The Concept of Sustainability in EU Competition Law: A Legal Realist Perspective

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Abstract

This article explores the role of sustainability in EU competition law from the perspective of the theory of legal realism. It addresses the issue by analysing three interrelated themes. It first outlines the main normative and methodological arguments of the protagonists and the opponents of a more societally engaged account of competition policy. Such an account pleads for a more permissive interpretation of competition rules. Secondly, it develops an account of competition law, basing on the premises of the legal realist tradition, adjusting legal realism to the needs and specificities of our field and our time, and submitting that this legal philosophical theory is well-suited for capturing the present discussion. Finally, it projects this jurisprudential theory of legal realism to an applied dimension, offering an outline of the central theoretical issue of a more societally inclusive EU competition policy: the issue of balancing incommensurable values.

Key words:

Competition law, sustainable development, legal philosophy, legal realism, balancing, in-/commensurability, EU law.

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I. Introduction

Competition law, economics and policy are in the midst of a major transformation. Numerous internal and external factors are triggering various revisions and raising various challenges for the discipline. Some of the factors are mutually-invigorating, others – mutually-exclusive. One of the most vocal and convincingly argued dimension of the discussion on the very essence of competition policy, as well as on its role in the broader constellation of various societal values, is the issue of sustainability. Can agreements between competitors aiming at enhancing sustainable development be exempted from the sanctions envisaged by competition law? And if yes, under what conditions? Should such agreements be seen as not being anticompetitive in the first place, and as such going beyond the scope of Art 101 TFEU at all, or should the rationale of Art 101(3) TFEU be expanded to cover (some of) such agreements? These questions are equally relevant *mutatis mutandis* to other pillars of EU competition law: unilateral conduct, merger control, State aid rules and ex-ante regulation.

At the same time, the very foundations of competition policy are being revised in various contexts and for various purposes. The emergence of a *sui generis* approach to competition law in the area of the digital economy,[1] discussions about the role of competition policy in

[1] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15.12.2020 COM(2020) 825 final 2020/0361 (COD) available at: https://eur-lex.europa.eu/legal-content/en/txt/?uri=com%3a2020%3a825%3afin (accessed 20/07.2021); Proposal for Regulation of the European Parliament and of the Council On Contestable and Fair Markets in the Digital Sector (Digital Markets

remedying various societal, economic, industrial, racial, gender and other problems and challenges show that competition policy can no longer be addressed hermetically, only via the traditional toolkit of law and economics.

The main purpose of this article is to provide a legal theoretical framework explaining, justifying and conceptualising the existing reconfiguration of competition law, economics and policy. Its main purpose is not to use this legal theory to support a specific sustainability-related normative argument, but to analyse how the key arguments of the supporters and critics of a greener competition policy could be shaped and underpinned by the jurisprudential theory of legal realism. On an applied level, the article explains why the current situation in competition law is particularly susceptible to various versions of 'competition law and …' movements.

More specifically, this article aims to (i) examine and systematise the central arguments of the supporters and the opponents of the idea of sustainability-centred – or at least sustainability-minded – competition law; (ii) to place these arguments into a broader context of the development of (primarily EU) competition policy; (iii) to transpose the discussion into legal-theoretical discourse and the apparatus of legal realism; and (iv) to operationalise the system by showing the mechanics of balancing. It summarises and explains its main contribution in the conclusion.

II. Competition and sustainability: pros & cons

A stylised argumentation of the proponents of a more sustainability-minded approach begins with reminding us of the dangers associated with rapid climate change, 'a disaster in slow motion' (Dolmans, 2020) and of humankind's responsibility to adjust our economic and socio-cultural practices and habits accordingly. Then the scientific, political and legal sources of the UN, OECD, EU and other international and domestic organisations and polities are analysed, with the demonstration of the topicality and the urgency of the issue and the availability of legally binding instruments for applying a more sustainability-minded approach to competition policy. Finally, advantages and shortcomings of the current case law are addressed and ways for re-interpreting the legislative, administrative and judicial sources are offered.

Act), Brussels, 15.12.2020 COM(2020) 842 final 2020/0374 (COD), available at: https://eur-lex.europa.eu/legal-content/en/txt/?uri=com%3a2020%3a842%3afin (accessed 20.07.2021).

One of the most comprehensive and well-argued pieces by the proponents of a more proactive sustainability-minded application of competition policy is Simon Holmes' 'Climate Change, Sustainability, and Competition Law' (Holmes, 2020). The author's central message is that competition law should become a solution rather than remain an obstacle to a more sustainable development. Holmes supports this normative plea with reference to the constitutional architecture of EU law, referring to some hierarchical primacy of sustainability and environmental protection over competition policy, as deduced from the provisions of the TFEU. Holmes notices a common tactical move of responsibility shifting, when any meaningful initiative to tackle climate change is relativised and downrated by the rhetorical arguments of the inability of such an initiative alone to achieve clearly measurable outcomes. He argues that the existing legal framework of EU law is sufficient for achieving much better results, and elaborates a conception of a purposeful reinterpretation of the provisions of its primary law. The main argument is that Article 11 TFEU stipulates that '[e]nvironmental protection requirements **must** be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development' (emphasis added by Holmes). This implies that these requirements must be also integrated into the definition and interpretation of competition policy.

