Antitrust's Social "Ripple Effect"

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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 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. Instead of laxer enforcement, I contend that a robust strategy can provide adjuvant protection to social goals. In this context, I propose a strategy to maximize antitrust's social "ripple effect" within the current boundaries of competition policy.

DOI: https://doi.org/10.15779/Z38BK16R36

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INTRODUCTION

Elegance does not sit well with competition law.[1] It is not in the DNA of a discipline that is a political construct,[2] intrinsically prone to ideological shifts, and shaped by a compound of societal variants.[3] 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.[4] 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."[5] The result could be a tidy but rather meaningless policy that fails to heed the problems it was designed to tackle.

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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 COMPETITION POLICY FOR THE NEW ERA: INSIGHTS FROM BRICS COUNTRIES 22, 27 (Tembinkosi Bonakele et al. eds., 2017) (claiming that antitrust "has been seduced by beautiful, elegant, but unfitting economic assumptions").

2. *See* Spencer Weber Waller & Jacob E. Morse, *The Political Face of Antitrust*, 15 BROOK. J. CORP. FIN. & COM. L. 75, 95 (2020) (asserting that "antitrust has always been political in nature"); *See also* Ariel Ezrachi, *Sponge,* 5 J. ANTITRUST ENF'T. 49, 51 (2017) (describing antitrust as a "political creation").

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 (2013) (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)").

5. Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 422 (1965).

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."[6] The discussion around whether competition policy should consider non-economic goals is rich and prolific.[7] It is a dispute pushed by those willing to sacrifice validity for the sake of reliability,[8] leading to oscillations between workability and predictability.[9] 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, one that will never be completely settled. It has spawned some of the most fascinating literature in the field. Yet, much like Walter Gallie's essentially contested concepts, it will never succumb to "a definite or judicial knock-out."[10]

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.[11] 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.[12] Notably, 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, but they may also clash with one another, thus potentially affecting antitrust in opposing fashions. Two concerns of global dimensions increasingly prominent in the goal discussion illustrate this tension: rising wealth inequality and the desire for sustainability. On the one hand, the

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6. "Permacrisis" was Collins Dictionary's 2022 word of the year. *See* David Shariatmadari, *A year of 'permacrisis,'* COLLINS LANGUAGE LOVERS BLOG (Nov. 1, 2022), https://blog.collinsdictionary.com/language-lovers/a-year-of-permacrisis/ (last visited Dec. 15, 2024).

7. *See generally* CHRISTOPHER TOWNLEY, ARTICLE 81 EC AND PUBLIC POLICY (2009); OLES ANDRIYCHUK, THE NORMATIVE FOUNDATIONS OF EU COMPETITION LAW: ASSESSING THE GOALS OF ANTITRUST THROUGH THE LENS OF LEGAL PHILOSOPHY (2017); OR BROOK, NON-ECONOMIC INTERESTS IN EU ANTITRUST LAW (2022); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917 (1987); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012).

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.

10. Walter Bryce Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 179 (1956).

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").

12. On partisan antitrust rhetoric, see generally William E. Kovacic*, Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687 (2014).

alarming upward trend in wealth concentration[13] has been linked to issues competition law may have the power to tackle, such as the intensification of unchallengeable market power.[14] On the other hand, as the world grapples with an impending environmental catastrophe[15] and pressure mounts on the business community to take action,[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.[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.

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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 Decompositions*, EUROPEAN COMMISSION (May 2018) https://publications.europa.eu/resource/cellar/97058bfe-62f6-11e8-ab9c-01aa75ed71a1.0001.01/DOC_1.

14. *See, e.g.*, Lina M. Khan & Sadeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 53–59 (2012); Maurice E. Stucke, *Occupy Wall Street and Antitrust,* 85 S. CAL. L. REV. 33 (2012); ATKINSON, *supra* note 13; Ariel Ezrachi et al., *The Effects on Competition Law on Inequality—An Incidental By-product or a Path for Societal Change?*, 11 J. ANTITRUST ENF'T. 51 (2023); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L. J. 1 (2015); Joseph E. Stiglitz, *Towards a Broader View of Competition Policy*, in COMPETITION POLICY FOR THE NEW ERA, *supra* note 1, at 4; Herbert J. Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI ANTITRUST CHRON. (Oct. 2017); Michal S. Gal, *The Social Contract at the Basis of Competition Law*, in RECONCILING EFFICIENCY AND EQUITY 88 (Damien Gerard and Ioannis Lianos eds., 2019); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018); Ioannis Lianos, *The Poverty of Competition Law: The Long Story* (UCL Centre for Law, Economics and Society Research Paper No. 2/2018, 2018), https://www.ucl.ac.uk/cles/sites/cles/files/cles_2-2018.pdf [https://perma.cc/AD3V-QMC5]; JONATHAN TEPPER WITH DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION (2018); Mark Glick, *The Unsound Theory behind the Consumer (and Total) Welfare Goal in Antitrust,* 63 ANTITRUST BULL. 455 (2018); Shi-Ling Hsu, *Antitrust and Inequality—The Problem of Super-Firms*, 63 ANTITRUST BULL. 104 (2018); PIKETTY, *supra* note 13.

15. Initiatives include: *The European Green Deal (Communication to the European Parliament, the European Council, the Council, the European Social and Economic Committee and the Committee of the Regions)* COM (2019) 640 final (Dec. 11, 2019); RECOGNIZING THE DUTY OF THE FEDERAL GOVERNMENT TO CREATE A GREEN NEW DEAL, H.Res.109, 116th Cong. (Feb. 7, 2019) https://www.congress.gov/116/bills/hres109/BILLS-116hres109ih.pdf; National Environmental Protection Agency, *China's Ten Strategic Policies on Environment and Development* (1994).

16. *See generally* Daina Mazutis & Anna Eckhart, *Sleepwalking into Catastrophe: Cognitive Biases and Corporate Climate Change Inertia*, 59 CAL. MANAG. REV. 74 (2017) (on the importance of corporate action to tackle climate change).

17. *See generally* Simon Holmes, *Climate Change, Sustainability, and Competition Law*, 8 J. ANTITRUST ENF'T. 354 (2020); Kevin Coates & 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. Q. CURRENTS 219 (2020). On the issue of competition law and sustainability objectives, see generally SUZANNE KINGSTON, GREENING EU COMPETITION LAW AND POLICY (2011).

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 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,"[18] and may be exacerbated by the selective effects of innovation. Consequently, if antitrust policy successfully boosts innovation, it may inadvertently widen the wealth gap. Similarly, applying antitrust law can often curb conduct harmful to both competition and the environment. A clear example is the European Commission's 2021 decision to fine carmakers for colluding to hamper innovation in diesel car emission standards.[19] 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 seventeen goals of sustainable development,[20] and antitrust enforcers have acknowledged that sustainability encompasses "numerous domains," ranging "from ecological preservation … to economic equality."[21] 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 by drawing on legal theory, this Article considers how environmental and equality considerations have shaped and influenced antitrust enforcement. The work 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."[22] It is one of the pieces of the legal system designed to protect the values of the society it serves. Since those values are not immutable, antitrust may have to adapt to ensure it continues to fit in that system.[23] Second, the role of competition law in pursuing non-economic goals is

18. Baker & Salop, *supra* note 14, at 5.

19. European Commission Press Release IP/21/3581, Antitrust: Commission Fines Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars (Jul. 8, 2021) (IP/21/3581). *See also* Julian Nowag, *Antitrust and Sustainability: An Introduction to an Ongoing Debate*, PROMARKET (Feb. 23, 2022) https://www.promarket.org/2022/02/23/antitrust-sustainability-climate-change-debate-europe/ (describing the "competition v. sustainability" narrative as "simplistic, reductionist" and "sensationalist").

20. United Nations, *Sustainable Development Goals*, https://www.un.org/sustainabledevelopment/ (last visited Dec. 15, 2024).

21. Hellenic Competition Commission (HCC) & Netherlands Authority for Consumers and Markets (ACM), *Technical Report on Sustainability and Competition* 1 (Jan. 2021), https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf.

22. MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 230 (2010).

23. Ezrachi et al., *supra* note 14, at 54.

secondary. The discipline "cannot be all things to all people,"[24] and there are often more effective tools for attaining social goals than antitrust. Third, competition law is possibly underenforced, particularly in the United States.[25] The prevailing ideology behind antitrust policymaking favors minimal intervention and tends to underestimate the costs and risks of false negatives.[26]

Based on these assertions and the findings of the comparative and doctrinal research conducted, this Article rejects calls for laxer antitrust enforcement. Instead, I contend that the best tactic to provide adjuvant protection to non-economic goals resides in the robustness of antitrust regimes. Grounded on this premise, I propose a strategy to maximize antitrust's social "ripple effect" within the boundaries of current antitrust policy. To this end, Section I ponders whether there is any room for social pursuits in the (efficiency-focused) ideological framework that underpins contemporary antitrust policy. Section II explores two main routes for balancing competition and non-competition goals—less antitrust and robust enforcement. Section III conducts a critical reflection and puts forward normative and policy proposals. Finally, I draw conclusions on the basis of this analysis.

I. ANTITRUST'S "WIGGLE ROOM" FOR NON-ECONOMIC AIMS

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

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

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24. Ezrachi, *supra* note 2, at 50.

25. *See, e.g.*, THURMAN ARNOLD PROJECT: YALE SCHOOL OF MANAGEMENT, MODERN ANTITRUST ENFORCEMENT, https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement (last visited Dec. 15, 2024) (stating that the "bulk of the research featured in our interactive database on these key topics in competition enforcement in the United States finds evidence of significant problems of underenforcement of antitrust law"); on merger control underenforcement, see generally Jason Furman et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (Mar. 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

26. *See generally* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015). Ideology is discussed *infra* section I.A.

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, consumer welfare, and efficiency are "nearly impossible to define … without creating contradictions and inconsistencies").

To illustrate the first of these issues, one need only consider Robert Bork's understanding of consumer welfare as a synonym of "the wealth of the nation."[28] Whether that wealth benefits consumers or, as in most cases resulting from Bork's postulates, producers is less relevant. However, such a notion 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 consumer welfare refers to "anything that factors into demand," including "price, quality, innovation, [and] privacy."[30] Instead, the notion used in US antitrust policy mainly[31] follows Bork and the Chicago School movement.[32] It focuses solely on achieving efficient markets or wealth maximization, which translates into high output, increased choice, and low prices.[33] It principally seeks the allocative side of efficiency.[34] Legislative history does not lend support to this view.[35] Leah Samuel and Fiona Scott-Morton have denounced that the consumer welfare standard has been distorted by a school of thought to justify "a defendant-friendly antitrust standard that dismisses the benefit of quality and innovation."[36] Advocates of Bork's redefinition claim that, in the decades before it was adopted, "[c]ourts were freely choosing among multiple, incommensurable, and often conflicting values."[37]

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

29. *See, e.g.*, Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, in THE GOALS OF COMPETITION LAW 3–24 (Daniel Zimmer ed. 2012); ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE (1920). For criticisms of Bork's definition of consumer welfare, see generally Kenneth Hayer, *Consumer Welfare and the Legacy of Robert Bork* 57 J.L. & ECON. S19 (2014); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

30. Leah Samuel & Fiona Scott-Morton, *What Economists Mean When They Say "Consumer Welfare Standard,"* PROMARKET (Feb. 16, 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/.

31. While Bork's polarizing views are 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 law 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").

32. *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

33. Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Imperiled?*, 45 J. CORP. L. 101, 102 (2019).

34. *See generally* VILFREDO PARETO, MANUALE DI ECONOMIA POLITICA (1906). For an English version, see VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY (2014).

35. Herbert J. Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008).

36. Samuel & Scott-Morton, *supra* note 30.

37. Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941, 950 (2014). *See also* Okeoghene Odudu, *The Wider Concerns of Competition Law*, 30 OXFORD J. LEGAL STUD. 599, 599 (2010) (criticizing the "state of disarray" and "incoherence" of pre-Chicago antitrust policy).

