Square Peg in a Round Hole? Sustainability as an Aim of Antitrust Law

by

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CONTENTS

Abstract

The ongoing debate on sustainability in antitrust only briefly refers to the established legal methodologies of interpretation. In particular, there seems to be hardly any reflection on the teleological interpretation of competition law in the context of making sustainable development the aim thereof. This is problematic, because a methodologically sound construction of the aims of law is instrumental not only for the interpretation of its provisions, but also for ensuring the rule of law and safeguarding the rights of individuals. This article is an attempt to

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trigger a discussion in this area by analysing whether promoting sustainability is, or can be, an appropriate aim of antitrust law within the existing methodological framework. This allows for a consideration of whether promoting sustainability is currently a legitimate aim of competition law, and if not – whether and how it can, and whether it should, be introduced as such. The conducted analysis described in this article shows that the aims of antitrust are elusive, but essentially the aim of competition law should be an economic one, focusing on the protection of the freedom of competition, promoting economic efficiencies and ultimately protecting consumer welfare (surplus). Promoting sustainable development through antitrust, as it is currently proposed, inevitably leads to decreasing consumer surplus, and it is at least highly disputable if it increases consumer welfare. It is apparent that the proposed pro-sustainability solutions assume, or at least allow, that prices will increase, so the consumer surplus will decrease. Therefore, sustainability and the core economic aim of competition law are apparently in conflict with each other. Additionally, the broadness of the notion of sustainability and the significant diversity of its parts lead us to the conclusion that in legal terms it is internally contradictory. Thus, it may be reasonably concluded that there is no legitimate justification for the proposal that promoting sustainable development is an aim of currently binding Polish or European competition law, and furthermore, that it does not seem to be the proper aim of antitrust law for the future.

Resumé

Le débat actuel sur la durabilité dans le domaine de la concurrence ne fait que brièvement référence aux méthodes d'interprétation juridique en place. En particulier, il n'y ait pratiquement aucune réflexion sur l'interprétation téléologique du droit de la concurrence dans le contexte de l'objectif du développement durable. Ceci est problématique, car une construction méthodologiquement solide des objectifs du droit est instrumentale non seulement pour l'interprétation de ses dispositions, mais aussi pour assurer l'état de droit et sauvegarder les droits des individus. Cet article a pour but de stimuler la discussion dans ce domaine en analysant si la promotion de la durabilité est, ou peut être, un objectif approprié du droit de la concurrence dans le cadre méthodologique existant. Cela permet d'examiner si la promotion de la durabilité est actuellement un objectif légitime du droit de la concurrence et, si ce n'est pas le cas, si et comment elle peut, et si elle doit, être introduite en tant que telle. L'analyse décrite dans cet article montre que les objectifs de l'antitrust sont complexes, mais que l'objectif du droit de la concurrence devrait être essentiellement économique, en se concentrant sur la protection de la liberté de la concurrence, la promotion de l'efficacité économique et, en fin de compte, la protection du bien-être des consommateurs (surplus). La promotion du développement durable à travers l'antitrust, telle qu'elle est actuellement proposée, conduit inévitablement à une diminution du surplus du consommateur, et il est pour le moins très contestable qu'elle augmente le bien-être du consommateur. Il est évident que les solutions proposées en faveur du développement durable

supposent, ou du moins permettent, que les prix augmentent et que le surplus du consommateur diminue. Par conséquent, la durabilité et l'objectif économique central du droit de la concurrence sont apparemment en conflit l'un avec l'autre. En outre, l'étendue de la notion de durabilité et la grande diversité de ses composantes nous amènent à conclure qu'en termes juridiques, elle est contradictoire. Ainsi, on peut raisonnablement conclure qu'il n'y a pas de justification légitime à la proposition selon laquelle la promotion du développement durable est un objectif du droit de la concurrence polonais ou européen actuellement contraignant et, en outre, que cela ne semble pas être l'objectif approprié du droit de la concurrence pour l'avenir.

Key words: competition law; antitrust law; purposive interpretation; sustainability; green antitrust.

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I. Introduction

In recent years, a number of authors (e.g. Inderst and Thomas, 2020; Dolmans, 2020; Scott, 2016; Vedder, 2021) and competition authorities (e.g. Authority for Consumers and Markets, 2021; Hellenic Competition Commission, 2020) have argued that competition law should serve the purpose of promoting sustainable development. This is related predominantly to environmental or green sustainability, but sometimes also to the social or socio-economic aspects of sustainable development (OECD, 2020). In terms of specific institutions of competition law, the pro-sustainability argumentation seems to focus on allowing undertakings to enter into agreements that would be immediately harmful to consumers, in particular by driving prices upwards, but which would hypothetically be beneficial for the environment (and indirectly to consumers) in the long term (Hellenic Competition Commission, 2020).

Proponents of such an approach, often called 'green antitrust', focus on two arguments. First of all, on the general urgency of environmental issues and the resulting need to put 'all hands on deck' to ensure sustainability (Ellison, 2020). It follows that undertakings should be allowed to act in a way that is otherwise contrary to competition law, as long as it is justified by environmental reasons (Vedder, 2021). Secondly, they focus on the possibility to economically justify the fact that decreasing consumer surplus is offset by assumed future benefits from protecting the environment, so on balance it does not decrease consumer welfare (Hellenic Competition Commission, 2020). Economic analysis of competition law should not be underestimated, since

economisation[1] has brought a welcome advancement of antitrust, in particular in terms of the certainty of law, as the law could no longer be described as an entanglement of various political goals (Wright and Ginsburg, 2013). However, despite its dependence on economic issues, competition law still needs to be analysed according to legal methods and reasoning.