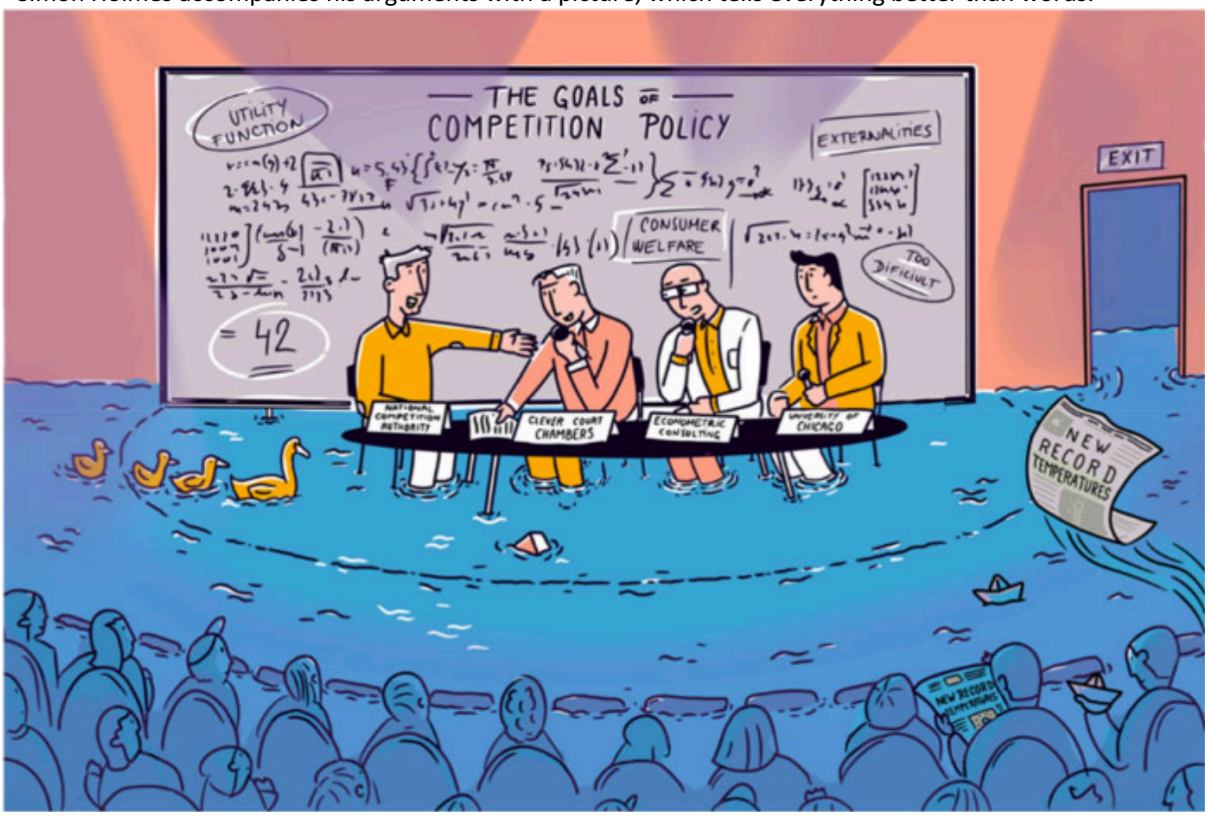
Obviously, several important clarificatory questions emerge: (i) who and how should the limits of such re-interpretation of established doctrinal avenues of competition policy be defined, particularly given that unlike the issues of competition, environmental policy belongs to shared, rather than exclusive, EU competences (Article 4 TFEU); (ii) the provisions of Article 7 TFEU requiring consistency between its policies and activities may well be interpreted not as an imperative that all its *policies* must be consistent with each other (i.e. that competition policy must be consistent with the environmental one), but that all EU *activities* must be consistent with its *policies* – and thus no direct requirement of consistency between the policies themselves; (iii) even the former interpretation refers to a mere *consistency* between policies, not *primacy* of one over the other, and as such could be interpreted both as 'sustainability-minded competition policy' as well as 'competition-minded environmental policy'. Given that the EU has many other (often conceptually conflicting) policies, expecting all of them to be consistent with each other would be very hard to achieve. This can be deduced from the wording of Article 7 TFEU, which stipulates that all EU objectives must be *taken into account* rather than taxonomically *subordinated* to each other.

However, all these counterarguments do not negate the wording of Article 11 TFEU, requiring all EU policies being defined and interpreted with environmental protection in mind.

This is an important legal imperative imposing a categorical requirement of sustainability-minded definition and interpretation of EU policies, providing thereby some hierarchical primacy of the latter over all former. Evidently, this interpretation would be unenforceable in reality – Holmes, for example, acknowledges that over his long and remarkable career in competition law, this legal argument never played an important role in daily enforcement – (Holmes, 2020, p. 359), and hard to conceptualise in theory as such an approach would also imply a primacy of environmental policy over e.g. (all other) human rights. Yet such an apagogical *reductio ad absurdum* alone does negate the fact that formally this imperative exists and despite the questions related to its enforceability, the imperative remains legally binding. These conflicts of policies are much more common in constitutional law and legal theory, and there is rich doctrinal and practical literature addressing these dilemmas (Andriychuk, 2017).

The next powerful argument of Holmes' paper is that (i) the term consumer welfare is much broader than its economic dimension implies, and that (ii) the methodological reduction of consumer welfare – let alone the competitive process – to the neoclassical apparatus of price theory is myopic and distortive of the very meaning of the phenomena it seeks to comprehend and steer.[2]

[2] Simon Holmes accompanies his arguments with a picture, which tells everything better than words:



Finally, Holmes offers a convincing analysis of five formal ways of incorporating sustainable development into the current competition law framework: (i) some sustainability agreements do not restrict competition (as long as competition policy is reinterpreted in an environmentally-minded way); (ii) 'Albany' route of finding the provisions of Article 101 TFEU inapplicable to (some) sustainability agreements; (iii) ancillary restraints; (iv) Article 101(3) TFEU; (v) standardisation agreements. The remainder of his article focuses on the elaboration of the above five avenues, looking at other pillars of competition law and offering eight practical recommendations for implementing a more sustainability-minded competition policy: (i) positive statements by competition authorities; (ii) test cases in courts; (iii) publication of legal opinions which facilitate this approach for others; (iv) revising soft-law; (v) enforcement priorities; (vi) block exemptions; (vii) changes to the law and (viii) changes to the Treaties.

A stylised argumentation of the proponents of the *status quo* also begins with acknowledging the dangers of climate change and the need for a more proactive approach to remedying its negative implications. They question, however, if competition policy is indeed suitable for such purposes, showing examples of why and how the rhetoric of sustainability could be used for so called 'greenwashing' and other forms of opportunistic, if not deceptive, misuse of the idea of sustainable development. They counter the argument of sustainability-minded competition policy with the idea that many other societal values, which either conflict directly or at least diverge substantially, are also acknowledged by the political and legal documents, and that without a proper 'division of labour' between different policies the goal of a sustainable development – as well as many other societal policies – would suffer immeasurable loses, and submit that a greener competition policy would eventually backfire as 'more, not less, competition [… is] the right stimulus for inducing sustainability efforts' (Schinkel, Treuren, 2020).

Edith Loozen offers a range of appealing arguments from the perspective of EU constitutional law (Loozen, 2019). Unlike Holmes, Loozen is rather sceptical about the ability of EU competition law to encapsulate so proactively the sustainability-driven narrative. The author begins by offering an excellent reference to earlier literature on this issue. Then Loozen analyses the provision of Article 3(3) TEU and submits that the primary objective of the EU constitutional project concerns market integration. Questions about the characteristics of the internal market are of paramount importance, but they are not – and conceptually can never be – superior over the market integration narrative as such. The paper offers an appealing

substantiation of this normative proposition, analysing inter alia the main jurisprudence of the Court of Justice (hereinafter: CJ).

Loozen begins with analysing *Wouters*[3] followed by *Meca-Medina*[4] and *OTOC* and *CNG*.[5] These cases offer *prima facie* the same rationale of the non-applicability of Article 101(1) TFEU to some types of sectorial agreements. In *Wouters,* Article 101(1) TFEU was held inapplicable. The otherwise anticompetitive Netherlands Bar's measures were considered to be necessary for ensuring the proper functioning of the profession. However, according to Loozen, this case does not allow for a flexible weighing of the applicability of Article 101(1) TFEU any time when the 'legitimate objective' outweighs the rationale of Article 101(1) TFEU.