Those who adhere to this view see it as the only way to ensure institutional administrability.[38]

Inconsistencies in the role of the consumer welfare standard can be seen in the different understandings of its purpose and meaning held by antitrust authorities around the world. In a 2011 survey among members of the International Competition Network ("ICN"), only seven out of fifty-seven agencies understood consumer welfare in the way that Bork did.[39] Discrepancies exist even within jurisdictions, and the European Union 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.[40] In practice, while at times the efficiency of markets is considered paramount,[41] other times the competitiveness and openness of those markets appears to be more important (though this is ultimately a way to make markets more efficient).[42] In the early 2000s, with the introduction of the "more economic approach,"[43] the former of these views gained significant ground. The European Commission 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"[44]—a view corroborated by the European courts.[45] This 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

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38. *See, e.g.*, D. Daniel Sokol, *Antitrust's "Curse of Bigness" Problem*, 118 MICH. L. REV. 1259, 1280 (2020); Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985); Christine Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get*, Luncheon Keynote Address, George Mason Law Review 22nd Antitrust Symposium (Feb. 15, 2020), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

39. MARSHALL STEINBAUM & MAURICE E. STUCKE, THE EFFECTIVE COMPETITION STANDARD 11–12 (2018).

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.

41. *See, e.g.*, opinion of Advocate General Wahl, Case C-413/14 P, Intel Corp. v. Eur. Comm'n, ECLI:EU:C:2016:788 (Oct. 20, 2016).

42. *See, e.g.*, opinion of Advocate General Kokott, Case C-23/14, Post Danmark A/S v. Konkurrencerådet, ECLI:EU:C:2015:343 (May 21, 2015); opinion of Advocate General Kokott, Case C-376/20P, Eur. Comm'n v. CK Telecoms UK Investments Ltd., ECLI:EU:C:2022:817 (Oct. 20, 2022).

43. Eur. Comm'n, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, 1999 O.J. (C 132) 1 (Apr. 28, 1999).

44. Eur. Comm'n, *Guidelines on the Application of Article 81(3) of the Treaty,* 2004 O.J. (C 101) 97, ¶ 33 (Apr. 27, 2004) [hereinafter 101(3) Guidelines].

45. *See, e.g.*, Case T-168/01, GlaxoSmithKline Services v. Eur. Comm'n ECLI:EU:T:2006:265 ¶¶ 118, 273 (GC Sept. 18, 2003).

will be for conduct pursuing social objectives to run counter to antitrust provisions. However, the focus on allocative 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.[46] It is from this standpoint that commentators have asserted that the consumer welfare standard falls short and needs to be replaced so that enforcement may be (re)invigorated.[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 United States, plenty of antitrust revitalization proposals have been put forward by those who dispute that wealth maximization should be the main purpose of competition law. For instance, relying on behavioral economics, scholars have questioned the rational predictions of firms' conduct that frequently guide neoclassical-rooted competition policy development,[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."[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,"[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, without necessarily tampering with the consumer welfare standard.[51]

There have been explicit calls for focusing on wider objectives. Scholars have, for instance, proposed relying on welfare economics to take into account factors improving well-being and quality of life.[52] This would allow enforcers to

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46. *See* sources *supra* note 25.

47. *See, e.g.*, Mark Glick et al., *Why Economists Should Support Populist Antitrust Goals*, UTAH L. REV. 769, 812 (2023) (describing the consumer welfare 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").

48. *See generally* James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J. L. ECON. & POL'Y 779 (2012); Maurice E. Stucke, *Behavioral Economics at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007).

49. Maurice E. Stucke, *How Can Competition Agencies Use Behavioral Economics?*, 59 ANTITRUST BULL. 695, 741 (2014).

50. Herbert J. Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, COLUM. BUS. L. REV. 257, 268 (2001).

51. *See, e.g.*, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST (Robert Pitofsky ed., 2008); Christopher Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917l (2014); Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145 (2020).

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.

consider aspects that citizens value more than efficiency (such as cleaner air or better working conditions),[53] opening the door for social, political, and even moral goals in antitrust.[54] Another popular idea is to use the competitive process test to replace the consumer welfare standard as the lodestar of antitrust,[55] adopted in recent years by the progressive Neo-Brandeis movement. This young school of thought has been calling for greater focus on structural issues.[56] Representatives include Lina Khan, who was Biden's chair of the US Federal Trade Commission ("FTC"), and Tim Wu, former Special Assistant to President Biden for Technology and Competition Policy.[57] 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"[58] via antitrust legislation.

From the Neo-Brandeisians' originalist perspective, low prices may be harmful if they come at the expense of reduced competition (eliminating competitors with higher costs) or unfair wages.[59] They express an aversion to "bigness"[60] and excessive market power, linking it to wealth inequality. In this regard, Wu claims that "extreme economic concentration yields gross inequality and material suffering,"[61] 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 percent and 0.1 percent at the top of the income and wealth distribution."[62] Wealth

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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 N.Y.U. J. L. & LIBERTY 326 (2020).

53. Stucke, *supra* note 7, at 590.

54. *Id*. at 595.

55. *See, e.g.*, *Ohio v. American Express*, 138 S. Ct. 2274, 2294 (2018) (Breyer, J., dissenting); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE (Aug. 2015); Gregory J. Werden, *Antitrust's Rule of Reason*, 79 ANTITRUST L. J. 713 (2014); Dep't of Justice, Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

56. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, COMPETITION POL'Y INT'L 1 (2018).

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 MOD. L. REV. 230, 247 (2021) (explaining that high prices may be positive "from the perspective of suppliers seeking an 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. *Id.*

62. Khan & Vaheesan, *supra* note 14, at 236.

redistribution thus becomes a valid aim of competition policy.[63] 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."[64] The movement thus favors supporting the goals that antitrust laws were designed to protect and/or those that are connected to its general pursuits.

In the United States, those calling for more ambitious antitrust laws generally aspire to veer away from the impasse of the last four decades. By contrast, in Europe, a revival of non-economic concerns has been taking place from *within* the system. Former EU Competition Commissioner Margrethe Vestager's calls for fairness, for example, have been advanced within the parameters of the more economic approach.[65] It is not so much about disregarding price effects as it is about *additionally* considering other issues, including structural or innovative harm.[66] In a 2021 Policy Brief, the European Commission insisted on the need to "ensure that antitrust enforcement remains anchored to the consumer welfare standard."[67] 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."[68]

As contradictory as it may seem, the acceptance of assorted antitrust pursuits is consistent with a consumer welfare underpinning. EU competition law never gave up on other goals—it could not, since it was envisaged as a means to an

63. *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").

64. Lina M. Khan, *ESG Won't Stop the FTC*, WALL ST. J. (Dec. 21, 2022) https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135.

65. *See, e.g.*, Margrethe Vestager, *Competition for a Fairer Society*, European American Chamber of Commerce (Sep. 29, 2016), https://eaccny.com/news/chapternews/eu-commissioner-margrethe-vestager-competition-for-a-fairer-society; Margrethe Vestager, *Antitrust for the Digital Age,* Eur. Comm'n (Sep. 16, 2022), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5590. On fairness and competition law, see generally Damien Gerard, *Fairness in EU Competition Policy: Significance and Implications*, 9 J. EUR. COMPETITION L. & PRAC. 211 (2018); Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Antitrust*, J. BUS. L. 329 (2019); Dunne, *supra* note 59; Giuseppe Colangelo, *In Fairness We (Should Not) Trust: The Duplicity of the EU Policy Mantra in Digital Markets*, 68 ANTITRUST BULL. 618 (2023).

66. Johannes Laitenberger, *EU Competition Law in Innovation and Digital Markets: Fairness and the Consumer Welfare Perspective,* Eur. Comm'n (Oct. 10, 2017).

67. Eur. Comm'n, *Competition Policy Brief No. 2021-01* 6 (Sept. 2021) https://data.europa.eu/doi/10.2763/962262.

68. Margrethe Vestager, *A Principles Based approach to Competition Policy*, Keynote at the Competition Law Tuesdays (Oct. 22, 2022). The adequacy of the assertion that EU competition law pursues multiple goals is discussed *infra* section II.A.1.

(integration) end.[69] 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"),[70] where protection of competition is only one of multiple priorities. The most prominent goal is the single market imperative, which remains an explicit purpose of EU competition law.[71] Other goals include: promoting employment and education;[72] consumer protection;[73] social cohesion;[74] and environmental protection (a pursuit that needs to be integrated into all of the EU's policies, as discussed later).[75] As for ideology, Ordoliberalism and the Freiburg School have exerted significant influence in EU competition law and policy development from the outset.[76] For this school, competition is not always a synonym of welfare and efficiency. It is only beneficial when subject to certain governmental limitations.[77]

The backdrop of EU competition law compels policymakers to respect both the wider framework embedded with the core provisions and the motivation(s) of the Member States to adopt the law. It would be difficult to reconcile this setting with the *laissez-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 necessary discussion.[78] 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.[79] 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

69. Konstantinos Stylianou & Marios Iacovides, *The Goals of EU Competition Law: A Comprehensive Empirical Investigation*, 42 LEGAL STUD. 620, 647 (2020).

70. TFEU, *supra* note 40.

71. Opinion of Advocate General Mischo, Case C-283/98 P, Mo och Domsjö AB v. Eur. Comm'n, ECLI:EU:C:2000:262 (May 18, 2000).

72. TFEU art. 9, *supra* note 40.

73. *Id*. art. 12.

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

75. *Id*. art. 11. *See infra* section II.B.1.

76. *See, e.g.*, DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 232-265 (1998).

77. *See, e.g.*, Viktor J. Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism*, Freiburg Discussion Papers on Constitutional Economics, No. 04/11 (2004); SANDRA MARCO COLINO, VERTICAL AGREEMENTS AND COMPETITION LAW: A COMPARATIVE STUDY OF THE EU AND US REGIMES (2010).

78. 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").

79. 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).

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 as to the enforceability of the resulting approach.

A first issue is that delineating the contours of non-economic purposes can be tricky, 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 of efficiency exclusively, a quantifiable concept producing "an unambiguous public benefit (it enhances the size of the pie available to all)."[80] 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"[81] and "toothless" concept vague enough to lend support to conflicting ideologies.[82] The consumer welfare standard was meant to be "a method to resolve deep ambiguities about what 'competition and the competitive process' means," not a substitute.[83] This all shows that "[t]o destroy is easier than to create,"[84] and to date, critics have been better at demonstrating the shortcomings of efficiency-driven policymaking than at putting forward a workable action plan.[85] When discussing whether consumer welfare is the optimal standard, the words of Einer Elhauge spring to mind: "Perhaps it is not, though I have not seen so far a better one."[86]

A second challenge is the aptness of competition law as a vehicle to attain these non-economic 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.[87] Competition enforcers cannot be expected to predict the repercussions of their decisions on *all* public policies and societal objectives, as this would force them to take into account a reality of unmanageable breadth.

A third general problem relates to the institutional complexity of policy development. Multi-goal policy development is complicated to implement and

80. Dunne, *supra* note 59, at 248–49.

81. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L. J. 501, 514 (2019).

82. Herbert J. Hovenkamp, *The Slogans and Goals of Antirust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 746 (2023). *See generally* Glick et al., *supra* note 47.

83. Einer Elhauge, *Should the Competitive Process Test Replace the Consumer Welfare Standard?*, PROMARKET (May 24, 2022) https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/.

84. IVAN KLÍMA, LOVE AND GARBAGE (2002) (originally published in Czech in 1986).

85. Dunne, *supra* note 59, at 259 (arguing that Neo-Brandeisian antitrust "is not a constructive movement" and lacks a "detailed blueprint for reform").

86. Elhauge, *supra* note 83.

87. Dunne, *supra* note 59, at 248.

almost inevitably increases enforcers' discretionary potential.[88] 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."[89] 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.[90]

From a European perspective, these institutional woes may be less conspicuous. The historical prominence of public over private enforcement[91] has made, and often still makes, highly specialized administrative bodies in charge of applying competition law in the first instance. But this comes with its own challenges. The European Commission's multiple hats as "lawmaker, policeman, investigator, prosecutor, judge, and jury" raise procedural fairness concerns.[92] While formal Commission decisions can be reviewed (and ultimately quashed) by the European judiciary,[93] informal settlements are difficult to challenge.[94] Because EU competition law enforcement was "decentralized" in 2004, 90 percent of its application currently happens in the Member States.[95] A recent study by Or Brook found that national competition authorities take assorted non-economic goals into account when applying (or not applying) antitrust.[96] They enjoy a wide latitude of decisional discretion since the EU Courts have yet to provide 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.[97]

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88. 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).