The aim of this article is to analyse whether promoting sustainability is, or can be, an appropriate aim of antitrust law. This requires three steps: (1) analysing methods in which the aim or aims of legislation can be legitimately construed; (2) subsuming antitrust law within this general interpretation framework, and ascertaining the aim or aims of this branch of law; as well as (3) considering whether promoting sustainability is the aim of competition law, and if not – whether and how it can, and whether it should, be introduced as such a goal.

The aim of law can be considered in the descriptive aspect, namely by answering the question what *are* the aims of a legal principle? as well as in the normative aspect, that is by answering the question of what the aims of a legal principle *should be* (Korzycka and Wojciechowski, 2017; Wróblewski, 1959). A larger part of this article considers the former aspect, but to a lesser extent it also relates to the latter one.

This article is focused on Polish and EU competition laws, although it includes references to the US origins of antitrust law due to the genetic connection of the systems (Monti, 2001; Weitbrecht, 2008). The analysis conducted herein is based primarily on the Polish legal theory framework, which has its peculiarities, such as the assumption of rationality of the legislator (Nowak, 1973). The article is dedicated to the teleological interpretation of law, using methods traditionally applied for that purpose (Gizbert-Studnicki, 1985), including the legal-dogmatic, historical and empirical methods. The methodology has been selected to address the apparent lack of reflection on the teleological interpretation of antitrust law, which must not be omitted to ascertain its legitimate aims in a proper manner.

II. Methods of construing aims of law

The notion of aim can be understood twofold: subjectively (psychologically), as the goal of an acting individual or group, or objectively (non-psychologically), as the purpose of a certain piece of work (Wojciechowski, 2014). Both these concepts have been supported in jurisprucence and literature (the former, for example in Korzycka and Wojciechowski, 2017; the latter, for example in

[1] Which involved, in particular, the introduction of the consumer welfare standard (Wright and Ginsburg, 2013; Kleit, 1992).

Bielska-Brodziak, 2009). This issue does not have to be resolved here, because various approaches to the teleological interpretation of law (discussed below) take into account both the personal intentions of an individual or individuals, and the objectivised purpose of legal norms.

Establishing the aims of law, whether in reference to a specific legal norm, a legal text or a branch of law[2], is crucial for a number of reasons.

Firstly, they affect the abstract interpretation of the provisions of law, including the meaning of the most rudimentary concepts and definitions (Wojciechowski, 2014), thus building a complex legal system. Legal norms may have a number of material aims: social, economic, political or cultural (Gizbert-Studnicki, 1985). These aims constitute the outcome expected by the legislator, so legal norms established for the realisation of this outcome must be interpreted in view of these aims (Korzycka and Wojciechowski, 2017).

Secondly, the aims of law affect applying law in specific cases (Kotowski, 2017). Therefore, the task of explaining the behaviour of a lawmaker by indicating its intentions or aims in establishing certain rules is vested not only in legal academics, but also in legal practitioners (Pietrzykowski, 2017).

Thirdly, the aims of law are instrumental from the perspective of the rule of law and safeguarding the rights of individuals. The powers of authorities are determined by and limited to the extent that they are necessary for achieving the goals of the relevant regulations. Thus, the authorities must consider them when applying the law (Korzycka and Wojciechowski, 2017).

Regardless of whether a teleological (purposive) interpretation of law is considered as an autonomic interpretation method, or as a manner of selecting the most appropriate of the possible meanings of a legal text (Kotowski, 2017), there are basically three concepts of how it should be applied: the objective approach, the subjective approach and the dynamic approach (Bielska-Brodziak, 2009).

The objective approach is focused on the objective aims, namely on the purpose of the provisions of law. The aim in this approach is primarily derived from the legal text itself, using textual interpretation and logical reasoning. This does not entirely exclude taking into account external circumstances, such as the legislator's other statements, in order to choose from the possible meanings of specific words and phrases. This approach regards the present circumstances, that is those existing at the time of making the interpretation, so any reference to a lawmaker would relate to the current, not historical, lawmaker (Gizbert-Studnicki, 1985).

The subjective approach is focused on subjective aims, in other words the intentions of the lawmaker (individual or individuals). Therefore, the legal

[2] Or even the law as a whole. However, such analysis is less frequent, less practical and outside of the scope of this article, which is confined to competition (and, in fact, to antitrust) law.

text is an important, but not exclusive source of information as to the aim of the law. Extra-textual sources, such as documents that triggered the legislative action, preparatory reports or parliamentary records, are used for establishing the legislator's aim. This approach regards the historical circumstances, those existing at the time of introducing the interpreted law, so any reference to a lawmaker would have a historical meaning (Gizbert-Studnicki, 1985).

The last, and least popular, is the dynamic approach, which assumes that the interpretation of law is a mechanism for realising current socio-economic policy. According to this theory, the text of the law should be respected only if it allows for the realisation of such policy (Morawski, 2010). It has been described as a postmodern approach, in which the interpreter 'constructs' the legal principle making use of the legal text, rather than on the basis of the text and its linguistic and logical analysis (Kotowski, 2017). This approach involves two main problems. First, it does not allow for a meaningful debate allowing for a verification or falsification of any views, because every interpreter may create his own assumptions, boundaries and rules of analysis (Stelmach and Brożek, 2006). Second, it diminishes the role of the legal text and, in consequence, of the legislator in favour of the person interpreting or applying the law, which raises doubts from the rule of law perspective (Wojciechowski, 2014). Thus, the dynamic approach will be only briefly mentioned in this article. Recognising the desired aims of legislation that cannot be legitimately inferred from existing law (in other words, what the law *should* be) may only be useful *de lege ferenda*.

There are multiple typologies of goals of legal norms (see Bielska-Brodziak, 2009). For the purpose of this article it is sufficient to discuss divisions (1) by the material source for identifying the aim, and (2) by the interrelation of several aims of a given act of law.