In *Meca-Medina,* anti-doping rules as adopted by sports federations were considered as capable of falling within the scope of Article 101(1) TFEU, but not infringing competition in practice. In other words, unlike the Netherlands' Bar, the IOC does not enjoy immunity from Article 101(1) TFEU, and as such Loozen concludes that the recourse to the *legitimate objective* rationale was needed in the first place. She finishes by discussing why the attempts of some EU Member States to impose an imperative public mandate on some of the widely supported by the public sustainability initiatives violate the EU *useful effect* doctrine, imposing on and expecting from the Member States a duty of sincere cooperation and/or Article 105(1) TFEU.

Another impactful paper by the sceptics is written from an economic point of view by Maarten Schinkel and Leonard Treuren (Schinkel, Treuren, 2020). Their central normative position is based on the basic principle of non-intervention as the cornerstone of competition (qua invisible hand). They also begin by acknowledging the urgency of environmental challenges, but submit that such an all-inclusiveness of competition analysis is likely to lead to cartel greenwashing, with the overarching formula: 'minimum sustainability benefits for maximum prices' underpinning the very idea. The authors submit that such a shift of responsibility would slow down those governmental divisions which are directly responsible for a more proactive sustainability policy.

A number of appealing arguments are raised by Giorgio Monti (Monti, 2020). He offers a conceptual resolution to the opposite parties. He begins by analysing cases in which

[3] ECJ judgment of 19.02.2003, Case C-309/99 *Wouters and Others*, ECLI:EU:C:2002:98.
[4] CJ judgment 18.07.2006, Case C-519/04 P *Meca-Medina and Majcen v. Commission*, ECLI:EU:C:2006:492.
[5] CJ judgment of 28.02.2013, Case C-1/12 *Ordem dos Técnicos Oficias de Contas* (OTOC), ECLI:EU:C:2013:127; and CJ judgment of 18.07.2013, Case C-136/12 *Consiglio nazionale dei geologi* (CNG), ECLI:EU:C:2013:489.

environmental benefits were converted into a monetary dimension and balanced against eventual economic inefficiencies. Monti then reverts to the landmark *CECED* case,[6] analysing the changes in approaches of the Commission to the scope of the definition of 'consumers' in Article 101(3) TFEU. The key question being if the definition embraces only those directly involved in the purchase – or also a broader category. Only if taken in the scope of the latter, the benefits from environmental improvements would be seen as sufficient for outweighing the anti-competitiveness of the agreement. This would be in line with the Guidelines on Horizontal Agreements[7], adopted two years later, prescribing the analysis of net improvements. Monti than notices that this coincided with the growing popularity of the more economic approach and, thus, the Commission was moving towards a more restrictive approach to non-economic benefits of Article 101(3) TFEU, which was reflected, inter alia, in a new edition of the Guidelines.[8] This has created quite a confusing situation – where both the supporters of private sustainability initiatives and their critics had strong legal arguments underpinning the position of both sides, arguments which are counterbalanced with the equally meritorious position of the opponents (as well as the middle-position). This Hartian 'open texture of law' is not a legal pathology, but the only possible condition of law.

The main contribution of the paper is in its development of legal avenues, which would remedy the existing uncertainty. Monti puts forward four options for a reform. The lightest proposes a more cooperative approach of the enforcers to sustainability initiatives from the industry – an approach which would imply giving less attention to such agreements either in a form of enforcement de-prioritisation or any shape of comfort letters. Option 2 concerns a greener interpretation of Article 101(3) TFEU, focusing on refining the cost-benefit analysis – a difficulty, of course, would be the uncertainty and the burden of proof on the undertakings. Option 3 concerns deeper green alternatives, focusing on the issues, which are not always at the centre of the discussion – for example territoriality. Option 4, the greenest competition policy, implies internalising the rationale of Article 11 TFEU, and overall, a more proactive application of other non-competition law provisions of the Treaties and secondary legislation in tackling environmental problems via the competition law paradigm. Comparable examples may refer to the use of ethical standards in international trade and public procurement, GDPR,

[6] Case IV.F.1/36.718, CECED [2000] OJ L187/47.
[7] Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/2.
[8] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.

privacy and all other instances of instrumental competition enforcement of the 'antidumping' type.

III. The (post-) pandemic impact

A number of insightful contributions to the discussion on competition and sustainability were raised during the Commission's consultation on 'Competition Policy supporting the Green Deal', which was launched in October 2020. It has generated a great deal of responses from the industry, academia, public authorities and law firms. Many submissions note that pursuing a greener competition policy is easier in the area of State aid (Bruzzone, Capozzi, 2020). Indeed, while the wording of Articles 101 & 107 TFEU both refer to actions restricting competition and declare these actions to be incompatible with the internal market, the nature of State aid – unlike the nature of the prohibition of anticompetitive agreements – concerns competition only peripherally. The main essence and the main mission of State aid control is the protection and promotion of the Internal Market, making it more homogeneous. The interest of protecting competition is used mainly as a convenient proxy (no other developed antitrust jurisdiction with a con-/federative system has its rules on State aid developed to a degree similar to the EU – as the integration of the internal market is not as an important task for any other such jurisdiction as it is for the EU).

In response to the consultation, for example, Francisco Costa-Cabral notes that we can learn from the model of how the reference to the protection of public health is being used in a competition law analysis: '[t]he Commission has done so by using the consequences for national health systems and for the research of new pharmaceuticals to ground novel anti-competitive behaviour and theories of harm in merger control (See Case A.37.507/F3 AstraZeneca 15.06.2005 112–132 and Case M.7275 - Novartis/GSK 28.1.2015 101-114)' (Costa-Cabral, 2020), and this has been done despite the existence of ex ante regulation. He calls for a more proactive approach by the Commission in pursuing environmental objectives.

As far as the UK concerns, the Competition and Market Authority (hereinafter: CMA) issued in 2021 a guidance on 'Environmental Sustainability Agreements and Competition Law',[9] outlining its vision on the key problems of the issue, focusing only on anticompetitive agreements and only on the environmental dimension of sustainable development. The central

[9] UK Competition and Markets Authority, 'Environmental Sustainability Agreements and Competition Law', 21 January, 2021.

purpose of the CMA in this context is to avoid 'unnecessary obstacles' to sustainable development, rather than creating an atmosphere where any formally questionable environmental initiative is abandoned by the businesses as one susceptible of raising competition law concerns. Some anticompetitive agreements can indeed be exempted either individually or as part of an existing exemption category. The emphasis is placed on the subjective part of the agreement, questioning if its real intention is not a cover for a cartel. Standardisation agreements are a significant part of pro-environmental anticompetitive agreements and the guidance is focused on explaining the key criteria for the agreement being qualified as such. The document also offers a helpful 'Framework for assessment' flowchart.

