

SUSTAINABILITY OF “TRADITIONAL ANTITRUST” UNDER THE CHALLENGE OF “SUSTAINABILITY” AND DIGITALIZATION

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Abstract: Antitrust law arose from political pressures and has been subject to political pressures all the time. Recently, the slogan of the digital and economic transformation of society has been spread and there have been discussions about the impact of this social trend on the nature and goals of competition law. The digitalization of antitrust itself does not affect the already rather controversial debate on the goals of competition law. While digitalization does not change the goals of competition law, and competition law “only” has to deal with the challenge of adapting to technological developments within its tool-box, the so-called sustainability is associated with pressures to change and expand the goals of antitrust themselves. However, the protection of competition and consumer welfare must remain a priority, and competition authorities should not be forced to pursue a political agenda outside their remit under the pretext of a significant social change. Considerations of the so-called sustainability, however defined, must be addressed in the context of a classical competitive analysis, which provides enough flexibility to do so even today.

Keywords: conflict of goals; digitalization of antitrust; sustainability; digital and ecological transformation

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1. INTRODUCTION

1.1 CONUNDRUM OF THE GOALS

We can thank the current topical challenges for the new outbreak of endless disputes about antitrust goals and their conflicts. Like the almost unlimited number of goals attributed to antitrust (AT), the range of current influences¹ that modify, alter, and sometimes negate these goals is very wide, too. Digitalization, the focus of this issue of AUCI, is just one in a number of these. The digitalization of AT must be considered in context with other comparably significant current changes and in the context of the more general issue of conflict of goals.²

¹ I am freely building on part of a paper BEJČEK, J. Antitrust’s response to the conflict of goals in the disarray of some current trends. In: ŠMEJKAL, V. (ed.). *EU ANTITRUST: HOT TOPICS & NEXT STEPS*. Prague: Charles University, Faculty of Law, 2022, pp. 347–371.

² As described and discussed in many sources, e.g., very clearly ORBACH, B. Foreword: Antitrust Pursuit of Purpose. *Fordham Law Review*. 2013, Vol. 81. No. 5, pp. 2151–2156.

AT protects the competitive environment as a public good and thus consumer welfare, and it also provides protection against some market failures, since the market obviously does not possess a mystical and reliable autocorrective capacity.³ It is clear that no branch of law or legal regulation has any “natural” tasks or goals; they are all set (assigned) by the legislature and we can talk about rather traditional goals and those set by the majority.

AT is thus traditionally assigned the task of protecting competition and consumer welfare. The dispute is whether this is the only objective or only the main objective, accompanied by a number of collateral objectives, or even whether it is a differently composed interplay or contest between a number of parallel goals imposed on the AT according to the political order of the day. “Consumer welfare” is not a panacea for all ills but it may have broader sense than a simple consumption. It may also encompass broader values than those that are measurable in terms of price, including the broad quality of goods and services, taking into account, for example, environmental and socio-political values, too.⁴

The question is whether AT law intervention should be limited to protection of competition (when competition fails) and possibly in cases of other market failures (existence of public goods, externalities, incomplete markets, lack and asymmetry of information, unemployment etc.⁵) or whether it can also pursue specific sectoral or broader societal goals. The answer to this question cannot be “right or wrong”, but only consistent or inconsistent with this or that value premise and stance. The value base correlates with the political direction that is currently in power.⁶ AT is not the only area of law that is instrumentalized to achieve extraneous goals. It also sometimes happens even in private law, which might be required to be a vehicle for pioneering “progressive” values that may not be in tune with its main protective purpose (cf. private corporate law “enriched” by corporate social responsibility considerations, mandatory participation of employees’ representatives or mandatory female quotas for statutory boards, etc.).

AT deals with protection of competition mainly in the course of cooperation of private companies. They naturally act in their own interest. The performance of society-wide tasks is difficult to delegate to them. Nor can the decisions of a cartel authority or a court substitute for an authoritative and legitimate countervailing decision by the legislature on how the conflict between the interests of protection of competition on the one hand and the objectives of the public good on the other hand should actually

³ GALBRAITH, J. K. *Společnost hojnosti* [Society of Abundance]. Praha: Svoboda, 1967, p. 76.

⁴ Similarly, BURNSIDE, A. *Bob Dylan and consumer welfare* [online]. Dechert LLP, 2017, p. 4 [cit. 2023-02-21]. Available at: <https://info.dechert.com/12/9073/landing-pages/bob-dylan-and-consumer-welfare-white-paper.pdf>.

⁵ STIGLITZ, J. E. *Ekonomie veřejného sektoru* [Economics of the public sector]. Praha: Grada Publishing, 1997, p. 22.

⁶ In searching for an answer, I would like to avoid a possible pitfall of legal argumentation, namely that “*there appears to be something in the nature of lawyers that suggests that winning an argument is more important than reaching the right result in the broader good*”. See WHISH, R. Do Competition Lawyers Harm Welfare? In: *Network Law Review* [online]. 11.5.2020 [cit. 2023-02-21]. Available at: <https://www.networklawreview.org/richard-whish-welfare/>.

be resolved.⁷ AT was not created - and thus should not be used – as an all-purpose tool for dealing with and treating all the ills of modern society. To widen its inherent goals may be tempting but endangering its enforcement, while it may not even benefit those added (expanded) goals.

The ideology of competition as a governing principle of a market-based economy is, in general, no worse or better than the ideology of targeted regulation of central assurance of general welfare. The superiority of the former is, of course, backed up by convincing empirical evidence, and the latter too, but with the opposite sign. Therefore, I confess at the outset that I am a proponent of the ideology of competition as an indispensable self-regulatory tool and that I am value-biased. This is not cynicism – rather, I see cynicism in the opposite approach – in obscuring value bias.

AT, which is supposed to protect competition, has the misfortune of being highly political in nature.⁸ But despite that – AT is equipped to deal with one type of specialised market failures only – distortion of competition. However, this does not qualify it to step in to solve completely different market failures or to solve policy assignments.

1.2 DIGITALIZATION

Since it is impossible to deal with all the goals of AT that are promoted today, in this paper I will focus first on the more general question of the criteria for choosing AT goals and their nature. I will then discuss and comment on two of the most controversial aspects of contemporary AT, namely the digitalization and the so-called sustainability.

Often, these factors are considered decisive for the so-called “ecological-digital social transformation”,⁹ which is also a challenge for the competition order. AT must not only react to this trend and passively adapt to it, but it is increasingly being encouraged and required¹⁰ to assist this transformation by revising its traditional objectives and, where appropriate, prioritising new ones. I think it is essential to clarify whether this current technological and ideological trend should have any implications for the treatment of the goals of competition law.

Adding “sustainability” aspects to the AT is an example of purely political decision which should, if at all, only be made on the basis of a thorough discussion and

⁷ Bundeskartellamt. *Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis* [online]. 2020, p. 14 [cit. 2023-02-21]. Available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=366990DF0CA10B8C8B5424C4290F25D3.1_cid378?__blob=publicationFile&v=2.

⁸ Former chairman of the Federal Trade Commission of the United States once declared (PITOFISKY, R. The political content of antitrust. *University of Pennsylvania Law Review*. 1979, Vol. 127, p. 1051), that it is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws...

⁹ See KÜHLING, J. Die sieben Herausforderungen für eine wettbewerbliche Ordnung. *Wirtschaft und Wettbewerb*. 2022, Jhrg. 72, Nr. 10, p. 522; Monopolkommission. Die ökologisch-digitale Transformation gelingt nur mit einer starken Wettbewerbsordnung. In: *Monopolkommission* [online]. 5.6.2022 [cit. 2023-02-21]. Available at: <https://www.monopolkommission.de/de/gutachten/hauptgutachten/385-xxiv-gesamt.html>.

¹⁰ HOLMES, S. – MIDDELSCHULTE, D. – SNOEP, M. (eds.). *Competition Law, Climate Change & Environmental Sustainability*. New York: Concurrences, 2021.

evaluation.¹¹ Despite being enshrined in legislation, fluctuations in value orientation manifest themselves in the interpretation of legislation, which is sometimes functionally comparable to amending legislation. Even independent civil servants and independent judges carry value ideas, professional opinions and biases, and can shift the de facto meaning of legal norms. This is particularly striking in the case of competition law rules, which are characterised by vague and undefined (and usually also undefinable by law) concepts, allowing for considerable restriction and expansion in administrative and judicial discretion.

