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Sustainability Agreements in the Land of the Rising Sun: Ippon or Kaeshi-Waza?

Prof. dr. Maarten Pieter Schinkel

Japanese Fair Trade Commission (JFTC), Tokyo, Japan

October 28, 2025

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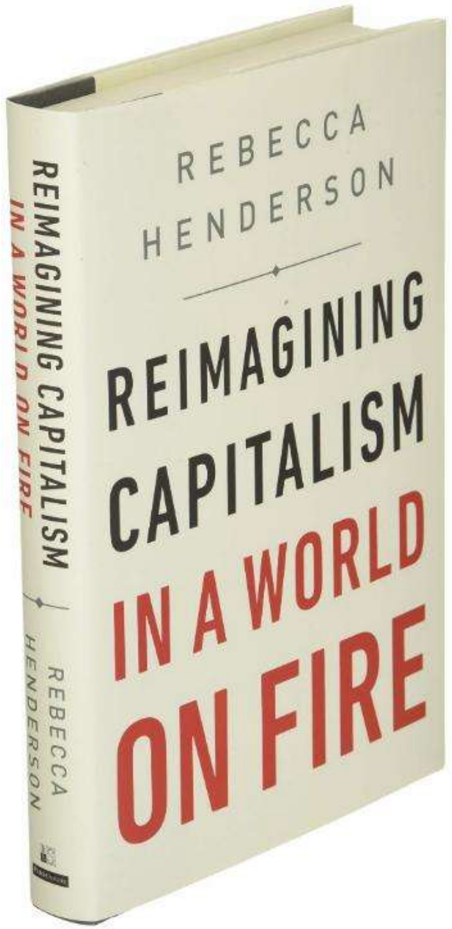

The Collaboration Imperative

New partnership models can protect the environment and create value for everyone.
by Ram Nidumolu, Jib Ellison, John Whalen, and Erin Billman


THE HBR INTERVIEW

Unilever CEO Paul Polman

Captain Planet

PAUL POLMAN isn't afraid to shake things up. Since taking over as CEO of Unilever, in 2009, he has transformed the Anglo-Dutch multinational into one of the world's most innovative corporations. He did away with earnings guidance and quarterly reporting, and tells hedge funds they aren't welcome as investors. And last year he launched an ambitious plan to double revenue by 2020 while halving the company's environmental impact.

If he succeeds, he could be a model for other CEOs. But if Unilever falters, he knows, the critics will call for his head. In this edited interview with HBR editor in chief Adi Ignatius, Polman discusses the challenges of leading a socially driven mission while protecting his company's core.

HBR: What motivated you to launch such an aggressive long-term plan?

How far up and down the supply chain are you willing to look?

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Competition contributing to the European Green Deal

#EUGreenDeal

mlex

No easing of EU competition enforcement to achieve Green Deal, Commission says

10 Sep 2021 | 08:50 GMT | Insight

By Natalie McNelis and Nicholas Hirst

SustainableViews

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Competition Law, Climate Change & Environmental Sustainability

Competition Law, Climate Change & Environmental Sustainability

“ This innovati
provides rich ins
for policymakers
defining the imp
role of competiti
in achieving a m
sustainable econ

Alan Jope, CEO, U

“ This book pr
innovative and fr
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the most pressin
debates in
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competition law.

Marc Van der Wou
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of the EU

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book offers rare
from industry le

ENACTING SYSTEMS CHANGE

Precompetitive Collaboration to Address Persistent Global Problems

BY Naomi Barker, Douglas Ely, Nicholas Galvin, Anya Shapiro, and Adrienne Watts

Policy and Regulation

November 22, 2022

Sustainability debate rattles competition world

By Olivier Holmey

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Net-Zero Banking Alliance

Bank-led, UN-convened

Bank-led and UN-convened, the Net Zero Banking Alliance is a group of leading global banks committed to aligning their lending, investment, and capital markets activities with net-zero greenhouse gas emissions by 2050.

NZBA's framework, guidance, and peer learning opportunities support members to design, set, and achieve credible science-based net zero targets for 2030 or sooner that deliver value for their investors, clients, and customers.

NZBA is the climate accelerator for UNEP FI's Principles for Responsible Banking (PRB) and the sector-specific alliance for banks under the Glasgow Financial Alliance for Net Zero (GFANZ).

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"*Coordinate joint ambition.* Climate alliances also enable businesses to align around a long-term, shared vision of change. (...) Each member is supposed to pledge and develop plans to reach net-zero carbon emissions by 2050. ... [This] mitigates the first-mover disadvantage by enabling members to precompetitively and concurrently engage in cleaner activities.

Because of antitrust concerns, firms are extraordinarily cautious about anything that might be construed as joint action. Some climate alliances nevertheless add value by providing the formal organizational structures, processes, transparency, and governance necessary to enable collective action across firms while remaining compliant with the law. They bind their interactions to specific tasks, simplify and reduce the costs of coordination, and enable actors to develop systemic solutions to fill critical gaps. For example, despite allegations of greenwashing, the Oil and Gas Climate Initiative (OGCI) is a platform through which 12 major oil and gas competitors pool their resources and expertise. By founding and being limited partners in the $1 billion Climate Investment Fund, OGCI members make joint investments as an industry, rather than as individual firms."

Business leaders are under pressure to address the climate crisis, but they can't do so alone. Climate alliances can help leaders and firms be more ambitious, responsible, and effective in driving the systems change necessary to save the planet.

the case for climate alliances

BY MATTEO GASPARINI, KNUT HAANAES, EMILY TEDARDS & PETER TUFANO

Illustration by Caroline Gamon

CITIZENS, GOVERNMENTS, AND BUSINESSES WORLDWIDE ARE FEELING THE GROWING IMPACT OF CLIMATE CHANGE, as the average temperature now hits 1.5 degrees Celsius above preindustrial levels. The pressure is on business leaders to manage the strategic consequences of global warming and to implement their firms' increasingly ambitious climate agendas. While more and more companies are expanding their commitments to fight climate change, 64 percent of people surveyed in 14 major countries believe that firms are falling short of their commitments, according to an Edelman special report.[1] Despite high levels of public trust in businesses, citizens across the globe are skeptical about companies' willingness and ability to fulfill their climate promises.

Business leaders can advance their firms' climate agendas up to a point, but their actions are limited by the broader systems in which they operate. A firm can't decarbonize its supply chain if it can't find the green products it needs on the market, or if its suppliers and distributors aren't keeping pace in decarbonizing. A firm can't justify to its investors the necessary research and development (R&D) expenses to decarbonize its products if consumer demand is uncertain and that firm risks creating a competitive disadvantage if it is the first to take action (i.e., first-mover disadvantage). A firm can't report useful, consistent, and accurate emissions data or set emissions targets without standardized reporting and target-setting frameworks.

Climate change—like other business sustainability challenges—is a systemic problem that demands systemic solutions.[2] Policy makers and regulators play a critical role, but, given the magnitude of the problem, the pace demanded by the science of climate change, the skills and resources required, and the fractured political landscape, business leaders must move decisively.

CLIMATE CONTROL: EXPOSING THE DECARBONIZATION COLLUSION IN ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTING

Interim Staff Report of the

Committee on the Judiciary
U.S. House of Representatives

June 11, 2024

UNSUSTAINABLE AND UNORIGINAL: HOW THE REPUBLICANS BORROWED A BOGUS ANTITRUST THEORY TO PROTECT BIG OIL

Democratic Staff Report
Committee on the Judiciary
U.S. House of Representatives

June 11, 2024

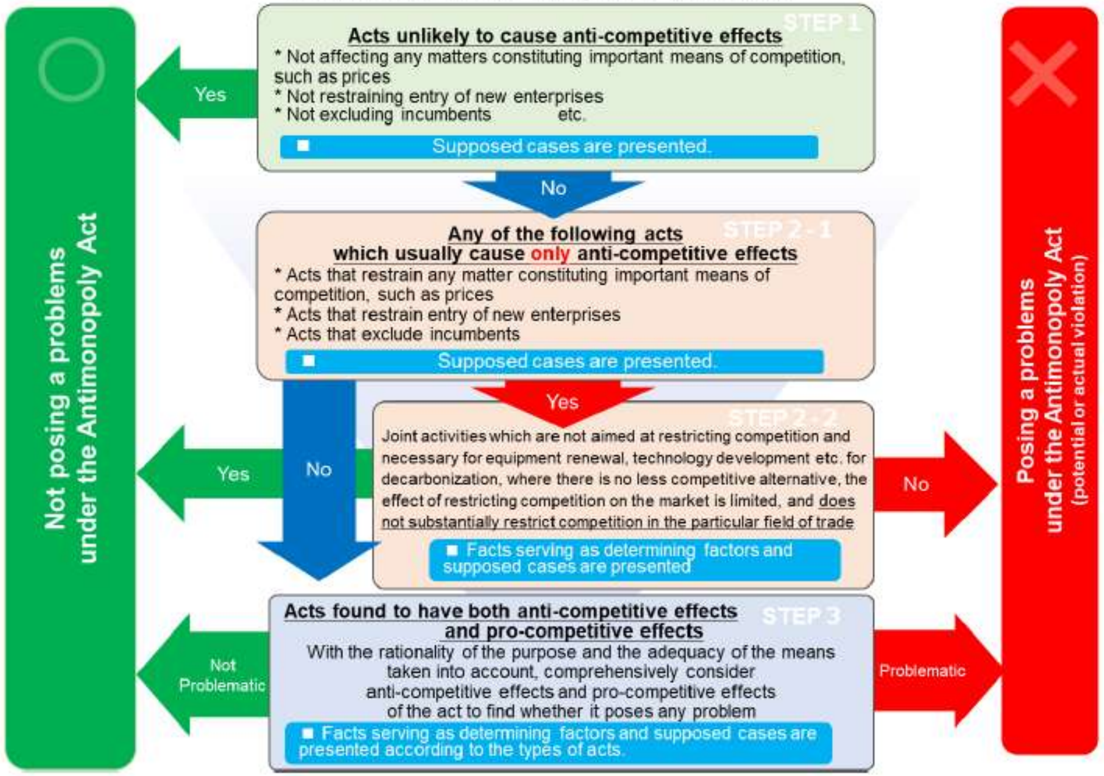
Universiteit van Amsterdam
Amsterdam School of Economics