A separate strand of literature contextualises the discussion to the (post-)pandemic crisis. Despite substantive differences between the issue of sustainability and crisis cartels, there are also some important similarities as both address situations where the economics-centred antitrust methodology interacts with broader (and for many 'more important') societal values.

Julian Nowag raises the issue of the resilience of competition law, looking at the pandemics as a test of the system against *ad hoc* emergency regulatory measures. A resilient system is expected to survive the exogenous shocks, ultimately getting out of it stronger. He argues for a need to strike a balance between some elements of the interventionist crisis-management and systematicity and certainty (Nowag, 2020).

Masako Wakui puts forward an argument for a more inductive, case-by-case approach to this highly contested issue, using market studies as the main legitimate cause for action.[10] Even such an approach is seen by the representatives of many producers as not sufficiently proactive. They would be prepared to undertake much more inclusive actions to tackle the pandemic-related challenges (Wakui). But many of such actions require coordination and/or synchronous entry to avoid the first mover disadvantage. This appears to be the real apple of discord for the entire matter.

Alison Jones emphasises that in such a situation, where multiple conflicting approaches to the issue may be chosen by the enforcers, what really matters is clear and expedient guidance about the approach chosen by the relevant agency (Jones, 2020).

Maurice Stucke and Ariel Ezrachi see the pandemic as an opportunity to recalibrate the overall societal vision about the very phenomenon of economic competition,[11] submitting that

[10] Masako Wakui, 'Free Market Versus State or Something Else?: Civic Sector and Competition Law's Roles During the COVID-19 Pandemic in Japan', Journal of Antitrust Enforcement, Vol. 8, No. 2, 2020, pp. 316–318.
[11] Maurice Stucke and Ariel Ezrachi, 'COVID-19 and Competition – Aspiring for More than Our Old Normality?', Journal of Antitrust Enforcement, Vol. 8, No. 2, 2020, pp. 313–315.

if a major revision of competition policy is inevitable anyway, it should be done in an ethically minded manner, in a way promoting the instances of noble and discouraging toxic competition (Stucke, Ezrachi, 2020).

Peter Ormosi and Andreas Stephan warn against an excessively permissive approach by competition agencies, which in the times of crisis tend to tolerate or treat more leniently commercial practices of competitors aiming to help the society to tackle the crisis. They refer to situations where undertakings were allowed to enter into what could formally qualified as a cartel (Ormosi, Stephan, 2020). The central message of the note is that while the current situation is in many respects unique, the severity of the crisis alone does not justify a long-term compromise upon the cornerstone principles of competition law. Each crisis is somewhat unique, and each asks for extraordinary measures. But those going beyond real emergency-solving instances, should be treated rather conservatively. The authors rely on the scientific wisdom of economics, which in the long run is capable to offer much more sustainable and efficient results than *ad hoc* measures, regardless of the level of benevolence of their proponents. They support their thesis with some quite appealing arguments related to the inherent opportunism of the colluders, operationalisation of the exemptions and their temporal dimension as well as the shortcomings of assigning to competition policy tasks going far beyond its mandate. The Authors' normative view is shared by Jorge Padilla, submitting that 'it is not a good time to relax antitrust policy' (Padila, 2020).

Overall, antitrust scholarship has generated rich experience in re-interpreting competition policy in times of economic, social, economic or political turbulences. A rich contribution in this area is also made by the OECD[12], which remains one of the most vocal and competent intellectual centres of the discussion.

IV. The decline of the 'scientific' approach to competition policy

The purpose of the previous sections was to offer an illustration of the conceptual parameters of the positions and arguments of key stakeholders in the discussion. The purpose of the following sections is to offer a perspective from the theory of legal realism, which is one of the most impactful contemporary jurisprudential traditions. Evidently, the purpose is

[12] Suffices to mention a comprehensive collection OECD Global Forum on Competition, 'Crisis Cartels', DAF/COMP/GF(2011)11, available at: https://www.oecd.org/competition/cartels/48948847.pdf (accessed 20.07.2021), and more specifically on sustainability Julian Nowag, 'Sustainability & Competition Law and Policy – Background Note', OECD DAF/COMP(2020)3, 2021, pp. 1–39.

not normative but purely methodological. The idea is to shape a theoretical avenue, a conceptual toolkit, which would allow a more proactive interpretation of the relevant legal provisions – proactive primarily in the sense of a more sustainability-minded competition policy, but equally for the arguments of the opponents of such a normative position. In other words, the purpose is to expand the apparatus of the discussion, rather than to use legal realism in support of a specific vision of the eventual constellation of a more sustainability-minded competition policy.

The analysis of the positions of the proponents and the critics of a greener competition policy reveals that in spite of being in a normative conflict with each other, most of the arguments are well-calibrated, appealing and convincing. Such a condition of two antagonistic views being simultaneously correct is very problematic for the currently dominant 'scientific' methodology of competition law, economics and policy. By contrast, such condition is not uncommon and is conceptually acceptable in the domain of social sciences, as the latter does not deal with absolute deterministic categories.

Having two alternative interpretations of an objective fact, being each formally correct, is against the very rationale of scientific analysis – an analysis, which assigns to itself the ability to demonstrate with absolute certainty and deterministic causality the 'real' state of affairs in the field. Such an approach is pervasively transposed to competition policy by the current mathematical microeconomic reasoning.

Contrary to the deterministic power of the laws of nature, competition as an inherently societal phenomenon is not driven by categorical causalities. The positions of both antagonists may well be simultaneously correct from the perspective of law, economics and facts. This polyarchy of competition law is not pathological and does not require a remedy in the sense of its conceptual treatment and a recalibration of its apparatus.

Chronologically, legal realism can be seen as a theory (i) challenging, first, the monopoly of legal formalistic ('scientific') reasoning, (ii) paving thereby the way to law and economics, (iii) it then has been relegated by its own disciples to the periphery of the discussions about the economic analysis of law and (iv) replaced by neoclassical law and economics – at least as far as competition economics is concerned.

Its origins are traced back to late 19th century US jurisprudence, and the main purpose of the movement was to relativise the absolute categorical self-referentiality of legal formalism. As one of its founders – Karl Llewellyn pointed out, '[t]he difficulty in framing any concept of "law" is that there are so many things to be included, and the things to be included are so unbelievably different from each other' (Llewellyn, 1930). The famous motto of legal realism

– 'Law is too important to be left to lawyers' (for the history of the phrase see Broderick, 1987) – fits well current discussions on competition policy. Of course, with a caveat that: 'law is too important to be left to lawyers *and economists*'. It is also important to note that what is so fiercely opposed to is not the reliance on the letter of law or the letter of economics as such, but only the categorical, deterministic absolutisation of the solutions offered by both formalisms.