Recently AT has already been facing unprecedented challenges related to the digitalization of the economy and the rapid developments in information technologies. These in themselves pose major question marks over the rationale, content, and methods of application of AT, which has emerged and evolved in fundamentally different conditions; it is even argued that we are facing the end of competition as we know it. The big question is whether the objectives of AT should be changed or supplemented in the context of digitalization (for example, adding privacy and data protection), or whether the objectives remain the same but only the analytical tools used by AT will change.¹²

This “information-digitalization” challenge is being tackled in theory and responded to by legislation – most recently by the European Commission’s Digital Markets Act (DMA)¹³ and Digital Services Act (DSA)¹⁴ or the regulation in § 19a of the German Gesetz gegen Wettbewerbsbeschränkungen (GWB), according to which a conduct is prohibited without having to prove that the platform concerned is dominant on a given market and without having to resort to proven abusive conduct.¹⁵ In the case of DMA, the European legislature deliberately departed from competition law *stricto sensu* in favour of special regulation, albeit close to competition law.¹⁶

¹¹ Studienvereinigung Kartellrecht. *Stellungnahme der Studienvereinigung Kartellrecht e.V. im Rahmen der Öffentlichen Konsultation der Europäischen Kommission über “Wettbewerbspolitik des Grünen Deals”* [online]. 2020, p. 25 [cit. 2023-02-21]. Available at: <https://docplayer.org/204728082-Per-european-commission-directorate-general-for-competition-1049-brussels-belgium-20.html>.

¹² KÖHLER, A. Online Advertising and the Competition for Data: What Abuse are We Looking For? *World Competition Law and Economics Review*. 2021, Vol. 44, No. 2, p. 200.

¹³ Regulation 2022/1925, OJ, L 265, 12 October 2022, pp. 1–66.

¹⁴ Regulation 2022/2065 OJ, L 277, 19 October 2022, pp. 1–102. Earlier comments e.g., EZRACHI, A. – STUCKE, M. E. *Virtual Competition*. Cambridge, Massachusetts: Harvard University Press, 2016, p. 203; BEJČEK, J. “Digitalizace antitrustu” – móda, nebo revoluce? [“Digitization of antitrust” – fashion or revolution?]. *Antitrust*. 2018, Vol. 10, No. 3, p. VIII; BEJČEK, J. Chytré protiprávní “chytré” smlouvy [Cleverly unlawful “smart” contracts]. *Právník*. 2020, Vol. 159, No. 5, p. 399; PODSZUN, R. *Empfiehlst sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?* München: C. H. Beck, 2020, p. 104 ff; EIFERT, M. – METZGER, A. – SCHWEITZER, H. – WAGNER, G. Taming the giants: the DMA/DAS Package. *Common Market Law Review*. 2021, Vol. 58, No. 4, p. 988.

¹⁵ HAUCAP, J. – SCHWEITZER, H. Revolutionen im deutschen und europäischen Wettbewerbsrecht. *WRP*. 2021, Jhrg. 67, Nr. 7, p. 1.

¹⁶ DMA tries to ensure that “markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effect of a given gatekeeper [...] on competition on a given market”. § 19a GWB in contrast, remains consistent with the competition law toolbox. See WOLF, G. – BRÜGGEMANN, N. Agenda 2025: der Digital Markets Act und § 19a GWB. In: *D’Kart* [online]. 19.7.2022 [cit. 2023-02-21]. Available at: https://www.d-kart-de.translate.google.com/en/blog/2022/07/19/agenda-2025-der-digital-markets-act-und-%C2%A719a-gwb/?_x_tr_sl=en&_x_tr_tl=cs&_x_tr_hl=cs&_x_tr_pto=sc.

1.3 BROADER SOCIETAL GOALS

In addition to this unprecedented challenge, we can observe increasingly strong pressures to expand the catalogue of broader societal goals that – as some activists believe – AT should pursue and support. Since the times are changing and antitrust needs to change with them,¹⁷ we are witnessing a fundamental rethinking of AT that will include an assessment of the relationships between AT and media, sustainability, human rights, gender, privacy.¹⁸

However, there is a danger of forgetting that the original purpose of AT is to serve as a tool to remove the structural causes of market power and to provide a defence against behavioural distortions of competition. AT should protect not only consumer welfare – however this may be defined – but the process of rivalry – however difficult it may be to operationalise or even measure it. Even in the USA, as the cradle of economic and consumer approach to AT, we can observe attempts to include growth of wages and employment and reduction of income inequality, raising the Corporate Social Responsibility (CSR) etc. in the catalogue of goals.

Open markets and dispersion of economic power (as preconditions to self-regulatory workable competition) may be particularly undermined by the massive digitalization of the economy and the emergence of digital giants in various interconnected markets. Thus, AT is in danger of eroding under the “crossfire” from several directions, of losing its coherence and, above all, its proven functionality. Traditional conflicts of goals¹⁹ have been joined in recent years by new and perhaps even more controversial conflicts than before.²⁰

2. THE WIDER AND NARROWER CONCERNS OF COMPETITION LAW (CONFLICTS OF GOALS IN ANTITRUST)

According to a classical statement of Robert Bork, antitrust policy cannot be made rational until we are able to give a firm answer to one question: what is the

¹⁷ BURNSIDE, *c. d.*, p. 4.

¹⁸ CAPOBIANCO, A. The Ghost of Competition past, present, future. *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 7–8, p. 387.

¹⁹ BEJČEK, J. Cílové konflikty v soutěžním právu [Target conflicts in competition law]. *Právník*. 2007, Vol. 146, No. 6, p. 66; ZIMMER, D. (ed.). *The Goals of Competition Law*. Cheltenham: Edward Elgar, 2012.

²⁰ “Binary choice” between intervention and non-intervention based on experience, ideology, and/or opportunism should be allegedly replaced by the so called “complexity antitrust”. It is promised to introduce new positive feedback loops to create new competitive dynamics in order to understand when and why markets develop in terms of a provisional form of market control. Understanding of uncertainty should be improved. See PETIT, N. – SCHREPEL, T. Complexity-Minded Antitrust. In: *SSRN* [online]. 29.7.2022, pp. 20, 24–25 [cit. 2023-02-21]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050536. This would be nice if it did not lead to even more dispersion and vagueness, coupled with arbitrariness of judgement. Especially since the “market economy” is now more a theoretical model for abstract study than a reality. It has been deformed by a rampant system of various subsidies, ideologically motivated large-scale regulations and huge social transfers. “Complexity-minded AT” does not resolve the conflict of goals – it just hides it under an impenetrable cover of “complexity”.

point of the law – what are its goals?²¹ If we were to follow this rule, we would have to conclude that antitrust policy could never be successfully implemented because there was never a consensus on a clear definition of antitrust objectives.²² There are so many and differing goals that it can cause confusion and despair. Moreover, their “collection” will probably never be completed and it is constantly being supplemented with new surprising ideas. In general, the various goals are set depending on the bias as to whether competition is merely an instrument for achieving other social goals or whether, as an expression of freedom, it is an end in itself. The former (utilitarian) approach prevails over the latter (deontological).²³

In addition, the “list” of objectives does not have a clear and explicit structure and hierarchy. Even the EU case law is ambiguous as to the existence of a hierarchy of objectives in EU competition law. Some objectives partially overlap, some are fully included in others, and some are contradictory and incompatible. Some pursue hard-to-define non-economic welfare, others promote European market integration, or consumer protection, freedom of competition or diverse social values.²⁴ The call for more “order” in this area has led to a desire for a “more holistic competition law”.²⁵

Some doctrinal concepts of competition law²⁶ tend to be very ambitious in their conception, while certainly well-intentioned and morally anchored, and question the existing functioning competition law instruments and overestimate its potential and coverage. Such approaches conceptualise competition law as an almost “catch-all-instrument” of social regulation. AT, which was founded and developed as a type of applied microeconomics and was primarily concerned with efficiency, is thus shifting into a role of a tool that should promote public policy objectives and to contribute to a kind of hard-to-measure general well-being.²⁷ Competition law should even include among its goals e.g., environmental sustainability and the reduction of teenage alcohol or tobacco consumption, because the law is allegedly incapable of achieving these non-economic

²¹ BORK, R. *The Antitrust Paradox: a Policy at War with Itself*. Oxford: MacMillan, 1993.

²² See e.g., a short survey ORBACH, c. d., pp. 2151 ff.

²³ See ANDRIYCHUCK, O. Rediscovering the Spirit of Competition: on the Normative Value of the Competition Process. *European Competition Journal*. 2010, Vol. 6, No. 3, pp. 578 ff.

²⁴ Cf. LIANOS, I. *Some Reflections on the Question of the Goals of EU Competition Law*. CLES Research Papers Series 3/2013. London: Centre for Law, Economics and Society, 2013, pp. 2–64.

²⁵ *Ibid.*, p. 64. Holistic approach stands for a belief that the parts of something are interconnected and can be explained only by reference to the whole. This is highly desirable in regulating economics and society in general, but it faces the problem of recognizability of all relevant influences and their operationalisation and balancing. For this reason, and in order to increase legal certainty and predictability, competition law has also introduced narrower and more identifiable and measurable goals.