Tentative Translation

Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act

March 31, 2023
Revised: April 24, 2024
Japan Fair Trade Commission

Joint Activities: Analysis Flowchart



Ippon or Kaeshi-Waza? – Agenda

- The debate on sustainability agreements
- On adding ‘out-of-market-efficiencies’
- Are ‘first mover disadvantages’ real?
- The Japanese ‘Green Society under the Antimonopoly Act’ initiative
- More promising avenues for ‘green antitrust’
- [Encore: Joint Elimination of Low-end Products – ongoing work with Marco Haan, RUG]

‘National Energy Agreement’ (2013)

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Source: Article 101(3) TFEU, *Official Journal*, 9 May 2008

"… allowing consumers a fair share …"

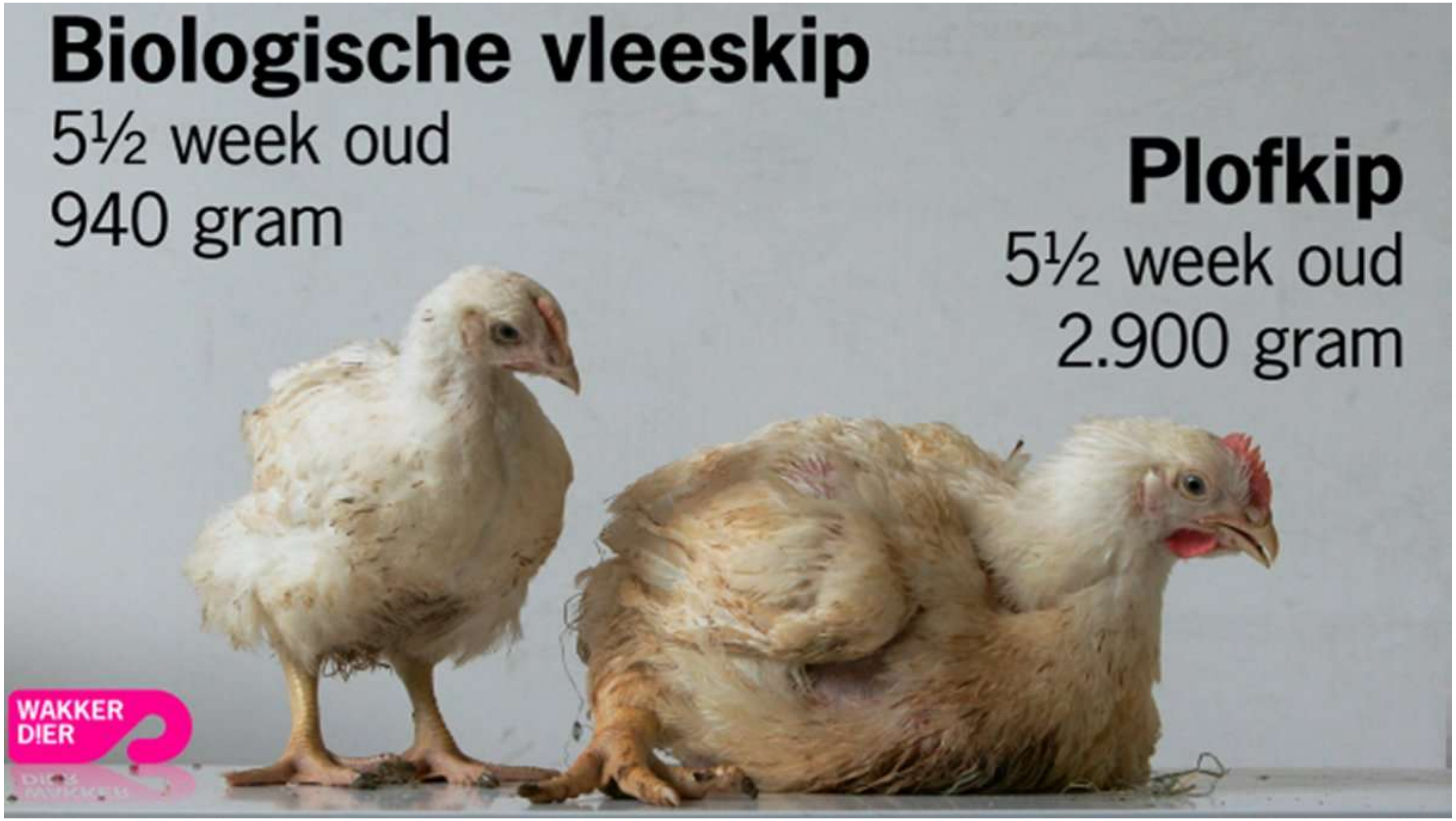
- European Commission (2004), Guidelines on the Application of Article 81(3), recital 87:

"The decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers"

- *Shaw* (2002): "the average" consumer

- 'Fair share' interpreted (as in merger control) as 'at least indifferent'

‘The Chicken of Tomorrow’ (2015)



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Autoriteit
Consument & Markt

Guidelines

Sustainability agreements

Opportunities within competition law

Kansen & keuzes voor bedrijven en consumenten

Second draft: 26 January 2021

48. ACM believes that, with regard to environmental-damage agreements, it should be possible, also in a paragraph 3-assessment, to take into account benefits for others than merely those of the users. In such situations, it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions. Moreover, they enjoy the same benefits as the rest of society. In that context, the agreement must contribute (efficiently) to the compliance with an international or national standard (to which undertakings are not bound) or to a concrete policy objective. One example of a concrete policy objective is the government's policy aimed at reducing CO2 emissions on Dutch soil by year X by Y%.

ACM: Shell and TotalEnergies can collaborate in the storage of CO2 in empty North Sea gas fields

Following an assessment of their plans, the Netherlands Authority for Consumers and Markets (ACM) has decided to allow competitors Shell and TotalEnergies to collaborate in the storage of CO2 in empty natural-gas fields in the North Sea. By transporting CO2 through pipes and storing it in old gas fields, this greenhouse gas will not be released into the atmosphere. This initiative thus helps realize the climate objectives. As cooperation is necessary for getting this initiative off the ground and for realizing the climate benefits, the slight restriction of competition between Shell and TotalEnergies is not that harmful. The benefits for customers of both companies and for society as a whole exceed the negative effects of that restriction.

What is this case about?

Shell and TotalEnergies wish to store CO2 in empty North Sea gas fields on a large scale. This is part of the Aramis project, in which the government, Gasunie and Energie Beheer Nederland work together with Shell and TotalEnergies in order to build a high-capacity trunkline that connects to empty gas fields, among other activities.

Carbon capture and storage helps reduce CO2 emissions of businesses located in the Netherlands that, at the moment, still have few alternatives. Major investments are needed since it concerns a high-capacity trunkline and a new, innovative method. In order to get the project off the ground, Shell and TotalEnergies need to offer the CO2 storage together, and therefore jointly set the price with an eye to putting the first ±20% of the trunkline's capacity into operation. For the remaining 80%, no collective agreements will be made.

alternatives. Major investments are needed since it concerns a high-capacity trunkline and a new, innovative method. In order to get the project off the ground, Shell and TotalEnergies need to offer the CO_2 storage together, and therefore jointly set the price with an eye to putting the first ±20% of the trunkline's capacity into operation. For the remaining 80%, no collective agreements will be made.

realization of the Paris climate agreement. ACM has come to the conclusion that this collaboration is necessary for making this project a success. The benefits for customers and society as a whole exceed the costs of the restriction of competition. In that context, it is important that competition is not restricted for the remaining 80% of transport and storage capacity. That is why, according to ACM, these companies are allowed, under both Dutch and European competition rules, to restrict their mutual competition when selling the first 20% of the transport and storage of CO_2 in their empty gas fields.

Source: ACM Press Release, 27 March 2022

ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles

Soft-drink suppliers, including Coca-Cola, Vrumona, and supermarket chains Albert Heijn and Jumbo, wish to make arrangements regarding the discontinuation of plastic handles on all soft-drink and water multipacks. The Netherlands Authority for Consumers and Markets (ACM) has assessed their plans, and is favorable to the agreement. Soft-drink multipacks consist of, for example, six bottles of soda, wrapped in plastic with a plastic handle on top. By removing the handles on these multipacks, they become more recyclable, and less plastic is needed. With this joint agreement, over 70% of multipacks will no longer have handles.

The agreement helps realize sustainability goals, while not having any negative effects on consumers. In its assessment, ACM applied its draft Guidelines regarding sustainability agreements.