As Oliver Williamson explains, 'that one [legal realism] foundered while the other [law and economics] flourished is explained largely by the absence of an intellectual framework for Legal Realism and the use by law and economics of the powerful framework of neoclassical economics' (Williamson, 1996). This has been observed in 1996, at a time that could be seen as a 'golden age' of law and economics – and evidently Williamson was sceptical about this situation, referring to the scholarship of Bruce Ackerman, who suggested in 1986 that we 'should look to the sciences of culture, anthropology, sociology, and sociolinguistics' (Ackerman, 1986). This paper does not intend to internalise the scholarship of Williamson, acknowledging that in many respects the ideas articulated in this section concur with the institutional view on economics – but oppose the new institutional economics' reliance on empirical methods.

The main criticism of legal realism and old institutional economics was that both failed to offer an alternative positive agenda, focusing mainly on criticising traditional theoretical approaches. In Ricard Posner's words, '[f]ormalism and realism are useful concepts, but only for the analysis of common law cases and doctrines. For interpretation we need different intellectual tools' (Posner, 1986). Describing legal realism, Lon Fuller points out that 'there is no realist 'school' […]. The movement represents a variety of points of view; it has its left and right wings' (Fuller, 1934). A good history of the movement and its main controversies is offered by Stewart Macaulay (Macaulay, 2005). Rule-scepticism – an absolutist form of legal realism, reducing legal considerations to politics – was convincingly criticised by HLA Hart in Chapter 7 of his 'Concept of Law' (Hart, 1994).

Twenty-five years after the highlighted discussions, we see far less categorical support of law and economics. The movement is losing its momentum – at least in the domain of competition policy – and the task of this section is to highlight the reasons for an objective decline of neoclassical law and economics, and to show why and how its intellectual predecessor – legal realism – can in fact be used as an alternative intellectual background underpinning the most vibrant discussions taking place in competition policy these days:

‘“new legal realism’ is a response to a ‘new formalism’ – that derived from neoclassical law and economics’ (Nourse, Shaffer, 2009).

The reasons for the decline of law and economics are numerous. Some are mutually supportive. Others are completely independent from one another. Not intending to engage in a detailed analysis of each of them, suffices to mention the most appealing ones:

(i) The financial crisis of 2008-2009 questioning the very suitability of the mathematised neoclassical economics to predict and to address effectively the causes of the crisis.

(ii) The emergence and the rapid growth of hybrid economies, with their hybrid state-market vision of competition. This has undermined the orthodox perception of the mathematical modelling of neoclassical economics.

(iii) Normative ignorance of neoclassical competition as to the value of the competitive process: we protect it only because (and as long as) it is efficient.

(iv) The variables in the equations are often polyvalent – and this makes the entire calculus futile.

(v) The rapid growth of the zero-price digital economy, blurring the apparent clarity and predictability of the traditional microeconomic calculus.

(vi) Polarisation of international trade and stronger links between competition and industrial policies, instrumentalisation of competition law.

(vii) Pandemic crisis necessitating a search for alternative and more suitable models.

In this context, legal realism is gaining a new momentum – the momentum, which this paper aims to articulate.

The current re-emergence of a more context-minded approach to competition policy, its disentanglement from the deterministic formalism of mathematised microeconomics and law, is the development going in line with the rationale of legal realism.

As observed by Frederick Schauer, legal realism can be seen ‘as denying that official legal sources can usually produce the straightforward outcomes that the traditional view imagines

[… and that] formal legal materials ordinarily do not determine legal outcomes without the substantial influence of nonlegal supplements. To the extent that this is so, legal outcomes will then be the product not of formal or official law, but instead either of the ideological or policy preferences of individual adjudicators' (Schauer, 2012). Clearly, the new wave of legal realism 'liberates' social reality not only from the letter of law, but also from the letter of microeconomics.

Schauer further suggests that what has been described, for example, by HLA Hart as 'hard cases' – enabling, and in fact requiring judicial discretion – are only tiny 'indeterminate edges' of an otherwise stable, predictable, 'simple' reading of legal rules (Hart, 1994). This idea is developed further by Brian Leiter (Leiter, 2002). Legal realism goes beyond what is 'absolutely necessary' for a Hartian (or Dworkinian) judge.

V. The revival of a more 'contextual' competition policy

Legal realism implies that political considerations or broader societal interests can – and do – play a role in interpreting the law, and that this situation is not pathological, but normal for each legal system (Tamanaha, 2008). The hardness of a case is not its objective feature, and hardness is not attributable to a specific set of cases. Depending on the interests of the parties in the judicial proceedings, even a *prima facie* trivial case can be problematised by internalising into the consideration more legal rules, economic theories, technical facts and their interpretations. And *vice versa* even *prima facie* the most complicated case can be trivialised, reduced to hypothetical speculations or ignored outright if there are no societal interests and individual stakes in pursuing it.

Only a tiny and non-representative component of the hardness of a cases has a purely juristic pedigree (vaguely defined terms, direct linguistic conflict and alike). Hardness is a systemic feature of any mature legal system when the stakes are high, because in such cases not a single, but a cascade of norms is invoked, and the more norms, acts and cases are being interpreted the more inevitable the element of 'hardness' becomes.

In competition law this becomes even more inevitable as legal hardness is always complemented by the economic one, and often by other technical circumstances each of which cannot be miraculously assembled into a conflict-free 'jigsaw puzzle', with each of its elements suiting perfectly one another. A realist adjudication process is much more similar to a Lego-construction with a room for various objects being created out of the same set of particles.

This implies that in hard cases, involving important societal values and interests, the choice is ultimately extra-legal (that is, political), as opposed to the view (still) dominant in competition circles that the choice can be mathematically calculated, and that the ultimate economic and legal truth are discoverable. Legal and economic 'truths' are polyvalent rather than singular. If the case is genuinely hard, different stakeholders are able to present different plausible interpretations of legal rules, economics and facts, and if those are interpreted meritoriously (and when the stakes are high, they are usually interpreted meritoriously – otherwise, the case ceases to be hard, becoming trivial), it is for the decision-maker to select the one, which reflects best the interests of the polity.

Jeremy Waldron points out that '[t]here is no final word about rights or anything else, from either legislators, judges, or philosophers. The things we want to prioritize in moral and political life […] are the subject of constant controversy and interpretation, vision and revision' (Waldron, 1984). Pierre Legrand is even more explicit: 'those who claim to have elicited a common denominator transcending laws and the places of laws, allowing for a mathematization of law, partaking in some sort of epistemological bilingualism, and permitting a rigorous Archimedean assessment (and ranking) of laws in terms of 'efficiency' are, in effect, positing a range of audacious postulates' (Legrand, 2009). John Flynn notes that '[t]he legal process is constantly confronted with reconciling competing and conflicting moral values underlying its rules in light of the specific realities of individual disputes, role definitions, and the consequences of the decision.' (Flynn, 1988). He concludes that this feature is the core of the mastery of the legal profession.