²⁶ E.g., TOWNLEY, CH. *Article 81 EC and Public Policy*. Oxford: Hart Publishing, 2009; LIANOS, I. *Polycentric Competition Law*. London: UCL, Centre for Law, Economics and Society, 2018; FOER, A. A. – DURST, A. The Multiple Goals of Antitrust. *The Antitrust Bulletin*. 2018, Vol. 63, No. 4, pp. 494–508; CENGIZ, F. The conflict between market competition and worker solidarity: moving from consumer to a citizen welfare standard in competition law. *Legal studies*. 2021, Vol. 41, pp. 73–90; obviously confusing or merging economically based “consumer welfare” and socially broader “citizen welfare” (p. 90); MIAZAD, A. Prosocial Antitrust. *Hastings Law Journal*. 2022, Vol. 73, No. 6, pp. 1640–1696.

²⁷ TOWNLEY, c. d., p. 11.

objectives by other means. Competition law is in this very broad concept “hijacked” to achieve wider objectives until the appropriate legislation is enacted.²⁸

In fact, no one objects to the legitimacy of non-economic values that achieve social acceptance, but which should be formally anchored and enforced by legislation. To place these values among the goals of competition law is to sacrifice and to compromise the actual goal of competition law and to put in question or even spoil the competitive process. Such a “trade-off” and setting efficiency aside in order to promote socially valuable virtues is very controversial. A legally unsafe “sloping surface” of exceptions and of arbitrary decision making of competition authorities and of hardly predictable judicial shaping of law might be consequence thereof. Values and political priorities are a sovereignly political problem, and should be dealt with in a regulatory manner, and not by an expansive interpretation of competition law. AT has more modest but achievable goals that should not be compromised in favour of those political values and, in addition, only interpretatively.

Even a noncontentious, more economic, approach to competition law emphasises the economic context of the conduct under review. This is still within the framework of AT as applied microeconomics. It is stated that context is (almost) everything when it comes to antitrust assessment.²⁹ This would be all the more true if the context of antitrust regulation were to be measured in non-economic terms with no measurable impact on efficiency. Conflict of specific (industry related) regulation and antitrust regulation may occur. Full compliance with one regulatory barrier “*may not only leave one too exposed to liability under the other; but may indeed be conceptualised as part of a pattern of strategic behaviour that, coupled with evidence of anticompetitive intent, comes to constitute the very substance of a competition violation*”.³⁰

It is therefore a question of whether we are confusing the conflict between the objectives of general competition regulation and the objectives of sector-specific regulation (which should be decided politically) with the conflict between an unlimited and unbounded number of goals of competition law. Thus, this value-conflict is only seemingly put under the guise of competition law, which cannot deal with the conflict in a sophisticated (transparent, methodological, predictable, credible, reviewable...) way.

It is arrogant to assume that a competition authority understands a specialised area better than a sectoral regulator when the competition authority is supposed to deal with other than competition matters and vice versa. Competition enforcement may serve as an antidote to sectoral regulatory intervention and can correct regulatory interventions

²⁸ See criticism of this Townley’s opinion in ODUDU, O. The Wider Concerns of Competition Law. *Oxford Journal of Legal Studies*. 2010, Vol. 30, No. 3, pp. 607 ff. He also criticises the confusion about the breadth of this concept – that on the one hand it is argued that the absence of environmental sustainability cannot be used as an excuse for pursuing environmental policy through competition law, but that on the other hand environmental policy objectives should be included in the competition assessment. Unquestionable virtues are to be converted into legal duties by means of competition law and competition authorities (ibid., p. 609).

²⁹ See DUNNE, N. The Role of Regulation in EU Competition Law Assessment. *LSE Legal Studies Working Papers* [online]. 2021, No. 9, p. 6 [cit. 2023-02-21]. Available at: <https://ssrn.com/abstract=3871315>.

³⁰ Ibid., p. 12.

that are deliberately at odds with competition policy. It is argued,³¹ that the use of competition law is problematic if it is used as a means to reverse legitimate political decisions to prioritise socially important values other than effective competition. “*To the extent that the regulatory outcome is suboptimal from a competition policy perspective, advocacy efforts may be the more effective and appropriate solution.*”³²

Competition and regulation of different social activities and goals are complementary tools, so that the main goals of competition law should not be left behind or compromised by their confusing with specific regulatory goals. Rather, they should be applied properly even with regard to the other specific regulatory social goals. Strong voices are heard saying that today’s antitrust based on modern economic thinking must be strengthened and more strict in order to face the challenges of raising market power and it should not be endangered and weakened by vague political considerations.³³

Efforts to exclude those “non-market goals”³⁴ from decision-making with conflicting goals can take many forms. I have argued above for the separation of such issues for sector-specific regulation that would not contaminate and distort competition regulation by introducing incompatible and incommensurable considerations in relation to the competition economic analysis.

The existence of important and legitimate public interests other than competition is undoubtful. Implementing these “alternative” goals by the competition authorities³⁵ presupposes to include these “alternative goals” into a broader concept of whatever welfare, or to suspend the goals of competition law and to prioritize. This would mean an expansive interpretation of that provision beyond its purely linguistic framework, slipping into a teleological interpretation in favour of a vague and arbitrarily determinable “public interest”.

When assessing restrictive agreements distorting competition³⁶ that simultaneously meets one of the “out-of-market” goals, in addition to the use of the statutory exemptions from the ban, another possibility has been offered in terms of expansive understanding of so-called prioritisation.³⁷ It might functionally serve as a means to avoid conflict of goals by putting the “out-of-market” goals aside the competition assessment.

This is possible, according to Czech law, however only because there is no public interest in the conduct of the proceedings due to the low degree of detrimental effect on competition. A problem can arise (and prioritisation³⁸ cannot be applied) if an “out-

³¹ *Ibid.*, p. 16.

³² *Ibid.*, p. 17.

³³ BAKER, J. B. Competitive Edge. In: *Washington Center for Equitable Growth* [online]. 31.1.2019, p. 4 [cit. 2023-02-21]. Available at: <https://equitablegrowth.org/revitalizing-u-s-antitrust-enforcement-is-not-simply-a-contest-between-brandeis-and-bork-look-first-to-thurman-arnold/>.

³⁴ KUPČÍK, J. Alternativní cíle soutěžního práva a prioritizace [Alternative competition law objectives and prioritisation]. *Antitrust*. 2018, Vol. 10, No. 3, p. 73.

³⁵ *Ibid.*, p. 79.

³⁶ Art. 101/1 TFEU, § 3/4 of the Czech Act on Protection of Competition.

³⁷ Sec. 21/2 of the Czech Act on Protection of Competition. See KUPČÍK, *c. d.*, p. 77.

³⁸ The term is, by the way, used – in terms of semantic – rather incorrectly. Whereas genuine “prioritisation” means *preferring* something to anything else, “prioritisation” in terms of Sec. § 21/2 of the Czech Act on Protection of Competition is even not an opposite to posteriorisation of the not “prioritised” case (dealing

of-market” goal (e.g. in the area of environmental sustainability) can have a significant impact on the competition.

2.1 TREATMENT DIFFERENT GOALS OF COMPETITION LAW

The alleged or asserted goals of competition law are manifold and it is difficult to find any system or order in them. These include, for example, consumer welfare, general welfare, dispersion of economic and political power, economic growth, and “workable and politically acceptable mixture of competition and cooperation”.³⁹ This conception is very fuzzy and attributes to antitrust the role of a universally applicable political tool, whose actual non-use or use (and its intensity) depends on arbitrary political-value judgments. Attempts to express this quasi-knowledge in terms such as “cooperation” or “prosocial cooperation” and the claim that prosocial collaboration between competitors is the economic imperative today illustrate this trend of so-called “progressive antitrust”. Antitrust policy is supposed to support collaboration between competitors with the collective goal (!) of addressing systematic risks⁴⁰ for AT allegedly, it actually prevents companies from addressing systematic risks.

More sophisticated approaches emphasise the enumerative method (naturally open-ended) of the main and secondary goals of AT. However, the hierarchy of goals should not be rigid, but the goals of the “polycentric competition law” are dispersed among the main ones that form the core of AT (such as ensuring low prices, high output, promoting innovation, consumer choice and variety competition) and the rest. “Grey area” includes fairness (lack of exploitative conduct), freedom to compete, ensuring market access for small and medium undertakings, privacy⁴¹ and self-determination. The last group of the “goals” normally falling outside the competition law core, but mirroring public policy interests, contains e.g., protection of environment, biodiversity

it later, postponing it); it is rather about *not dealing* the case at all, that is suspension, putting it aside, which is an outright opposite of prioritisation. Whether something is “prioritised”, then an indefinite and open set of cases that have been left out of the decision according to § 21/2. Some of them, including those of which the antitrust authority does not yet know, may later also be subject to this “prioritisation”.

³⁹ See FOER – DURST, *c. d.*, p. 22.