What was ACM's assessment?

In this particular case, several competitors wish to make joint arrangements regarding the discontinuation of plastic handles on their packaging. The suppliers first carried out a self-assessment to see whether their arrangements were compatible with competition rules. Coca-Cola subsequently asked ACM for an opinion. One element of the assessment is to see whether the arrangements negatively affect competition and harm consumers, for example, as a result of higher prices or reduced product quality. That is not the case here.

According to the suppliers, the handles (or the ease thereof) do not play a role in the competitive process. A market study conducted by several of the suppliers did not reveal any other findings either.

In addition, ACM finds it important that the agreement offers participants the opportunity to continue making their own decisions (sustainable or otherwise). For example, each participant decides for themselves when and how they discontinue

Publication date

26-07-2022

Publication type

News

Keywords

Cartels Sustainability Cooperation

Subjects

Competition

Source: ACM Press Release, 26 July 2022

Green Antitrust: Friendly Fire in the Fight Against Climate Change

Maarten Pieter Schinkel* and Leonard Treuren**
University of Amsterdam

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices… But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776), Book I, Chapter 10.

I. Introduction

The urgency of the climate crisis and the apparent failure of many governments to meet the Paris Agreement objectives have led inspired competition law scholars to push for "green antitrust policy".[1] The idea behind this movement is to revise the competition rules, as far as they may stand in the way of companies

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** PhD candidate, University of Amsterdam: l.m.treuren@uva.nl. He works in industrial organisation, with a focus on competition policy, in particular investigating product and labour market effects of cartels and mergers.
Parts of this paper were previously published in Dutch as one of the KVS Preadviezen titled "Beter geen mededingingsbeperkingen voor duurzaamheid." In MA Haan and MP Schinkel (eds), KVS Preadviezen 2020 Mededingingsbeleid (Koninklijke Vereniging voor de Staathuishoudkunde 2020).

1 See Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009); Suzanne Kingston, *Greening EU Competition Law and Policy* (CUP 2011); Giorgio Monti, "Four options for a greener competition law" (2020) 11(3) – (4) JECL & Pract.

Updated version available on SSRN, as: "Green Antitrust: (More) Friendly Fire in the Fight against Climate Change"

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PROMARKET

THE PUBLICATION OF THE STIGLER CENTER
AT THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS

MAARTEN PIETER SCHINKEL, LEONARD TREUREN

Green Antitrust: Why Would Restricting Competition Induce Sustainability Efforts?

COMMENTARY

Senator Klobucha
Far Enough

ERIC A. POSNER

Senator Klobuch
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RESEARCH

Why We Need to S

Key Premise behind ‘Green Antitrust’

- Competition and sustainability can be in conflict – Public Economics 1.01

- **Restrictions of competition will stimulate sustainability initiatives**
    - Exemption of horizontal agreements under Article 101(3) TFEU – unfortunately
    - N.B. 1 This is **not** about output restriction – ‘cartel taxation’
    - N.B. 2 This is **not** about R&D – but green transition investments

- **But should we expect companies to take more corporate social responsibility (CSR) in cooperation than in competition?**

- If so, under what conditions? – ‘first mover disadvantage’ (Commission’s HG, 2023)

- Focus narrowed down to sustainability: fighting climate change – CO2-reductions

566. There may be other instances where, due to negative externalities or other market failures, sustainability benefits cannot be achieved through the free interplay of market forces, or can be achieved more cost-efficiently through cooperation between undertakings. For example, a sustainability agreement may be necessary - in an initial phase - to avoid free-riding on the investments required to promote a sustainable product and to provide information to consumers (overcoming the so-called 'first mover disadvantage')([397]).

([397]) For instance, this could happen where a company invests in marketing a sustainable product to ensure consumers are aware of the quality of the new product. If competitors then also start producing sustainable versions of their own products, for which consumer demand has already been established, these competitors do not have to incur the costs linked to the initial launch of the sustainable product and can free-ride on the investments made by the first company to launch the sustainable product.

Source: Horizontal Guidelines, 21 July 2023

CSR and joint agreements

- Baron (2001), McWilliams and Siegel (2001) – strategic CSR
- Bénabou and Tirole (2010), Hart and Zingales (2017) – intrinsic CSR incentives
- Flammer (2015a), Aghion *et al* (2020) – competition, empirics
- Lyon and Maxwell (2004), Ahmed and Segerson (2011) – voluntary collaboration

- Schinkel and Spiegel (2017); Schinkel and Treuren (2021); Schinkel, Spiegel and Treuren (2022)
- Semi-collusion model – Fershtman and Gandal (1994)
- Consumers have a willingness to pay for CSR efforts – e.g. Delmas and Colgan (2018)
- A higher CSR-profile is a form of ‘product quality improvement’

Journal of Environmental Economics and Management 123 (2024) 102897

Contents lists available at ScienceDirect

Journal of Environmental Economics and Management

journal homepage: www.elsevier.com/locate/jeem

Corporate social responsibility by joint agreement[☆]

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ARTICLE INFO

JEL classification:
K21
L13
L40
Q01

Keywords:
CSR
Collaboration
Voluntary agreement
Cartel
Antitrust
Externalities
Regulation

ABSTRACT

Industry-wide voluntary agreements are touted as a means for corporations to take more corporate social responsibility (CSR). We study what type of joint CSR agreement induces competitors to increase CSR efforts in a model of oligopolistic competition with differentiated products. Consumers have a higher willingness to pay for more responsibly produced goods and services. Firms are driven by profit, and are also possibly intrinsically motivated, to invest in CSR. We find that cooperative agreements directly on the level of CSR *reduce* CSR efforts compared to competition. Such agreements throttle both for-profit and intrinsic motivation for CSR. CSR efforts only increase if agreements are permitted *solely* on output. Such production agreements, however, reduce total welfare in the market and raise antitrust concerns. Taking externalities into account may help justify a production agreement under a broader welfare standard, but not agreements on CSR directly. Simply setting a higher mandatory CSR standard by regulation while preserving competition always gives higher within-market welfare.

1. Introduction

There is a surging call for corporations to step in where governments fail and to take responsibility for pressing social objectives such as diverting climate change, assuring fair trade that respects human rights and animal welfare, or promoting public health. A prominent contemporary idea is that, in light of the enormity of the transition and the costs that come with it, agreements amongst competitors are needed to induce impactful corporate social responsibility (CSR) efforts. If companies that pioneer social responsibility risk losing business and not covering costs, none may dare to initiate CSR in competition. Private coordination may also be a solution where public authorities do not provide the orchestration required for the provision of common goods — for lack of legal instruments, for example, or political power. Nidumolu et al. (2014) claim that business collaboration is imperative to advancing sustainability. Kotchen and Segerson (2019) advocate voluntary collective agreements to solve commons problems in natural resource sectors such as forestry and fishery. Henderson (2020) calls for "industry-wide cooperation", and Polman and Winston (2021) tout "pre-competitive collaboration" to stop environmental degradation and economic inequality.

What type of collaboration promotes CSR?

- Two-stages: Stage 1. CSR efforts/investments (v); Stage 2. quantities (q)
- One-shot: contractable; symmetric equilibria
- Constant marginal costs of production (c); fixed transitioning cost (t)
- n-firms, any net WTP (δ), intrinsic motivation (I) – image/goodwill
- Four possible regimes:
  - competition (*);
  - CSR agreement (*csr*);
  - production agreement (p);
  - full agreement (f)

Reduces sustainability for any (net) willingness to pay

$$\pi_i^\delta(\mathbf{q}, v_i) = \Bigg(\overbrace{\alpha + \delta v_i - q_i - \gamma \sum_{i \neq j}^{n} q_j}^{\text{price firm } i \text{ (inverse demand)}} - c\Bigg) q_i - \frac{t v_i^2}{2}$$

Proposition 3. $v_\delta^p > v_\delta^* > v_\delta^f > v_\delta^{csr}$ for all $\delta > 0$.

Intrinsic motivation

$$\pi_i(\mathbf{q}, v_i) = \overbrace{\left(\alpha + v_i - q_i - \gamma \sum_{i \neq j}^{n} q_j - c\right)}^{\text{price firm } i \text{ (inverse demand)}} q_i - \frac{t v_i^2}{2} + \theta v_i,$$

Proposition 5. $v_I^p > v_I^* > v_I^f > v_I^{csr}$ for all $\theta > 0$.

Proposition 6. $\frac{\partial(v_I^p - v_I^*)}{\partial\theta} > 0$, $\frac{\partial(v_I^* - v_I^f)}{\partial\theta} > 0$, and $\frac{\partial(v_I^f - v_I^{csr})}{\partial\theta} > 0$ for all $\theta > 0$.