Rebecca Haw Allensworth makes one of the central points in the discussion arguing that 'despite the inevitability of value judgments in antitrust cases, courts have perpetuated a commensurability myth, claiming to evaluate "net" competitive effect as if the pros and cons of a restraint of trade are in the same unit of measure'. (Haw Allensworth, 2016). She points out further that such an assumption is very tempting for all decision-makers as it appears to be simple (complex in terms of the process of its calculation, but simple in terms of the recommended solution). As Kelsen notes, '[i]n terms of the positive law there is simply no method according to which only one of the several readings of a norm could be distinguished as "correct" (Kelsen, 1990). This makes it possible to conclude that 'being a political creation, competition law is inherently susceptive to a wide range of domestic societal variants' (Ezrachi, 2016).

It is essential to make a clarificatory point against a common misperception of legal realism being an uncritical, value- and standard-free opportunistic relativism, shaping arbitrarily the

process of adjudication into the direction, which a specific polity or its adjudicators are keen to pursue. In democratic systems, there are many obvious institutional constraints, limiting, framing and taming such an interpretative omnipotence – the main one being the very adversarial system as such. Only the arguments of the parties, which meet the minimum thresholds of legality, economic rationality and technical correctness could be meaningfully argued for in the proceedings. Only in a situation where two or more interpretations of legal, economic and technical elements of the case pass this invisible acceptability threshold, it is then, and only then, the decision-maker operates in the legal realist fashion, and the choice of the decision-maker is limited solely to the options, which meet the institutional thresholds of legal formality, economic rationality and technical facticity. In other words, if the political interests of a polity nudge the decision-maker towards Option 1, which while being politically the best does not (fully) meet the threshold of legality, rationality and facticity, Option 2 should always prevail if it meets the abovementioned thresholds, even if the political implications of such an option are inferior to those of the Option 1.

This caveat is both restrictive and expansive: it is restrictive in a sense of limiting the instances of judicial discretion only to the options, which meet the standards of legality, rationality and facticity, as well as only to hard cases. It is expansive because the hardness of a case is not a specific distinctive attribute of a norm, but is a situation, which can be triggered even with *prima facie* trivial, non-conflicting preconditions: if the interests of the parties are high enough for such intellectual problematisation. Such a version of legal realism is fundamentally different from the one labelled by Leiter as 'post-hoc rationalisation for decisions reached on the basis of non-legal consideration' (Leiter, 2012).

The non-legal consideration may well be present *a priori*, but it is always constrained and limited by the institutional framework with its powerful proxies: legality, economic rationality and facticity as articulated by the parties. The conceptions of legality, rationality and facticity are flexible and are subject to interpretation, but they are not amorphous and all-inclusive. They meet the requirements of democratic governance each and every moment. This does not, however, mean that political considerations are not taken into considerations and are not factored in – they are. In other words, legal realism operates with a relative indeterminacy, rather than an absolute one, and it is subject to relative encapsulation of the political considerations, without being under their absolute disposal.

Legal realism appears a suitable approach not only because its apparatus is capable of explaining (and we are primarily interested in explaining, and only marginally in justifying) the current multidimensional conceptual perplexity in competition law: normative,

interdisciplinary, contextual, methodological. It is also suitable because unlike most of other mature legal theories, it is not embedded in a complex, autonomous, highly theorised philosophical language. Its propositions are intuitive and are capable of being operationalised without too deep philosophical analysis. As Leiter explains, '[u]nlike its Scandinavian cousin, American Legal Realism was not primarily an extension to law of substantive philosophical doctrines from semantics and epistemology. The Realists were lawyers (plus a few social scientists), not philosophers […]. As lawyers, they were reacting against the dominant "mechanical jurisprudence" or "formalism" of their day' (Leiter, 2002). The agenda of legal realism in contemporary competition law is different. Its main target should not be legal formalism, but mathematical reductionism of law and economics. Moreover, the purpose of a critical revision should not be a refutation of neoclassical microeconomics but a refutation of its categorical claim of the truthfulness of its findings. Legal realism in this sense should relativise axiomatic competition policy, and demonstrate that such relative indeterminacy of legal rules, economic concepts and technical facts is not an obstacle, but a natural condition, which has to be operationalised rather than fought against.

Essentially, the original mission of legal realism was a de-mythologisation of the positivity of law. Its original rival was legal formalism, with its absolutisation and axiomatisation of legal rules – and, at this stage, legal realism was going hand in hand with law and economics, which was pursuing the same purpose of de-mythologising legal formalism (and this partially explains why legal realists have some sympathy for empirical methods as, then, the only meaningful alternative to legal positivity). But after de-sacralising the positivity of law, the law and economics approach has taken over the intellectual crystal ball, becoming the new absolutist: the dominance of the positivity of law has been replaced by the dominance of the positivity of economics. The axiomatic determinism of law has been replaced by the axiomatic determinism of economics *qua* natural science.

Thus, the purpose of legal realism today is to relativise and to operationalise both positivities without refuting them. While in the past the most organic and intuitive ally for combating legal formalism was law and economics, today it is likely that the criticism of new legal realism would be targeted precisely at the 'scientised' neoclassical microeconomic approach of law and economics as an embodiment of the new formalism.

A similar conceptual model – but with a set of parameters originating from another jurisprudential tradition – is offered by Ioannis Lianos in his article 'Polycentric Competition Law' (Lianos, 2018). The author internalises into the competition law discussion a theory of polycentricity formulated by one of the most important contemporary legal philosophers, Lon

Fuller (Fuller, 1978). The central idea is very similar to the one used as a central methodological proposition of this article: our common assumptions that law is axiomatic, determined and certain are only partially correct. In reality, the law is full of inherent controversies and contradictions, and this situation is not resolvable. It is, in fact, a condition rather than a problem, an inherent feature of the law. Law for Fuller and Lianos (and for the premises of this paper) is 'a complicated web of interdependent relationships', and even if we assume its static nature, a change to one element of the system triggers a cascade of changes in many other of its aspects. Furthermore, it is impossible to comprehend – let alone steer or operate on a daily basis – the variety of changes in their entirety.

VI. The need for balancing

There is a plethora of legitimate EU values, rights and interests. Their scope is impossible to reduce to a universal subsumption. Each attempt to establish a taxonomic hierarchy of these values, rights and interests will only multiply the conflicts between the proponents of different views. The lack of clear taxonomy of all legitimate EU values, rights and interests is not a pathological situation. They conflict, and such a conflict is normal as cumulatively they are much broader than any regulator can meaningfully satisfy. Such pluralism implies a constant contest between these approaches, aiming to be prioritised by the decision-makers; The choice is context-dependent. At any one time the constellation of values, interests and rights can be different, and the value prioritised in the situation A will not be prioritised in situations B, C and D (as in a paper-scissors-rock model).