⁴⁰ So MIAZAD, *c. d.*, pp. 1643, 1646, 1673. Reading some of the statements, with our historical experience, one cannot help but be reminded of the era of slogans from Eastern European “real state socialism”: such as “put an end to the era of shareholder capitalism”, or “the prosocial corporation reigns triumphant”, or about corporations as “guasi-public” institutions that “serve not alone the owners to the control group but all society”. Relying on market-based solutions is labelled as an “expedient diversion from the more difficult and intractable questions concerning economic inequality”. *Ibid.*, pp. 1649–1670, 1988. It seems that “progressive AT” and the CSR (Corporate Social Responsibility) movement have common ideological roots. Therefore, it can be generalized that social problems should not be solved through AT, but through special regulation, which is appropriately complemented with CSR (and sustainability, note JB). They both motivate companies to behave in a desirable way and represent a profitable business model in which there is a struggle for customers. After all, it is the consumer who appreciates more socially responsible behaviour in a market (which is also regulated by various specific protectionist regulations). See in detail SCHINKEL, M. P. – TREUREN, L. *Corporate Social Responsibility by Joint Agreement*. Tinbergen Institute Discussion Paper TI 2021–063/VII. University of Amsterdam, Tinbergen Institute, 2021, p. 26.

⁴¹ So privacy is protected by specific regulations, the violation of which only co-creates the context of the competition law analysis.

and sustainability (including even “animal welfare”⁴²), media pluralism, promotion of employment and social security⁴³ and social welfare, and even “human happiness or capabilities”.⁴⁴

Unlike the “gray area”, in which AT may overlap with other regulations and may dominate, this third group is typically the domain of specific sectoral regulations, or remains completely beyond the regulatory ambitions of the state. Intuitive (non-quantitative) balancing among competition law approaches and “appropriate weight” of framing “out-of-competition values” may distort workable and consistent antitrust tool-box and to reshape it to a largely unpredictable policy instrument and a kind of “law of everything”.⁴⁵ It is as if it were forgotten that all these non-competitive values also enter the broad minds of consumers and are part of their decision-making in the marketplace, and therefore also of the competition between undertakings that more or less implicitly offer them to consumers of their products and services.

The “trade-off” between a narrow competitive perspective and “higher societal values” may therefore be unnecessarily sharpened. Consumers (including corporate ones) are not, after all, narrow price decision-making machines, but include non-price considerations in their decisions about the content of their present and future “well-being”, which – in accordance with the findings of behavioural economics – bypass even their rational price calculations. A wide variety of conduct can admittedly push output and welfare in opposite directions and therefore a more “coherent, practical, and efficient antitrust”⁴⁶ is demanded, but the problem is “only” what it should look like.

The mixture of multiple goals of competition law has also been investigated empirically.⁴⁷

It is correctly stated that numerous attempts to identify the role and objectives of competition law ranging from interpretations of legislative history to normative principle-based analyses have been made, while the final word rests with courts and enforcers.⁴⁸ According to a review of the literature and European case law, there are dozens of differently formulated competition law objectives that can be divided into several groups, namely efficiency, welfare (both total and a consumer’s one), freedom (freedom of competition, equality of opportunities, economic freedom, protection of competitors etc.), market structure, fairness, European integration, competition process. It is

⁴² However, this value is rather intuitive and cannot be compared to economically measurable “consumer welfare”. On the first glance, this is a case suitable for special veterinary-hygiene regulations and not for contamination of competition law criteria by moral compassion.

⁴³ See ŠMEJKAL, V. Competition law and the social market economy goal of the EU. *International Comparative Jurisprudence*. 2015, Vol. 1, No. 1, pp. 33–43.

⁴⁴ See LIANOS, *Polycentric Competition Law*, pp. 17 ff.

⁴⁵ It is enough to imagine how the content of the so far quite precisely economically detectable “consumer welfare” (or human welfare) would change if it were to be judged as arbitrarily and intuitively as the so-called “animal welfare”.

⁴⁶ NEWMANN, J. M. The Output-Welfare Fallacy: a Modern Antitrust Paradox. *Iowa Law Review*. 2022, Vol. 107, No. 2, p. 563.

⁴⁷ See STYLIANOU, K. – IACOVIDES, M. C. The Goals of Competition Law: a comprehensive empirical investigation. *Konkurrensverket* [online]. 28.1.2021, Dnr. 407/2019 [cit. 2023-02-21]. Available at: https://www.konkurrensverket.se/globalassets/dokument/kunskap-och-forskning/forskningsprojekt/19-0407_the-goals-of-eu-competition-law.pdf.

⁴⁸ *Ibid.*, p. 4.

concluded that EU competition law pursues a multitude of goals concurrently and it can therefore not be said that it is monothematic.

EU competition law prioritizes the process of competition rather than directly the achievement of a desirable outcome (e.g. efficiency, welfare maximization etc.). Fairness does not fare highly in the decisional practice of any EU institution. The Commission assigns more value to welfare and to the protection of competitors and commercial freedom, but less value to efficiency than the Court and Advocates General. Different Commissioners seem to emphasize different goals during their terms. Ordoliberal objectives (like open and free markets and undistorted free competition) are still being pursued and may recently be on the rise again.⁴⁹

These empirical findings argue against preferring “outputism” in the real competition “law in action.”⁵⁰ On the contrary, it is hereby verified that competition law focuses, even in practice, on the structure of markets and the competitive process rather than on a partial output.⁵¹ In fact, the various contemporary “expansive concepts” of competition law are also a kind of “outputism” because they promote, instead of (or in addition to) consumer welfare, various sets of social goals – e.g. more jobs or less inequality, whereas AT is expected and supposed to refocus on structures and on competitive process.⁵² Some “overriding” or desirable goals (such as coping with pandemics, climate change, income inequality and racial injustice) are presented as “social issues” and, in more modern and psychologically appealing jargon, as “systematic risks”.⁵³

Sometimes different goals of competition law are labelled as being “alternative”.⁵⁴ This leads to the impression that these goals are other, substitute or surrogate ones (which is the true meaning of the word “alternative”), whereas at most these goals are further, additional, complementary, or associated ones. It is clear from theoretical considerations, from the history of AT development, and from decision-making practice that the goals of AT are multiple and that there is no clear hierarchy among them. They are therefore subject to value-based assessment and evaluation on a case-by-case basis, depending on current socio-political priorities. Thus, rather than hierarchization, proportioning and balancing comes into consideration. In this process, any didactic division of objectives into different groups⁵⁵ will not help much, because it is irrelevant from the point of view of the values and interests involved in the decision making.

⁴⁹ Ibid., pp. 14 ff, 26 ff.

⁵⁰ Proponents of “outputism” insist that AT is properly focused on competition and that achieving its specific goals (welfare standards) should be measurable. Difficulties in implementation of the goals and *outputs* (such as productivity, economic growth, innovation, consumer choice and broad opportunities for labour) should not be an excuse for replacing them with something much worse: protection of the competitive *process* is denied as a slogan, not as a goal. See HOVENKAMP, H. The Slogan and Goals of Antitrust Law. In: *Faculty Scholarship at Penn Carey Law* [online]. 2022, pp. 92–93 [cit. 2023-02-21]. Available at: https://scholarship.law.upenn.edu/faculty_scholarship/2853.

⁵¹ The proponents of the Chicago School, by the way, advocate a particular outcome – namely consumer welfare instead of the process of competition.

⁵² See KHAN, L. The New Brandeis Movement: America’s Antimonopoly Debate. *Journal of Competition Law & Practice*. 2018, Vol. 9, No. 3, p. 132.

⁵³ See MIAZAD, *c. d.*, p. 1641.

⁵⁴ See KUPČÍK, *c. d.*, p. 73.

⁵⁵ Such as “*market goals*” including both ordoliberal values in terms of free competition, but also “*output*”: maximisation of differently distributed welfare, and “*out-of-market goals*” that are not “strictly speaking”

Practical solution to the conflicting or collateral goals of competition law can be demonstrated by an example of strong position of BigTech firms, which, however, do not reach the threshold of dominance in the relevant market. Traditional AT is therefore unable to operate and intervene effectively in these circumstances. However, due to the power and information asymmetry in favour of the big digital players, the value of fairness obviously suffers. Nevertheless, this cannot be “made up” for by an expansion of competition law, but will be helped by specific regulation based on political consensus in society: both in favour of fairness protection and of both customers (Digital Market Act) and consumers (Digital Services Act).

2.2 THE DISPUTE IS CONCERNING THE VERY NATURE OF ANTITRUST

AT used to be focused on competition issues, on protection of competition, thus basically against cooperation of rivals, against misuse of market power and potentially anticompetitive market structures. The goal of antitrust law is, by preserving free competition to preserve a tool to achieve the goal of economic welfare, which includes consumer welfare.

AT can only contain norms that allow competition to operate socially as a “process of disclosure and discovery”. They must therefore be very general and abstract rules, universally applicable to all subjects equally (exceptions cannot be completely avoided for obvious reasons).