Legitimate sources of information on the aims of a legal act can be textual or extra-textual. As regards the textual sources, the aims can be divided[3] as (a) expressly stated by the lawmaker, for example in the preamble, recitals or initial provisions of the act of law or (b) not expressly stated, but inferred from the text of law based on a linguistic analysis and logical reasoning (Gizbert-Studnicki, 1985). As regards extra-textual sources, the aims can be divided as derived (c) from materials from the legislative process, such as reports or parliamentary records (Morawski, 2010); and, (d) if the interpretation relates to a legal text that forms long-standing legal institutions – from the functions of these institutions commonly accepted by lawyers (Gizbert-Studnicki, 1985) or from the traditionally defined 'nature' of such an institution (Bielska-Brodziak, 2009); or (e) from aims previously established by other authorities applying the law (Bielska-Brodziak, 2009). In the latter case, it should be posited that

[3] Please note that the divisions described in this paragraph are not disjunctive, so an aim or aims of a certain law may be interpreted from more than one source at the same time.

the other authorities should have derived the relevant aims from legitimate sources in the first place.

The same legal text may serve a number of purposes, which, taken into account when interpreting the said text, may lead to different conclusions or judgments (Bielska-Brodziak, 2009). This requires establishing what is the interrelation of multiple purposes of legislation. One of the key aspects is distinguishing superior and inferior aims. The distinction does not relate to appraising the social, moral, etc. value of the aims. It is connected with a rational determination of whether a specific text of law is structured in a way that one (inferior) of its aims serves the purpose of achieving another (superior) aim (Gizbert-Studnicki, 1985). In any case, the objectives of an act of law must not be conflicting or even incompatible for at least three reasons. First, this would contradict the assumption of the rationality of the legislator (*ibidem*; see also Nowak, 1973)[4]. Second, it would hinder the proper application of the law. Finally, it would undermine legal certainty, as the relevant authorities and courts applying the law would arrive at conflicting decisions for no apparent reason.

There seem to be three main methods of resolving a collision of conflicting aims: (1) rejecting the proposed aim due to a lack of provisions that would allow for its enforcement; (2) rejecting the proposed aim due to the irrational, absurd or unacceptable effects of interpreting the law in view of this aim, and (3) rejecting the aim due to the fact that it would invalidate the superior aim of the legislation (Barak, 2005; Bielska-Brodziak, 2009).

III. Construing aims of antitrust law

1. Introductory remarks

The issue of the aims of competition law continues to be highly contentious. This is in no small part due to the fact that none of the possible objectives of antitrust law is neutral and choosing any of them will inevitably favour a particular interest group at the expense of another (Miąsik, 2004).

[4] The Polish Supreme Court has issued multiple judgments, wherein it expressly rejected interpretation of law that would be contrary to the rule of rationality of the legislator. Some examples are: Judgment of the Supreme Court dated 6 December 2006, III KK 181/06, available at: http://www.sn.pl/sites/orzecznictwo/orzeczenia1/iii%20kk%20181-06.pdf (accessed 21.07.2021); Judgment of the Supreme Court dated 23 October 2014, I CSK 1/14, available at: http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20csk%201-14-1.pdf (accessed 21.07.2021); Judgment of the Supreme Court dated 20 March 2018, III KRS 6/18, available at: http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20krs%206-18.pdf (accessed 21.07.2021).

Among other issues, it is controversial whether the objectives of competition law are objectively determined by factors that stem from economic sciences, or whether particular (national or supranational) legislators may adjust or change these objectives when introducing local antitrust laws (Miąsik, 2012). The former approach seems unacceptable. There is no consensus among antitrust economists on various economic concepts and theories, so it is not possible to extract a unified scientific aim. It is apparent that despite similar wording, and in the case of EU Member States the coordinating role of EU law and of the European Commission, various antitrust laws may be applied differently in identical circumstances (Miąsik, 2004). Even if the objectives are the same in various antitrust regimes, they may be pursued in a different manner, for example by following the approach of the Harvard school or the Chicago school (Materna, 2009). However, even if there was such a consensus, the same economic theories may have different effects and application in various countries depending, for instance, on the level of their development. Furthermore, despite the general postulate that legislation should be based on evidence, no scientific concept can override the sovereignty of various states, which includes the power of autonomous law-making.

In practice, the recent expansion of jurisdictions which adopted antitrust laws has led to the introduction of a wide variety of aims of such legislation declared in their legal texts. These include various social policy goals, protection of small and medium enterprises, income redistribution, safeguarding local business ownership, preventing the excessive concentration of political power, consumer protection, regional policy, equalising the chances of market participants, protection of employment levels, protection of the national economy or supporting the aims of a socialist state (Materna, 2009). However, the material provisions of antitrust law in various jurisdictions relating to anticompetitive agreements and abuse of a dominant (or monopolistic) market position are often very similar, which, in the absence of other circumstances, could bring similar effects of interpretation of these laws, in particular under the objective approach.

2. Objective approach

The wording of the material provisions in the original US and EU antitrust legislation, the Sherman Act and the Treaty establishing the European Coal and Steel Community (and later the Treaty of Rome), is vague to the extent that it does not give any guidance as to its goals (Miąsik, 2012).

No valuable guidance stems from the broader legal texts that include these provisions, either. For example, the Treaty on the Functioning of the European

Union (hereinafter: TFEU) indicates in Article 3(1)(b) that the EU has competence in the area of 'the establishing of the competition rules necessary for the functioning of the internal market'. Despite the somewhat vague nature of this statement, it could lead to the conclusion that the ultimate purpose of antitrust rules in the EU legal system is the promotion of the single market. However, according to the Protocol on the Internal Market and Competition attached to the TFEU, 'the internal market as set out in Article 3 of the Treaty on the European Union includes a system ensuring that competition is not distorted'. This does not convene the superiority of the internal market, but rather the equality of aims.