Policy paradox – sustainability agreements deliver *less* green

- CSR is a dimension of competition in Stage 1 – business-stealing
- It is costly to produce more responsibly, but it attracts customers
- Coordination eliminates this competitive drive: saving the firms the investments

- **Findings in stark contrast with the policy – seeks to allow sustainability agreements only**
- Only production agreements increase CSR efforts: competing with better product for the higher rents
- Yet those harm consumers
- There is no surplus wealth to compensate consumers with

‘Green Antitrust’ risks to be counter-productive

- Risk 1: **Cartel greenwashing** – minimal green for maximum price increase – *Coal* (2013)
  - CA would need to constantly monitor a green collaboration
  - With prohibitively large information requirements – ‘mission creep’, Tirole (2022)

- Risk 2: Green antitrust providing **further excuse for continued government failure** – *Chicken* (2015)
  - Allows government to shift responsibility to collaborative self-regulation
  - Whereas public policy is easily superior (vertical) – regulation, taxes, subsidies, Vickers (2024)

Opinion
Cop26

The Cop26 message? We are trusting big business, not states, to fix the climate crisis

Adam Tooze

Tue 16 Nov 2021 08.00 GMT

439

The summit exposed a world looking beyond a broken neoliberal model

Adam Tooze is a professor of history at Columbia University

On adding 'out-of-market-efficiencies'

- Introduces redistribution of wealth: from consumers to non-consumers – poor to rich?
- Hugely increases information requirements CA – preferences of all citizens
- *Reduces* level of sustainability required to compensate for a given price increase
- Weakens bargaining position of CA for green
- Consumer welfare standard serving total welfare – Farrell & Katz (2006), Armstrong & Vickers (2010)
- Recall: sustainability agreements are likely ineffective

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21.7.2023 EN Official Journal of the European Union C 259/1

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

(2023/C 259/01)

‘Fair share’ has to be fully compensating

9.4.3. *Pass-on to consumers*

569. The second condition of Article 101(3) requires that consumers receive a fair share of the claimed benefits. The concept of ‘consumers’ encompasses all direct and indirect customers of the products covered by the agreement ([399]). Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral ([400]). Therefore, the sustainability benefits that result from an agreement must accrue to the consumers of the products covered by that agreement.

Source: Horizontal Guidelines, 21 July 2023

Policy rule ACM's oversight on sustainability agreements

The Netherlands Authority for Consumers and Markets (ACM) has drawn up new rules on sustainability agreements between businesses.

ACM does not want competition rules to stand in the way of agreements that contribute towards a more sustainable society. This policy rule is in line with recently revised European rules, and replaces previous draft guidelines of ACM on sustainability agreements between businesses.

The policy rule follows the approach to sustainability agreements that the European Commission explains in its Guidelines regarding horizontal cooperation agreements. The policy rule also explains that ACM will not take enforcement action in two additional situations if all conditions are met. This provides businesses with more opportunities to collaborate.

Documents

Informal translation Policy Rule ACM oversight on sustainability agreements (PDF - 303.27 KB)

+ About document accessibility

Publication date

04-10-2023

Publication type

Regulations

Spokesperson

Murco Mijnlieff

Keywords

Cartels Sustainability Cooperation

Subjects

Competition

Green Agreements Guidance:

Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

CMA 185

12 October 2023

CMA
Competition & Markets Authority

6.4 The CMA therefore considers it appropriate, in the case of climate change agreements, to depart from the general approach and exempt such agreements if the 'fair share to consumers' condition can be satisfied taking into account the totality of the climate change benefits to all UK consumers arising from the agreement, rather than apportioning those climate change benefits between consumers within the market affected by the agreement and those in other markets. The CMA considers that the full climate change benefits to all UK consumers should be, exceptionally, taken into account because of the exceptional nature of the harms posed by climate change (and

"[C]ompanies sometimes claim that their ESG [environment, social, and governance] or DEI [diversity, equity, and inclusion] commitments can cure an otherwise illegal merger. I believe it is paramount in these instances to remind them that there is no ESG exemption to the antitrust laws."

Lina Khan's testimony to the U.S. Senate Committee on the Judiciary, Hearing on September 20, 2022.

WSJ | OPINION

OPINION COMMENTARY Follow

ESG Won't Stop the FTC

Our job is to prevent illegal mergers, not to make the world a better place.

By Lina Khan
Dec. 21, 2022 5:10 pm ET

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Companies can get creative when they want to fend off a government challenge to an illegal merger. As chair of the Federal Trade Commission, I've heard would-be merging parties make all sorts of commitments to be better corporate citizens if only we would back off from a lawsuit. If only we hold off on suing to block the merger, they promise they will reduce their carbon footprints, give back to the community and so on. These commitments sometimes fall under the heading of ESG, for environmental, social and corporate governance factors. Some in corporate America seem to think that the FTC won't challenge an otherwise illegal deal if we approve of its ESG impact.

They are mistaken. The antitrust laws don't permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit. The laws we enforce are explicit: They prohibit mergers that "may substantially lessen competition or tend to create a monopoly." They don't ask us to pick between good and bad monopolies. Our statutory mandate is to halt a lessening of competition "in any line of commerce." So we can't act as deal makers,

THE WALL STREET JOURNAL.

News

ESG initiatives: no defense under U.S. antitrust laws

23 September 2022

On 20 September 2022, the US Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights held a hearing on "Oversight of Federal Enforcement of the Antitrust Laws."1 Senators from both parties questioned the heads of the U.S. antitrust agencies—Chair Lina Khan of the U.S. Federal Trade Commission (FTC) and Jonathan Kanter, Assistant Attorney General (AAG) of the Antitrust Division of the U.S. Department of Justice (DOJ)—on a wide range of topics. During the hearing, both Chair Khan and AAG Kanter made important statements in response to questioning about the antitrust implications of environmental, social, and governance (ESG) initiatives.

Are ‘First mover disadvantages’ real?

- What would those FMDs be?
  1. **A hurdle** that no firm takes in competition – individual firm would benefit too little;
  2. Resulting in a competitive stand-off **that collaboration would help overcome**

- We already know that it must be more than: little WTP, well-intending CEO, stake-holder interests, existential threat, altruism. So what can it be?

- Spill-over effects – ‘efforts by one firm that (also) benefit other firms’
- Why would the initiator company not itself benefit enough? – very case-specific
- Why should we expect a coalition to form for these public goods? – back at freeriding

‘First mover disadvantages’ – spill-overs

$$\pi_i^{\delta}(\mathbf{q}, v_i) = \Bigg(\overbrace{\alpha + \delta v_i + \sum_{i \neq j}^{n} s_j v_j - q_i - \gamma \sum_{i \neq j}^{n} q_j - c}^{\text{price firm } i \text{ (inverse demand)}}\Bigg) q_i - \frac{t v_i^2}{2}$$

- Truly substantial spill-overs may change the efforts order:
- Schinkel and Spiegel (2017) duopoly: $v^{sc} > v^* \text{ if } s > \frac{\gamma}{2}$ N.B. higher for closer substitutes
- Condition appears to be independent of *n* in *n* > 2 extension

‘First mover disadvantages’ – two conditions

- What would those FMDs be?
  1. **A hurdle** that no firm takes in competition – individual firm would benefit too little;
  2. Resulting in a competitive stand-off **that collaboration would help overcome**

- We already know that it must be more than: little WTP, well-intending CEO, stake-holder interests, existential threat, altruism

- Spill-over effects – ‘efforts by one firm that (also) benefit other firms’
- Why would the initiator company not itself benefit enough? – very case-specific
- Why should we expect a coalition to form for these public goods? – back at freeriding

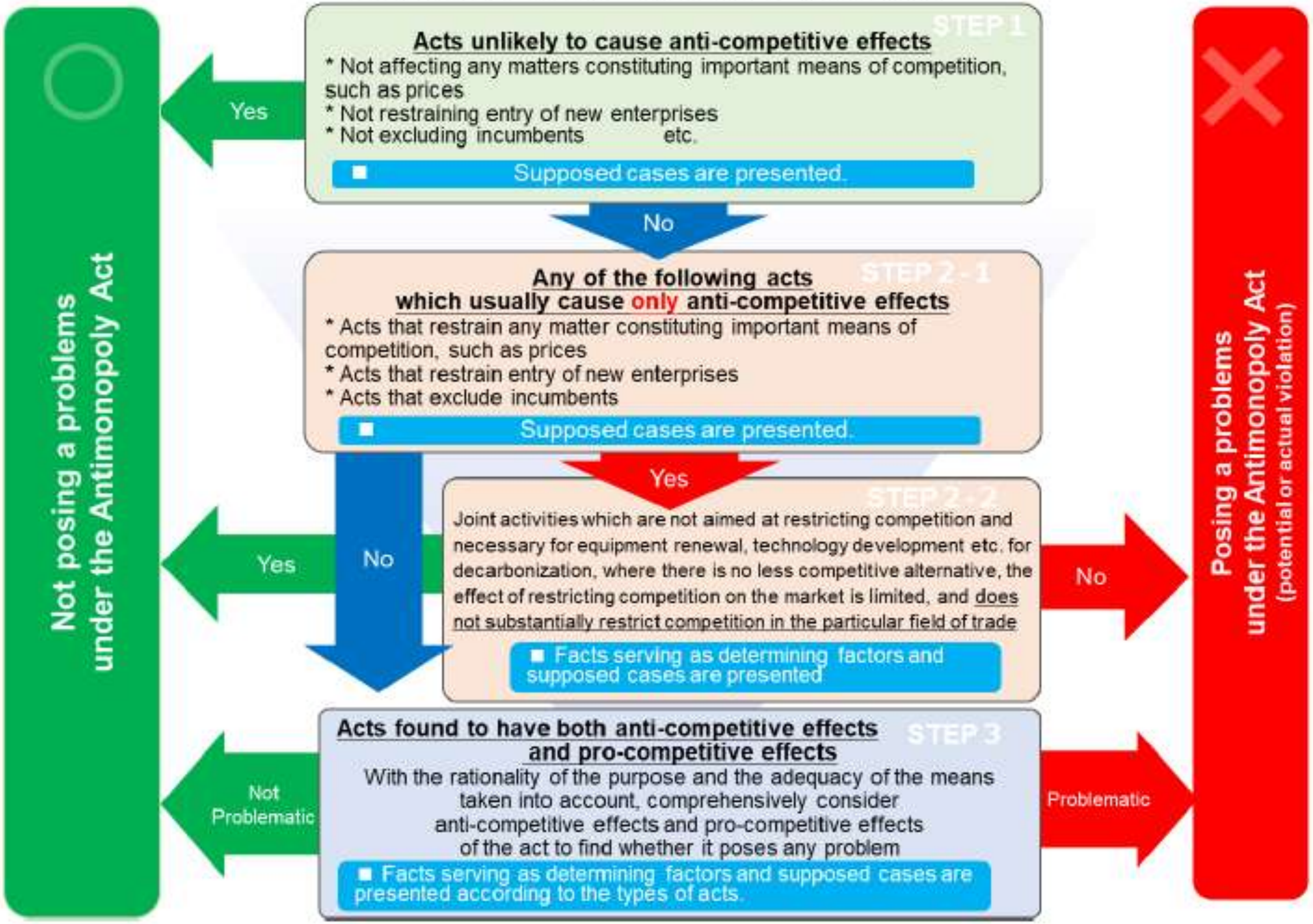
The Japanese ‘Green Society under the Antimonopoly Act’ initiative