These rules cannot have any specific objectives in relation to specific conduct and must be specific and their application must be subject to objectively ascertainable circumstances.

Competition law is primarily aimed at protecting this social value and should not be used instrumentally to enforce arbitrary current economic policy objectives of a lower order compared with the preservation and development of competitive environment. The goal (purpose) of competition law is therefore to create barriers against restricting competition.

Conflicts between effective competition and other goals should be a fairly exceptional matter. Competition policy and competition law both have tools enabling them to grant such exemptions in case that a particular competition value is found to carry a greater importance than the value of workable competition. Competition policy is the best “industrial policy”. Healthy growth of companies in an environment protected against competition and deformed by different subsidies or exemptions from the application of antitrust laws is an unlikely option.

Nowadays some tendencies occur that speak in favour of current “antitrust empowering more collaboration.” The reason should be facing systematic risks arising from climate change, income inequality, and the COVID-19 pandemic.⁵⁶ Competition is not,

related to the functioning of the market and include a potentially infinite set of sub-political decision objectives (artificial support of “national champions”, protection of the labour market in a broad social context, broadly defined sustainability of economic development and environmental protection, etc.). See *ibid.*, pp. 75–76.

⁵⁶ See MIAZAD, *c. d.*, p. 1637.

of course, an untouchable fetish and idol that denies the legitimacy of cooperation and disregards broader societal goals. But competition is a kind of public good, not an end in itself, rather a tool whose self-regulatory ability makes broader societal goals easier, faster and more effective to achieve.⁵⁷

Contemporary AT as a set of rules cultivated over decades and specified by extensive case law and decision-making, largely on the basis of the rule of reason, has created and continues to create a transparent and predictable environment for the economic activity of undertakings.

As is well known, the difference between the principle and the exception to the principle is relative and depends on their proportional relationship. The saying that the exception proves the rule is old and somewhat cynical, because it obscures the fact that it applies only if the exception is truly “exceptional” and that the number of exceptions does not exceed a certain critical mass.

A principle “perforated” by many exceptions ceases to be a principle and may itself become an exception to the “principle”. Indeed, such a weakened “declaratory principle” is valid only if there is enough room for it after many extremely numerous exceptions are preferably applied.

Above, I have tried to show that the current trends towards large-scale expansion of the goals of competition law or their “trade-off” for other actual socially valued and promoted goals are dangerous and short-sighted in their frequency, scope and intensity. Some externally imposed “exogenous” challenges for competition policy are more dangerous, as they may strike at the very “heart” of the AT and threaten its core function for which it was created and which gives it its purpose: to protect competition and consumer welfare.

So AT can be distorted not only by competitors and lobbyists motivated by them, but also by the (perhaps well-intentioned and noble) efforts of socially responsible and ethical people for the “social good for all”. However, we must be very cautious about them from the AT viewpoint without necessarily calling into question the broader societal goals themselves or the values that underpin them. The road to hell is often paved with good intentions.

Also, behind the lofty-sounding values, to which competition considerations should be aligned, there may be a vested interest that is better promoted than an undistorted competition environment would allow. AT is unable to deal with societal tasks aimed at “citizen welfare” instead of “consumer welfare”, such as “low incomes and marginalised communities”, “structural racism”, “press freedom” etc., the fulfilment of which

⁵⁷ In addition to the generally declaratory considerations that competition law will have to take environmental factors into account (e.g., KINGSTON, S. Integrating Environmental Protection and EU Competition Law: Why Competition Isn’t Special. *European Law Journal*. 2021, Vol. 16, No. 6, pp. 780–805), there are very sophisticated and detailed procedures in various areas of competition law that allow for environmental considerations to be taken into account even in the existing legal framework (see HOLMES, S. Climate change, sustainability and competition law. *Journal of Antitrust Enforcement*. 2020, No. 8, pp. 354–405; VAN DIJK, T. A New Approach to Assess Certain Sustainability Agreements under Competition Law. In: HOLMES, S. et al. *Competition Law, Climate Change & Environmental Sustainability*. New York: Institute of Competition Law, 2021, pp. 55–68.

should condition mergers and could even break up longstanding merged companies for similar reasons.⁵⁸

The latest attempts to outline in rough contours another “consumer standard” in a form of a “universal consumer standard”⁵⁹ accounting for “systematic risks” are just another conceptual variation on an old topic. This new “goal” of AT should probably consider even the welfare of future (not yet living) consumers and it should be able to alleviate market failures and serve as a procompetitive justification of an otherwise anticompetitive behaviour. This term seems to me to be rather vague and fuzzy and can be filled with basically any politically supported content. Its relationship to the established concept of “total welfare” is also vague. I do not think it has any advantages over a reasonable interpretation of the established and judicially tested exceptions to the prohibition on anticompetitive conduct and over an appropriate application of the “rule of reason”.

3. TWO OF THE MOST SIGNIFICANT CURRENT CHALLENGES TO THE INTEGRITY AND COHERENCE OF COMPETITION LAW

I found the previous more general discussion on the purpose, goals and functionality of AT useful before commenting on the two most frequently mentioned threats and challenges to traditional AT, namely digitalization and the so-called sustainability. AT is recently already facing unprecedented challenges related to the digitalization of the economy and the rapid developments in information technologies. These in themselves pose major question marks over the rationale, content, and methods of application of AT, which has emerged and evolved in fundamentally different conditions; it is even argued, that we are facing the end of competition as we know it. The big question is whether the objectives of AT should be changed or supplemented in the context of digitalization (for example, adding privacy and data protection) and similarly of sustainability, or whether the objectives remain the same but only the analytical tools used by AT will change.⁶⁰

Each of these two selected areas constitutes its own professional “universe”. I can and will shortly mention them here, primarily because this issue of the AUCI takes a closer look at one of these areas, which nevertheless might be seen in their context as part of the declared “ecological-digital transformation”⁶¹ of recent society.

⁵⁸ OHLHAUSEN, M. K. Liberty, Equality, and Fraternity: Evolution or Revolution in Antitrust? In: *Concurrences* [online]. 2021 [cit. 2023-02-21]. Available at: <https://awards.concurrences.com/en/awards/2021/business-articles/liberty-equality-and-fraternity-evolution-or-revolution-in-antitrust>.

⁵⁹ See MIAZAD, *c. d.*, pp. 1690 ff.

⁶⁰ See KÖHLER, *c. d.*, p. 200; HOLMES, *c. d.*

⁶¹ So KÜHLING, *c. d.*, pp. 522, 529. Number of other challenges for contemporary AT (e.g., privacy protection, dealing with social inequality, gender-related issues, etc.) cannot be addressed here, simply because of the allowed scope of the contribution. I refer to BEJČEK, *Antitrust's response to the conflict of goals in the disarray of some current trends*. Particularly dramatic developments are taking place at the interface between competition law and privacy law. It reflects the conflict of interest between the public interest in the competitiveness of the economy on the one hand and the purely private interest in data protection on

Nevertheless, I see one fundamental methodological difference between the two recently emerging antitrust-related aspects: the digitalization viewpoint and the ecological (or broader sustainability) dimension. Digitization aspects in AT originate from technological developments. They are “endogenous”, or “internal”, “inside”, possibly “own” challenges. They fall *within antitrust’s remit* and they simply must be dealt with in pursuit of its (and not wider societal) objectives, and include, among others, the evaluation of digital platforms and their operators, pricing algorithms, killing acquisitions etc. It is a question whether and how the traditional AT-toolbox could be used or changed in these areas as a consequence of rapidly changing conditions in digitalized markets.

On the other hand, digitization expands and improves the ability of competition authorities to fight anti-competitive behaviour by using sophisticated digital investigation tools in terms of “fighting technology with technology”.⁶²

Ecological (sustainability) viewpoint or challenge to AT is rather different. It is a kind of a so-called “exogenous” (or “imported”, “external”, “outside”, possibly “foreign”) challenge, which in my opinion threatens the essence and very functionality of AT more than endogenous challenges, for it attacks the traditional goals of AT. It arises as if outside the scope of the AT, or affects its scope only marginally, or it is artificially imposed into the remit of the AT.

The number of out-of-competition normative goals that could be taken into account in the competition law assessment is practically unlimited.⁶³ However, they practically oscillate around a few ethically and media attractive topics, the solutions to which are offered at the cost of weakening (or at least risking) the self-regulatory effect of competition.

“Sustainability” is one of the most attractive topics of this kind. By the way, sustainability is a very broad word that hardly might be labelled as a true concept because of its fuzziness, its ability to opportunistically draw in (or, on the contrary, exclude) almost anything that just fits or does not. Far from being just about environmental issues, it has a much broader scope, which in some conceptions has directly social engineering ambitions that cannot remain without impact on competition law.

