

Exempting Green Cartels from Competition Law? Competition versus Regulation in Times of Sustainability

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EXEMPTING GREEN CARTELS FROM COMPETITION LAW?

Competition versus Regulation in Times of Sustainability

Niels J. Philipsen

1 INTRODUCTION

It is not easy to choose a topic for a contribution to a Liber Amicorum, especially when the celebrated person is someone who has been active in different academic fields. Hildegard Schneider has contributed to academic research on internal market law, regulation of professions, competition law, and European migration law, and that is only a selection. Throughout the years Hildegard and I have worked together regularly, in different settings, ranging from contract research (projects on free movement of lawyers in the EU, for example) and collaborative research projects (like the more recent TRANSMIC project on migration) to joint participation in conferences on competition and regulation in China and the EU. Which topic to write on then, keeping in mind that there should be a connection with the work and research interests of Hildegard and with my own current research interests?

I settled down on a competition law topic, more specifically one that fits in well with the current focus of academia and policy makers on sustainability, inter alia in the light of the European Green Deal.¹ Having attended several events on competition law in recent years, I more and more get the impression that lawyers who specialize in competition law would like to see that sustainability concerns take a prominent place among traditional goals of competition law, being protection of competition, efficiency, consumer welfare and internal market concerns. This view is also expressed in the literature.² From an

1 European Commission, 'A European Green Deal – striving to be the first climate neutral continent', available at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en, last accessed on 23 February 2022.

2 For example G. Monti, 'Four Options for a Greener Competition Law', *Journal of European Competition Law & Practice*, Vol. 11, Issue 3-4, 2020, pp. 124 -132; S. Holmes, 'Climate Change, Sustainability and Competition Law', *Journal of Antitrust Enforcement*, Vol. 8, 2020, pp. 354-405. For an overview of developments at the policy level see M.P. Schinkel & L. Treuren, 'Green Antitrust: Friendly Fire in the Fight against Climate Change', Amsterdam Law School Research Paper No. 2020-72, Amsterdam Centre for Law & Economics Working Paper No. 2020-07, March 2021. Available at SSRN <https://ssrn.com/abstract=3749147>, last accessed on 23 February 2022.

economist's perspective, however, it is not immediately obvious why sustainability should take up a prominent role in competition law.

In this contribution I would therefore like to answer the question which role sustainability goals can play in competition law, if we take environmental concerns (and more particularly climate change) seriously. From a law and economics perspective, that role seems rather modest, as I will explain in the following sections. After all, going easy on green cartels may be dangerous in the light of allocative efficiency. Moreover, competition law is part of a governance mix of different instruments, all attempting to address sustainability concerns. In order to address the research question above in more detail, I will first remind the reader of the importance of competition for sustainable production and (green) innovation (section 2). After that, the discussion turns to competition law, analysing whether sustainability could fit in as one of its goals (section 3). Section 4 summarizes some key findings of the 'economics of regulation' literature, providing an overview of the contributions that public and private regulation can make to sustainability. Subsequently, section 5 introduces the concept of 'smart mixes', indicating that competition law may only make up a small part of that mix. Lastly, I will provide some final observations in section 6.

2 COMPETITION AND SUSTAINABILITY

Competition law is based on the idea that, generally, competition between firms leads to lower prices and higher output, including (potentially) higher product quality and more choices for consumers. In addition, economic theory teaches us that monopolistic markets are characterised by 'social deadweight losses', i.e. losses caused by an inefficient allocation of resources. In other words: competition between firms will increase (static) allocative efficiency.³

While the above is certainly true if we compare the theoretical benchmark models of perfect competition and pure monopoly, it is likely to hold also when comparing perfect competition with other, more realistic market forms, such as oligopoly and monopolistic competition.⁴ This is why oligopolistic markets need to be monitored by competition agencies, to prevent that firms collude rather than compete. An exception to the rule that *more* competition works better than less competition would be a 'natural monopoly', which

3 The basic monopoly model is discussed in any textbook in microeconomics or competition law and economics. See e.g. A. O'Sullivan & S.M. Sheffrin, *Economics: Principles & Tools*, fourth edition, Upper Saddle River, NJ, Pearson Prentice Hall, 2005, pp. 296-298 and S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, London, Sweet & Maxwell, 2010, pp. 26-27.

