & Decker, \textit{supra} note 14, at 54.
\textsuperscript{337} See \textit{supra} sections II.A.2 and 3.
\textsuperscript{338} Schinkel & Treuren, \textit{supra} note 108, at 6.
\textsuperscript{339} Holmes, \textit{supra} note 17, at 405.
\textsuperscript{340} Id., at 402.
\textsuperscript{341} Schinkel & Treuren, \textit{supra} note 108, at 12–13.
\textsuperscript{342} See \textit{supra} section II.A.3.
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, particularly under the per se illegality in the US. Antitrust tools are struggling 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 *inter alia* by the *Consumer Detergents* investigation.\textsuperscript{344}

Even Aquinas envisaged important limits to the principle of double effect. On the basis of his premises, it is doubtful that he would have justified the kinds of arrangements that fall foul of antitrust rules while trying to pursue other aims. Edith Loozen has rightly summed up the contradiction in the arguments defending lax enforcement by questioning the extent to which “antitrust can be used to correct one market failure, a negative externality, by accommodating the very market failure that competition law is tasked to protect against—market power.”\textsuperscript{345}

The recent wave of sustainability guidelines is welcome, given the need for clarity on the potential clash between sustainability and competition objectives. In the EU, the new Horizontal Cooperation Guidelines essentially reiterate that antitrust will not bend over backwards to accommodate certain forms of potentially detrimental cooperation. The European Commission is willing to be receptive to possible sustainability benefits, but without treading over red lines. This position is laudable. However, the efforts to respect those limits combined with the emphasis on willingness to pay has led to the unfortunate exclusion of some important benefits paid for by (unwilling) consumers in the EU but enjoyed by those who are far away and possibly in greater need for those benefits.\textsuperscript{346} This is something that certainly calls for further reflection. Ultimately, one would hope that EU consumers would be prepared to bear

\textsuperscript{344} See *supra* section II.A.3.

\textsuperscript{345} Loozen, *supra* note 109.

\textsuperscript{346} See *supra* section II.A.3.
the cost of such improvements—in which case the new Guidelines show a willingness to accept the computability of the benefits.

If all else fails, and a significantly beneficial practice cannot escape antitrust liability, then it should be up to the legislator, not the agencies, to redeem it via sectoral regulation. It is a fundamental tenet of democracy that these matters are decided by elected officials, not bureaucrats.347

C. Boosting Antitrust’s Social Potential: More Antitrust?

In the previous section, the impact of effective antitrust enforcement on environmental protection and equality was assessed.348 Direct and indirect benefits, it was established, may arise provided that there is no clash between competition and non-competition objectives. This condition is met in most cases, suggesting antitrust enforcement may inadvertently boost objectives beyond efficiency. If this is the case, it begs the question of whether it is possible to go one step further and find ways to purposefully boost the social effect of competition enforcement within the current policy framework.

A popular suggestion is to adjust enforcement priorities so as to give precedence to cases with ecological or egalitarian consequences.349 Since the adoption of the Green Deal, it seems that the European Commission is already prioritizing investigations with an environmental angle. Another possibility is that, when punishing a company, social harm be considered an aggravating circumstance so as to increase the severity of the penalties imposed.

347 This point is made, inter alia, by: Ezrachi et al., supra note 14, at 54; Loozen, supra note 109 (arguing that in “market democracies like the EU and its Member States, only the legislature is democratically legitimized to define and redefine the scope for voluntary exchange”); Martijn Snoep, Keynote on competition and sustainability, IBA 24th Annual Competition Conference (Sept. 9, 2020) (stating that the ACM is “very reluctant to allow agreements … that lead to redistribution between users and non-users” since “it is up to the democratically elected legislature to determine who contributes to what extent to the achievement of public interest goals”).
348 See supra section II.B.1.
349 Ezrachi et al., supra note 14, at 68.
and ultimately make social harm costlier. A more complex but very helpful approach would be to chisel more elaborate theories of harm that allow enforcers to take into account a wider range of externalities in the assessment of the impact of conduct or mergers. This appears necessary not just to boost the protection of social goals, but also to address the underenforcement problem. In the European context, the principle of indirect effect of EU law could be mimicked to ensure enforcers apply competition law in the most sustainable manner possible, so as to comply with the wider TFEU objectives.

The above proposals are relatively straightforward to implement. There are however other important issues that stand in the way of reaping the full social potential of antitrust, and they require deeper systemic reform. In the EU, the difficulties the European Commission has encountered to meet the huge evidentiary burden could be addressed by, *inter alia*, rethinking the standard of proof, and putting the onus on companies with market power to justify their ostensibly harmful behavior. A number of appeals pending before the EU judiciary in relation to landmark cases, including the *Intel* saga, present a unique opportunity for the judges to take decisive steps in this regard. More complicated is the issue of the lengthy proceedings that result from the complex appeal process, with some cases taking decades to be resolved. It is a consequence of the strong procedural guarantees in place, and therefore it is unlikely to change despite the impossibility of fixing issues requiring an immediate solution. In the US, the role politics and ideology play in appointing judges to the bench has made it difficult to combat underenforcement. And this is not something that can be easily nor steadily fixed. Fortunately, the federal agencies are currently doing their part to revive the laws. If their efforts eventually translate into meaningful legislation, they might secure the durability of an antitrust resurgence that was long overdue.

351 See *supra* note 318.
CONCLUSIONS

Climate change and wealth inequality are among the greatest global challenges of our time, and ones that antitrust cannot turn its back on. Nonetheless, the less antitrust / more antitrust doctrinal dichotomy spawned by these concerns is proof, if proof were needed, that an overly ambitious policy could be fraught with contradictions. There is also a very real danger that the goal debate is hijacked by corporate interests. Companies and their representatives are quick to cry foul when the pursuit of non-economic objectives gives enforcers greater muscle to quash their behavior, but are simultaneously delighted to jump on the “green antitrust” bandwagon if it provides them with a get-out-of-jail-free card for lucrative, harmful conduct.

The idea that competition law enforcement hampers social objectives is both misguided and unrealistic. Misguided, because it is oblivious to the beneficial social impact of healthy markets. Unrealistic, because practice shows non-economic objectives are often de facto weighed into antitrust decisions—even in efficiency-fixated systems. In the US, antitrust is finally making a comeback both in terms of invigorated enforcement and political salience, and calls for a laxer policy are out of sync with the times. They overstate the need for flexibility based on a hypothetical, and make the mistake of shifting the onus of the protection of the environment from the legislature to the private sector (i.e. those who stand to gain the most from weakened law enforcement). The EU’s impressive environmental agenda has put pressure on competition agencies to provide clarity as to how they will assess environmental initiatives. While their responses suggest assorted levels of permissibility, the European Commission’s position in the new Horizontal Cooperation Guidelines shows a determination to protect the effectiveness of EU antitrust policy.

Antitrust was not designed to save the planet, and should not be sacrificed because it cannot achieve a purpose it was not meant to serve. Diluting antitrust for the “greater good”
could entail losing out on the positive social impact of well-functioning markets, as well as the
distributive advantages of laws that can neutralize the harms associated with excessive market
power. Instead, a healthy antitrust system is much better equipped to reap direct and indirect
social gains. Enforcers may use the discretion they have been afforded under the current legal
framework to channel their efforts towards investigations and initiatives that will boost both
competition and non-competition goals. Beyond that, the pursuit of social goals exceeds the
role and purpose of antitrust legislation.