The first modern Polish antitrust legislation, the 1990 Act on counteracting monopolistic practices[5], included a brief preamble that set out three goals: '[e]nsuring development of competition, protection of business entities subject to monopolistic practices, and protection of consumer interests'. While the first and third aims seem coherent with the traditional American approach, the second one seems rooted in the ordoliberal concept of protecting (the commercial freedom of) small businesses and – indirectly – the competitive structure of the market[6] (see below). However, these objectives do not follow the definitions commonly used in legal language in relation to antitrust and they are vague, so it is difficult to precisely indicate the aims they establish, except for the general need to include economic factors when analysing competition law. The same problem of vagueness relates to Article 1(1) of the 2007 Polish Act on Competition and Consumer Protection, which states that the rationale of the law is to 'set out the conditions for the development and protection of competition, as well as the principles of protection of business entities and consumers' interests undertaken in the public interest'.

This lack of guidance makes it necessary to address the extra-textual sources of establishing the aims of law, in particular, since the institutions of antitrust law are long-standing, the functions of the law traditionally and commonly accepted by lawyers and applied by the relevant authorities. While reference to 'commonly held views' may seem to weaken the teleological analysis, it fits into the framework of instruments that may be used to identify

[5] Technically, the 1933 Act on cartels was the first Polish antitrust legislation. However, an analysis of that statute makes it apparent that it had no impact whatsoever on modern Polish competition law. The 1933 Act on cartels does not expressly state its aims. It may be construed from its provisions that its main purposes were preventing the concealment of cartel agreements (i.e. promoting transparency) and quashing them if they threatened public interest, in particular if their effects were economically harmful or if they caused a price increase exceeding the economically justified level.

[6] This makes sense, as antitrust was received from the EEA shortly prior to the Americanisation of European competition law (see Weitbrecht, 2008). This issue is discussed in more detail in the following part of the article.

the objectives of law (Gizbert-Studnicki, 1985, see above) and, in the absence of more stable grounds for review, it provides the opportunity to recognise the aims of antitrust law.

At least since the entry into force of the (earlier) 2000 Polish Act on Competition and Consumer Protection, it has been commonly accepted that the goal of Polish antitrust law should be to increase the efficiency of the economy (in principle as a whole, but also to some extent with regard to individual undertakings) (see Skoczny, 2005). A distinction is made between allocative, productive and dynamic efficiency (Materna, 2009). Allocative efficiency means the availability on the market of products that consumers want, in a quantity corresponding to demand, and at a price that consumers are willing to pay. In this context, 'willingness to pay', that is the voluntary agreement of the buyer to enter into a transaction on terms proposed by the seller, is of key importance (Miąsik, 2012). Production efficiency means the production by an undertaking of an optimal quantity of goods at the lowest possible cost. Dynamic efficiency means the impact of competition in the market on the development of innovation (Robertson, 2020).

It is also generally accepted that the ultimate aim of Polish competition law is consumer welfare (Bernatt and Mleczko, 2018; Skoczny, 2005)[7]. It is disputable whether the efficiencies generated by competition should increase total welfare or consumer welfare. The former approach assumes that society's welfare increases whenever the value of the benefits gained by the entrepreneur from his economic actions is higher than the deadweight loss of other market participants (Bork, 1966; Miąsik, 2012). The latter approach is closer to the ordoliberal concept whereby competition serves to increase general welfare by benefiting the undertaking who best saves the purchasing power of customers at any given time (Lande, 1982; Dold and Krieger, 2017). At least in the circumstances of the EU and Polish antitrust law systems, the latter approach seems much more convincing. At the same time, consumer welfare should include benefits (surplus) that competition brings to all buyers and not only to end users (Miąsik, 2012). This makes it possible to take into account all the effects of competition on market participants, including the static and dynamic aspects thereof. Furthermore, it makes it possible to coalesce the system by including in it buyers that purchase products for their commercial activity on downstream markets, rather than just for their own use.

[7] Possible doubts as to whether the ultimate aim of Polish competition law is consumer welfare are mentioned by authors who *support* this view, but an opposing opinion is barely present in the Polish legal debate. Even if certain authors give priority to economic efficiency, the dominant view is that efficiency should be analysed from the consumers' perspective (see Miąsik and Skoczny, 2014).

This also calls for a review of the approach of the Polish and the EU courts with regard to the notion of the public interest in the assessment of competition law. The history and evolution thereof was thoroughly analysed by Bernatt and Mleczko (2018). The authors indicate that at least until 2014, the courts (as well as legal literature) identified little to no place for non-competition (non-economic) considerations in Polish competition law. However, in a decision from 2014[8], the Supreme Court stated that values other than protecting competition[9] may be taken into account when assessing on a case-by-case basis whether particular conduct or a particular agreement is anticompetitive. In particular, non-competition considerations could form part of an individual exemption analysis under the Polish counterpart of Article 101(3) TFEU. The authors consider this judgment (along with another judgment of a lower-instance court in a controversial matter regarding homeopathy) as a sign that the courts might be ready to balance different public interests as part of their antitrust analysis.

The review of Polish Supreme Court judgments and decisions following the discussed publication indicates that the issue was not further developed. On the contrary, the level of the sophistication of analysis seems to have dropped. The public interest in antitrust law, apart from standard references to consumer welfare or protecting the competition mechanism, was discussed in-depth only sporadically and even then, the Supreme Court's approach may be summarised by stating that any breach of Polish competition law is contrary to the public interest.

In a judgment relating to a vertical pricing arrangement[10], the Supreme Court indicated without any deeper consideration that 'entering into an agreement relating to a fundamental parameter of competition on the market, such as the price, is without a doubt in breach of public interest'. Apparently, the Supreme Court assumed that a vertical pricing agreement is by definition contrary to the competition mechanism as such, because it proceeded to indicate that Polish competition law 'protects the existence of the competition mechanism, which is the optimal method of wealth distribution in a social market economy, so any action against this mechanism is as a rule against the public interest'.