4 For an introduction into oligopolistic markets, see e.g. Bishop & Walker, 2010, pp. 33-45.

is a market characterised by large economies of scale, in which it would be efficient to have only one or a few firms rather than many.⁵

From a dynamic efficiency perspective, i.e. when taking into account also the incentives of firms to invest in research, development and innovation, the story is more complex. After all, firms operating in a perfectly competitive market will not have sufficient resources to invest in R&D&I. That means we need at least some deviation from perfect competition. Moreover, in very dynamic markets, where innovation is crucial (such as those in which Big Tech companies are active), competition for new markets may be more important than competition in current markets. Still, even under these circumstances, competition – combined with temporary IP protection in case R&D&I is successful, inter alia to prevent free-riding behaviour by competitors – generally leads to better results in terms of innovation.⁶

Relating this economic theory on static and dynamic efficiency to the issue at hand, i.e. sustainable production, Schinkel & Treuren (2021) conclude in a recent paper that “[i]ncentives to produce more sustainably are stronger when firms compete than when they are allowed to make sustainability agreements. This is also true when firms are intrinsically motivated to promote sustainability.”⁷ A similar conclusion is reached by Loozen (2019), albeit on the basis of a constitutional law perspective, holding that “strict competition enforcement is the way forward to promote [sustainable production and consumption]”.⁸ Both Schinkel & Treuren and Loozen suggest in their papers that problems of under-regulation are best addressed through regulation rather than via sector-wide private coordination, a point on which I would like to elaborate in later sections of this contribution.

One may wonder whether the conclusion that competition is necessary to achieve green innovation holds also for other types of horizontal agreements, i.e. not aimed at green innovation, but where firms collectively decide to withdraw certain energy-inefficient products from the market. In such cases,⁹ the restriction of competition is clear: limitation

5 O’Sullivan & Sheffran, 2005, p. 289. Note that natural monopolies may still require regulation of price or quality. For more information, see J.K. Viscusi, J.M. Vernon & J.E. Harrington, *Economics of Regulation and Antitrust*, third edition, Cambridge, MIT press, 2000, Chapter 12.

6 R. van den Bergh, *Comparative Competition Law and Economics*, Cheltenham, UK and Northampton, USA, Edward Elgar, 2017, pp. 52-56; Bishop & Walker, 2010, pp. 45-47.

7 Schinkel & Treuren, 2021, p. 1. The two examples of sustainable cartels presented by Monti, 2020, pp. 126-127 also provide reasons to act carefully.

8 E. Loozen, ‘Strict Competition Enforcement and Welfare: A Constitutional Perspective on Article 101 TFEU and Sustainability’, *Common Market Law Review*, Vol. 56, No. 5, 2019, p. 1265.

9 Well-known examples from competition law are the cases *CECED*, *AISE* and *Chicken of Tomorrow*, discussed in inter alia Monti, 2020, Schinkel & Treuren, 2021, and P. Jansen, S.J. Beeston & L. Van Acker, ‘The Sustainability Guidelines of the Netherlands Authority for Consumers and Markets: An Impetus for a Modern EU Approach to Sustainability and Competition Policy Reflecting the Principle that the Polluter Pays?’, *European Competition Journal*, 2021.

of output (by taking certain models from the market) will most certainly result in higher prices for consumers. On the other hand, one could argue that consumer welfare may still increase, if (and only if) consumers would in principle be willing to pay for this higher price due to the ‘sustainability’ gains they receive. To the extent that consumers would not be able to pay for such price increase, however, a public actor (for example, via regulation) seems to be better placed to reach the same sustainability goal.¹⁰