3.1 DIGITALIZATION AS BOTH A BOON AND A MENACE TO COMPETITION LAW?

Digitalization is probably one of the two most difficult challenges (besides sustainability) that the current AT is facing.⁶⁴ In my working typology, this is an endogenous challenge, not a specific AT goal. The AT must deal with the digitalization of the economy in a similar way as it has done with a number of other technological

the other. For more details see KOKKOT, J. Regulierung zwischen Datenmacht und digitaler Autonomie. *Wirtschaft und Wettbewerb*. 2022, Jhrg. 72, Nr. 12, p. 641.

⁶² See LORENZONI, I. Why do Competition Authorities need Artificial Intelligence? *Yearbook of Antitrust and Regulatory Studies*. 2022, Vol. 15, No. 26, pp. 33–56.

⁶³ THOMAS, S. Normative Goals in Merger Control: Why Merger Control Should Not Attempt to Achieve “Better” Outcomes than Competition. In: *Concurrences* [online]. 2021, p. 10 [cit. 2023-02-21]. Available at: <https://awards.concurrences.com/en/awards/2021/academic-articles/normative-goals-in-merger-control-why-merger-control-should-not-attempt-to>.

⁶⁴ As we have shown above, there is currently even some discussion about a “digital-ecological transformation” of society.

challenges. Fortunately, however, new advanced digitalized methods for detecting anti-competitive behaviour are also evolving as a result.⁶⁵

Digitized economy is based on the processing of huge amounts of data and their interconnection. Digital platforms have become synonymous with the digital economy. Some of the huge digital platforms (especially GAFA) have gained so much power that they have become gatekeepers with the potential to stifle competition, especially through self-preferencing, killer acquisitions, leveraging their power into other markets, etc. Some GAFA members may, in parallel, be guilty of both unfair trade practices and abusive exclusionary conduct due to their bottleneck position.⁶⁶

A global consensus is rapidly growing, that BigTech companies cannot anymore be left alone. A lot of classical economic wisdom is being modified or denied in the digital economy and the law must respond to this. This includes recognising a single global or pan-European market for online services and harmonising consumer protection in online contracts. So, the aim of EU competition law is to take back the control over the digital economy and self-determination of those who depend on the biggest digital platforms,⁶⁷ though without endangering or reducing network effects.

A justifiable and understandable fear of the great power of gatekeepers, which can also be pre-emptively secured by acquiring promising would-be competitors by incumbent undertakings, even gives way to somewhat bizarre ideas about retroactive divestiture. This would mean total destruction of legal certainty and security not only for the merging parties but also for third parties trading with them. Stronger ex post regulation is proposed as an alternative to the need for new ex ante regulation. Ex post supervision of mergers should depend on an assessment of a possible anticompetitive plan and could even take the form of a challenge to a legally cleared consummated transaction.⁶⁸

There is widespread scepticism that AT cannot meet this challenge without additional special regulation (incl. creating new regulatory body) and an opinion is growing that “using the regulatory approach is much better than using the AT process as a form of quasi-regulation”.⁶⁹ This approach is implicitly confirmed by the European Commission

⁶⁵ See e.g. NADLER, J. et al. *Investigation of Competition in Digital Markets* [online]. Washington: U.S. Government Publishing Office, 2022 [cit. 2023-02-21]. Available at: <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

⁶⁶ GERADIN, D. – KATSIFIS, D. The Antitrust Case against the Apple App Store. *Journal of Competition Law&Economics*. 2021, Vol. 17, No. 3, p. 503.

⁶⁷ DE STREEL, A. – LAROUCHE, P. The European Digital Markets Act proposal: how to improve a regulator revolution. *Concurrences*. 2021, No. 2, p. 63.

⁶⁸ HEMPHILL, C. S. – WU, T. Nascent Competitors. *University of Pennsylvania Law Review*. 2020, Vol. 168, No. 7, pp. 1879–1910. The DMA presupposes a. o. that gatekeepers will be required to inform the Commission of an intended concentration involving another provider of core platform or any other services provided in the digital sector, irrespective of whether the transaction is notifiable in terms of merger regulation. Special attention is devoted to structural impact of great digital firms, to analysing the substantive assessment of digital and technology merger cases against the background of the growing concern about the market power of Big Tech, to identifying theories of harm and considering remedies adopted to address these competition concerns. See one of the very latest researches ROBERTSON, V. *Merger review in digital and technology markets: insights from national case law: final report*. Luxembourg: Publications Office of the European Union, 2022.

⁶⁹ MOSS, D. L. Moss says U.S. Needs a Digital Market Regulator to Curb Big tech Power. In: *American Antitrust Institute* [online]. 5.11.2021 [cit. 2023-02-21]. Available at: <https://www.antitrustinstitute.org/moss-says-u-s-needs-a-digital-market-regulator-to-curb-big-techs-power/>.

with its DSA and DMA. Implicitly this approach for they go beyond the existing AT standards and lay down special rules of conduct (inter alia self-preferencing, leveraging, use of data preventing interoperability/portability) for a specific group of actors, effectively regulating their behaviour ex ante.⁷⁰ In doing so, they are clearly based on many years of experience with GAFA-established practices and are in fact a casuistic response to this behaviour, which led to an apparent market failure.

It may be reminiscent of “preparations for the last war”. However, this is certainly a more appropriate approach than anticipating and misjudging future developments in information technology and committing overregulation. Yet the objectives of these regulations are more ambiguous, aiming mainly at fairness or transparency and accountability); it is, of course, questionable whether the desired global standard will emerge.⁷¹

Some commentators have even spoken in this context of the emergence of “hybrid competition law”, which has gone beyond the existing supervision of abuse of market power⁷² and which relies rather on classical regulatory approaches; it should only be a complementary tool to competition policy and not a substitute for it; it could, however, turn into a double jeopardy overlapping with Art. 102 TFEU.⁷³ There is also the problem of the enumerative list of prohibited conduct, which will have to be updated, and the fact that the possibility of justifying prohibited conduct is not allowed, so that the direct applicability of the prohibition also covers innovative and pro-competitive conducts.⁷⁴

Experience with digital multinational giants and (perhaps well-intentioned) efforts to harness them have also motivated ideas for more far-reaching changes to AT. Thus, for example, senator Klobuchar’s proposal (The Competition and Antitrust Enforcement Act of 2021)⁷⁵ included the idea of banning mergers that “*may create an appreciable risk [!] of materially lessening competition*” and of enacting a presumption that would have to be rebutted by the parties.⁷⁶ Given the difficulty for even an expert antitrust authority to establish credible positive evidence of a substantial competitive harm as a result of a merger, shifting the burden of proof of credible negative evidence to the parties could effectively block mergers.

This proposal might really be a kind of “firing squad”. Similarly remarkable is the suggestion that the exclusionary conduct is anticompetitive regardless of market power. The presumption could be rebutted by its addressee, which is a firm or group of firms that have over 50% market share or otherwise have (only) “significant market power”.⁷⁷

⁷⁰ GUERSENT, O. The Commission’s proposal for a Digital Markets Act. *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 2, p. 69.

⁷¹ EIFERT, M. – METZGER, A. – SCHWEITZER, H. – WAGNER, G. Taming the giants: the DMA/DAS Package. *Common Market Law Review*. 2021, Vol. 58, No. 4, p. 1028.

⁷² Shifting to a stand-alone approach distinct from an established competition law frame of reference; see HAUS, F. – WEUSTHOF, L. The Digital Markets Act – a Gatekeeper’s Nightmare? *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 6, p. 318.

⁷³ HAUS – WEUSTHOF, c. d., p. 324.

⁷⁴ POILLEY, R. – KONRAD, F. A. Der Digital Markets Act – Brüssels neues Regulierungskonzept für Digitale Märkte. *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 4, p. 206.

⁷⁵ See BIDAR, M. – TURMAN, J. Klobuchar pushes for antitrust enforcement of big tech. In: *CBS News* [online]. 19.3.2021 [cit. 2023-02-21]. Available at: <https://www.cbsnews.com/news/antitrust-laws-enforcement-big-tech-klobuchar/>.

⁷⁶ OHLHAUSEN, c. d., p. 9.

⁷⁷ Not inevitably dominant position – *ibid.*, p. 10.

We need to monitor the discussion of these proposals closely, as they may be important and even fatal for the development of AT worldwide.