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[8] Decision of the Supreme Court dated 27 November 2014, III SK 21/14, LEX No. 1565780.

[9] The Supreme Court discussed the generally applicable legal rules, although it is worth mentioning that the adjudicated matter considered the waste management market, and the considered non-economic (non-competition) value was environmental protection, which correlates with the topic of this article.

[10] Judgment of the Supreme Court dated 9 October 2019, I NSK 89/18, LEX nr 2727399. An identical approach was applied in a later Judgment of the Supreme Court dated 15 October 2019, I NSK 72/18, LEX nr 2772803.

In another judgment, relating to the failure to perform by an energy company of a commitments decision issued by the Polish Competition Authority in the face of considerable changes to market conditions[11], the Supreme Court considered whether Poland's energy security is an aspect of public interest sufficient to refrain from implementing a decision of the Polish Competition Authority. The Court accepted that energy security is clearly a constitutional value in the Polish legal system and continued to state that 'threats to energy security always require in-depth analysis by antitrust authorities and the courts', which might suggest a readiness to accept external public interest circumstances in an antitrust analysis. However, the Supreme Court all but countered this suggestion by stating that 'circumstances relating to energy security of the state cannot be analysed in isolation from the formal preconditions and construction assumptions of the Polish legal order', so they cannot overturn a breach of competition law.

The above review shows that apart from the valuable, but isolated observation of the Supreme Court that non-competition considerations could form part of an individual exemption, there is little support from the Polish courts for considering non-economic circumstances as a public interest aspect of an antitrust analysis.

Also with regard to EU competition law, it has been noted that its goals 'centre around, and are primarily consistent, with consumer welfare' (Ezrachi, 2018). The body of jurisprudence and literature regarding the objectives of EU competition law is immense, and its detailed analysis exceeds the scope of this article. It will suffice to refer to and comment on two recent compilations regarding this issue, which show a similar picture and lead to the same conclusions as regards the question posed herein.

Ezrachi (2018) found that EU competition law, as it is applied by EU courts, serves several goals that 'represent an amalgamation of values which often overlap, but may also reveal friction' and whose implementation 'may result in varying balancing points and ambiguity'. The objectives include: consumer welfare, protection of an effective competitive structure, protection of efficiencies, fairness, economic freedom, plurality and democracy, as well as market integration. This shows that even EU courts tend to have conflicting views on the goals of antitrust. However, all of the listed objectives are essentially of an economic nature, including fairness (which, in this context, is necessarily 'fused' with economic reasoning), and safeguarding democracy (which consists of the notion that the 'preservation of economic freedom has been viewed as creating the preconditions for democracy').

[11] Judgment of the Supreme Court dated 22 January 2020, I NSK 105/18, LEX nr 2771346. A similar approach was applied in relation to a prohibition decision in an earlier Judgment of the Supreme Court dated 7 March 2018, III SK 6/17, OSNP 2018, No 12, item 166.

Stylianou and Iacovides (2020) reviewed over 3,700 documents (EU court judgements, opinions of Advocates General, Commission decisions and Commissioner for Competition speeches) which also show that EU institutions responsible for competition law enforcement do not identify a single (or even one dominant) goal of EU antitrust law. The quoted objectives include: market structure, competition process, consumer or total welfare, freedom to compete and competitors' interests, fairness, as well as European integration. Despite the lack of consistency, in principle these are all economic objectives (and possibly the least economic, the objective of fairness, is simultaneously the least prominent one in the documents of EU institutions). The authors have also compiled over 40 years of (mainly EU) scholarship on the goals and purposes of competition law. Only four out of 28 authors – most of them prior to 2000 – had indicated that the objective of competition law includes non-economic political or social goals.

The above view finds further support in the practice of the European Commission. Its only widely cited decision which indicated that environmental benefits may be an argument justifying an otherwise potentially anticompetitive arrangement, was issued in the *CECED* case[12]. The arrangement in question was entered into by producers of washing machines and would result in stopping the production of low-end, energy-inefficient units. The European Commission underlined the collective environmental benefits, indicating that 'environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines'. However, it cannot be omitted that, in the first place, the decision indicated that the analysed agreement would result in individual economic benefits for consumers, so it would realise the fair share principle on purely economic grounds. This allows for a conclusion that the European Commission did not decide that non-economic issues may override economic harm to consumers, and that environmental benefits were mentioned as a supplementary argument.

Finally, it should be pointed out that the protection of the freedom of competition is often cited as an objective of competition law, recognising that it leads to increased competition, which in turn leads to increased welfare in every area. This is the second (next to saving customers' purchasing power) pillar of the ordoliberal concept of competition (Dold and Krieger, 2017). Nevertheless, this goal does not currently seem to be as widely adopted as the first two goals described above (Miąsik, 2012).

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[12] Commission Decision of 24.01.1999, Case IV.F.1/36.718. *CECED relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement* (notified under document number C(1999) 5064) (OJ L 187, 26/07/2000 P. 0047–0054).

In view of the above findings, it seems reasonable to propose that the objective of competition law should be an economic one. Specific details may be debatable[13], but a triad of objectives seems to be the most appropriate: protection of the freedom of competition (or the competitive process), promoting economic efficiencies (which, as much as possible, should take into account dynamic efficiency, and not just static efficiencies) and protecting consumer welfare (understood as discussed above). However, these aims should not be viewed as equal; rather, the protection of the freedom of competition is an instrument to promote economic efficiencies, which in turn lead to the protection of consumer welfare, which should be considered as the ultimate objective of antitrust law.