I realize that the above is a simplified, short and fairly basic overview of microeconomic principles. Readers may wonder therefore why I presented it here. The answer to that question is that many competition law scholars today seem to have forgotten these seemingly simple lessons, when they plead for lenient application or even revision of competition rules in relation to green cartels and other anti-competitive practices that may increase sustainability. Their implicit argument – and that of corporate lobbies and politicians supporting the same idea – is that cooperation (e.g. agreements) between firms leads to better results in terms of green innovation than competition. More precisely, cooperation between firms would be necessary to move to more sustainable ways of production, because firms acting alone would not be able to overcome the so-called ‘first mover disadvantage’.¹¹ However, this is a point that has hardly been empirically verified¹² and that, as I just explained, is in contrast with microeconomic theory. Even in those cases where cooperation indeed enhances (green) innovation, it almost certainly comes at a price, of possibly a minimal improvement in sustainability at the highest price that undertakings can charge for their new or improved products or technologies. In other words, there is a risk of ‘cartel greenwashing’.¹³

3 COMPETITION LAW AND SUSTAINABILITY

Competition law may serve different goals in different jurisdictions. However, in all major jurisdictions, economic efficiency, with a particular focus on consumer welfare (as opposed

10 In sections 4 and 5 below I will suggest in this respect that hybrid forms of regulation, where private actors are involved in the regulatory process, may be a ‘smart mix’.

11 Schinkel & Treuren, 2021, p. 2.

12 Although corporations bring up this point themselves in the discussion on how competition rules could support the Green Deal and in a recent survey by the law firm Linklaters. For details, see Jansen, Beeston & Van Acker, pp. 3-4.

13 See on the importance of preventing cartel greenwashing Schinkel and Treuren, 2021, and K. Tyagi, ‘Competition Policy, with a touch of Green: From Competition on the Merits to ‘Sustainable’ Competition on the Merits’, 2021. For a critical perspective on corporate lobbying, see G.J. Stigler, ‘The Theory of Economic Regulation’, *Bell Journal of Economics and Management Science*, Vol. 2, 1971, pp. 3-21 and J.M. Buchanan, R.D. Tollison & G. Tullock (Eds.), *Toward a Theory of the Rent-Seeking Society*, College Station, Texas A&M University Press, 1980.

to total welfare) is one of its main goals.¹⁴ Other goals may include protection of competition, protection of SMEs, and industrial policy goals. Furthermore, EU competition law is unique in the world in that it also serves the goal of protecting the internal market.¹⁵

In order to reach these goals, competition law allows national competition agencies (NCAs) and courts to declare void any agreements between firms that restrict competition, to prohibit certain anti-competitive practices carried out by firms having a dominant market position, and to impose fines and order remedies where appropriate. While competition law also offers possibilities to exempt such anti-competitive agreements and unilateral practices, certain conditions (related to efficiency and consumer welfare) need to be fulfilled before such exemption can be made.¹⁶ The same goes for merger control, where the parties involved may invoke efficiency arguments in an attempt to have their proposed merger or full-function joint venture cleared by the competition authorities despite competition concerns.¹⁷

Historically, public interest reasons – other than efficiency and consumer protection – to exempt anti-competitive agreements from the application of competition law, or to allow concentrations that would otherwise be held to restrict competition, have only been restrictively taken into account.¹⁸ Moreover, these reasons often related to public interest exemptions that are explicitly mentioned in competition law, such as national security and media plurality in EU merger control. Environmental concerns could only be taken into account when they directly affect consumer welfare, i.e. when a trade-off needs to be made between the alleged negative effects of an agreement on competition (high price, lower output) and the alleged positive effects for consumers in the form of better or more sustainable products.¹⁹ More recently, competition agencies and regulators have been discussing the option of not only considering the (expected) positive effects on consumers in a competition case, but also the (expected) positive effects on society as a whole. In such case, a trade-off could be made between the negative effects on competition and the expected

14 This is true, for example for the United States, China and the EU. A detailed discussion of the goals of competition law is provided in Van den Bergh, 2018, Chapter 2. See also N.J. Philipsen, 'Evolving Goals of EU State Aid Policy and Possible Lessons for China: A Law and Economics Approach', in S.E. Weishaar, N.J. Philipsen & W. Xu. (Eds.), *Regulatory Reform in China and the EU: A Law and Economics Perspective*, Cheltenham, UK and Northampton, MA, USA, Edward Elgar, 2017, pp. 139-162, with a particular focus on the goals of EU State aid policy.

