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Can collusion promote sustainable consumption  
and production? ☆Maarten Pieter Schinkel<sup>a</sup>, Yossi Spiegel<sup>b,\*</sup><sup>a</sup> Amsterdam School of Economics and ACLE, University of Amsterdam, Plantage  
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## ABSTRACT

Several competition authorities consider the exemption of horizontal agreements among firms from antitrust liability if the agreements sufficiently promote public interest objectives such as sustainable consumption and production. We show that when consumers value sustainable products and firms choose investments in sustainability before choosing output or prices, coordination of output choices or prices boosts investments in sustainability and may even enhance consumer surplus when products are sufficiently close substitutes and the marginal cost of investment in sustainability is relatively low. By contrast, coordination of investments in sustainability leads to lower investments and harms consumers.

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## 1. Introduction

Sustainable consumption and production (SCP), which improves resource efficiency and minimizes pollution and waste, is considered as one solution to environmental

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challenges such as climate change, pollution, and depletion of resources.<sup>1</sup> Many governments already promote SCP, such as green energy, biological food, and fair trade products, using various policies, including performance standards and mandatory labels, taxes and subsidies, and public campaigns and education (OECD, 2008). Motivated by a concern that competition may encourage firms to offer unsustainable products, it has been suggested that exempting horizontal agreements from cartel liability may be another way to promote SCP.

In the U.S., antitrust agencies focus solely on competitive considerations and do not weigh broader public interest considerations like SCP in antitrust proceedings.<sup>2</sup> The European Commission exempted in 1999 a horizontal agreement among manufacturers of washing machines to discontinue energy inefficient models, both on the grounds that the savings of electricity and water directly benefit consumers and that the environmental benefits of the agreement exceed its potential anticompetitive effects.<sup>3</sup> Since then, however, the Commission has been reluctant to weigh general public interest considerations in its cartel decisions. While the Commission clarified that goals pursued by other Treaty provisions, such environmental protection, can be taken into account to the extent that they can be subsumed under the four conditions of Article 101(3), including that they lead to a net benefit for consumers in the same relevant market, no further exemptions on sustainability grounds were given and the European Commission (2011) Guidelines on Horizontal Agreements no longer contains a separate assessment of environmental agreements.<sup>4</sup>

The Dutch Authority for Consumers and Markets (ACM) has become receptive to claims that horizontal agreements may promote public interest objectives, and pioneered the implementation of cartel exemptions aimed at improving SCP, applying the conditions of Article 101(3) (ACM, 2013a).<sup>5</sup> The public interest defense had been invoked in the Netherlands in 2003 by North Sea shrimp fishermen, who claimed on appeal that

<sup>1</sup> The 1994 Oslo Symposium on Sustainable Consumption defines sustainable consumption as: “The use of services and related products which respond to basic needs and bring a better quality of life while minimizing the use of natural resources and toxic materials as well as emissions of waste and pollutants over the life cycle of the service or product so as not to jeopardize the needs of future generations.” See OECD (1999).

<sup>2</sup> Adler (2004) argues that competition among fishermen may lead to fishery depletion, and claims that “conservation cartels,” which control catches, may solve the tragedy of the commons in fishing, albeit they also raise prices in the short-run. The U.S. federal courts found several fishermen associations guilty of conspiracy in restraint of trade under the Sherman Act and held that conservation of fisheries does not free the associations from the restrictive provisions of the antitrust act.

<sup>3</sup> European Commission Decision, *Case IV.F.1/36.718. CECED*, 24 January 1999. The exemption was given under Paragraph 3 of Article 81—later replaced by Article 101(3) TFEU. Importantly, the Commission determined that the agreement does not eliminate competition as regards prices, washing performance, or brand image. The exemption was extended in 2001 to agreements to improve the energy efficiency of dishwashers and water heaters. See European Commission (2001a).

<sup>4</sup> The European Commission (2011) Guidelines on Horizontal Agreements mention environmental benefits only briefly in passing, as one example of standards in general, whereas the 2001 Guidelines which they replaced (European Commission, 2001b) contained a separate chapter on assessing environmental agreements for exemption under 81(3). Several legal scholars, including Monti (2002), Townley (2009), and Kingston (2011), nevertheless argue that the EU Treaties and case-law of the European courts allow, or even demand consideration of wider public interests.

<sup>5</sup> In 2014, the Dutch Ministry of Economic Affairs issued a policy rule that: “In the application of Article 6(3) of the competition law [the Dutch equivalent of 101(3) TFEU] the ACM considers in its assessment of the conditions whether [...] in agreements that restrict competition made in order to enhance sustainability,

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