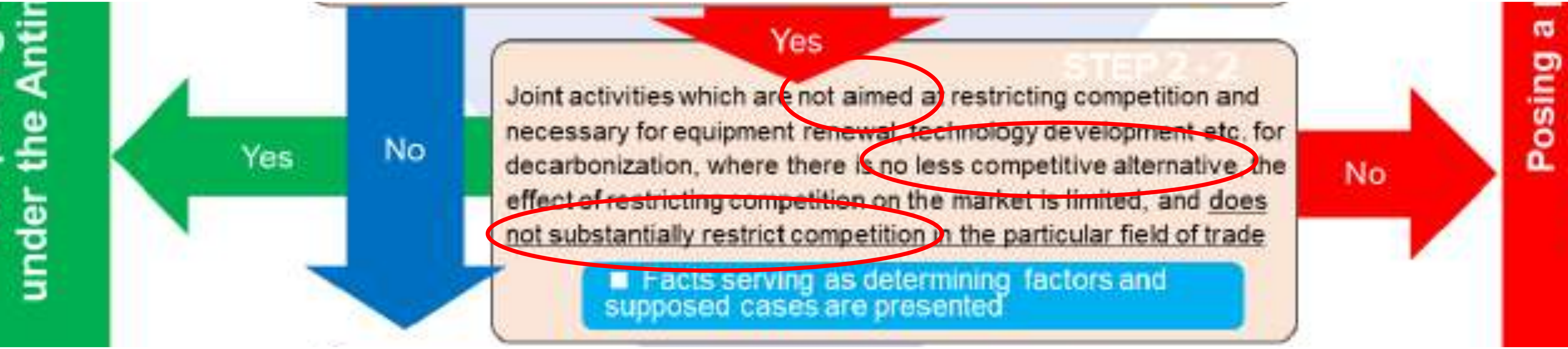
- The Antimonopoly Act has a wide ‘public interest’ obligation
- Japan has a history of viewing cooperation favourably – Uesugi (2005), Takigawa (2009)
- Few actual exceptions – *Oil Price* (1984), *Toshiba Elevator* (1993), *Toy Gun* (1997)
- Yet informal enforcement – undisclosed cases, low fines
- Also after the 1974 revision, MITI and JFTC diverge – Matsushita (1978), First (1995)
- JFTC’s *Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act*, April 24, 2024

Some observations on the JFTC's 'Green Society' Guidelines

- Focus in "excellent products" – i.e., consumer benefits; footnote 4
- 'Green' is not explicitly recognized as a dimension of competition, or 'collective benefits'
- A lot of trust is put in firms' intensions – "joint activities which are *not aimed at* restricting competition …"
- No concrete structure is offered for:
  - assessing what is "limited" or "less restrictive" of competition – than an agreement
  - balancing "anti-competitive" and "pro-competitive" effects – US-style
- The guidelines leave the JFTC a lot of discretion – ippon or kaeshi-waza?

Joint Activities: Analysis Flowchart




Yes
Yes
No
STEP 2-2
Joint activities which are not aimed at restricting competition and necessary for equipment renewal, technology development etc, for decarbonization, where there is no less competitive alternative, the effect of restricting competition on the market is limited, and does not substantially restrict competition in the particular field of trade
■ Facts serving as determining factors and supposed cases are presented
No

Some observations on the JFTC's 'Green Society' Guidelines

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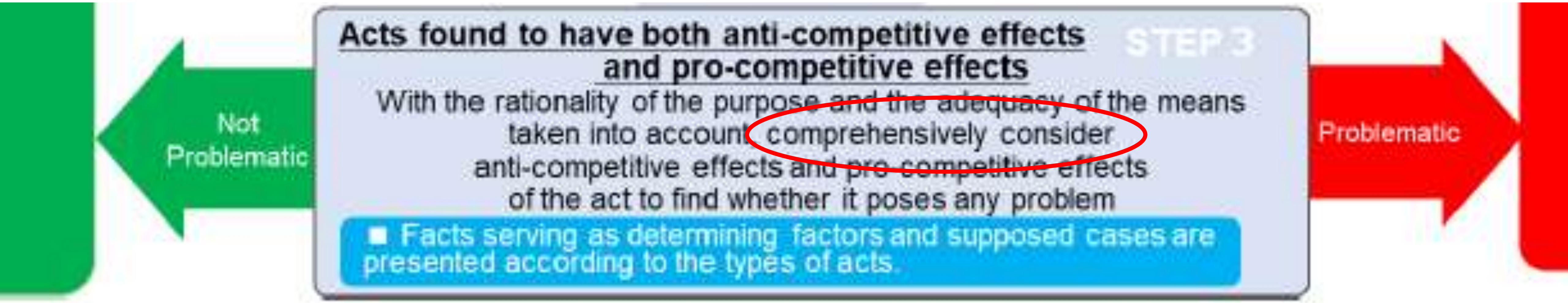
Acts found to have both anti-competitive effects and pro-competitive effects
STEP 3
With the rationality of the purpose and the adequacy of the means taken into account, comprehensively consider anti-competitive effects and pro-competitive effects of the act to find whether it poses any problem
■ Facts serving as determining factors and supposed cases are presented according to the types of acts.
Not Problematic
Problematic

Some observations on the JFTC's 'Green Society' Guidelines

- Focus in "excellent products" – i.e., consumer benefits, footnote 4
- 'Green' is not explicitly recognized as a dimension of competition, or 'collective benefits'
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Concluding on sustainability agreements

- Considering a ‘sustainability defense’ for a cartel exemption, CA is to ask critically:
  1. Is there a real reason for the sector to be stuck in a grey competitive equilibrium? – a FMD?
  2. Will an anticompetitive agreement get the sector unstuck and move to a greener equilibrium? – are the benefits ‘cartel-specific’?
  3. Is the agreement required to keep the sector in that greener equilibrium? – temporary?
- Competition authorities best stay reserved and ‘tough’ – demand full consumer compensation
- The wider the benefits that are taken into account, the thinner the green coating becomes
- Develop the indispensability requirement – what “less restrictive means” will be considered?
- The debate is badly off – better focus on polluting cartels, mergers and abuses

Sustainability in merger control

- Green efficiency defence
- Failing grey firm defence

- Reduced R&D in green transition
- Green killer acquisitions

In this context, there is demand from some stakeholders for the Commission to consider a longer time horizon and overall benefits to society when looking at whether the conditions for efficiencies are met. So far, there have been no cases in which the Commission has accepted this type of out-of-market efficiencies. In accordance with the *Mastercard* case law[35], when efficiencies do not arise in the affected market, the Commission may take them into account only if the benefits cover substantially the same customers otherwise harmed by the merger.

European Commission

Competition *merger brief*

Issue 2/2023 – September

This issue focuses on sustainability related aspects in EU merger control:

Page 1	***EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future*** This paper presents the European Commission's approach to sustainability in EU merger control and explains how the current legal framework and case practice can and do support the European Green Deal.
Page 7	***Norsk Hydro / Alumetal and KPS Capital Partners / Real Alloy: "Greening" Aluminium***

Competition merger briefs are

Merging for efficiencies - but only within the affected market

The Commission states that it is prepared to take social and environmental benefits into account when assessing mergers. Benefits may arise, for example, from a reduction of waste in production or the use of fewer raw materials. Efficiencies may also lead to the development of green(er) technologies. In line with the Horizontal Merger Guidelines, the Commission will accept as merger efficiencies those that benefit consumers, are merger-specific and verifiable.

Those following the ESG debate in antitrust (regarding the pitfalls of competitor cooperation) know that this gives rise to a crucial question: Does this mean that out-of-market efficiencies will be recognized? And they also know the answer: A resounding (and disappointing) "no".