15 See on potential conflicts between the goals of efficiency and market integration Bishop & Walker, 2010, pp. 7-8, Philipsen, 2017, and Van den Bergh, 2018, pp. 109-114.

16 In EU competition law, the criteria of Article 101 TFEU are leading in this respect. The four conditions mentioned in that article need to be fulfilled for an anti-competitive agreement to be exempted from the application of competition law. One of those conditions explicitly refers to consumers not being worse off. For an analysis of these conditions in relation to sustainability, see Schinkel & Treuren, 2021, pp. 5-7.

17 This is not the place to discuss the basics of competition law and its enforcement, so again I simplify matters here. For further details, readers are referred to any introductory textbook in competition/antitrust law.

18 See also Tyagi, 2021, pp. 2-3 and Jansen, Beeston & Van Acker, 2021, p. 3.

19 See for example Monti, 2020, pp. 125-126 and Schinkel & Treuren, 2021, pp. 5-7

positive environmental effects on society, which would increase the possibility for green cartels to be exempted. The Dutch NCA, the Netherlands Authority for Consumers and Markets (ACM) already took these steps and also published guidelines in this respect.²⁰

In some jurisdictions, such as Germany, other ‘non-competition concerns’ have already been taken into account in merger cases, but in a different way: the analysis of the effects on competition is strictly separated from the analysis of the effects on other public interests, such as employment, public health or the environment. In those cases, the responsible authorities (e.g. the Minister of Economic Affairs, or an administrative agency) are often not the same authorities that carry out the competition assessment.²¹ In practice this means that a merger that restricts competition may still be allowed when, for example, it saves jobs, protects public health or generates environmental benefits. The competition assessment is hence clearly separated from the assessment of other effects.

I would like to stress here that, when an NCA has to decide whether or not to exempt a green cartel or concentration, it is important that the decision is based on a sound empirical analysis (with sufficient and convincing information) and on sound calculations of the expected environmental benefits. Specialists in cost-benefit analysis in the field of environmental economics hence need to be involved in this process, making it a potentially difficult task for an NCA if it does not have staff members qualified in this area.²² Taking environmental benefits into account in a competition case would also imply that an additional administrative burden is imposed on competition authorities, as it costs time and money and may impact the availability of staff in other cases. It also reduces predictability of competition cases and hence legal certainty. Adding this to the point I made in the previous section, i.e. that cartel greenwashing may be stimulated, I conclude that competition law should be used only when there are no alternative means to achieve the same sustainability goals, and only when the enforcement agency concerned has qualified staff members to do so. If this expertise is not available in NCAs, a system where competition goals are clearly separated from other policy goals should be used, like in Germany.

20 For an analysis of the guidelines published by the ACM see, for example Jansen, Beeston & Van Acker, 2021. Note that the European Commission is also assessing the option of including sustainability in its revision of the guidelines on horizontal agreements. At the time of writing this contribution it is unclear whether it will do so.

21 See H. Ai and N.J. Philipsen, ‘Public Interest Exemptions in Merger Control: Comparing China and Germany’, forthcoming, 2021.

22 Admittedly, some competition agencies (more particularly at the national level) are making some progress in this regard, as argued by Monti, 2020. However, the Bundeskartellamt in Germany has pointed out that it is very difficult to make a coherent quantification of the benefits of sustainable cooperation (Jansen, Beeston & Van Acker, 2021, p. 5).