The perception of law being clearly divided into branches and areas is a convenient methodological assumption, which should not be mechanistically transposed into the domain of enforcement. Legal reality is much less taxonomized than our theoretical conventions teach us to believe. In this sense, not all provisions of EU competition law concern competition *sensu stricto*. Some concern the interaction between the societal value of the competitive process and other legitimate societal values (such as, *inter alia,* the value of sustainable development). The clearest example is the provision of Article 101(3) TFEU, which re-legitimises otherwise anticompetitive agreements, based on reasons, at least some of which are extra-competition.

The consumer-welfare oriented approach commits a conceptual fallacy by assuming that the provisions of Article 101(3) TFEU concern competition (both normative and methodological consumer welfare-centred approaches do see the provisions of Article 101(3)

TFEU as competition-related provisions, inasmuch as for them 'competition' means 'welfare'). For the consumer welfare-centred vision, any application of Article 101(3) TFEU implies that the procompetitive elements of an agreement outweigh its anticompetitive elements. In reality, however, the provisions of Article 101(3) TFEU are proxies for balancing the value of the competitive process with other legitimate societal values. The fact that sustainability is seldom articulated in this balancing mechanics may indeed be a problem from the perspective of legal certainty and continuity, but it is certainly not a problem from the perspective of the theory of legal realism. The rationale of Article 101(3) TFEU allows exempting anticompetitive agreements for a number of legitimate societal reasons. The fact that the list of these interests is expanded or amended ('welfare + sustainability' or 'sustainability as welfare') does not make the situation any better or worse from the perspective of this theory.

The wording and the semantic of Article 101(3) TFEU require (or at least allow for) a balancing of competition *sensu stricto* (as defined within the framework of Article 101(1) TFEU) with some other legitimate economic interests. Evidently, this view is not reflected in the current paradigm, which assigns to the agreements meeting the requirements of Article 101(3) TFEU the features of 'procompetitiveness'. The same holds true in US antitrust law with its concept of the 'rule of reason'. While explicitly mentioning reasonableness, it in fact refers it back to competition, making (i) the idea circular: '[t]he rule of reason is designed and used to eliminate anticompetitive transactions from the market',[13] (instead of saying 'to exempt beneficial yet formally anticompetitive transactions) and then (ii) equates competition with the interests of consumers: '[t]he rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer's best interest'.[14] The examples from both jurisdictions indicate the inclination of the monovalent epistemic singularity of modernist competition policy to close the conceptual doors and loopholes opened to the polyvalent account of competition policy either by the legislator (EU) or courts (US). The framework of Article 101(3) TFEU – particularly, if looked at from the perspective of the proponents of its broader, rather than narrower reading – and the framework of the rule of reason in the US allow for a significantly more open interpretation, and the more merits the emerging paradigm would be generating, the more flexible the reading of these provisions would become.

[13] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[14] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

If a decision cannot be just made basing on some form of quasi-automatic subsumption (which would only be possible for trivial, simple cases), the role of decision-maker goes beyond the scope of simply double-checking the compliance of the decision with the facts, rules and economics. The art of balancing hard cases is based on several inner mechanisms. Among the most important ones are the following three: (i) the problem of in-/commensurability; (ii) lack of hierarchical primacy and mutual subordination; and (iii) kaleidoscopic constellation of factors:

(i) The problem of in-/commensurability implies that each fact or group of facts relevant to a specific case, cannot be seen with one and only one metrics. As hard cases mainly concern societally important facts, any decision on them usually has a number of implications for various societal groups, areas, policies, values, interests, rights, strategies etc. Typically, these factors would have their own *raison d'être*, their own metrics, regulatory framework, policy implications, value scale etc., and comparing them would often imply the problem of incommensurability: they simply belong to two or more different metrics, and one cannot be expressed via the other (and vice versa) without diluting some of its decisive or at least important features. It is conceptually possible to imagine a position, denying any conversion of these factors into the metrics of another. This would imply a categorical self-centricity of the value, a normative purism and a radical incommensurability. On the other hand, it is equally possible to imagine another side of polarity, arguing that if all these values and interests remain sitting in the box of their own, self-centred metrics, no decision could be made, as the total scope of all these self-centred values (or, at least, of how their advocates would like these values to be perceived) exceeds significantly the scope any decision-maker has for making a balanced compromise.

This purity paralyses the functioning of the system, and there must be an objective, overarching currency, bringing all of these compartmentalised metrics under a common denominator. Such objective currency could be represented in monetary terms, and thus all values, rights and interests become ultimately commensurable. The specificity of the balancing situation is that both of the polarities (the absolute incommensurability and the absolute commensurability) of the values do exist in the same space and time, and the premises of both are inherently and equally non-disprovable. This necessitates the need to operationalise the model, clearing it from the two polar conceptual breaks. The situation of the simultaneous dialectical coexistence of two diametrically opposed, but equally meaningful polarities, inevitably necessitates political reasonableness. Selecting which approach could be applied in what proportion and with what justification, is an art and an absolute condition of balancing.

This can never be prescribed even in the most detailed rulebooks. As noted by Francisco Urbina, 'whether two things can be commensurated or not depends on the property by reference to which one compares them. It is not a feature of things as such. There is always some property with respect to which it is possible to compare two things' (Urbina, 2015). Aharon Barak sharing his rich judicial experience submits that '"balancing" and "weighing" […] do not produce singular, unambiguous legal solutions [… T]he proper resolution of this conflict lies not in the elimination of the inferior value but in determining the proper boundary between the conflicting values', (Barak, 2006).

(ii) The impossibility of drafting an ex-ante taxonomy or rules, values, principles and interests becomes even more explicit due to the perpetually changing correlation between different values (even after their reduction to the common denominator, after their commensuration). This condition is akin to the rock-paper-scissors game, where each value is more important than the neighbouring one, but is less important than the third one, which in its turn is more important than the previous, neighbouring, one. This cycle is closed: $A < B < C < A$. The only way of solving the aporia is in applying a politically reasonable judgement by the legitimate decision-maker.

(iii) Last but not least, the principle of kaleidoscopic constellation of values, predetermining each instance of balancing. It can be illustrated by another proto-formula $(2 \times 2) + 2 \neq 2 \times (2 + 2)$, which implies that identical variables can produce different results depending on the scope of the focus, as interpreted by the parties and the decision-maker. As Peczenik explains, 'x may weigh more than y in isolation, but in a certain situation z can occur and reverse the order' (Peczenik, 2007).