Contacts

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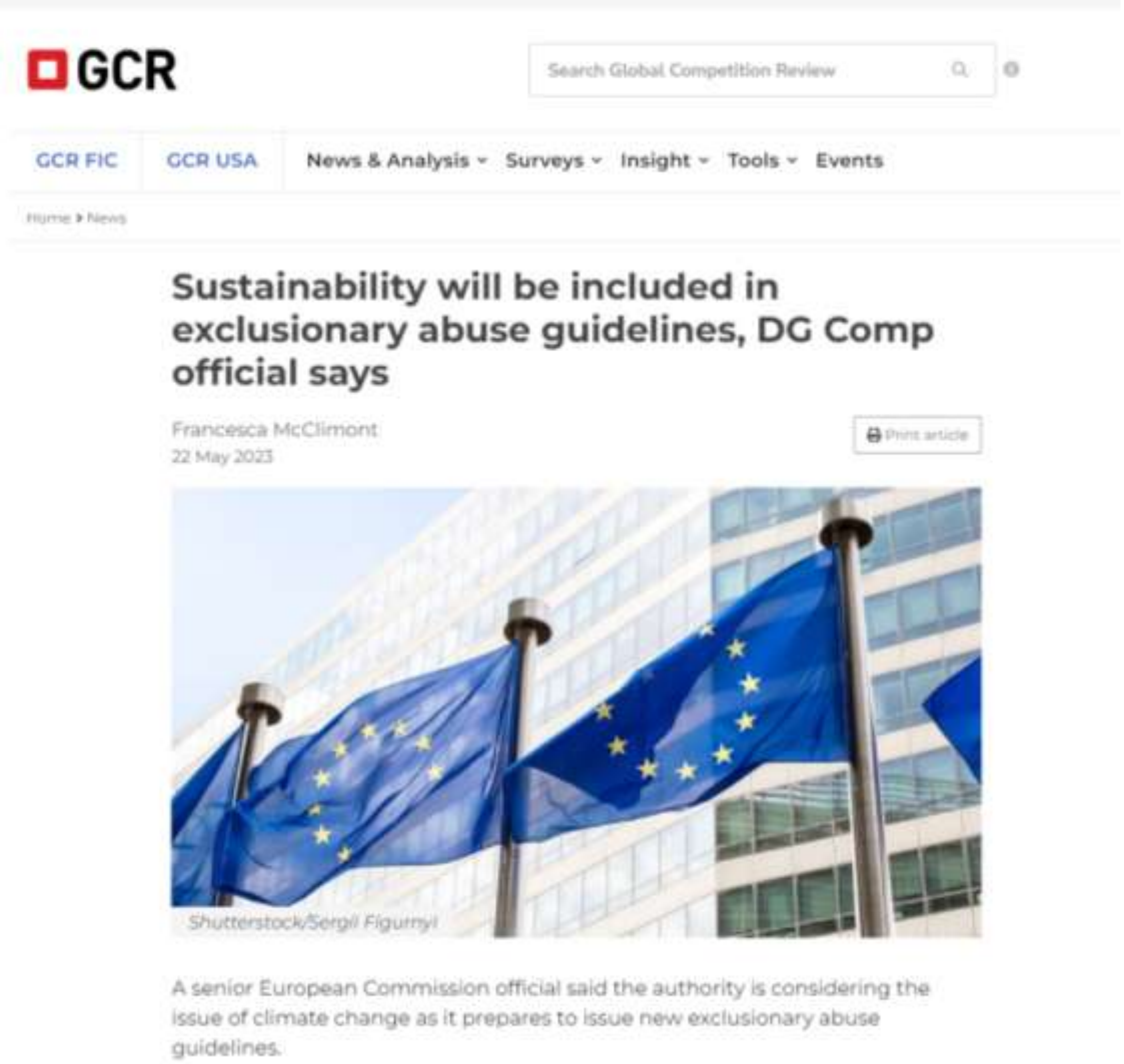
From time to time, the Commission summarizes old and new thinking in its Competition Merger

Dirty abuses of dominance – Article 102 TFEU

- Exploitative abuses: harm from unsustainable business practices that the dominant position allowed to remain
- Exclusionary abuses: keeping or pushing greener (potential) entrants or rivals out



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Sustainability will be included in exclusionary abuse guidelines, DG Comp official says

Francesca McClimont
22 May 2023

Shutterstock/Sergii Figurnyi

A senior European Commission official said the authority is considering the issue of climate change as it prepares to issue new exclusionary abuse guidelines.

Private actions for reparation of environmental cartel damages

Colluding Against Environmental Regulation

Jorge Alé-Chilet   Cuicui Chen   Jing Li   Mathias Reynaert *

Keywords: collusion, regulation, pollution, automobile market, noncompliance

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sciencesconf.org:afed2023:484457

A Green Switch in Time Saves Nine - Assessing the Environmental Damage of the European Truck Cartel

Patrice Bougette [1], Christophe Charlier [2], Ilona Dielen [2,*]

1 : Université Côte d'Azur, CNRS, GREDEG

Joint Elimination of Low-end Products – with Marco Haan, RUG

FINANCIAL TIMES

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UK retail industry + Add to myFT

UK supermarkets in talks about joining forces for Fairtrade products

Bananas, coffee and cocoa could be collectively bought after competition watchdog indicated it would not challenge the scheme

Save

COMMISSION

COMMISSION DECISION

of 24 January 1999

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(Case IV.F.1/36.718. CECED)

(notified under document number C(1999) 5064)

(Only the English text is authentic)

(Text with EEA relevance)

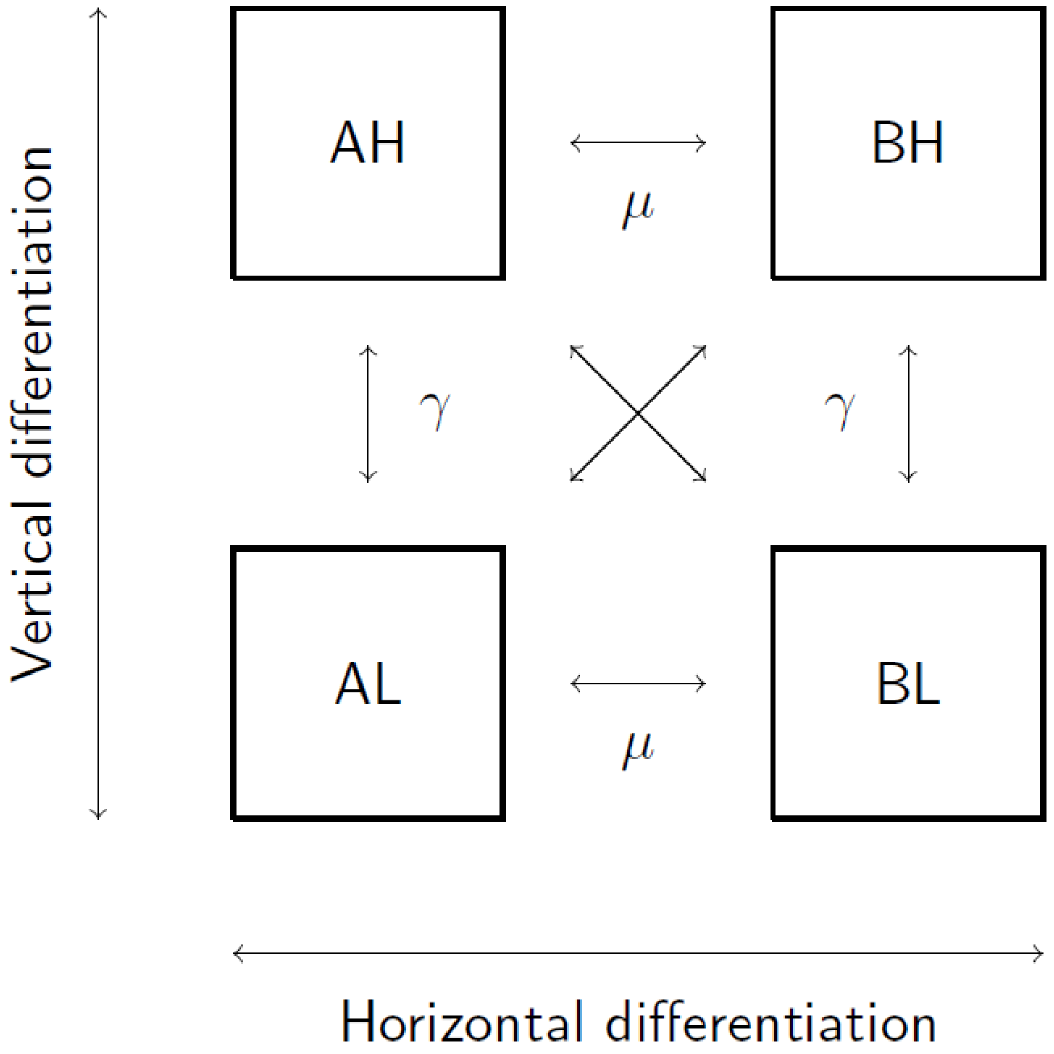
(2000/475/EC)

European truckmakers to phase out diesel sales decade earlier than planned

Heads of seven businesses sign joint pledge to ditch traditional combustion engines by 2040

An alliance of European truckmakers — Daimler, Scania, Man, Volvo, Daf, Iveco and Ford — plan to focus on hydrogen, battery