4 REGULATION AND SUSTAINABILITY

In Law & Economics, environmental pollution is considered as a market failure, more specifically a problem of ‘negative externalities’. An externality is a side effect of production or consumption that affects third parties, but that is not (sufficiently) taken into account by the party causing it.²³ Pollution is a prime example of this, as it is a clear side effect of either industrial production or consumption (for example, driving cars).²⁴

Economic literature offers several solutions for negative externalities. Indeed, there are different ways to make ‘polluters’ internalize an environmental externality. The classic response in the economic literature was to impose a tax on the polluting activity, following the work of Arthur Pigou. Theoretically, if we would be able to calculate the external costs created by a polluter (for example, a factory or a car driver), we could calculate the level of the environmental tax that needs to be charged to make the polluter internalize the externality.²⁵ Of course, in practice these types of calculations are very difficult to make. Moreover, it would be very costly (in terms of both administrative costs and information costs) to impose such ‘Pigouvian taxes’ on each and every polluter.

Another way to internalize environmental externalities would be to impose liability on the polluter, because the idea of being held liable and having to pay compensation to victims *ex post* will change the behaviour of the polluter *ex ante*. Indeed, in relation to environmental pollution more generally, this is a widely applied instrument, but in relation to climate change the application of liability rules is still difficult and (therefore) rather uncommon, despite some recent case law in the field of climate litigation from e.g. the Netherlands, France and Germany.²⁶

Yet another instrument that can be used to internalize environmental externalities is command and control regulation. This refers to all types of public regulation designed by

23 The concept of externalities is discussed in every microeconomics or Law & Economics textbook. See for example O’Sullivan and Sheffrin, 2005, pp. 146-147, R. Cooter & T. Ulen, *Law & Economics*, 6th edition, Berkeley Law Books, 2016, pp. 39-40, and for a broader discussion on market failures and their solutions N.J. Philipsen, ‘Regulation of Liberal Professions and Competition Policy: Developments in the EU and China’, *Journal of Competition Law and Economics*, Vol. 6, 2010, pp. 203-231.

24 Climate change also fits into the ‘tragedy of the commons’ problem, in which overuse of a common property (like the air) is analyzed. Standard solutions to a commons problem include regulating the use of the common property, via public ownership or distribution of private property rights. See Cooter & Ulen, 2016, pp. 139-142.

25 A.C. Pigou, *A Study in Public Finance*, London, Macmillan, 1951; M.G. Faure & R.A. Partain, *Environmental Law and Economics: Theory and Practice*, Cambridge University Press, 2019, p. 107.

26 See for further information and references M. Peeters and D. Misonne, ‘The European Union and its rule creating force at the European continent for moving to climate neutrality in 2050’, in van Calster G., Vanderberghe W., & Reins L., 2nd edition of the *Research Handbook on Climate Change Mitigation Law*, Edward Elgar, 2021, section 4.

the government and enforced via administrative or (sometimes) criminal law. In relation to environmental pollution, the most common types of command and control regulation include licensing, permitting and standard setting by administrative agencies.²⁷ From an economic perspective, public regulation has some clear advantages: the *ex-ante* character of the regulation, the wide choice of possible sanctioning mechanisms that can be used, and (in most cases) its democratic legitimacy. However, there are also disadvantages, notably the relative lack of flexibility of public law (resulting from the democratic processes just mentioned), the possibility of rent seeking by lobbying group and possible misuse of discretionary power by public officials, and the potentially high costs of administrative enforcement. Moreover, enforcement of regulation is rarely, if ever, perfect, which means that also public regulation alone cannot solve all environmental problems. Some of these disadvantages can be (partially) addressed by involving private actors in the regulation as this may have some additional potential advantages in terms of reducing information costs. Indeed, private actors may be better informed about a particular issue that needs to be regulated than a public actor. However, there are also downsides of involving private parties in regulatory processes, more specifically the risk that regulation serves private interests rather than the public interest. To reduce this risk of ‘rent seeking behaviour’ by private actors, literature has suggested hybrid forms of regulation, such as public verification of private certification systems, co-regulation or conditioned self-regulation.²⁸