Digitally driven and boosted changes are manifold and they are hardly to describe, let alone analyse on such a small space, even just as an update to the outcomes of last year's conference "EU Antitrust: Hot Topics & Next Steps". It concerns among others the general issues of the development and protection of competition in the digital economy⁷⁸ and in particular online platforms,⁷⁹ pricing algorithms undermining the category of intent or mutual understanding underlying the classic cartel doctrine. Pricing algorithms have recently begun to outgrow the already quite complex issue of instantaneous automated responses to market price movements. Self-learning algorithms go even further and obscure the will of their real operators even more. Their ability to learn and adapt themselves makes it difficult to define and punish anticompetitive conduct and to separate it from an otherwise desirable and pro-competitive response to market changes.⁸⁰

Digital economy nevertheless does not affect the goals of competition law and their constellation. It does not change the fact that AT is embedded in an ideology (or even a subcategory of an ideology) and that it is necessarily influenced by interest groups. Thus, digitalization only adds another technological aspect to the traditional method of measuring and balancing different goals, without affecting them themselves as to their substance.⁸¹

3.2 "SUSTAINABILITY" ENDANGERING SUSTAINABILITY OF GOALS AND ANALYTICAL METHODS OF AT?

Digitalization as the first part of the name of the declared stage of social development (under the shorthand label of digital-ecological transformation) does not impose new goals on competition law. It forces them to adopt new practices in order to achieve the original (traditional) goals of AT, however constantly they are debated. It is kind of an endogenous challenge.

⁷⁸ See COLANGELO, G. et al. Competition Policy in the Digital Economy. *Concurrences*. 2021, No. 2, pp. 1–51.

⁷⁹ For the most recent contributions see BAKER, J. B. Protecting and Fostering Online Platform Competition: the Role of Antitrust Law. *Journal of Competition Law & Economics*. 2021, Vol. 17, No. 2, pp. 493–501; BERNHARD, L. – VOGES, P. Kartellrechtsdurchsetzung in Plattformmärkten. *Wirtschaft und Wettbewerb*. 2022, Jhrg. 72, Nr. 12, pp. 651–659; EZRACHI, A. – STUCKE, M. E. The Darker Sides of Digital Platform Innovation. In: *Network Law Review* [online]. 11.8.2022 [cit. 2023-02-21]. Available at: <https://www.networklawreview.org/ezrachi-stucke/>.

⁸⁰ See e.g. among the newest contributions HOYNG, A. C. – VANDENBORRE, I. – JANSSENS, C. Pricing Algorithms: thoughts on a framework for competition law analysis. *European Competition Law Review*. 2022, Vol. 43, No. 1, pp. 28–39; OTT, L. The Future is now: machine learning pricing algorithms and tacit collusion. *Wirtschaft und Wettbewerb*. 2022, Jhrg. 72, Nr. 11, pp. 590–596; DESCAMPS, A. – KLEIN, T. – SHIER, G. Algorithms and competition: the latest theory and evidence. *Competition Law Journal*. 2021, Vol. 20, No. 1, 32–39; GAL, M. Limiting Algorithmic Cartels. *Berkeley Journal of Law and Technology*. 2023, Vol. 38, No. 1.

⁸¹ Similarly EZRACHI, A. *Discussion Paper The Goals of EU Competition Law and the Digital Economy* [online]. Brussels: BEUC – The European Consumer Organization, 2018 [cit. 2023-02-21]. Available at: https://www.beuc.eu/sites/default/files/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf.

“Sustainability” is a different case representing one of the recently most preferred attractive challenges. It is often just a buzzword that has not escaped its use as a mere label, which is undeserving of the respectable value it implies and denotes. Despite its weak conceptual and terminological anchoring,⁸² it has far-reaching ambitions to change the life of society and, among other things, to redefine the goals of competition law.⁸³ This is obviously an exogenous influence even if the values that are promoted under this name are just “*reflexes or beneficial side effects*”, rather than “*immediate goals that ought to be achieved directly by specific government intervention in antitrust cases*”.⁸⁴

Despite the penetration potential of “sustainability”⁸⁵ (or perhaps because of it), it is not at all clear what is meant by it. It is far from being just a question of environmental sustainability, which is inherently dynamic. Some relevant and otherwise systematic sources⁸⁶ even speak of some vague and arbitrarily adaptable “green quality improvements”, “green investing direction”, “carbon-neutrality targets”.

The experience with the once-famous “more economic approach” to the law of competition is instructive. It was the evergreen of conferences and publications around the world, and a bit of a fashion. However, the tendency to see things “more economically” led, among other things, to the removal of the section on environmental agreements from the Horizontal Guidelines on the application of Art. 101/3 TFEU.⁸⁷ It is now apparently going to be reintroduced again, and probably as a very important issue.

The term sustainability also might include aspects such as fair trade, or even the welfare-being of animals in the farms has been considered a new possible theory of

⁸² Attempts to clarify this concept are most welcome – see the very latest EU draft of Sustainability agreements in agriculture – consultation on draft guidelines on antitrust exclusion. In: *European Commission: Competition Policy* [online]. 2023 [cit. 2023-02-21]. Available at: https://competition-policy.ec.europa.eu/public-consultations/2023-sustainability-agreements-agriculture_en.

⁸³ See another very recent step to sustainable economy: Directorate-General for Internal Market. Just and sustainable economy: commission lays down rules for companies to respect human rights and environment in global value chains. In: *European Commission: Internal Market, Industry, Entrepreneurship and SMEs* [online]. 23.2.2022 [cit. 2023-02-21]. Available at: https://single-market-economy.ec.europa.eu/news/just-and-sustainable-economy-commission-lays-down-rules-companies-respect-human-rights-and-2022-02-23_en.

⁸⁴ FUCHS, A. Characteristic aspects of competition and their consequences for the objectives of competition law – comment on Stucke. In: ZIMMER, D. (ed.). *The Goals of Competition Law*. Cheltenham: Edward Elgar, 2012, pp. 53–60, p. 58.

⁸⁵ See e.g., MIAZAD, c. d., asserting that “addressing” climate change is an economic necessity that ensures continuous profitability (p. 1666); fuzzy “addressing” implicitly incorporates efficiency as a traditional microeconomic goal of AT, and this “addressing” even goes well beyond efficiency (Sustainability objectives may be doubtlessly in many cases viewed as economic efficiencies; remark JB). Confusing “market failure” with “consumer failure” in context with sustainability is remarkable, too (p. 1683).

⁸⁶ OECD. *Environmental Considerations in Competition Enforcement* [online]. OECD Competition Committee Discussion Paper. OECD, 2021 [cit. 2023-02-21]. Available at: <https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement-2021.pdf>.

⁸⁷ MAYER, CH. Der Beitrag des Kartellrechts zum Green Deal. *Wirtschaft und Wettbewerb*. 2021, Vol. 50, No. 5, p. 259. However, environmental protection has been included in Art. 3(3) of the European Treaty since the very beginning, so it is by no means a new goal. Removing environmental considerations from the Horizontal Guidelines and their envisaged revival 10 years later demonstrates the purpose-driven nature and political volatility of the out-of-competition goals. In addition to the general proclamation in Art. 3/3, the TFEU refers to the environment in Art.191, but this is aimed primarily at the EU institutions (and therefore the legislature) and not at private individuals or undertakings. See BKA, c. d., p. 20.

harm⁸⁸ in this context of sustainability. The 2019 European Green Deal does not foresee AT being at the forefront or the main instrument for its enforcement. Rather, it is about applying existing rules in a way that supports policy objectives in favour of environmental protection.⁸⁹

The “more holistic” approach involving out-of-competition goals has a strange flavour of sectoral regulation outside the remit of the competition authority.⁹⁰ Traditionally, such considerations of out-of-markets effects are fundamentally incompatible with the nature of the competitive assessment. AT built on the achievement of using the rule of reason in a graspable sense in relation exclusively to competition benchmarks should not give up this methodological advantage.

Sustainability can be achieved primarily through appropriate environmental protection policies and legislation. There is no fundamental contradiction between the public interest objectives (which include the protection of the environment and the sustainable development of society) and the objective of protecting competition. As a rule, the competition will also lead to the achievement of public welfare goals.⁹¹ Within a well-designed ecological framework, competition works in favour of environmental protection, leads to efficient use of scarce resources and prevents waste.⁹² The complementarity between the objectives of competition law and whatever defined goals of sustainability is undeniable in many cases.

It is generally true that consumer welfare does contain and take into account a variety of values that it can optimise, unless these values are protected by direct public instruments outside the market. Because if consumers internalize these values, they are also willing to pay for them. But if such normative values are imposed on consumers against their will in the market, it means that someone else knows better than they do what the market should properly look like which is “[...] *the opposite of what competition is supposed to do. Ultimately, antitrust authorities could become subject to undue influence by political stakeholders. This could eventually undermine their role as impartial competition watchdogs.*”⁹³

⁸⁸ DREYER, J. – AHLENSTIEHL, E. Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen. *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 2, p. 79.

⁸⁹ Green Deal starts to be understood as a far-reaching regulatory framework including a very risky call for the “establishment of a new societal order”; similar attempts to introduce something like that have historically backfired so many times... See CHITI, E. Managing the Ecological Transition of the EU: the European Green Deal as a Regulatory Process. *Common Market Law Review*. 2022, Vol. 59, No. 1, pp. 19–48.