3. Subjective approach

The original aims of both US and EU antitrust law are difficult to trace for at least three reasons. First, as already indicated, the wording of the original legislation is vague to the extent that it does not give any guidance as to its goals (Miąsik, 2012). Second, sources that would clarify the intentions of the legislators (in the case of the US) or negotiators (in the case of the EU) are limited (Weitbrecht, 2008). Third, the enforcement practice that followed after the adoption of the legislation was not sufficiently consistent to determine the aims of competition law on its basis (Bradley, 1990).

Attempts to establish the goal of American antitrust legislation based on an analysis of Congressional debate records have brought contradictory results. Most notably, Robert Bork concluded that the goal of the Sherman Act was the promotion of economic efficiency, which, economically speaking, translates into a total welfare or total surplus test (Bork, 1966). Robert Lande found that the legislation was aimed at supporting consumer welfare (consumer surplus), which basically meant preventing unjustified transfers of wealth from consumers to producers (Lande, 1982; see also Kleit, 1992, who compares these two sets of conclusions and supports Bork).

[13] For example, Cseres (2007) conducted a thorough analysis of the consumer welfare standard in competition law enforcement and concluded that consumer welfare is controversial as the ultimate goal of competition law, because 'competition law is primarily concerned with economic efficiency and with the overall welfare of society' rather than welfare of final consumers. Still, adopting her total welfare approach would not significantly change the conclusions of this article, as she concludes that 'the role of competition law is above all to address economic efficiency concerns and it should consider non-economic objectives merely in exceptional cases. These issues should be the primary objectives of consumer protection laws and other sector specific regulation'.

The analysis of the circumstances surrounding the adoption of the Sherman Act has shown that traditional views of the reason for introducing active antitrust legislation (for instance, the influence of agrarian movements) should be debunked. At the same time, only 'modest support' was found for alternative hypotheses, such as that the law was lobbied by small business interests (Stigler, 1985). In this light, one may find compelling 'cynical' argumentation that the Sherman Act was proposed and passed for reasons other than economic, most likely connected with day-to-day politics or even personal matters (Bradley, 1990). Antitrust law was a minor exception to the generally pro-trust policy of the US Congress at that time, mainly exemplified by the tariffs legislation.

In reference to European law, it has been commented that '[t]he origins of the decision to include detailed competition rules in the Rome Treaty remain shrouded in history as the materials documenting the negotiations of the Rome Treaty have not been published' (Weitbrecht, 2008, p. 82). Only dim light is shed on that event in the memoirs of actors such as Jean Monet, who 'recalls the role played by then Secretary of State Dean Acheson in introducing a competition culture to Europe' at the time of creating the European Coal and Steel Community (see Monti, 2001, p. 2), which was later copied into the Treaty of Rome[14]. Despite the obscure nature of the decision to include competition law provisions at all, an analysis of the *travaux préparatoires* to the Treaty of Rome[15] may give more insight into the objectives of EU antitrust laws. This task was undertaken notably by Akman (2009) who analysed the preparatory works in relation to Article 102 TFEU with the ambition to verify if the provision was adopted to serve the goals of ordoliberal policy (in particular, to protect economic freedom of market players) or if the ordoliberal approach appeared only at the stage of the execution of the law. The author concludes that 'apart from the constant concern with increasing efficiency, it is not possible to determine another ultimate aim [of Article 102 TFEU] from the *travaux préparatoires*'. Her analysis is inconclusive on the specific understanding of the efficiency notion, as 'one can conclude

[14] Regardless of this American influence, at least until 1990, EU competition law has been predominantly influenced by the ordoliberal Freiburg School, which considered antitrust as an instrument to protect the economic freedom of business actors rather than to protect competitive markets (Weitbrecht, 2008; Akman, 2009). The ordoliberal concept of competition is focused on the freedom to compete, embodied in a competitive order safeguarded by an institutional order, and combined in feedback with a more equal distribution of (economic) power (Dold and Krieger, 2017). In that paradigm, economic efficiency is merely an effect of Walter Eucken's 'performance competition', not an aim of competition policy and law.

[15] According to Article 32 of the 1969 Vienna Convention on the Law of Treaties, preparatory works may serve as supplementary means of interpreting the Treaty, in particular if the general methods of interpretation leave the meaning ambiguous or obscure.

that Article 82 EC is capable of being applied in a manner consistent with both the "consumer welfare" and the "total welfare" standard'. In any case, preparatory works do not justify other objectives rather than the economic ones mentioned above and the additional political goal of market integration. In fact, it is widely agreed that the direct goals of introducing competition law in the EEC were not strictly economic, but the integration of the Common Market and removing barriers to trade between Member States, and indirectly facilitating political integration (Weitbrecht, 2008; Gezici and Taşpınar, 2016). This conclusion is a logical consequence of the fact that creating a level playing field for EEC businesses in all Member States was operative for establishing the Internal Market. The lack of centrally coordinated antitrust regulations and policy could have easily undermined these efforts.

In terms of the 1990 Polish Act on Counteracting Monopolistic Practices, the records of the legislative process have not been published. The more general aim of introducing antitrust to the Polish legal system at the outset of its economic transformation was indicated in a green paper published in October 1989, later called the 'Balcerowicz plan', which stated that 'in order to create conditions favourable for competition in the economy, an active antimonopoly policy will be conducted' (Wyżnikiewicz, 2005, pp. 88–89). This is probably as generic as possible, but taking into account the circumstances of the plan, it may be assumed that the ultimate goal would be ensuring the efficiency of the newly introduced free-market economic system.

In view of the above, it is fair to conclude that from the subjective perspective the original aims of competition law, in the US, in the EU and to some extent in Poland, were opportunistic and political (in the sense of politics and not policy) rather than legal or economic. This likely is a major reason that the debate on the aims of antitrust has not been resolved for decades and it is likely to go on in the future. Furthermore, historical circumstances do not allow for determining the intentions of the lawmakers with sufficient certainty.