Finally, law and economics scholars have extensively discussed the option of using market-based instruments (MBIs), also called ‘economic instruments’, to solve externality problems. MBIs are policy instruments that use the market mechanism and the price mechanism to incentivize actors to internalize environmental externalities. In relation to environmental externalities, the most obvious example of MBIs are tradable permits (that is, emissions trading). Intellectual property rights and environmental taxes/subsidies (already discussed above) are also considered as MBIs. While MBIs have a great potential to solve externality problems by mixing market mechanisms with government intervention, it is a real challenge to make the market for a newly created property right (like a license to pollute or an IP right) function well. For example, one would have to make decisions on the initial allocation and conditions of tradable permits, or on the duration and scope of IP protection.²⁹

In the above, the focus has been on single instruments that can be used to internalize environmental externalities (or to solve global commons problems), some of which have

27 Faure & Partain, 2019, p. 30.

28 For a further discussion on hybrid (public/private) forms of regulation, see Philipsen, 2018. Classic literature references on the ‘private interest’ approach to regulation and the notion of rent seeking are Stigler, 1971, A.O. Krueger, ‘The Political Economy of the Rent-Seeking Society’, *American Economic Review*, Vol. 64, 1974, pp. 291-303 and Buchanan, Tollison & Tullock, 1980.

29 See generally Faure & Partain, 2019, chapter 7.

the theoretical potential to work very well. However, it also became clear that they all have shortcomings, either in the formulation (too complex or costly, influenced by lobbying groups) or in the enforcement (for example, requiring continuous monitoring). In the next section we will therefore move to the discussion on interactions of instruments.

Before doing so, I would like to point out that the economic literature, as discussed above, apparently does not suggest to address externality problems or global commons problems by giving market power to firms, for example by allowing a green cartel or a anti-competitive green merger. Rather, market power leading to a lack of competition in a market is itself a market failure, just like externalities.³⁰

5 FINDING ‘SMART MIXES’ – AND THE ROLE OF COMPETITION LAW THEREIN

In the previous section I presented various instruments that can help to ‘internalize’ environmental externalities in order to obtain sustainable production and consumption, concluding that each of them has disadvantages. That is precisely why the literature suggests to apply a ‘smart mix’ of instruments and actors. Weaknesses of particular instruments can then be compensated by strengths of other instruments.³¹ It is important that instruments complement rather than ‘bite’ each other, to avoid an overly complex and ‘messy mix’ of instruments. An overly complex regulatory regime has the disadvantage that it may provide opportunities for actors to strategically exploit regulatory diversity, besides it being inefficient in addressing environmental externalities.³²

Unfortunately, it seems impossible to come up with a ‘Grand Design’, that is, an optimal mix of instruments that can address environmental externalities in all jurisdictions. What fits one jurisdiction or context does not necessarily fit another: what works and what doesn’t depends on institutional, social, economic and environmental circumstances.

30 See Cooter and Ulen, 2016, chapter 2 and Philipsen, 2010, 2017. This is precisely why we need regulation, either in the form of competition law or sector-specific regulation.

31 Discussions of interactions between instruments are not new to law and economics. As an example, Shavell (S. Shavell, ‘Liability for Harm versus Regulation of Safety’, *Journal of Legal Studies*, Vol. 13, No. 2, 1984, pp. 357-374) famously discussed how liability rules and regulation work together in externality situations, discussing not only the disadvantages and advantages of the respective instruments, pointing to the relative importance of regulation or liability rules in governing externalities, but also why it is often efficient to combine them. Other examples include papers on the combination of private and public regulation (for a summary see N.J. Philipsen, ‘The Role of Private Actors in Preventing Work-Related Risks: A Law and Economics Perspective’, *European Public Law*, Vol. 24, No. 3, 2018, pp. 539-554) and literature on the interaction between emissions trading systems and taxes). See M. Peeters & D. Misonne, ‘The European Union and its rule creating force at the European continent for moving to climate neutrality in 2050’, in G. van Calster, W. Vanderberghe, & L. Reins, *2nd edition of the Research Handbook on Climate Change Mitigation Law*, Edward Elgar, forthcoming, 2022.