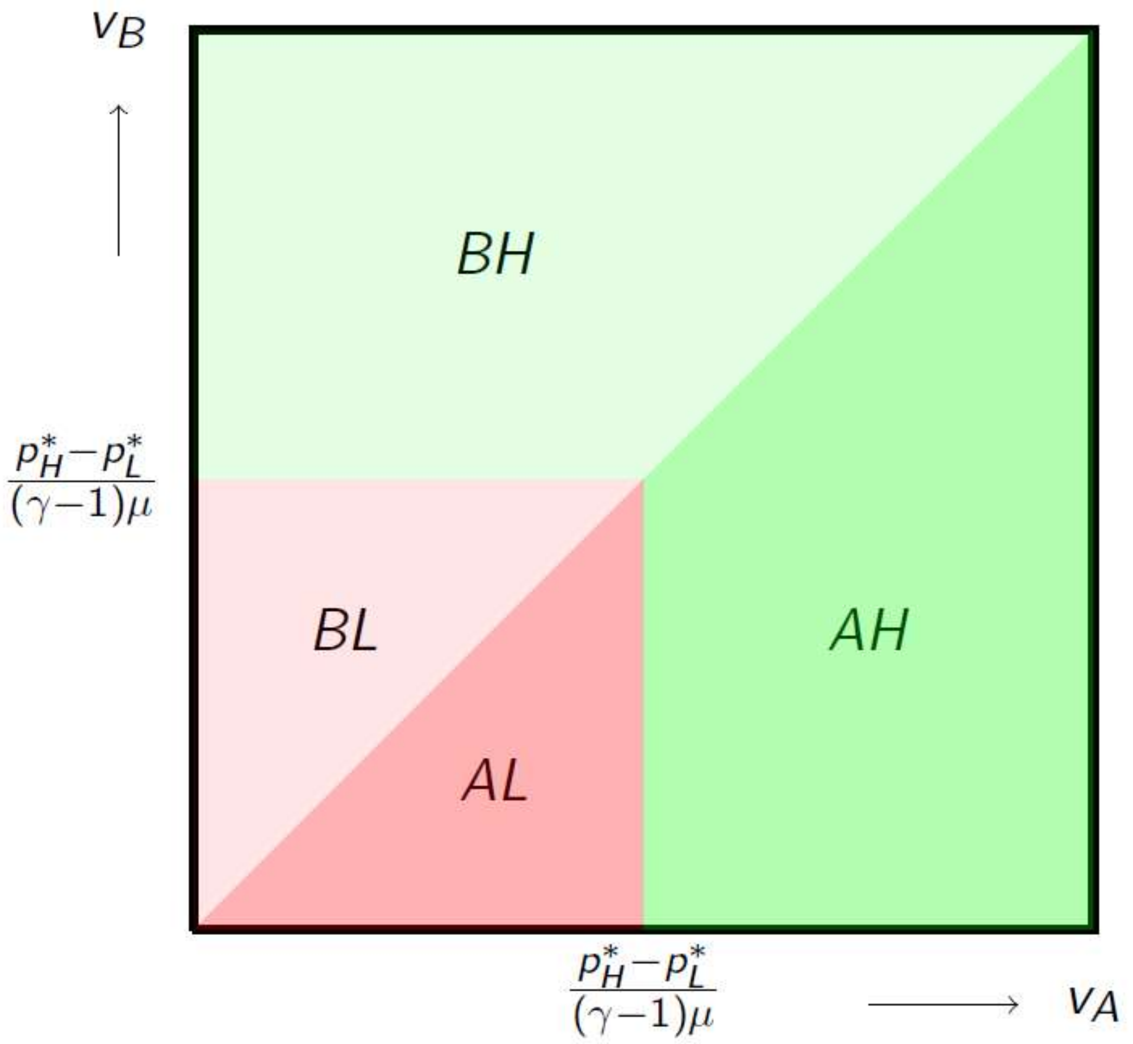
The Model


AH
BH
AL
BL
μ
μ
γ
γ
Vertical differentiation
Horizontal differentiation

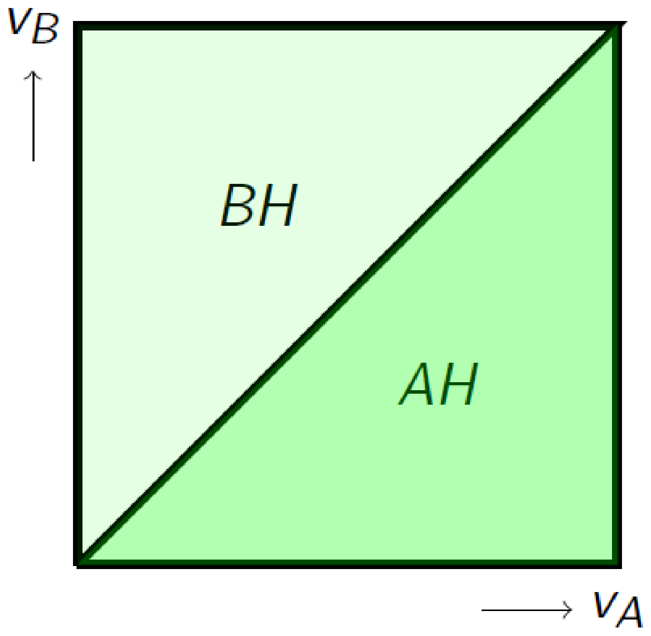
The Model

- Two firms: A and B.
- Each firm sells two products: high end H and low end L.
- Marginal costs: for L: 0. For H: c.
- Consumers differ in their willingness-to-pay for each product.
- Valuation low-end product: $U_{iL} = v + \mu v_i$, $v_i \sim U[0,1]$.
- μ reflects the extent of horizontal product differentiation.
- Perloff-Salop.
- Valuation for the high-end product: $U_{iH} = v + \gamma \cdot \mu v_i$.
- $\gamma > 1$ reflects the extent of vertical product differentiation.
- So we combine horizontal and vertical product differentiation.
- For now: v is large enough to have a covered market.

In equilibrium, firms charge p_L^* for L and p_H^* for H.



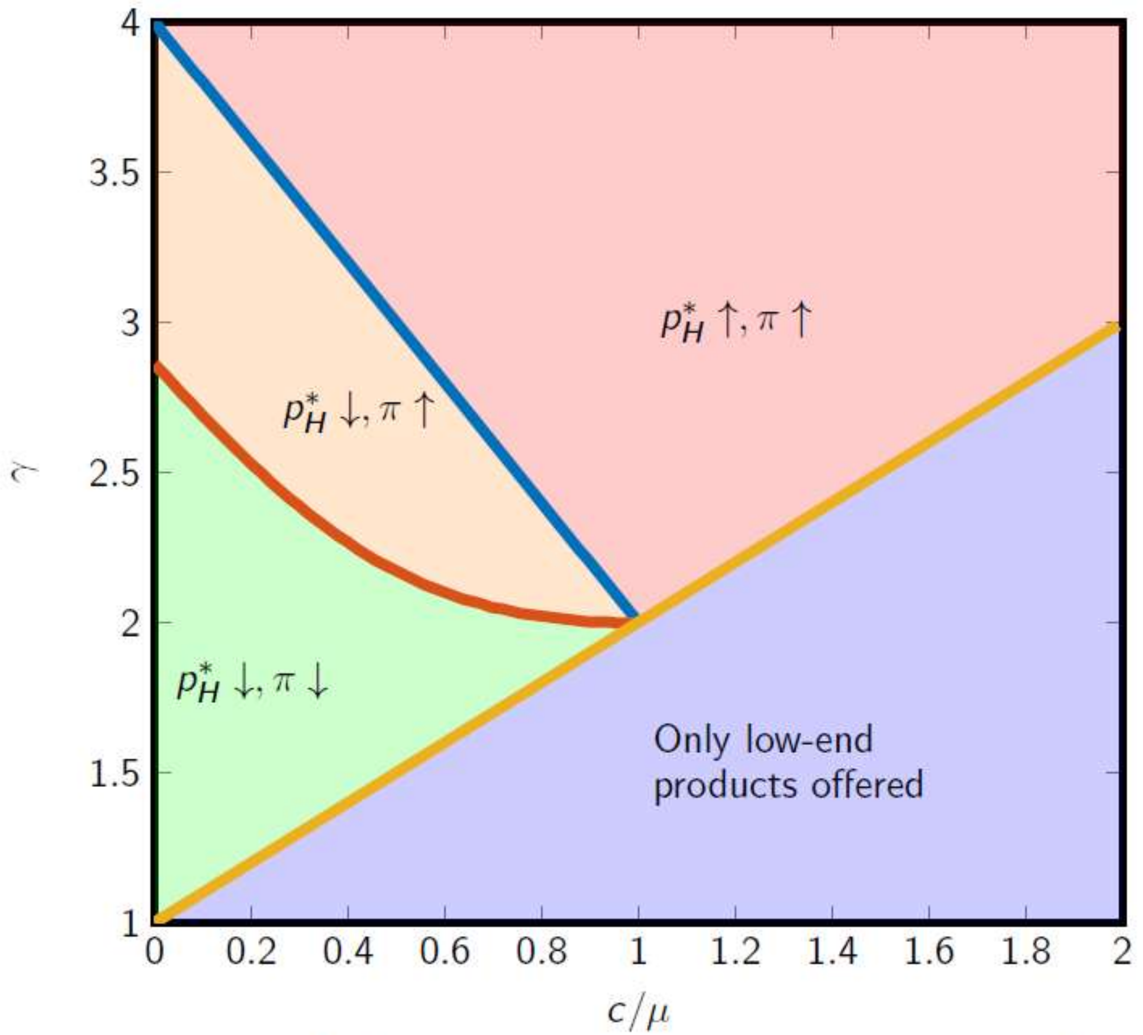
What if firms agree to eliminate the low-end product?



