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# Greening Antitrust is a No-Go

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# Key Question

Can antitrust clear green cartels?



## Short Answer

- Intersection between two market failures
- Negative externality: market failure because coercion is necessary to correct the externality
  - the use of coercion requires democratic legitimacy: legislative government
  - the level of correction concerns a political choice
- Market power in terms of coercion: market failure because market mechanism no longer yields efficient outcomes
  - legislature already acted: competition law that promotes efficiency by way of protecting competition
  - democratic legitimacy administrative enforcement: apolitical decision-making
- Keyword: democratic legitimacy
  - to ensure objective enforcement, antitrust is limited to the market regulation that is
  - if that regulation is inefficient, political domain must act

# Long answer

## Reset ‘fair share’ in the consumer benefit condition: unlawful

- Collective benefits may also evidence full consumer compensation
- Presumption *MasterCard* analogy is incorrect
  - ECJ did not discuss ‘fair share’
  - *MasterCard* did not concern out-of-market effects
- Question: Does limitation to consumers in the relevant market ensure apolitical competition enforcement?
- No: Objective allocation of benefits acknowledges voluntary choice
- Instead: antitrust based on collective consumer welfare analysis implies political decision-making per se as clearance limits the legitimate choices of consumers in the market place

# Long answer

## Reset of the indispensability condition: ineffective

- Standard interpretation
  - the indispensability condition must rule out that the efficiencies can be attained by a lesser restrictive alternative
  
- Additional task
  - the indispensability condition must also filter out fake first mover disadvantage
  - it cannot because both real and fake first mover disadvantages require coercion to be corrected
  
- Inconsistent
  - the Commission accepts phasing out agreements, which are textbook examples fake FMD

# Long answer

## Residual competition condition: in urgent need of a reset

- Current interpretation
  - This condition only targets agreements that eliminate competition in its most important dimensions  
→ Important facilitator green antitrust
- Yet, the text of the residual competition condition does not differentiate between different types of competition dimensions
- Reason:
  - Protecting the means to improve efficiency, competition law ultimately prioritizes the protection of the competitive progress over potential efficiency gains
  - If the market consists of voluntary exchange processes between individuals, the protection of the competitive process by definition regards all product dimensions except those that are regulated by public norms



# Conclusion

- Green antitrust is a no-go
- Instead, the residual competition condition should be reset

For more detailed reasoning:

- Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability, CML Rev 56 (2019)5: 1265-1302

- EU antitrust in support of the Green Deal. Why good is not good enough,

<https://ssrn.com/abstract=4094169>