89. Lianos, *supra* note 14, at n. 66.

90. *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).

91. *See* Andreas Stephan, *Does the EU's Drive for Private Enforcement of Competition Law Lack Coherent Purpose?*, 37 UNIV. OF QUEENSLAND L. J. 153, 157 (explaining that by 2004 "the EU's public competition law enforcement regime reached a point of maturity" but there were "apparent low levels of private enforcement.").

92. ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW: TEXT, CASES, AND MATERIALS 893 (6th ed., 2016). For a critique of the Commission's allegedly excessive powers, see Ian Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 EUR. L. REV. 817 (2009).

93. Opinion of Advocate General Sharpston, Case C-272/09 P, KME Germany and Others v Eur. Comm'n ECLI:EU:C:2011:63 ¶ 69 (Feb. 10, 2011).

94. Dunne, *supra* note 59, at 262.

95. Directive (EU) No. 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive), 2019 O.J. (L 11) 3.

96. *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).

97. BROOK, *supra* note 7, at 403.

In the United States, the appointments of Neo-Brandeisians to key antitrust positions in the Biden era signaled a desire to implement changes, and there has been notable progress.[98] However, the attempts to invigorate enforcement at times hit a judicial brick wall, fueling concerns that the conservative tilt of the Supreme Court is bound to maintain a non-interventionist stance and reject any meaningful changes.[99] 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, yet the judges' ability to grasp intricate antitrust concepts has also been called into question. There is risk that "the subtleties of strategic behavior in complex markets" may be overlooked.[100] Importantly, the new Trump administration may be changing course. As of April 2025, no major changes have been announced, but it is too early to predict the intensity of enforcement in the years ahead.

It has been suggested that the judicial "inactivism" described above may be the result of covert corporate lobbying.[101] Think tanks heavily subsidized by big companies (often at the center of antitrust investigations) train judges in economics while actively promoting minimal intervention.[102] The strategy appears to be paying off, as research suggests that after receiving such training judges tend to "render conservative votes and verdicts, rule against regulation,

98. *See generally* Terry Calvani & Thomas Ensign, *The New Brandeisians are Here*, 11 J. ANTITRUST ENF'T. 168 (2023). Enforcement victories during the Biden administration include: Illumina's divestiture of Grail following the 5th Circuit Court of Appeals' acknowledgment that the deal would likely substantially lessen competition (*Illumina, Inc., & Grail, L.L.C. v. Fed. Trade Comm'n*, No. 23-60167 (5th Cir., Dec. 15, 2023); John Muir Health's abandonment of the deal to purchase San Ramon Regional Medical Center following a challenge (Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of John Muir's Takeover of San Ramon Regional Medical Center from Tenet Healthcare (Dec. 18, 2023) https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-john-muirs-takeover-san-ramon-regional-medical-center-tenet); a temporary court order to block IQVIA's acquisition of healthcare advertising company DeepIntent (*Fed. Trade Comm'n v. IQVIA Holdings Inc. & Propel Media, Inc.* (23 Civ. 06188 (ER), Dec. 29, 2023); and a judgment of the district court in Massachusetts blocking the merger between airlines JetBlue and Spirit (Press Release, U.S. Dep't of Justice, Justice Department Statements on District Court Decision to Block JetBlue's Acquisition of Spirit Airlines (Jan. 16, 2024) https://www.justice.gov/opa/pr/justice-department-statements-district-court-decision-block-jetblues-acquisition-spirit. *See also* Fed. Trade Comm'm, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022) (embracing a non-CW approach on the powers of the Federal Trade Commission and how they should be exercised).

99. *See generally* Jonathan B. Baker, *What About the Supreme Court? The Lurking Threat to US Antitrust Reform*, 11 J. ANTITRUST ENF'T. 154.

100. Hovenkamp, *supra* note 50, at 273.

101. Daisuke Wakabayashi, *Big Tech Funds a Think Tank Pushing for Fewer Rules. For Big Tech*, N.Y. TIMES (Jul. 24, 2020) https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html.

102. 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").

[be] somewhat more permissive on antitrust, and mete out harsher criminal sentences."[103] Incidentally, they are also more likely to vote against environmental rules and restrictions.[104] 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 the 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 depends on whether, in a particular context, these goals and antitrust's general pursuits are aligned or in opposition. Borrowing recurrent imagery in analyses of the role of sustainability benefits in antitrust, non-competition goals could act as a "shield" (sparing otherwise unlawful conduct from illegality) or as a "sword" (prodding competition law enforcement to combat behavior that harms non-economic objectives).[105] This section refers to the shield option as the "less antitrust" route, whereas the sword would require enhanced enforcement. In this section, the theory and practice of implementing these alternatives in the United States and the European Union 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 anti-competitive act may conceivably enhance sustainability or equality, one obvious way to make room for non-economic aims in antitrust is to refrain from applying the law. Predictably, this strategy finds significant support among legal practitioners eager to find ways of defending their clients' behavior.[106] But scholars have equally defended this route. Amelia

103. Elliott Ash et al., *Ideas Have Consequences: The Impact of Law and Economics on American Justice*, National Bureau of Economic Research, Working Paper No. 29788, 51 (2022) https://www.nber.org/system/files/working_papers/w29788/w29788.pdf [https://perma.cc/C3DY-YVUD].

104. *Id*. at 4.

105. Holmes, *supra* note 17, at 355. *See also* TOWNLEY, *supra* note 7, at 21 (claiming that the pursuit of consumer welfare "can affect other policy goals both positively and negatively").

106. *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"); Coates & Middelschulte, *supra* note 17, at 319 (explaining that

Miazad, for instance, argues that the risk of being punished under antitrust laws hampers environmental improvements in the private sector,[107] and Daniel Crane posits that antitrust enforcement could, in some cases, aggravate inequality and social injustice.[108] Both conclude, albeit from different perspectives, that less competition law could help protect non-economic goals.[109] In Europe, the so-called "green antitrust" movement has ostensibly pushed 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."[110] This suggests its proponents want less enforcement. Edith Loozen includes in the movement all scholars who prioritize sustainability over the protection of competition.[111]

The less antitrust approach might not, in fact, be tantamount to the recognition of multiple valid objectives in competition law. Rather, it might be a case of suspending the law's application (and the pursuit of its purposes) for something considered more valuable.[112] From a doctrinal perspective, the strategy is akin to the principle of double effect, the origins of which can be traced back to the 13th 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."[113] 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 in which one's life is saved by killing the aggressor. In antitrust, the double effect would entail situations where wealth maximization is sacrificed 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 pursue environmentally-friendly joint

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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]").

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

108. Daniel Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1175 (2016).

109. *Id.* (stating that "a significant set of antitrust interventions actually impede voluntary efforts to secure a more equitable and just society"); Miazad, *supra* note 107, at 1690 (arguing that 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).

110. Maarten Pieter Schinkel & Leonard Treuren, *Green Antitrust: (More) Friendly Fire in the Fight Against Climate Change* (Amsterdam Law School Legal Studies Research Paper No. 2020-72, 2021), https://pure.uva.nl/ws/files/123876846/SSRN_id3749147.pdf [https://perma.cc/3XQC-QRZQ]. On the merits of green antitrust, with a specific focus on US literature, see Sandra Marco Colino, *Antitrust's Environmental Footprint: Redefining the Boundaries of Green Antitrust* (forthcoming 2024).

111. Edith Loozen, *EU Antitrust in Support of the Green Deal. Why Better Is Not Good Enough*, 12 J. ANTITRUST ENF'T. 75 (2024).

112. Giorgio Monti, remark at the conference *Hipster Antitrust, the European Way?*, European University Institute (Oct. 25, 2019). *See* https://cadmus.eui.eu/handle/1814/65747.

113. THOMAS AQUINAS, SUMMA THEOLOGICA, SECOND PART OF THE SECOND PART 279 (2018).

policies by adopting bigger aircrafts (a practice known as "upgauging") and reducing the number of flights they offer, with the purpose of cutting greenhouse gas emissions (first positive act).[114] The downside is that this would almost certainly decrease consumer choice—fewer flights available and a more rigid schedule—and raise prices (second negative act). Equality-related conflicts may also arise. An industry may decide to implement a policy that resists automation and refrains from replacing routine jobs with computers with the purpose of protecting low-wage jobs and income equality (first positive act).[115] The problem here is that innovation may be stifled, and prices could rise (second negative act).

The double effect principle cannot justify *all* harmful unintended actions. Scholars have acknowledged important boundaries to the acceptability of the negative consequences of conflicts between good and bad acts.[116] There are four requirements 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 cannot be intended. Third, the harmful consequences cannot be the means to achieve the benefits. Fourth, the positive results must be proportional to the bad implications.[117] If these conditions are not fulfilled, in Aquinas' words, "though proceeding from a good intention, an act may be rendered unlawful."[118]

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.[119] The textbook example is industry-wide projects that entail sustainability costs (leading

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114. PETER PAUL FITZGERALD, 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, 8 ASIAN J. INT'L L. 300 (2018).

115. On the negative impact of innovation on income equality, see Daron Acemoglu & Pascual Restrepo, *Robots and Jobs: Evidence from US Labor Markets*, 128 J. POL. ECON. 2188 (2020); Daron Acemoglu & Pascual Restrepo, *Automation and New Tasks: How Technology Displaces and Reinstates Labor*, 33 J. ECON. PERSPEC. 3 (2019). *See also* Jane G. Gravelle, *Wage Inequality and the Stagnation of Earnings of Low-Wage Workers: Contributing Factors and Policy Options,* Congressional Research Service Report R46212 7 (Feb. 5, 2020) https://sgp.fas.org/crs/misc/R46212.pdf (positing that automation "will make computers substitutes for nonroutine cognitive tasks and an expanded range of manual tasks," thereby disproportionately affecting low-wage workers").

116. *See, e.g.,* Richard Huxtable, *Get Out of Jail Free? The Doctrine of Double Effect in English Law*, 18 PALLIATIVE MEDICINE 62 (2004); Edward C. Lyons, *In Incognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469 (2005); Gareth B. Matthews, *Saint Thomas and the Principle of Double Effect*, in AQUINAS'S MORAL THEORY: ESSAYS IN HONOR OF NORMAN KRETZMANN 63 (Scott MacDonald & Eleonore Stump eds., 2018); Peter Knauer, *The Hermeneutic Function of the Principle of Double Effect* 12 NAT'L. L. F. 132 (1967); Seana Valentine Shiffrin, *Speech, Death, and Double Effect* 78 N.Y.U. L. REV. 1135 (2003).

117. Rosemarie Monge & Nien-hê Hsieh, *Recovering the Logic of Double Effect for Business: Intentions, Proportionality, and Impermissible Harms*, 30 BUS. ETHICS Q. 361 (2020).

118. AQUINAS, *supra* note 113.

119. Scott, *supra* note 27, at 142 (positing that "antitrust continues to chill arrangements that would receive traditional per se treatment").

to a price increase),[120] and/or which involve taking cheaper, less environmentally-friendly products out of the market (thereby reducing consumer choice).[121] 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.[122]

2. The "Shield" Option in US Antitrust

Double effect-like considerations are plausible in both US antitrust and EU competition law. In the United States, the rule of reason is the default standard for conduct falling under Section 1 of the Sherman Act.[123] It requires individual scrutiny to establish whether restraints on trade are "ancillary," or secondary, "to the main purpose of a lawful contract," and thus necessary to ensure adequate execution.[124] Yet, there would be little leeway for such considerations if the arrangements in question are per se illegal (for instance, if they are tantamount to price fixing or price boycotts).[125] From this standpoint, Miazad contends that the rule of reason should always apply to collaborations between competitors addressing societal or environmental risks, "even if the collaboration will necessarily increase price or reduce output."[126]

Escaping the Section 1 prohibition may be challenging for some socially minded forms of horizontal cooperation. It would even be hard to claim a 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.[127] 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."[128] The

120. Sophie Long, *Competition Law and Sustainability*, FAIRTRADE FOUNDATION (2019) https://www.fairtrade.org.uk/wp-content/uploads/legacy/Competition-Law-and-Sustainability—-Fairtrade-Report.pdf (last visited Dec. 15, 2024).