Two effects:

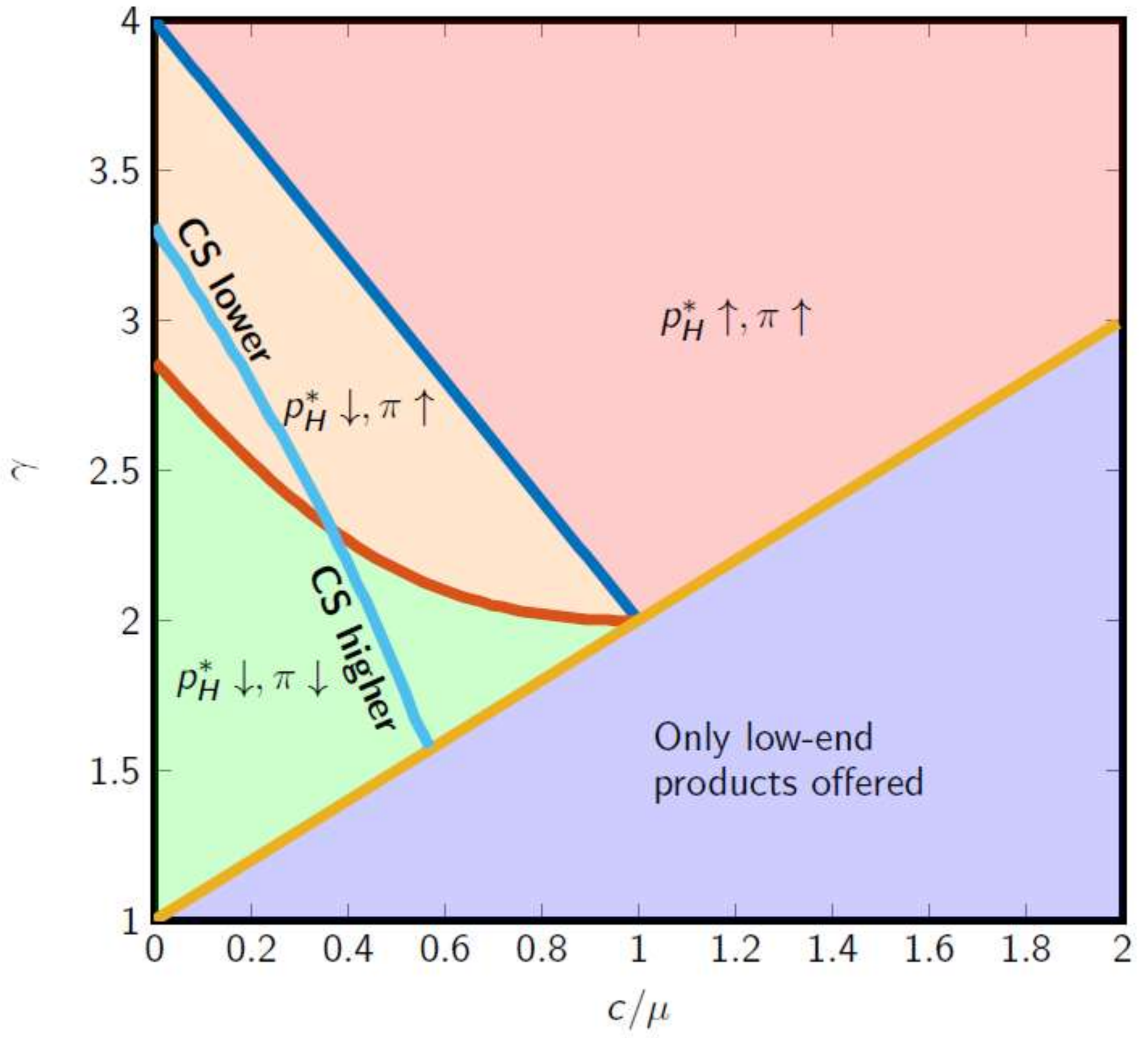
1. **Price discrimination effect.** Firms can no longer price discriminate — decreases profits.
2. **Competition softening effect.** Competition is less fierce as consumers are more heterogeneous — increases profits.

The net effect of joint elimination of low-end products

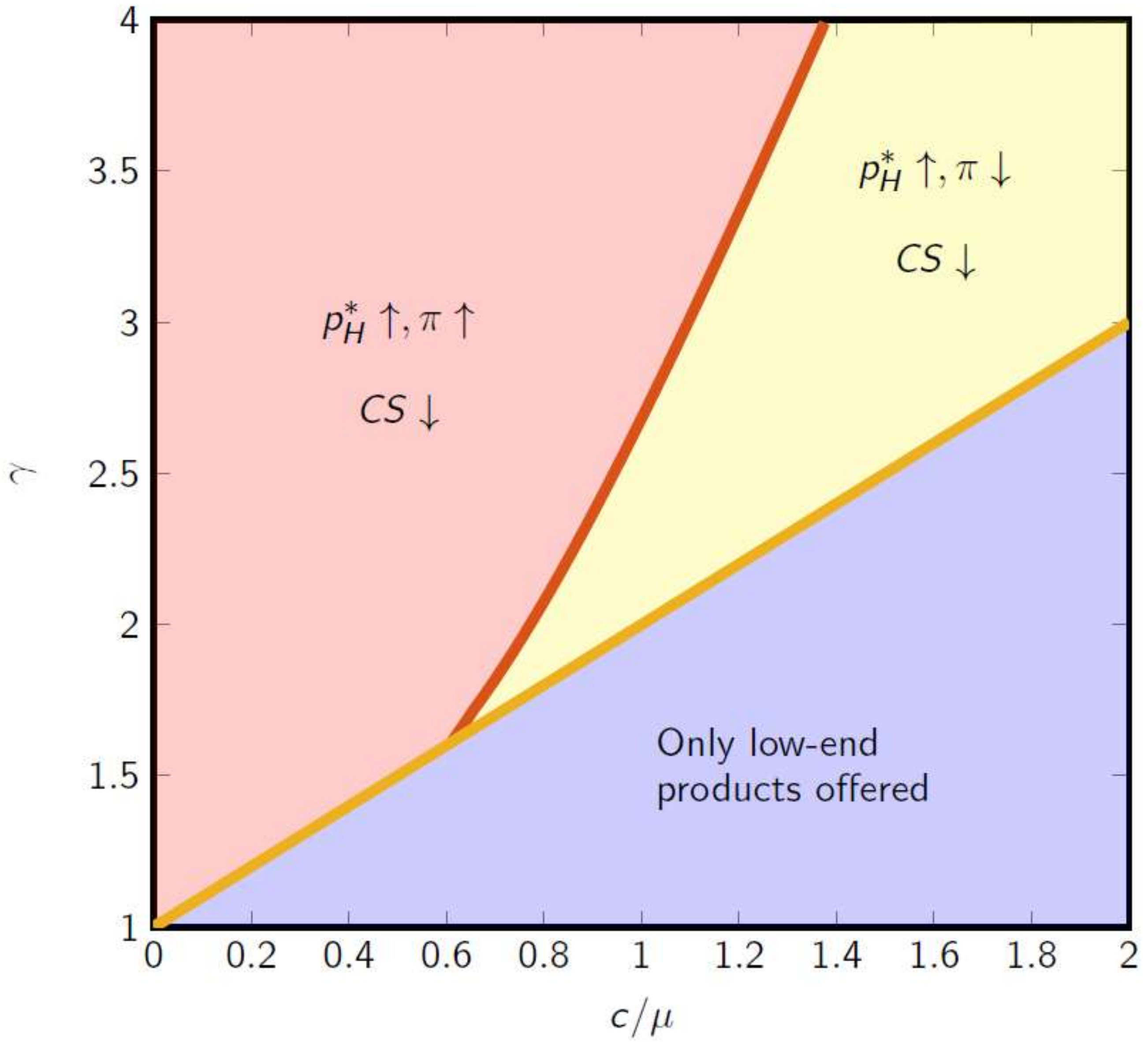


As γ increases, competition-softening effect starts to dominate.

Consumer welfare



What if the market is no longer covered?



Concluding remarks – preliminary

- ‘Grey product’ elimination softens competition for the greener products, decreasing (standard) total welfare
- Conveniently getting rid of low-end (dying) product lines (ahead of time, too early)
- For high enough vertical product differentiation (γ), the price of the high-end product goes up

    Higher prices and profit margins on energy-efficient washing machines, fair trade products, electric trucks; lower RoR on green finance projects, so with stronger outside options, fewer green projects may get financed

- Creates environmental benefits (ηη) by forced substitution – in essence a Solow-effect (which is not the policy line)
- Likely not socially optimal – too little low-end is being produced by the cartel compared to the central planner
- Government would ban differently; Pigouvian taxes may even increase competition – by lowering c

- Opportunity for full collusion, which then takes away the low-end elimination incentives – faking/retarding
- Demarcation of that is a ‘low’-end product is determined by the firms – choosing margin over environmental gain