4. Multiple aims and resolving conflicting aims

As already indicated, in general the same legal text may serve a number of purposes, which taken into account when interpreting the said text may lead to different conclusions or judgments. In practice, this is also the case with antitrust laws (Materna, 2009; Miąsik, 2012). In the event that conflicting aims are in collision, the usual methods of resolving such collision should be applied. As already indicated, these methods include: rejecting inferior aims that invalidate the superior aim of the legislation; or lead to irrational, absurd

or unacceptable effects; or the law does not include provisions that would allow for its enforcement.

For the purpose of this article, let us focus on the first of these methods. In view of the above analysis, it seems non-controversial to say that the primary aim of competition law is economically defined welfare protection. This is the distinguishing quality of competition legislation[16], in absence of which there would be no reason to sustain antitrust law, because all other objectives could be pursued without it. This economic aim may be described as a triad of protection of the freedom of competition, leading to economic efficiencies, which, in turn, leads to the ultimate aim of protecting consumer welfare. Depending on the specific economic theory or school adopted for the purpose of the analysis, the detailed economic concepts applied may differ, for example by referring to structural competition, or to total welfare. Regardless of these imponderabilia, the economic aim should be considered as the superior aim of competition law. It follows that other possible aims of competition law must not invalidate (be contrary to or incompliant with) the economic aim.

Let us take protection of employment levels as an example[17]. The competition process normally leads undertakings to decrease their costs (as a function of production efficiency), which in terms of employment relations is usually associated with limiting salaries and/or decreasing headcount. Furthermore, it leads to innovation (as a function of dynamic efficiency), which results in modernisation of the means of production and, in consequence, often in decreasing the number of employees. These cost cuts on the part of the undertaking are likely to drive down prices for its products and ultimately increase consumer surplus. Therefore, the aim of promoting full employment is obviously contrary to the general economic aim of antitrust.

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[16] Which is different e.g. from consumer protection law, which is based on protecting consumers from abuse, exploitation, being put in a disadvantageous position or any other unfair treatment, which obviously may affect their economic interests, but in essence is rooted in safeguarding equitability rather than commercial issues.

[17] Referring to the examples of the aims of antitrust law in various jurisdictions (Materna, 2009), it may be roughly indicated that the aims of income redistribution or supporting aims of a socialist state would also likely be contrary to the superior economic aim. They would decrease efficiency and hinder or soften competition due to the prioritisation of other values. Aims of social policy, regional policy, preventing excessive concentration of political power, safeguarding local business ownership or the protection of the national economy may be at least incompliant with the superior economic aim, although they are too vague to assess the likelihood of such a conclusion. On the other hand, the protection of small and medium enterprises, consumer protection or equalising the chances of market participants would, at least under certain assumptions or in view of some economic theories, likely be consistent or at least non-contradictory with the superior economic aim, as they would be expected to foster competition and ultimately increase the consumer surplus.

Conflicting secondary aims of law may either be expressly indicated in the text of law, or inferred from the law and additional circumstances (sources). Cases where the conflicting aims are expressly indicated in the text of law should be considered as legislative errors. Unless amended by the legislator, the possible solutions at the stage of the interpretation of law are the rejection of the inferior aim entirely, or assuming a set precedence of aims, where the inferior aim will always be taken into account only if in the specific case it does not interfere with achieving the superior aim. However, in any case, such a situation is unfavourable from the perspective of the rule of law and citizens' trust in the law.

If the conflicting aims are not aims expressly indicated in the text of law, the overriding rule of interpretation should be that the interpreter must not construe or assume the objective of an act of law that is contrary to or incompatible with the superior aim of that law. This should apply whether the conflicting aim is derived from the general provisions of a legal text, or from any extra-textual sources.

It follows from the above that introducing new objectives that are contrary to, or incompatible with a primary, superior objective, such as the economic objective in the case of antitrust law, must be avoided. At best, they will contribute to increasing legal uncertainty and negatively affect citizens' trust in the law. At worst, they will undermine the very purpose of competition legislation.

IV. Sustainability as the aim of antitrust law

1. Introductory remarks

As set out at the beginning of this article, in recent years a number of authors and competition authorities have argued that competition law should serve the purpose of promoting sustainable development. The issue of whether sustainability goals currently are, or may be in the future an appropriate aim of antitrust law should be assessed in view of the described methods of a teleological interpretation of law.

The first step is to indicate what sustainable development is. In this respect it is reasonable to follow the most universal sustainability programme in the world, namely the United Nation's Sustainable Development Agenda[18]. The Agenda consists of 17 various goals, of which Climate Action is just

[18] Available at: https://www.un.org/sustainabledevelopment/development-agenda/ (accessed 21.07.2021).

one of the objectives, and up to four other goals (Affordable and Clean Energy, Responsible Production and Consumption, Life below Water, Life on Land) at least partially refer to environmental sustainability and natural conservation. The remaining 12 goals cover a wide variety of social issues, including No Poverty, Zero Hunger, Reduced Inequalities or Gender Equality. It needs to be underlined that the majority of arguments for sustainability in antitrust are focused exclusively on green antitrust. Social and socio-economic sustainability goals are less frequently proposed as the proper aim for antitrust law (Scott, 2016). However, it needs to be stressed that the debate on including all aspects of sustainability in antitrust aims would need to go along the same lines (Authority for Consumers and Markets, 2021; OECD, 2020).

The broadness of the notion of sustainability apparently makes it difficult to reconcile at least certain commercial ventures with all the goals it covers. For example, the most obvious response to the hunger issue in less developed countries would be an increase of agricultural production, either by extensive or intensive agriculture means. However, targeting the issue with extensive farming would have to lead to an expansion of the agricultural frontier, which could threaten the environmental equilibrium. On the other hand, targeting the issue with intensive agriculture would require wealth transfers to modern agricultural suppliers in Western economies, which could undermine the goals of combating inequality and poverty. Another example may be the production of biofuels, which may contribute to a decrease of the carbon footprint attributable to the use of fossil fuels, but which is likely to increase food prices (Chakravorty et al., 2015), at least in certain countries and periods (Filip et al., 2017), which would obviously negatively impact the welfare of the population, especially (but not exclusively) its impoverished part.