121. *See, e.g.*, Case IV.F.1/36.718—CECED, Eur. Comm'n Decision ¶ 19, 2000 O.J. (L 187) 47.

122. 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. & ECON. (forthcoming 2023); 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).

123. 15 U.S.C. § 1. *See also* Ronald A. Cass and Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657 (2001).

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

125. United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 223 (1940); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 208−14 (1959).

126. Miazad, *supra* note 107, at 1690.

127. 310 U.S. at 224–26, n. 59.

128. Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA TODAY (Sept. 12, 2019) https://eu.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/.

Supreme Court has similarly asserted that there is no room for considering non-economic aims in antitrust,[129] and judges have asserted that environmental issues do not seem to be "a problem whose solution is found in the Sherman Act."[130] This would ostensibly rule out cooperation with sustainable purposes that negatively impact 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.*, the Supreme Court upheld a joint selling arrangement that,[131] although falling into the "literal" price-fixing category, would not be "plainly anticompetitive."[132] The price restrictions were found to 1) be a means to achieve broader procompetitive aims and 2) attain efficiency.[133] In a similar vein, the Supreme Court has stated that it would not make sense to classify horizontal restraints as per se illegal when they are "essential if the product is to be available at all," even when price and output competition are reduced.[134] 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."[135]

Thus, it would be conceivable for the courts to spare environmentally or equality-motivated restrictions from per se illegality, provided that they have some "redeeming virtue."[136] The case law above 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,[137] tackling

129. *See, e.g.*, National Society of Professional Engineers v United States, 435 U.S. 679 (1978); FTC v Superior Court Trial Lawyers Association, 493 U.S. 411 (1990).

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

131. 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).

132. Broadcast Music, Inc. v. CBS, Inc. (BMI), 441 U.S. 1, 9 (1979).

133. *Id*. at 21.

134. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 86 (1984).

135. Theodore J. Stachtiaris, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown University*, 62 FORDHAM L. REV. 1745, 1748 (1994).

136. 441 U.S. at 9.

137. *See, e.g.*, John Cook et al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature,* 8 ENV'L RSCH. LETTERS 024024 (2013); Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 SCI. 1686 (2004).

it has become a partisan issue[138] often portrayed as a "bastion of the left."[139] The courts, said to have been packed "at all levels by conservatives" since the Reagan era,[140] have been disinclined to embrace environmental causes.[141] Neal Devins and Lawrence Baum have further identified a trend suggesting that Republican appointments to the judiciary are increasingly conservative.[142]

The reluctance to justify severe restrictions of competition on social or environmental grounds 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.[143] The second is the practical difficulty, previously sketched, of implementing a multi-goal policy.[144] The third issue is that there is little empirical support for the concerns voiced about the harm antitrust enforcement may inflict on non-competition objectives; most of the apprehension articulated by those advocating for less competition law has been theoretical or based on anecdotal evidence that does not support the case for diluting enforcement.

The investigation that may best exemplify the weak empirical substantiation of the case for less antitrust is the Department of Justice's 2019 scrutiny of the efforts of four major automakers and the state of California to reduce harmful emissions.[145] The inquiry was eventually abandoned as there was no evidence of

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138. *See, e.g.*, Steve Cohen, *Building an American Political Consensus Behind Environmental Sustainability*, STATE OF THE PLANET (Dec. 27, 2021) https://news.climate.columbia.edu/2021/12/27/building-an-american-political-consensus-behind-environmental-sustainability/.

139. Blaine Fulmer, *Environmentalism Isn't Partisan—At Least It Shouldn't Be*, STATE OF THE PLANET (Aug. 2, 2022) https://news.climate.columbia.edu/2022/08/02/environmentalism-isnt-partisan-at-least-it-shouldnt-be/.

140. Jackie Calmes, *How Republicans Have Packed the Courts for Years*, TIME (June 22, 2021) https://time.com/6074707/republicans-courts-congress-mcconnell/. *See also* Howard Kurtz, *Reagan Transforms the Federal Judiciary*, WASH. POST (Mar. 31, 1985); CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE DC CIRCUIT COURT 102–103 (1999); Jess Bravin, *Supreme Court Marks New Era of Ambitious Conservatism*, WALL ST. J. (June 30, 2022) https://www.wsj.com/articles/supreme-court-marks-new-era-of-ambitious-conservatism-11656618449.

141. *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022) (in which the Supreme Court limited the powers of the Environmental Protection Agency (EPA) to curb carbon emissions); *See also 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").

142. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, SUP. CT. REV. 301, 305 (2016).

143. *See infra* section II.B.

144. *See supra* section I.C.

145. California Air Resources Board, *Framework Agreements on Clean Cars* (Aug. 17, 2020), https://ww2.arb.ca.gov/news/framework-agreements-clean-cars; Terms for Light-Duty Green House Emission Standards (July 2019) https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf.

an agreement between the competing car manufacturers.[146] However, the fact that this initiative was investigated 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.[147] This view overlooks that, ultimately, there were no consequences for the subjects of the inquiry. Moreover, it conflates an arguably misguided enforcement move with systemic problems in the legal discipline. The proceedings came under intense fire for being politically motivated[148] and for disregarding the *Noerr-Perrington* doctrine that protects companies from antitrust liability if they are cooperating to influence government policy.[149] Rather than from antitrust, the problem seems to stem from the documented polarization of political elites and the judiciary.[150] In fact, an ongoing inquiry is looking into whether the DOJ's case might have constituted an abuse of authority.[151] This case is not illustrative of how antitrust is typically enforced, nor does it justify weakening the application of a law designed to curb the problems associated with excessive market power. Such a conclusion is counterproductive and as partisan as the investigation.

Other cases cited to support the argument 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.[152] For Miazad, this constitutes a "textbook example of collusion in

146. Coral Davenport, *Justice Department Drops Antitrust Probe against Automakers that Sided with California on Emissions*, N.Y. TIMES (Feb. 7, 2020) https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html.

147. *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, *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 107, 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").

148. 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 described the proceedings as an attempt to "weaponize law enforcement for partisan political purposes". Juliet Eilperin & Steven Mufson, *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.

149. Named after Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

150. *See* sources *supra* notes 140 and 142.

151. Leah Nylen, *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.

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

violation of antitrust law" despite having noble intentions.[153] The facts paint a very different picture. The automakers' cooperation had originally been 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."[154] In a similar vein, Crane describes the antitrust case against various top universities that fixed the financial aid packages offered to students admitted to multiple schools[155] as an inquiry into a policy designed "to increase educational diversity."[156] This view obviates concerns that the scheme was designed to eliminate competition and raise the price of university degrees.[157] Crane 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,[158] as a potential obstacle to subsidizing "women's athletic programs and other less popular sporting programs."[159] This is despite a women's Division I basketball team acting as plaintiff and there being no evidence to suggest that carving out a remuneration for athletes from the NCAA's 4 billion USD revenue would prevent cross-subsidization.[160]

3. Less Competition Law Enforcement, the EU Way

In the European Union, joint business conduct with an anticompetitive object or effect may fall foul of Article 101 TFEU.[161] In the event that negative affects do accrue, they must be appreciable.[162] The European Commission insists that most initiatives pursuing non-economic benefits will not be caught.[163] 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,[164] and the agreement will most likely be illegal.

153. Miazad, *supra* note 107, at 1679.

154. Bennett H. Goldstein & 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).

155. United States v. Brown Univ., 5 F.3d 658, 661 (3d Cir. 1993).

156. Crane, *supra* note 108, at 1175.

157. *See, e.g.*, Theodore J. Stachtiaris, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown University*, 62 FORDHAM L. REV. 1745 (1994).

158. NCAA v. Alston, 141 S. Ct. 2141 (2021).

159. Crane, *supra* note 108, at 1175.

160. *See* case note NCAA v. Alston, 135 HARV. L. REV. 471, 471 (2021).

161. TFEU art. 101(1), *supra* note 40.

162. Eur. Comm'n, Notice on Agreements of Minor Importance*,* 2014 O.J. (C 291) 1 (Aug. 30, 2014).

163. 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, 2023 O.J. (C 259) 1, ¶¶ 529–531 (June 1, 2023) [hereinafter EU Horizontal Cooperation Guidelines].

164. *Id.* ¶ 13.

Restrictions with an anticompetitive object differ from per se illegal restraints[165] 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 may be spared. Nonetheless, as will be seen later in this section,[166] 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 to pass the test.

The TFEU refers to restrictions of competition by "object" to describe those restraints that are inherently harmful to the proper functioning of competition. They often involve hardcore cartels and the imposition of minimum resale prices. But the case law suggests that a finding of anticompetitive object is not so much about labels, but instead about repercussions. A "negative impact on competition" is the decisive factor.[167] To infer an agreement's purpose, its content, objectives, and the "legal and economic context" must be considered.[168] The focus is on whether these factors suggest that "competition on [the] market would be eliminated or seriously weakened."[169] Based on this premise, arrangements that do not amount to collusion nor minimum resale price maintenance have occasionally been considered object restrictions.[170] 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 have plausibly been pursuing a legitimate aim.[171]

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,[172] the European Commission considered 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.[173] They set a soft

165. On per se illegality, see *supra* section II.A.2.

166. *See infra*.

167. Case C–8/08, T-Mobile Neth. BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, ECLI:EU:C:2009:343 ¶ 31 (CJ, June 4, 2009).

168. *Id*. ¶ 31.

169. Case C–32/11, Allianz Hungária Biztosító Zrt. v. Gazdasági Versenyhivatal, ECLI:EU:C:2013:160 ¶ 48 (CJ, Mar. 14, 2013).

170. Case C–403/08, Football Ass'n Premier League Ltd v. QC Leisure, ECLI:EU:C:2011:631 (CJ, Oct. 4, 2008) (relating to territorial exclusivity); Case C-493/09, Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence, EU:C:2011:649 (CJ, Oct. 13, 2011) (relating to selective distribution systems).

171. Case C–67/13, Groupement des Cartes Bancaires v. European Commission, ECLI:EU:C:2014:2204 (CJ, Sept. 11, 2014). *See also* case C–345/14, SIA 'Maxima Latvija' v. Konkurrences Padome, ECLI:EU:C:2015:784 (CJ, Nov. 26, 2015).

172. European Green Deal*, supra* note 15.

173. EU Horizontal Cooperation Guidelines.

safe harbor for sustainability standardization agreements—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).[174] These agreements will be lawful, provided that the standards are developed following a transparent procedure open to all competitors and that they impose no obligations on those unwilling to comply. Participating parties, whose market shares cannot exceed twenty percent, must remain free to adopt higher sustainability standards, cannot exchange commercially sensitive information, and must allow non-participating companies to have "effective and non-discriminatory access" to the developed standards.[175] As a reminder of the prevalence of consumer welfare, the Guidelines insist that prices should not increase nor quality decrease as a result.[176] The new guidance, therefore, confirms that the Article 101(1) prohibition will continue to be stringently applied to inherently harmful conduct affecting consumer welfare, 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" that can be used to weigh non-market benefits. Article 101(3) TFEU establishes the parameters by which conduct that would normally be prohibited may be justified by the compensatory benefits it can generate.[177] To benefit from this exception, companies need to show that their joint conduct meets four conditions: it must 1) contribute to "improving the production or distribution of goods or to promoting technical or economic progress," 2) allow "consumers a fair share of the resulting benefit," 3) not impose "on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives," and 4) not afford them "the possibility of eliminating competition in respect of a substantial part of the products."[178] 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, *what types of benefits* to take into account, and *how*."[179]

The EU Horizontal Cooperation Guidelines suggest that 101(3) TFEU can only be successfully used to defend an otherwise prohibited arrangement in cases in which the outcome is efficient and, therefore, in line with antitrust's broad ambit. To meet the first condition of Article 101(3), companies must demonstrate "objective, concrete, and verifiable" sustainability benefits.[180] They must also

174. *Id*. ¶ 538.