⁹⁰ So, the proposal that the Commission might also be willing to look at sustainability aspects to actually justify a clearance decision for a merger that would otherwise negatively affect competition and so to admit out-of-market “green efficiencies”, such as cleaner water or air, that not only the customers of the merging parties would benefit from, but society at large; see GEISEL, B. – UWAGO, C. *Sustainability Belgium – The Impact of the Green Deal on EU Competition Law* [online]. Allen & Overy, 2021, p. 7 [cit. 2023-02-21]. Available at: <http://documents.jdsupra.com/1ca18a18-d9a1-4831-9132-4f5ccf569301.pdf>.

⁹¹ Bundeskartellamt, *c. d.*, p. 6.

⁹² HEINEMANN, A. Umweltschutz und Wettbewerb. *WRP*. 2021, Jhrg. 67, Nr. 4, p. I [editorial].

⁹³ THOMAS, *c. d.*, p. 10. Consumers value mostly (65%) positively ecological products and services even if only 26% are ready to pay more for it. They are called “elusive green consumers” (see Monopolkommission, *c. d.*, 9, p. 220). This is nevertheless not a sufficient reason to paternalistically eliminate the competition. The way forward is probably through strict environmental public standards, beyond which businesses can compete for more conscious consumers willing to pay...

Moreover, competition authorities are busy enough with the protection of competition and it is questionable whether they can at all intervene (not only formally in terms of remit but also substantively and with their professional staff) in environmental protection and other matters of general welfare.⁹⁴

We can also encounter a more broad than narrow ecological concept of sustainability, which is even harder to operationalise; e.g. in addition to the environmental issues, the progressive Dutch Competition Authority includes biodiversity, health, animal welfare, fair trade, fair working conditions including the protection of child labour and the right to form trade unions and human rights among its sustainability objectives.⁹⁵ This is clearly an over-ambitious goal, which places demands on the Authority at the level of the government or perhaps a modern-day “Committee for the Public Good”, but certainly higher than is desirable.

On 1 March 2022, the European Commission launched public consultation on the draft revised Horizontal Guidelines.⁹⁶ Although it concerns only horizontal agreements between competitors, Chapter 9 provides a number of suggestions for incorporating sustainability considerations into the competition analysis.⁹⁷

The scope of this overview paper does not allow us to dwell on the proposal in detail, but we will note some of the more general topics. On the one hand, the proposal very sensibly interprets the legal aspects of the exceptions to the prohibition of agreements restricting competition so that they can also include environmental considerations.⁹⁸ On the other hand, it refers to very vague aspects of what is actually meant by sustainability.⁹⁹

⁹⁴ MAYER, *c. d.*, p. 259.

⁹⁵ ACM. Guidelines on Sustainability Agreements – Opportunities within competition law. In: *Authority for Consumers and Markets* [online]. 2021 [cit. 2023-02-21]. Available at: <https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law>. Apart from “stretching” the concept of sustainability to include even animal welfare (what do they actually have in common?), this approach smacks of social engineering. It is argued that “*an agreement between competitors that benefits the environment and therefore society as a whole could be allowed even if the companies’ customers were left worse off*” (quotation of M. SNOEP in: JEPHCOTT, M. – SHAH, D. – KINGSBURY, L. Climate change, sustainability, and competition law: where are we now? *E.C.L.R.* 2022, Vol. 43, No. 8, pp. 366–371, p. 369). We have also had unfortunate experiences with the primacy of so-called society-wide interests over consumer interests and its consequences.

⁹⁶ Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines. In: *European Commission: Competition Policy* [online]. 1.3.2022 [cit. 2023-02-21]. Available at: https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

⁹⁷ It is noteworthy that, after the deletion of environmental agreements from the 2010 Guidelines, they reappear in the last draft.

⁹⁸ See points 541–621 of the draft. Promising might be in particular the path of “green standards” as a special kind of standardisation agreements already meeting the conditions for exemption from the prohibition under Article 101/3 TFEU. See GASSLER, M. The new sustainability chapter in the draft Horizontal Guidelines. *E.C.L.R.* 2022, Vol. 43, No. 10, pp. 449–457.

⁹⁹ See point 543 of the draft, where there is an open-ended list of aspects that could include not only climate change, eliminating pollution, reducing the exploitation of natural resources, respect for human rights, reducing food waste, facilitating the transition to healthy and nutritious food, ensuring animal welfare, but also gender equality, improving education, ensuring decent wages for workers, combating poverty, etc. Sustainability is therefore supposed to be certain, although it’s very “definition” is at least uncertain. Such a broad “definition” is unreasonable and methodologically worthless. Depending on political circumstances, it may lead either to an inability to apply it at all or to its arbitrary application “as needed”. Or to something “between”, which is also undesirable from the point of view of legal certainty. See

As the German Monopolkommission stated,¹⁰⁰ balancing between sustainability and competition can and should still take place within the framework of AT. Other non-competitive effects that cannot be assessed as economic efficiency should not be taken into account by the competition authorities, in order not to compromise the protection of competition with other policy objectives. Out-of-competition considerations can be developed outside antitrust law, but should be as transparent and objectively verifiable as possible. Internalisation of (ecological, among others) externalities should be preferentially made by instruments outside of competition policy, e.g. through regulation and legislative setting of minimum standards.

4. CONCLUSION

Competition is an agnostic principle¹⁰¹ serving directly or indirectly to some form of consumer welfare. Society at large and the legislature may, of course, be interested in various outcomes arising in a competitive environment. But not through antitrust, but perhaps through environmental, labour, social and other regulation. That is, through linear instruments that pursue other normative goals besides competition. The anonymous parametric influence of competition should not be conflated with the pursuit of other direct normative objectives. The evaluative considerations then confuse and contradict each other, leading to arbitrary (and ultimately political) decision-making.

The much talked-about ecological and digital transformation of society and the economy is no exception. This is just one of the additional traps set to threaten the competition order. These traps include¹⁰² lobbying;¹⁰³ strong state influence and a tendency towards renationalisation and remonopolisation; promotion of national points of view and national and EU-wide protectionism; problem with public welfare objectives that must first be carefully identified and then it is necessary to examine how competitive processes can be used to achieve these public welfare goals; asymmetry in the protective welfare state that listens more to employees of incumbent firms than to those who might work for would-be rivals; the complexity and interconnectedness of today's digitized economy, its increasingly networked nature, which deprives traditional AT of its effectiveness against GAFSA-companies and leads to the creation of hybrid practices on the border between antitrust and regulation (like Digital Market Act and Digital Services Act); problem of competition as such and its functions in a market economy being socially and ecologically mitigated.

LITTLE, D. – BERG, W. – PRADILLE, C. – AUBRY, A. The European Commissions' Draft Guidelines on Sustainability Agreements. *E.C.L.R.* 2022, Vol. 43, No. 9, p. 407.

¹⁰⁰ See Monopolkommission, *c. d.*, points 474–477, p. 228.

¹⁰¹ THOMAS, *c. d.*, p. 14.

¹⁰² See KÜHLING, *c. d.*, pp. 524 ff.

¹⁰³ Facebook and Google are undertakings with the largest annual lobbying expenditure in the EU which hardly cannot be connected with their market power.

Paternalistic control of societal wellbeing, even if it pursues worthy goals to which nothing can be objected, must not deprive the consumers of the ability to finally decide about the outcomes; and precisely this ability is guaranteed by the undeformed AT.¹⁰⁴

I also recommend that competition law sticks to its mission to protect a self-correcting functional competitive environment. The hardly substitutable role of competition as a discovery process should not be sacrificed in favour of arbitrarily set political achievements. It should not be “changed” and instrumentalised to achieve extra-competitive objectives that can be better addressed by direct regulation, and certainly not to comply with various vague mainstream slogans hiding interests that are not consistent (complementary) with the protection of competition. AT is neither a “collection basket” nor a “lamb of God” that takes away the sins of the world. Transformation of AT to all-purpose cure for socioeconomic ills would backfire.¹⁰⁵

No branch of law or any part of legal regulation can avoid the natural evolution in response to changing social conditions. It must not, however, lose its essence and main function and dissolve into a micromanagement of current socially supported problems. Society should not deprive itself of competition as an indispensable instrument of self-regulation, nor should it weaken its legal protection. Otherwise it could easily slide into detailed central control and influence over anything, which has failed more than once in history, and one just recently.

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¹⁰⁴ THOMAS, *c. d.*, pp. 15, 23.

¹⁰⁵ See LAMMI, G. Transformation Of Antitrust Law To All-Purpose Cure For Socioeconomic Ills Would Backfire. In: *Forbes* [online]. 23.7.2019 [cit. 2023-02-21]. Available at: <https://www.forbes.com/sites/wlf/2019/07/23/transformation-of-antitrust-law-to-all-purpose-cure-for-socio-economic-ills-would-backfire/?sh=451392dc74a8>.