32 See J. van Erp, M.G. Faure, A. Nollkaemper & N.J. Philipsen (Eds.), *Smart Mixes in Relation to Transboundary Environmental Harm*, Oxford, Oxford University Press, 2018, Chapter 1 and Chapter 15.

Moreover, most governance arrangements are path dependent, making it difficult to replace them with a completely new regulatory regime. In a book I edited with colleagues Judith van Erp, Michael Faure and André Nollkämper this topic is addressed in more detail for specific cases of transboundary environmental harm, including climate change.³³

While this is not the place to go into much detail on the discussion of finding ‘theoretically smart mixes’ of instruments (which in theory should even combine domestic and international law, substantive and procedural law, and public and private regulation³⁴), I can give some examples here of potentially ‘bad’ and ‘good’ mixes of instruments. As an example of potentially bad instrument mixes to address climate change, a heavy reliance on command and control regulation when combined with a cap-and-trade system is likely to limit too much the decision-making power of firms in the emissions trading. Also, taxes and cap-and-trade systems will not work well if the amount of discharge cannot be accurately measured. On the other side, a ‘smart’ interaction of instruments could be achieved when subsidies for correct implementation and compliance are used to complement command-and-control regulation, e.g. in the implementation of environmental standards. Another example would be the types of hybrid regulation (private-public) discussed in section 4 above (and more extensively in Philipson, 2018).

I do not want to exclude the possibility that in a ‘smart mix’ of instruments aimed at sustainable production and consumption, allowing green cartels under competition law plays a role as well. However, in the light of the literature that already presented so many other instruments (see section 4 above) and instrument mixes, that role to me seems to be small, particularly because of the risks it entails: creating market power (and related inefficiencies), opportunities for rent seeking behaviour and greenwashing, while it also risks blurring the boundaries between competition law and other areas.

6 CONCLUDING REMARKS

I hope that readers do not misunderstand the aim of this contribution. My intention is certainly *not* to argue that green innovation and sustainability are unimportant. To the contrary, a transition into more sustainable production and consumption should remain high on the list of policy priorities. Rather, my aim was to remind traditional competition law scholars and practitioners *why* we have competition law. More specifically, that allowing green cartels is likely to lead to a minimum level of innovation in sustainability at a maximum price, with an additional administrative burden for competition authorities (who also need to have staff members specialized in environmental economics, unless the

33 Van Erp et al, 2018, Chapter 15.

34 Van Erp et al, 2018, p. 12.

‘German model’ discussed in section 3 is chosen), and possibly even negative effects on market mechanisms that increase sustainable production. Or, in the words of Schinkel & Treuren: “However well-intended, green antitrust risks damaging both competition and the environment”.

The second message is to remind those competition law scholars, who are eager to contribute to the debate on sustainability and logically choose competition law as their weapon to achieve sustainable production, that there are other fields of law that may be better suitable. Section 4 discussed some of these options to address externalities (and global commons) in isolation, but my not-so-surprising conclusion from the subsequent section 5 was that a ‘smart mix’ of instruments is best suitable to address the problem. The role of a ‘sustainable competition law’ (i.e. one that is leniently applied to green cartels) in this mix seems to me to be only a minor one. Rather, competition law should aim at finding the right balance with IP law and leave the internalization of externalities to environmental law, taxes and subsidies, emissions trading mechanisms, and hybrid forms of regulation such as conditioned self-regulation and public verification of private environmental standards.³⁵

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35 Perhaps, with that last reference to mixes of private and public regulation, I am not very far removed from one of the ‘options for a greener competition law’ discussed in Monti, 2020. Despite my scepticism, I do believe very much in the role of private actors in achieving sustainability goals. Still, my personal take is that we should use competition law for this purpose only within the traditional boundaries: exempting horizontal agreements (or allowing anti-competitive mergers) only if identifiable consumer benefits clearly outweigh negative effects on price, quantity and allocative efficiency.

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