175. *Id*. ¶ 549.

176. *Id*.

177. TFEU art. 101(3), *supra* note 40.

178. *Id.*

179. Brook, *supra* note 7, at 93 (emphasis on original).

180. EU Horizontal Cooperation Guidelines ¶ 559. This is consistent with the case law of the EU Court of Justice. *See, e.g.*, Case T-528/93 Métropole Télévision SA v. Eur. Comm'n, ECLI:EU:T:1996:99, ¶ 118 (July 11, 1996); Case T-168/01, GlaxoSmithKline Servs. Unlimited v. Eur. Comm'n, ECLI:EU:T:2006:265 ¶ 244 (Sept. 27, 2006). For a discussion, see Christopher

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).[181] Some leeway is afforded for arrangements designed to overcome first mover disadvantage,[182] 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"[183] or to deal with situations where consumers are not appreciative of future benefits.[184] However, the Commission previously stated that it would prefer companies to "offer [more expensive but sustainable] products independently rather than by cooperating."[185] 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.[186]

The main piece of contention when it comes to accepting otherwise prohibited conduct is 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 ("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.[187] Moreover, those consumers may be present or future consumers and ought to be, on average, fully compensated for the harm suffered.[188] The calculation of future gains must also take into account factors such as inflation and lost interest.[189]

In its 2000 *CECED* decision the Commission appeared to open the door to wider social considerations.[190] It exempted an agreement between washing machine producers, permitting them to make more expensive, energy-efficient appliances and remove their cheaper alternatives from the market.[191] 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

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Townley, *The Relevant Market: An Acceptable Limit to Competition Analysis?*, 10 EUR. COMPETITION L. REV. 490, 491 (2011).

181. EU Horizontal Cooperation Guidelines, ¶ 561.

182. *See supra* II.A.1.

183. EU Horizontal Cooperation Guidelines, ¶ 567.

184. *Id.* ¶ 586.

185. Competition Policy Brief, *supra* note 67, at 6.

186. EU Horizontal Cooperation Guidelines, ¶ 593.

187. 101(3) Guidelines, ¶ 43.

188. *Id.* ¶ 85.

189. *Id.* ¶ 88.

190. CECED, *supra* note 121.

191. 101(3) Guidelines, ¶ 48.

purchase costs of more energy-efficient washing machines,"[192] which for the Commission would "allow consumers a fair share of the benefits *even if no benefits accrued to individual purchasers of machines*."[193] Nonetheless, consumers would also be compensated since energy bill savings would result in recovery of the increased costs "within nine to 40 months."[194] 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 Netherlands Authority for Consumers and Markets ("ACM")—which were not finally adopted—contemplated situations in which it would not be necessary to quantify the benefits of sustainability agreements.[195] However, in practice, the ACM has struggled to accept exceptions in practice. In its assessment of the *Chicken 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 anti-competitive and could not be justified.[196] The investigation revealed that consumers were not willing to pay the significant price increase the measures entailed.[197] The strict monetization of non-economic benefits has been subject to criticism.[198] At the same time, expert studies indicated that any animal well-being enhancements derived from the scheme would be minimal.[199] Similarly, 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.[200] Since CO_2 emissions were relocated rather than eliminated they

192. *Id.* ¶ 56.

193. *Id.* (emphasis added).

194. *Id.* ¶ 52

195. ACM, *Guidelines Sustainability Agreements: Opportunities within Competition Law,* ¶¶ 53–63 (Jan. 26, 2021) https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf (requiring that either the parties' combined market share be below 30% (¶¶ 54–55) or that the harm to competition be "evidently smaller" than the benefits "on a rough estimate" (¶¶ 54)).

196. ACM, ACM's Analysis of the Sustainability Arrangements Concerning the "Chicken of Tomorrow," ACM/DM/2014/206028 (2014).

https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf [hereinafter Chicken of Tomorrow decision] (this case has attracted significant scholarly attention). *See, e.g.*, Jacqueline M. Bos et al., *Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow*, 8 ANIMAL FRONTIERS 20 (2018); Giorgio Monti and Jotte Mulder, *Escaping the Clutches of EU Competition Law: Pathways to Assess Sustainability Initiatives*, 42 EUR. L. REV. 635, 639–641 (2017); María Campo Comba, *EU Competition Law and Sustainability*, ERASMUS L. REV. 190 (2022).

197. Chicken of Tomorrow decision, *supra* note 196.

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

199. Chicken of Tomorrow decision, *supra* note 196.

200. ACM, Analysis of the Planned Agreement on Closing Down Coal Power Plants from the 1980s as Part of the Social and Economic Council of the Netherlands' SER Energieakkorrd (2013).

could not be computed, and savings stemming from reducing other emissions were a fraction of the increased electricity costs for consumers.[201]

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 TotalEngergies to store CO_2 in offshore abandoned gas fields that included setting a joint price and adopting a joint marketing strategy was greenlighted by the ACM in 2022.[202] Here, the findings suggested that consumers (CO_2 emitters) would not see an increase in price nor a reduction of choice. This would suffice to meet the second requirement of Article 101(3) TFEU. But the ACM insisted on 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.[203] 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 remains reluctant 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."[204] 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).[205] 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.[206] 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. 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 reduce competition between them.[207] These measures were neither related to nor required to execute the original cooperation,

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https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf.

201. *Id*. at 5.

202. Press Release, ACM, Shell and TotalEnergies Can Cooperate in the Storage of CO2 in Empty North Sea Gas Fields, (June 27, 2022) https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields.

203. *Id.*

204. EU Horizontal Cooperation Guidelines, ¶ 569.

205. *Id*. ¶¶ 571–81.

206. *Id*. ¶ 578.

207. Case COMP/39.579—Consumer Detergents, Eur. Comm'n Decision ¶¶ 24–26, 2011 O.J. (C 193/14).

and consequently, the European Commission fined the companies for breaching Article 101 TFEU.[208]

A thornier issue is what happens when 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 EU Horizontal Cooperation Guidelines, defined as occurring "irrespective of the consumers' individual appreciation of the product" and accruing "to a wider section of society than just consumers in the relevant market."[209] The European Commission had previously accepted the merits of "sustainability benefits that accrue for the benefit of society as a whole," but had not outlined a path for assessing these.[210] 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."[211] This would require a significant overlap between the consumers paying for the efficiencies and those benefiting from them. This could occur, for example, if competing producers agreed to use more expensive but less polluting energy, and a large part of the consumers of their products were among those breathing the improved air.[212] Said overlap could be determined with relative ease, but the new Guidelines also require that 1) the gains are enough to *compensate* these consumers for the harms suffered,[213] and 2) the positive impact on consumers is "clearly identifiable."[214] There is therefore a high burden of proof placed on parties to agreements wishing to claim this exception.

The EU Horizontal Cooperation Guidelines' attempts to find a route for the viability of restrictive sustainability-guided initiatives within the confines of the consumer welfare standard are a juggling act and suggest 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. However, now it is possible to compute benefits for others, provided that the consumers are willing to foot the bill. Even general benefits that consumers do not want to pay for can be considered, if they ultimately benefit those consumers. These principles stem from the traditional interpretation of the conditions of Article 101(3) TFEU, which does not leave many other options when it comes to considering collective gains. Yet, leaving societal benefits up to the preferences of individual consumers may be problematic. Studies suggest that some are willing to accept the added costs of sustainable alternatives, and it is probable that consumers' appreciation of

208. *Id*.
209. EU Horizontal Cooperation Guidelines, ¶ 582.
210. Competition Policy Brief 2021-01, *supra* note 67, at 6.
211. EU Horizontal Cooperation Guidelines, ¶ 583.
212. *Id*. ¶ 585.
213. *Id*. ¶ 584.
214. *Id*. ¶ 589.

sustainability will improve in the years to come.[215] As things stand, however, consumer behavior towards sustainable products is often not as positive as one would hope.[216] Significant barriers hamper sustainable consumption, including incomplete knowledge and the difficulty for low-income consumers to afford more expensive sustainable options.[217] Crucially, an unfortunate ethically questionable consequence of the focus on consumer compensation and willingness to pay is the impossibility of saving green agreements if affected consumers do not want to pay for improvements they will not themselves enjoy. An example would be cleaner air thousands of miles away in the developing countries housing the factories that produce their goods.

There could be a way, within the current EU legal framework, to circumvent the strict requirements of Article 101(3) TFEU. In some cases, the primacy of non-economic aims over competition law objectives has been recognized by the EU courts. This has led to the introduction of certain derogations in the application of Article 101(1) TFEU, purely because "other things matter more than competitive markets."[218] The classic example is *Wouters*, where the Dutch Bar Association's restrictions on partnerships between members 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.[219] Building on this premise, in *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.[220] This case concerned a doping ban in sport competitions to ensure that they were "conducted fairly" and

215. Piet Eichholtz, Nils Kok & John M. Quigley, *Doing Well by Doing Good? Green Office Buildings,* 100 AMERICAN ECONOMIC REVIEW 2492 (2010); Ramón Casadesus-Masanell, Michael Crooke, Forest Reinhardt, and Vishal Vasishth, *Households' Willingness to Pay for "Green" Goods: Evidence from Patagonia's Introduction of Organic Cotton Sportswear*, 18 J. ECON. & MANAG. STRATEGY 203 (2009); Christoph Herrmann, Sebastian Rhein & Katharina Friederike Sträter, *Consumers' Sustainability-related Perception of and Willingness-to-Pay for Food Packaging Alternatives,* 181 RESOURCES, CONSERVATION & RECYCLING 106219 (2022).

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

217. Katherine White, David J. Hardisty & Rishab Habib, *The Elusive Green Consumer*, 97 HARV. BUS. REV. 124 (2019).

218. Giorgio Monti, *Four Options for a Greener Competition Law*, 11 J. OF EUR. COMPETITION L. & PRAC. 124, 129 (2020).

219. Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, ECLI:EU:C:2002:98 ¶ 110 (CJ, Feb. 19, 2002).

220. Case C-519/04, David Meca-Medina and Igor Majcen v. Eur. Comm'n ECLI:EU:C:2006:492 ¶ 42 (CJ, July 18, 2006).

protected "equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport."[221]

Scholars, including Gerbrandy and Monti, have defended the potential applicability of the *Wouters* doctrine to other non-economic benefits, particularly environmental issues.[222] This prospect would be supported by a "holistic reading of the Treaty," according to Monti.[223] At the same time, these scholars concede that important limitations exist. The existing case law suggests that a public authority needs to be involved in the agreement,[224] and the EU courts have trodden with extreme caution when developing derogations.[225] For instance, in December 2023, the Court of Justice clarified in the much-anticipated *European Superleague* case that FIFA and UEFA's prior approval requirement for new football competitions is anti-competitive.[226] 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."[227] Moreover, in the Royal Antwerp judgment—handed down on the same day as *European Superleague*—the Court of Justice found that restrictions of competition by object could not benefit from the *Wouters* rule.[228] The only way to exclude the application of Article 101(1) TFEU would be the Article 101(3) exception.

The European Commission seems equally reluctant to accept the *Wouters* path for environmental causes. In the draft of the EU Horizontal Cooperation Guidelines, a clarification was included stating that anticompetitive agreements could not be defended solely because "they are necessary for the pursuit of a sustainability objective."[229] 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.

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221. *Id.* ¶ 43.

222. Holmes, *supra* note 17, at 371 (seeing "no reason why [the *Wouters*] approach should not be taken in the case of sustainability agreements"); Gerbrandy, *supra* note 198, at 556 (considering this a "promising" option).