One of the most emblematic examples in the area of the quantification of non-monetary elements of consumer welfare – and the one directly relevant to the sustainability discussion – is the Dutch 'Chicken of Tomorrow' case. The question, whether the issues of sustainable development *sensu lato* could be transferred from the metrics of animal welfare to the monetary equivalent, was answered in affirmative, but, in that specific instance, the price increase was seen as too high in comparison to the monetised dimension of chicken welfare (Gerbandy, 2017). This illustrates a central specificity of each instance of balancing: the dialectics of in-/commensurability. The idea being that each meaningful conflict of the interests/rights originating from different value-systems is simultaneously capable and incapable of being resolved – capable in the sense of commensuration of different values to the single metrics, and incapable in the sense of the impossibility of such commensuration. Any meaningful conflict of values implies the possibility of two or more prima facie equally

plausible solutions, depending on the metrics opted for by the decision-maker (Forrester, 1997) and depending on the methodological and normative optics selected by her for consideration.

The dialectical element of the dilemma implies the productive, operationalised consequences of this systemic feature, its de-pathologisation, de-problematisation (Andriychuk, 2017).

Reading the provisions of Article 101(3) TFEU from the perspective of legal realism allows sufficient room for incorporating the logic of sustainability into the discourse of competition policy – as required by the provisions of the Treaty itself. The starting point of the analysis should be placed on interpreting the requirement of the contribution of the agreement 'to improving the production or distribution of goods'.

Also, the logic of the part of Article 101(3) TFEU that requires such agreements to simultaneously allow 'consumers a fair share of the resulting benefit' does not categorically constraint the analysis to purely microeconomic calculus as it does not imply – let alone impose – a duty of increasing or maximising economic welfare of consumers, but only refers to the distributional aspects of the resulting benefit, aiming at preventing a situations of redistributing such benefit only/mainly between the parties themselves (whatever the benefit is). Furthermore, the reference to the fairness of the share *ipso facto* implies a broader set of societal values, and for many, *a more sustainability-minded* element of the 'fair share' condition is a measurement at least as appropriate as *a more economically efficient* one (Dolmans, 2020).

This implies that out of three typical borderlines, which limit a more expansive interpretation of Article 101 (3) TFEU – (i) improving the production or distribution of goods; (ii) fair share and (iii) consumers, only the third indicates an explicit connection with the economic nature of the exemption, at least in a sense not allowing the reasons for exempting of the broader societal contribution of sustainability-minded anticompetitive agreements, requiring the demonstration of transferring a fair share of the benefits specifically to people directly involved in the consumption of the goods. Such limitation, however, should not automatically lead to the conclusion that the narrowly defined group of people directly consuming the goods (consumers) could only have economically measurable and/or short-term interests (Peeperkorn, 2020). If the contribution to the production or distribution of goods by an anticompetitive agreement can have a sustainability-relevant dimension, and if a fair (non-economic) share of such contribution is transferred to consumers, even if the category of consumers is defined within a purely economic metrics, this does not negate a possibility of

(i) bringing to such consumers a fair share of the non-economic improvements and/or (ii) converting the non-economic sustainability benefits into economically measurable ones – particularly, if anticipated in a longer perspective. Finally, the argument in support of a more sustainability-minded interpretation of the provisions of Article 101(3) TFEU can be drawn from the fact that Article 11 TFEU has been adopted only in the Amsterdam version of the Treaty — and, thus, is *lex posterior* vis-à-vis Article 101(3) TFEU.

At the same time, it should be noted that the policy-oriented apparatus of legal realism is equally capable of interpreting the provisions of Article 101(3) TFEU in a much more constrained, conservative way, the approach which its critic, Suzanne Kingston, calls 'isolationist' (Kingston, 2020), for example by placing a greater emphasis on the provisions of Articles 104–106 TFEU. In addition to references to existing instances of restrictive/ economics-focused interpretation of the provisions of Article 101(3) TFEU, the emphasis of such approach would be on the element of the 'indispensability of restrictions'. If applied *narrowly*, the concept of indispensability would mean that the restriction should not go beyond of what is absolutely necessary for achieving the declared efficiencies (and, thus, sustainability could not be seen as a part of the broader, economic efficiency, the part mitigating the severity of the anticompetitive harm). If applied *broadly*, the restrictions should be indispensable for achieving the sustainability-related efficiency (and, thus, sustainability would itself be seen as 'efficiency', even despite its eventual economic inefficiency and anticompetitive harm). Both scenarios appear to be very contestable and dependant on a number of case-by-case extra-legal variables and factors. The avenue of inapplicability of Article 101 TFEU appears to be much more straightforward for the structure of competition law reasoning. However, this would simply shift the discussion from the area of competition law, to the level of defining which practices and in which circumstances may or may not be qualified as contributing to achieving the goals of sustainable development. Giving the broadness of the scope of the term, this endeavour appears to be a major challenge in itself.

Haw Allensworth points out that '[w]hat are typically offered in antitrust cases as procompetitive and anticompetitive effects are rarely two sides of the same coin, and there is no such monolithic thing as "competition" that is furthered or impeded by competitor conduct. In fact, competition – whether defined as a process or as a set of outcomes associated with competitive markets – is multifaceted. Antitrust law often must trade off one kind of competition for another, or one salutary effect of competition (such as price, quality or innovation) for another. And in so doing, antitrust courts must make judgments between different and incommensurate values' (Haw Allensworth, 2016).

VII. Conclusion

The main theoretical objective of the paper was to contextualise the discussion on the place of sustainability in the current competition law discourse to the domain of jurisprudence, using the theory of legal realism as the one reflecting best the current trends. The law in the legal realist tradition is not seen purely as an instrument for achieving political goals, but the latter dimension cannot be hidden behind or annihilated by the legal forms or economic axioms. The desacralisation of legal formality and economic rationality helps to increase legal flexibility and adaptability, but it is also a double-edged sword. The purpose of the article was neither to put forward a normative argument in support of a more sustainability-friendly application of current competition rules, nor to argue against such an approach. The article is more analytical than normative, and its main purpose is to show how the main normative ideas of both sides could be embedded into the conceptual framework of legal realism – one of the most popular contemporary schools of jurisprudence.

A portion of moderate legal realism is necessary for EU competition law as its current development stage appears to be stuck in an intellectual trap: on one hand, it is mindful of its strong juristic pedigree and evolves within the rich jurisprudential tradition of case-law. This tradition has been modified and constrained by the inseparable penetration of competition law reasoning by neoclassical microeconomic theory, which has 'scientised' and 'objectivised' the discipline with its 'neutral' and 'universal' apparatus of mathematical reasoning. On the other hand, however, the external processes taking place in the current economies require a much more proactive, tailored and nuanced application of competition rules – the application going beyond the axiomatic approach of the (still) dominant paradigm of law and economics. The justification for a more flexible, interpretative and purposeful application of competition rules cannot necessarily be found – and should not be primarily searched for – in economic or political theory. The answers to complex theoretical legal problems are offered in an intellectually rich, mature and almost entirely neglected by competition law circles legal theory – the *magistra vitea* for all legal systems and areas. Evidently, such a transposition requires contextual adaptation, and the case of sustainability may be a very suitable opportunity for this.

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