223. Monti, *supra* note 218, at 129–30.

224. Gerbrandy, *supra* note 198, at 556.

225. Monti, *supra* note 218, at 129–30.

226. Case C-333/21 Eur. Superleague Company, SL v. UEFA and FIFA, ECLI:EU:C:2023:1101 ¶ 39 (CJ, Dec. 21, 2023).

227. *Id.*

228. Case C-680/21 SA Royal Antwerp Football Club v. Union Royale Belge des Sociétés de Football Associations ASBL (URBSFA), ECLI:EU:C:2023:1010 ¶¶ 113-117 (CJ, Dec. 21, 2023).

229. 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 (draft), ¶ 548 (Mar. 1, 2022) https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en [https://perma.cc/4VCJ-BRYK].

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.[230] These occur when an unrelated favorable outcome is achieved by promoting greater competitiveness. When additional benefits ensue in the pursuit of conventionally accepted goals of antitrust, 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 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.[231]

Unlike in other jurisdictions,[232] 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.[233] 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."[234] 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.[235] 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

230. Ezrachi et al., *supra* note 14, at 53.

231. Monti, *supra* note 218, at 132.

232. China's Anti-Monopoly Law contains an exemption for environmental agreements. Anti-Monopoly Law of the People's Republic of China (中國人民共和國反壟斷法) (in force Aug. 1, 2008, revised June 6, 2022, in force Aug. 1, 2022). Austria recently introduced a similar exemption (Ministerialentwurf betreffend Bundesgesetz, mit dem das Kartellgesetz 2005 und das Wettbewerbsgesetz geändert werden, 114/ME (Apr. 23, 2021)). *See* Viktoria H.S.E. Robertson, *Sustainability: A World-First Green Exemption in Austrian Competition Law*, 13 J. EUR. COMPETITION L. & PRAC. 426 (2022). The South African competition legislation, on its part, promotes "greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons". Competition Act 1998 (as amended), chap 1, s 2(f).

233. *See supra,* section I.B.

234. TFEU, art. 11., *supra* note 40.

235. JULIAN NOWAG, ENVIRONMENTAL INTEGRATION IN COMPETITION AND FREE-MOVEMENT LAWS 48 (2016).

requirements."[236] According to Julian Nowag, in cases of conflict, the Treaties can be interpreted as mandating a balancing exercise between environmental protection and competition interests, done "on equal footing."[237]

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.[238] 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."[239] Market power has the potential to increase inequality, indicating another reason, according to Joseph Stiglitz, to use antitrust policy to attack it.[240]

But what exactly can antitrust do to help? Studies suggest the law can improve equality "of income, consumption, and wealth," both directly and indirectly.[241] 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."[242] 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.[243]

It would be equally feasible to enhance environmental aims, provided that they are complementary to the goals of antitrust.[244] 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."[245] 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,

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

237. Nowag, *supra* note 235, at 30.

238. *See* sources *supra* note 14.

239. Khan & Vaheesan, *supra* note 14, at 246.

240. Stiglitz, *Towards a Broader View*…, *supra* note 14.

241. Ezrachi et al., *supra* note 14, at 53.

242. *Id*. at 55.

243. *Id*. at 55–56.

244. 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, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 175 (2019) (describing the DOJ's lawsuit against carmakers in the 1960s (*supra* note 150) and the European Commission's *Consumer Detergents* decision (*supra* note 206) as examples of antitrust law serving "as a mandate to promote environmental goals").

245. Monti, *supra* note 218, at 126.

ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare."[246]

As a consequence of the above, healthy enforcement, even when limited to pursuing consumer welfare, is likely to spontaneously reap some social benefits. To boost this positive impact, enforcers should 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[247] and energy systems[248] have significant environmental footprints, while healthcare,[249] pharma,[250] and telecom[251] are particularly important from a wealth inequality perspective. Adequate enforcement in these industries could contribute to the attainment of 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.

2. Social Antitrust Enforcement in the US (or Lack Thereof)

The present-day policy in the United States, as explained above,[252] is to rarely look past issues of pricing, output and consumer choice in antitrust cases. This position does not entirely preclude the attainment of non-competition benefits. An example of a direct impact on societal goals is the Section 1 lawsuit

246. EU Horizontal Cooperation Guidelines, ¶ 544.

247. *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 consumes, the emissions it generates, the junk left behind once it is taken out of circulation, and the infrastructure needed for its use).

248. *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 Dec. 15, 2024) (citing environmental effects such as greenhouse emissions, water use and pollution, solid waste, and land use).

249. National health expenditure in 2021 accounted for 18.3% of GDP, costing USD 12,914 per person. *NHE Fact Sheet*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.

250. Pharmaceutical costs in the US totaled US $633 billion in 2022. *See* Eric M. Tichy et al., *National Trends in Prescription Drug Expenditures and Projections for 2023*, 80 AMERICAN JOURNAL OF HEALTH-SYSTEM PHARMACY 899 (2023). Actions in this sector, therefore, will have "significant distributive effects" (Khan & Vaheesan, *supra* note 14, at 248).

251. According to data published in 2023, monthly Internet access costs anything between US $20 and $300 per month, while monthly cellphone plans cost an average of US $114. *See* Timothy Moore, *How Much Does Internet Cost Per Month?*, FORBES (Aug. 21, 2023) https://www.forbes.com/home-improvement/internet/internet-cost-per-month/; Robin Layton, *Cellphone Costs: Average Cost of a U.S. Mobile Plan is $144*, ALL CONNECT (Aug. 8, 2023) https://www.allconnect.com/blog/average-cost-of-cellphone-plan. They are a "significant and growing part of the consumer economy" (Khan & Vaheesan, *supra* note 14, at 256).

252. *See supra* section I.A.

filed against automakers in 1969, previously discussed,[253] for conspiring to eliminate competition in the research, development and manufacturing of equipment to reduce air pollution.[254] Encouraging companies to innovate to reduce emissions could improve environmental standards and since the conduct at stake affects prices, such a case could be brought under the current policy. Nonetheless, this investigation took place before the triumph of the consumer welfare standard.

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.[255] Reverse payments are arrangements between a drug originator holding a valid patent and manufacturers of the generic version of the drug where 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—sometimes even after the patent expires—thereby extending the branded drug's monopoly and preventing price competition. The case in question relates to the lucrative hormone medication AndroGel, produced by Solvay Pharmaceuticals.[256] Generic producers filed motions to have the patent annulled and were on course for victory. Faced with the prospect of losing about $125 million per year in profits, Solvay agreed to make annual payments to the patent challengers ranging between $10 and $30 million.[257] According to the FTC, this ensured that generic versions would not enter the market until 2015 (Solvay's patent was due to expire in 2020),[258] and amounted to an unreasonable restraint of trade contrary to Section 1 of the Sherman Act.[259]

The Supreme Court 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.[260] The monopoly granted by the patent was under litigation and this put its lawfulness into question.[261] However, the Court did not find pay-for-delay arrangements to be per se illegal.[262] This is a regrettable stance on a practice that, according to the FTC, costs consumers $3.5

253. *See supra* section II.A.2.

254. Complaint at 5-8, United States v. Automobile Mfrs. Ass'n, Inc., 307 F. Supp. 617 (C.D. Cal. 1970) (No. 69-75-JWC).

255. 1223 S. Ct. 2223 (2013).

256. 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.

257. *Id*. at 1305.

258. *Id*.

259. *In re* AndroGel Antitrust Litig. (No. II), 687 F. Supp. 2d 1371, 1375–76 (N.D. Ga. 2010).

260. FTC v. Actavis, Inc., 133 S. Ct. 2223, 2231 (2013).

261. *Id.*

262. *Id*. at 2237.

billion a year[263] and denies them generic versions of drugs for years.[264] Delaying the benefits typically derived from competition, including lower prices and greater choice, appears to be at odds with the orthodox goals of antitrust.[265] Declaring pay-for-delay agreements presumptively harmful would have helped to advance competition and non-competition aims.

The second significant case is *Ohio v. American Express Co.* ("*Amex*").[266] Here, the issue at stake was a practice known as "steering," described by Herbert Hovenkamp as being "fundamental to competition of any kind."[267] Steering happens when merchants tell their customers to use cards with lower fees, possibly offering them a discount or gift when using these recommended alternatives. 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.[268] 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."[269] This conclusion was based on the DOJ's failure to define the relevant market or show the existence of market power in that market. But this approach is hard to reconcile with judicial precedent.[270] As Justice Breyer noted in his dissent, "proof of actual adverse effects on competition *is, a fortiori*, proof of market power."[271] 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."[272]

The *Amex* "regressive, anti-economic" judgment is hard to justify on any grounds.[273] It has faced severe scholarly criticism, including from those

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263. Jon Leibowitz, *"Pay-for-Delay" Settlements in the Pharmaceutical Industry: How Congress Can Stop Anticompetitive Conduct, Protect Consumers' Wallets, and Help Pay for Healthcare Reform (The $35 Billion Solution)*, Fed. Trade Comm'n 8 (2009). https://www.ftc.gov/sites/default/files/documents/public_statements/pay-delay-settlements-pharmaceutical-industry-how-congress-can-stop-anticompetitive-conduct-protect/090623payfordelayspeech.pdf. For critical takes on the judgment, see Michael L. Fialkoff, *Pay-for-Delay Settlements in the Wake of Actavis*, 20 MICH. TELECOMM. & TECH. L. REV. 523, 546 (2014); Susan Schipper, *Bad Medicine: FTC v. Actavis, Inc. and the Missed Opportunity to Resolve the Pay-for-Delay Problem*, 73 MD. L. REV. 1240 (2014); Khan & Vaheesan, *supra* note 14, at 250–52.

264. Fialkoff, *supra* note 262, at 546.

265. Sandra Marco Colino et al., *The Lundbeck Case and the Concept of Potential Competition*, CONCURRENCES REV. 18 (2017).

266. 138 S. Ct. 2274 (2018).

267. Herbert J. Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 88 (2019).

268. 138 S. Ct. 2274 (2018).

269. *Id.* at 2284.

270. Steven Salop et al., *Rebuilding Platform Antitrust: Moving on from Ohio v. American Express*, 84 ANTITRUST L.J. 883 (2022).

271. 138 S. Ct. at 2297 (Breyer, J., dissenting).

272. *Id*.

273. Hovenkamp, *supra* note 267, at 46.

defending the consumer welfare standard,[274] and has been described as possibly "the worst antitrust decision in many decades."[275] Steering is beneficial for competition, as it can improve quality and lower prices.[276] Simultaneously, Amex's payment system has been described as rewarding "the wealthy while penalizing the poor."[277] This is because those who have access to more expensive cards 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 costs merchants incur when wealthy customers use costlier cards.[278] In support of its conclusion, the Court extensively cites the work of scholars who have acted as consultants for financial services corporations offering payment cards.[279] This begs the question of whether the Court may have been swayed by lobbying efforts masqueraded as independent research,[280] or at the very least by a philosophy based on personal experiences that could affect the impartiality of the arguments relied on.[281]

The third case is *United States 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.[282] 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

274. *See, e.g.*, Nancy L. Rose & Jonathan Sallet, *Ohio v. American Express: The Exception that Should not Become the Rule,* 36 Antitrust 76, 76 (2022) (noting that AmEx is 'destined to be considered bad law"); Tim Wu, *The American Express Opinion, the Rule of Reason, and Tech Platforms*, 7 J. ANTITRUST ENF'T. 117, 118 (2019) (stating that courts are "willing to disregard evidence of anticompetitive harm in favour of abstract theory—in favour of the defendant."); Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust,* 168 U. PA. L. REV. 2061, 2085 (2020) (finding that "the Court adopted a sweeping legal rule and based that rule on its highly imperfect understanding of the economic literature").

275. Salop et al., *supra* note 270, at 883.

276. Hovenkamp, *supra* note 267, at 91.

277. 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/.

278. 138 S. Ct. at 2297 (Breyer, J., dissenting).

279. David Evans, whose work is cited 30 times, thanks Visa for "financial support" in his article *The Antirust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 324 (2003). 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).

280. *See supra* section I.C.

281. 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.

282. United States v. UnitedHealth Group, Inc., No. 1:22-cv-00481 (D.D.C. Sep. 19, 2022).

claims.[283] 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 those innovations and strategies in the first place."[284] Moreover, owning Change could allow UnitedHealth to raise rivals' costs and prevent them from accessing Change's products.[285] This could affect consumer welfare through "higher cost, lower quality, and less innovative commercial health insurance for employers, employees, and their families."[286] It could also have a negative impact on equality, as 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.[287] Unfortunately, those living in poverty statistically have more health issues, so they would be most affected.[288]

Following a two-week trial, the district court threw out the DOJ's claims and allowed the merger to go ahead.[289] 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.[290] The judge did not believe that the misuse of data would materialize, thanks to the existence of firewalls and contractually-afforded consumer protection.[291] Additionally, in the judge's view, the DOJ did not provide sufficient proof of the innovation-stifling, exclusionary potential of the deal.[292] Stavroulaki lamented the court's overestimation of the reputational damage of breaching firewalls and underestimation of the huge gains UnitedHealth would stand to make from such breaches.[293]

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283. Complaint, United States v. UnitedHealth Group, Inc., No. 1:22-cv-00481 (D.D.C. Feb. 24, 2022).

284. *Id*. at 2.

285. *Id.*

286. *Id*. at 3.

287. Theodosia Stavroulaki, *Mergers That Harm Our Health*, 19 BERKELEY BUS. L.J. 89 (2022). *See also* Matt Stoller & Matt Seiler, *Big Health Care is Already Too Big*, THE AMERICAN PROSPECT (Sept. 1, 2022), https://prospect.org/health/big-health-care-is-already-too-big/.

288. *See* Lillian Witting, *Limited Access: Poverty and Barriers to Accessible Health Care*, National Health Council (Jan. 20, 2023), https://nationalhealthcouncil.org/blog/limited-access-poverty-and-barriers-to-accessible-health-care/#:~:text=People%20who%20live%20in%20poverty,liver%20disease%2C%20and%20kidney%20disease.

289. United States v. UnitedHealth Group, Inc., No. 1:22-cv-00481 (D.D.C. Sep. 19, 2022).

290. *Id.*

291. *Id.*

292. *Id*.

293. Theodosia Stavroulaki, *How the Wrong Presumptions Led to the Wrong Conclusions in the United/Change Healthcare Merger*, PROMARKET (Nov. 11, 2022). https://www.promarket.org/2022/11/11/how-the-wrong-presumptions-led-to-the-wrong-conclusions-in-the-united-change-healthcare-merger/.

The above may be punctual developments, but the big picture is somewhat disheartening. Until recently, the FTC had only attempted to enforce the Robinson-Patman Act (which prohibits price discrimination) twice since the 1980s, and as of April 2025 it has not brought any vertical price restraint cases in more than two decades.[294] Section 2 of the Sherman Act, which prohibits monopolization and is fundamental to combat misuses of market power, was similarly dormant.[295] To make matters worse, a study by Michael Carrier found that in 97 percent of the cases where the rule of reason applies, the plaintiff fails to demonstrate the existence of an anticompetitive effect.[296] The many voices decrying underenforcement may have a valid point.[297]

In recent years, there have been invigoration attempts, particularly (but not exclusively) under the Neo-Brandeisian leadership of the federal agencies.[298] In October 2022, the DOJ announced a conviction under Section 2 of the Sherman Act—the first in 40 years.[299] The government also sued Google—and won—for monopolizing digital advertising technologies.[300] The case has been described as being "about the future of the Internet."[301] Between 2021 and 2023, the FTC prevented three horizontal mergers in court and 13 transactions (including two non-horizontal mergers) were abandoned.[302] In December 2023, the DOJ and the FTC adopted revised Merger Guidelines aimed at energizing the scrutiny of such deals.[303] There was also an attempt to revive the possibility of challenging mergers before an administrative court.[304] In the final days of the Biden

294. 15 U.S.C. §§ 13-13a.

295. Kovacic, *supra* note 12, at 688.

296. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 837 (2009).

297. 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, *The Proper Role for States in Antitrust Lawsuits*, PELICAN INSTITUTE FOR PUBLIC POLICY (Dec. 2, 2021) https://iseg.wichita.edu/publications/the-proper-role-for-states-in-antitrust-lawsuits/.

298. *See supra* section I.C.

299. United States v. Zito, CR 22-113-BLG-SPW (D. Mont. Oct. 31, 2022).

300. *See* United States v. Google LLC, 747 F. Supp. 3d 1, 2024 WL 3647498, at *134 (D.D.C. Aug. 5, 2024).

301. Natalie Sherman & Brandon Denon, *Google Antitrust Trial: Tech Giant Denies Abusing Power to Gain Monopoly*, BBC NEWS (Sept. 13, 2023) https://www.bbc.com/news/business-66790608.

302. Jon B. Dubrow, *Assessing the State of Affairs in FTC/DOJ Merger Enforcement*, REUTERS (July 11, 2023) https://www.reuters.com/legal/transactional/assessing-state-affairs-ftcdoj-merger-enforcement-2023-07-10/. *See also* Calvani & Ensign, *supra* note 98, at 169 (describing the FTC's policy as "successful in making mergers more difficult and costly").

303. U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (Dec. 2023) https://www.justice.gov/atr/2023-merger-guidelines.

304. Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, *On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act*, FED. TRADE COMM'N (Nov. 10, 2022) https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-of-chair-khan-commissioners-slaughter-bedoya-on-policy-statement-regarding-section-5. Press Release,

administration, the FTC brought the two cases under the Robinson-Patman Act.[305]

This strategy has not been exempt from criticism. Opponents of Neo-Brandeisian policies accused Khan of politicizing antitrust to wage a war against Big Tech and corporate America.[306] 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. In fact, the second Trump administration has thus far echoed the sentiment that strong enforcement is fundamental.[307] Whether the mood will translate into effective, lasting changes is uncertain. Agency initiatives will often be scrutinized by a bench captured by "neo-liberal ideology"[308] and a conservative Supreme Court that, without legal reform, will likely not tamper with the late Justice Antonin Scalia's antitrust legacy.[309]

3. The Social Dimension of EU Competition Law Enforcement

In the EU context, a holistic reading of the TFEU, the Treaty in which the main competition law provisions are embedded, would suggest that taking other objectives into account is compulsory in antitrust policy development.[310] This could lend support to a doctrine akin to the principle of indirect effect of EU law when applying Articles 101 and 102 TFEU.[311] According to this principle, national courts must try to interpret national law "as far as possible, in the light of the wording and purpose" of EU law rules that lack direct effect and cannot be

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Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail, FED. TRADE COMM'N (Sept. 12, 2022) https://www.ftc.gov/news-events/news/press-releases/2022/09/administrative-law-judge-dismisses-ftcs-challenge-illuminas-proposed-acquisition-cancer-detection.

305. Ryan Quillian, Ross Demain, Terrell McSweeny & Alezeh Rauf, *FTC Brings First Robinson-Patman Act Case in More than Two Decades*, GLOBAL POLICY WATCH (Jan. 10, 2025) https://www.globalpolicywatch.com/2025/01/ftc-brings-first-robinson-patman-act-case-in-more-than-two-decades/; Julia Schiller, Anna T. Pletcher, Patrick J. Jones, Josh Cayetano, Courtney Dyer & Mark A. Racanelli, *FTC Files First Two Robinson-Patman Act Suits in Over a Generation*, O'MELVENY (Jan. 30, 2025) https://www.omm.com/insights/alerts-publications/ftc-files-first-two-robinson-patman-act-suits-in-over-a-generation/.

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

307. Marcia Brown, *Trump's Unexpected Antitrust Approach*, POLITICO (Jan. 15, 2025).

308. Fox, *supra* note 78, at 180.

309. *Id*. at 184.

310. *See supra* section 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).

311. Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentación SA, ECLI:EU:C:1990:395 (CJ, Nov. 13, 1990), based on Case 14/83 Sabine von Colson v. Land Nordrhein-Westfalen, ECLI:EU:C:1984:153 (CJ, Apr. 10, 1984).

invoked by individuals.[312] Transposing this logic into the context of antitrust, antitrust enforcers could be compelled, where possible, to interpret the TFEU's competition law provisions in a way that is coherent with other Treaty obligations, including environmental protection and equality-inducing purposes such as social cohesion and the promotion of employment or education.

It is easy to find examples of socially beneficial competition law enforcement in Europe. Relying on Article 101(1) TFEU, the European Commission targeted anticompetitive practices that had an environmental angle. In 2021, the European Commission imposed fines totaling €875 million on car manufacturers Daimler, BMW, and the Volkswagen group.[313] In the course of a lawful cooperation to curb nitrogen oxide exhaust emissions, automobile companies agreed not to compete to clean the air beyond legal requirements despite having the technology to go further.[314] In 2016 and 2017, record fines adding up to more than €3 billion were slapped on truck producers for using low emissions regulations to collude on prices and pass on to consumers the costs of complying with the law.[315] Recent examples of enforcement with "green" repercussions include the penalties imposed on two cartels: one between companies involved in the treatment of end-of-life cars considered waste[316] and an ethanol market cartel (a biofuel with beneficial environmental impact).[317] Regarding the latter, Vestager emphasized the importance of pursuing collusion "relevant for the Green Transition."[318]

Enforcement levels in the European Union are generally more encouraging than in the United States.[319] For comparison, whereas pay-for-delay agreements are subject to the rule of reason in the United States,[320] the European Commission's position is that they constitute a restriction of competition by object.[321] In addition, the European Commission regularly brings abuse of dominance cases under Article 102 TFEU, which is the equivalent of Section 2 of

312. 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 JURID. TRIB 5 (2021); Asif Hameed, *UK Withdrawal from the EU: Supremacy, Indirect Effect and Retained EU Law*, 85 MOD. 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).

313. Press Release, Eur. Comm'n, *supra* note 19.

314. *Id*.

315. Case AT.39824 Trucks, Eur. Comm'n Decision, 2017 O.J. (C 108) 5 [2016] OJ C 108/6.

316. Press Release, Eur. Comm'n, Antitrust: Commission Fines Car Manufacturers and Association €458 Million over End-of-life Vehicles Recycling Cartel (Apr. 1, 2025) (IP/25/881).

317. Press Release, Eur. Comm'n, Antitrust: Commission Fines Former Ethanol Producer Abengoa €20 Million in Cartel Settlement (Dec. 10, 2021) (IP/21/6769).

318. *Id.*

319. *See supra* section II.B.2.

320. *See supra* section II.A.2.

321. Case C-591/16 P, H. Lundbeck A/S v. Eur. Comm'n, ECLI:EU:C:2021:243 (CJ, Mar. 25, 2021).

the US Sherman Act. A US lawsuit against Google was only launched in 2023,[322] but in Europe the company had already been hit with three major fines, including a record €4.34 billion for abuses related to its Android operating system.[323] Google is being further investigated for favoring its own online advertising technology.[324] There have been EU inquiries relating to vertical restraints. In 2018, the European Commission fined four electronics manufacturers for imposing minimum resale prices via, *inter alia*, pricing algorithms.[325] The Court of Justice also confirmed in 2011 that banning the resale of luxury products on the Internet would be anticompetitive by object.[326]

The EU enforcement system comes with its own problems, however. For instance, the European Commission's merger control policy needs to be examined on its own merits.[327] From a sustainable development perspective, the inability to block two recent agrochemical mergers (Dow/Dupont and Bayer/Monsanto) was rather unfortunate.[328] Critics pointed out how the consolidation of the sector leaves 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."[329] Elias Deutscher and Stavros Makris have proposed changes to merger analysis so that, beyond considering the status quo, the European Commission would also take into account the future, particularly the impact of the concentration on "diversity, quality, and direction of innovation paths."[330]

Another problem is the evidentiary burden imposed on enforcers following the more economic approach of the last two decades. Even when companies possess significant market power and/or the conduct at stake is highly likely to be harmful, agencies and plaintiffs often have to prove negative effects to an

322. *See supra* section II.B.2.

323. Case AT.40099 - Google Android, Eur. Comm'n Decision, 2019 O.J. (C 402) 2019.

324. Press Release, Eur. Comm'n, Antitrust: Commission Sends Statement of Objections to Google over Abusive Practices in Online Advertising Technology (June 14, 2023) (IP/23/3207).

325. Case AT.40465 - Asus, Eur. Comm'n Decision, 2018 O.J. (C 338) 13; Case AT.40469 - Denon & Marantz, Eur. Comm'n Decision, 2018 O.J. (C 335) 5; Case AT.40181 - Philips, Eur. Comm'n Decision, 2018 O.J. (C 340) 10; Case AT.40182 - Pioneer, Eur. Comm'n Decision, 2018 O.J. (C 338) 19.

326. Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence, *supra* note 170. *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).

327. On the shortcomings of EU merger control, see Emanuela Lecchi, *Sustainabity and EU Merger Control*, 44 EUR. COMPETITION L. REV. 70 (2023); Elias Deutscher & Stavros Makris, *Sustainability Concerns in EU Merger Control: from Output-Maximising to Polycentric Innovation Competition*, 11 J. ANTITRUST ENF'T. 350 (2023); John E. Kwoka & Tommaso M. Valletti, *Unscrambling the Eggs: Breaking Up Consummated Mergers of Dominant Firms,* 30 INDUS. & CORP. CHANGE 1286 (2021).

328. Case M.7932 - Dow/DuPont, Eur. Comm'n Decision, 2017 O.J. (C 353) 9; Case M.8084 - Bayer/Monsanto*,* Eur. Comm'n Decision, 2018 O.J. (C 456) 10.

329. Deutscher & Makris, *supra* note 327.

330. *Id*.

impossibly high standard.[331] As a result, the European Commission is losing key cases, and some of the bigger abuses of dominance investigations take decades (and substantial resources) to be resolved.[332] In cases where the facts point to a likely violation, there have been calls for speeding up the shift of the burden of proof to the companies to justify their behavior[333] and imposing limits on judicial review.[334] 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, warning his audience to hold their laughter.[335] Among those goals were "countering income inequality" and "safeguarding the environment."[336] The vertiginous pace of developments since 2020 suggests Ginsburg's remarks have been overtaken by recent events. Since the speech, antitrust agencies in the Netherlands, the United Kingdom, Austria, and Singapore, among other countries, have all published guidance on sustainable cooperation.[337] The new EU Horizontal Cooperation Guidelines devote twenty-five pages to sustainability agreements,[338] and new guidelines for sustainability-oriented cooperation between agricultural producers

331. *See, e.g.*, Case C–67/13, Groupement des Cartes Bancaires v. Comm'n, ECLI:EU:C:2014:2204 (CJ, Sept. 11, 2014); Case C–345/14, SIA 'Maxima Latvija' v. Konkurrences Padome, ECLI:EU:C:2015:784 (CJ, Nov. 26, 2015).

332. 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, Eur. Comm'n v. Intel Corp. (Jan. 26, 2022).

333. Kwoka & Valletti, *supra* note 327.

334. Jason Furman et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, HM TREASURY (Mar. 2019). https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf.

335. Ginsburg, *supra* note 11.

336. *Id*.

337. *See generally* ACM, Beleidsregel Toezicht ACM op duurzaamheidsafspraken [Policy Rule on ACM's Oversight of Sustainability Agreements], Document No. ACM/UIT/596876 (Oct. 4, 2023) (Neth.), https://www.acm.nl/system/files/documents/beleidsregel-toezicht-acm-duurzaamheidsafspraken_0.pdf [https://perma.cc/6GFX-QZAT], *translated in ACM's website* https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf [https://perma.cc/QK33-CD4J]; UK Competition & Markets Authority, Green Agreements Guidance: Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Environmental Sustainability Agreements, CMA 185 (Oct. 12, 2023); Austrian Federal Competition Authority, Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines) (Sept. 2022); Competition & Consumer Commission Singapore, Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives (Mar. 1, 2024).

338. EU Horizontal Cooperation Guidelines, chapter 9.

have been adopted.[339] Austria's competition law now includes a sustainability exemption for agreements promoting cooperation with genuine environmental purposes.[340]

These developments show that discussion of the impact of environmental and equality goals on antitrust is being taken much more seriously than Ginsburg's remarks suggest. This section embraces the importance of these concerns and expounds 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.[341] The European Commission has been unambiguous in that "[t]here are better, much more effective ways" to strive for sustainable development.[342] 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.[343] This idea fundamentally underlies the conception of the welfare state: that it would do "things that markets would do badly or not at all."[344]

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 . . . climate change"[345] might be appealing, but it overlooks how they are inherently profit driven. As Adam Smith put it, "[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."[346] The benefits of corporate social responsibility have been questioned since the 1970s, when economist Milton Friedman famously asserted that businesses' only duty is to

339. Eur. Comm'n, Commission Guidelines on the Exclusion from Article 101 of the [TFEU] for Sustainability Agreements of Agricultural Producers Pursuant to Article 210(a) of Regulation (EU) 1308/2013 [2023] OJ C/2023/1446.

340. *See supra* note 230.

341. *See supra* section I.A.

342. European Commission, *Competition Policy Supporting the EU Green Deal* https://web.archive.org/web/20231106162321/https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf#expand (last visited Aug. 23, 2023).

343. The European Commission acknowledges that at times "existing (environmental) regulation already incentivises companies to produce in a sustainable manner and therefore obviates the need for cooperation". *See Competition Policy Brief*, *supra* note 67, at 6.

344. NICHOLAS BARR, THE ECONOMICS OF THE WELFARE STATE (6th ed., 2020). *See generally* Maarten Pieter Schinkel & Yossi Spiegel, *Can Collusion Promote Sustainable Consumption and Production?* 53 INT'L J. IND. ORG. 371 (2017) (questioning that companies can achieve public interest goals).

345. Balmer, *supra* note 17, at 219.

346. ADAM SMITH, WEALTH OF THE NATIONS I.II.2 (1776).

maximize shareholders' returns.[347] More recently, it has been suggested that corporate attempts to solve societal problems typically backfire because "evidence suggests that corporations will simply use such political engagement as an opportunity to extract more profit."[348] 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.

Thus, three detrimental consequences stem from overemphasizing the role of the business community in the attainment of social goals. First, the firms allegedly acting for the common good might flout the social goals at issue. Second, placing the onus on the corporate world could give governments an excuse "to shun their responsibility for designing proper regulation."[349] Third, the resulting antitrust policy would be almost unanimously unpalatable.[350] 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, even more 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.[351] As Schinkel has asserted, "[t]he rare genuine sustainability agreement cannot justify relaxing general competition rules."[352] Even Simon Holmes, who has advocated for radical changes—including TFEU reform—[353] admits that in practice, "very few cases [have] been brought against environmental or sustainability agreements."[354] Moreover, recent studies suggest that the first-mover disadvantage is a rare phenomenon, and its occurrence may have been grossly exaggerated.[355] For example, a follow-up study of the *Chicken of Tomorrow* ACM decision[356] revealed that the benefits of the project had been

347. *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 responsibility to shareholders).

348. Karthik Ramanna, *Friedman at 50: Is It Still the Social Responsibility of Businesses to Increase Profits?*, 62 CAL. MANAG. REV. 28, 29 (2020).

349. Schinkel & Treuren, *supra* note 110, at 6.

350. Ezrachi et al., *supra* note 14, at 54.

351. *See supra* sections II.A.2 and 3.

352. Schinkel & Treuren, *supra* note 110 at 6.

353. Holmes, *supra* note 17, at 405.

354. *Id*. at 402.

355. Schinkel & Treuren, *supra* note 110, at 12–13.

356. *See supra* section II.A.3.

attained without coordination, and instead came with the competitors acting independently.[357]

Although supporters of looser enforcement claim that current policy leaves no room for social considerations, *some* leeway exists for considering the legality of genuinely 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 United States. 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. There is a great risk of benevolent collaborations turning into hardcore collusion, as exemplified *inter alia* by the *Consumer Detergents* investigation.[358] Even Aquinas envisaged important limits to the principle of double effect.[359] It is doubtful that the kinds of arrangements that fall foul of antitrust rules while trying to pursue environmental aims could be justified in light of the limitations Aquinas foresaw. 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."[360]

The recent wave of sustainability guidelines is welcome, given the need for clarity on the potential clash between sustainability and competition objectives. In the European Union, the new Horizontal Cooperation Guidelines reiterate that antitrust will not bend over backward to accommodate certain forms of potentially detrimental cooperation.[361] The European Commission is willing to be receptive to possible sustainability benefits but without treading over red lines.[362] This position is laudable since it is necessary to ensure the effectiveness of the antitrust system. 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 European Union but enjoyed by those far away and possibly in greater need of benefits.[363] This is something that calls for further reflection. Ultimately, one would hope that EU consumers would be prepared to bear 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

357. ACM, Welfare of Today's Chicken and that of the "Chicken of Tomorrow" (Sep. 1, 2020) https://www.acm.nl/en/publications/welfare-todays-chicken-and-chicken-tomorrow.

358. See *supra* section II.A.3.

359. Aquinas, *supra* note 113.

360. Loozen, *supra* note 111.

361. EU Horizontal Cooperation Guidelines.

362. *Id.*

363. *See supra* section II.A.3.

regulation. It is a fundamental tenet of democracy that these matters should be decided by elected officials, not bureaucrats.[364]

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.[365] Direct and indirect benefits 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.[366] Since the adoption of the Green Deal, the European Commission is already prioritizing investigations with environmental implications.[367] Another possibility is that, when punishing a company, a regulator could consider social harm as an aggravating circumstance to increase the severity of the penalties imposed and ultimately make social harm costlier. A complex but helpful approach would be to chisel more elaborate theories of harm that allow enforcers to consider a wider range of externalities in the assessment of conduct and mergers.[368] 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 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. They may require deeper systemic reform. In the European Union, it has been suggested that it might be necessary to rethink the burden of proof to address the difficulties agencies face in their investigations. The onus should be on the companies with market power to justify their harmful

364. This point is made, *inter alia*, by: Ezrachi et al., *supra* note 14, at 54; Loozen, *supra* note 111 (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").

365. *See supra* section II.B.1.

366. Ezrachi et al., *supra* note 14, at 68.

367. *See supra* II.B.3.

368. *See generally* Deutscher & Makris, *supra* note 327; Iacovides & Vrettos, *supra* note 310.

behavior.[369] Nonetheless, this prospect is improbable as it is controversial. At least recent cases, including the Apple state aid saga,[370] suggest that the Court of Justice is willing to accept a realistic standard of proof. More complicated is the issue of the lengthy proceedings that result from the appeals process. It is a consequence of the strong procedural guarantees in place, and therefore it is unlikely to change despite the impossibility of resolving issues requiring an immediate solution. In the United States, the role politics and ideology play in appointing judges can affect the effectiveness of enforcement. This can neither be easily nor steadily fixed. Federal agencies have shown a commitment to revive antitrust. Yet their efforts have not translated into meaningful law reform, so it is unclear whether the "antitrust resurgence" will endure.

CONCLUSION

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 that an overly ambitious policy could be fraught with contradictions. There is also a danger that the debate becomes compromised 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. It is misguided because it is oblivious to the beneficial social impact of healthy markets. And it is unrealistic because practice shows non-economic objectives are often de facto weighed into antitrust decisions—even in efficiency-fixated systems. In the United States, antitrust has been making a comeback both in terms of invigorated enforcement and political salience. Calls for a laxer policy are out of sync with these developments. They overstate the need for flexibility based on purely hypothetical situations and make the mistake of shifting the onus of the protection of the environment from the legislature to the private sector—those who stand to gain the most from weakened law enforcement. The European Union's environmental agenda has put pressure on competition agencies of its Member States 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 EU Horizontal Cooperation Guidelines shows a determination to protect the effectiveness of the Union's competition laws.

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369. *See* Tommaso Valletti, *How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews*, PROMARKET (June 28, 2021) https://www.promarket.org/2021/06/28/tech-block-merger-review-enforcement-regulators/.

370. Case C–465/20 P, Comm'n v. Ireland and Others, ECLI:EU:C:2024:724 (CJ, Sept. 10, 2024).

Antitrust was not designed to save the planet and should not be sacrificed because it cannot achieve a purpose that 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 existing 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.