It is evident from Part II of this article that competition law may serve, and in fact in different periods has served, a multitude of various and often ostensibly conflicting purposes. Some of these purposes were purely economic (such as maximising economic efficiency or consumer welfare), and others were political (including creating a single market or income redistribution). This makes it possible to assume a hypothesis that there is nothing inherent in antitrust legislation that would prevent making sustainability (or ensuring sustainable development) its goal.

2. Sustainable development as the current aim of antitrust law

Neither the European nor Polish legislation foresees that sustainable development constitutes an aim of antitrust law, although in both cases the constitutional norms recognise it as a social value.

Article 3(3) of the Treaty on European Union (hereinafter: TEU), according to which the European Union 'shall work for the *sustainable development* of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and *a high level of protection and improvement of the quality of the environment*", and also "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, *solidarity between generations* and protection of the rights of the child'. However, this provision obviously sets out high-level aspirations for the entire activity of the European Union and it is clear that not every act of Union law must lead to fulfilling all these general objectives[19]. The same may be concluded in relation to Article 11 TFEU, which indicates that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'.

In a similar vein, Article 5 of the Constitution of the Republic of Poland indicates that one of the key duties of the State is ensuring environmental protection according to the sustainable development rule. This provision has a similar nature and effect as Article 3(3) TEU. Article 74 of the Constitution states that public authorities in Poland are obliged to protect the environment. However, the constitutional rights related to environmental issues may only be enforced to the extent set forth in statutes, which do not impose such duties specifically on competition authorities.

This calls for addressing the existing external circumstances (in the spirit of the objective interpretative approach) and the extra-textual sources (in the spirit of the subjective interpretative approach) to verify if they justify adopting sustainability as a current aim of competition law.

As indicated in Part II of this article, external circumstances, including the legislator's other statements than the interpreted act of law, may make it possible to *choose from the possible meanings* of specific words and phrases of that act of law. In this setup, nothing indicates that values such as sustainability, environmental protection, social security or social justice are aims of antitrust norms. Therefore, the idea that sustainable development is the aim of competition law cannot be one of the possible meanings of the relevant norms and, in consequence, no external circumstances may justify the opposite conclusion. One discouraging observation regarding the green antitrust debate is that the political statements of members of authorities that take part in the legislative process, such as the European Commission, often

[19] However, it is justified to postulate that no specific act of law should be contrary to these objectives. Construing competition law aims in the established way, by reference to the freedom of competition, economic efficiency and consumer welfare, does not oppose this postulate.

seem to be considered as decisive. However, they do not even constitute an authentic interpretation of the law, and cannot be taken into account for the purpose of the interpretation of law. The doubts are furthered by the duality of the European Commission, which combines legislative and executive functions, and it may be unclear in what capacity it makes certain statements. The rule of law requires that the executive branch does not apply the law in a way that has no grounds in the legislation, and with the said duality this distinction may be blurred.

As regards extra-textual sources, while they do not allow for an unequivocal determination of the aims of antitrust law, as described in Part II Section 3 of this article, it is evident that they have not envisaged sustainability as their objective.

In view of the above, it is not surprising that the authors who have proposed multiple and diverse ways in which antitrust law should recognise sustainability aims seem to apply the dynamic interpretative approach, which has, at best, an arguable link to binding law. Some of these proposals are based on the concept of including sustainability factors in consumer welfare, defined more broadly (and vaguely) than consumer surplus, for example, by projecting a willingness to pay and the preferences of future consumers by means of a prospective welfare analysis (Inderst and Thomas, 2020). Others argue for an analogy to other branches of law, for instance, exempting from antitrust law agreements between competitors that integrate externalities in the price, as long as they follow a 'polluter pays' principle (Dolmans, 2020). Yet others propose introducing (without amending existing legislation) new institutions in antitrust law, such as a 'market failure defence' allowing for collusion in cases when competition does not bring efficiencies or increase welfare (Scott, 2016); or a 'carbon defence' justifying cartel-type agreements if they may reduce greenhouse gas emissions (Ellison, 2020). Finally, certain authors propose an outright utilising of the flexibility of antitrust to introduce policy focused not only on economic values, but also on such qualities as social conditions and sustainability (Scott, 2016). This extremely wide variety of proposals in itself indicates that the concept is controversial and does not necessarily fit binding law.

A similar view may be taken of speculations of certain competition authorities about the creative (but at the same time controversial) application of existing antitrust concepts to justify sustainability agreements that are immediately harmful to consumers, for instance, using ancillary restraints or the objective necessity doctrines, identifying efficiencies in the future and on other markets (Hellenic Competition Commission, 2020) or treating sustainability as a quality parameter (OECD, 2020). A distinction has also been proposed between, on the one hand, cases that involve plain cartels somehow involving environmental

considerations, in other words, cartels relating to an environmentally relevant market, and on the other hand, cases that involve cooperation that is genuinely driven by a desire to enhance sustainability (Vedder, 2021). However, there is no legitimate reason to distinguish these cases if the genuine drive to enhance sustainability leads to cartel-like arrangements being made, or other agreements that have immediate anticompetitive effects.

These proposals seem to be underpinned by the general idea that at the basic level, the choice of a free market economy and competition will not work for sustainability and that there is a fundamental clash of these values (Vedder, 2021). Unavoidably, in the case of such a fundamental conflict one of the values must be rejected. This problem will remain actual regardless of the specific method in which sustainability objectives would be incorporated in antitrust law. The question of precedence of such goals over strictly economic aims will be present even if sustainability is treated only as an exception (whether in the fashion of Article 101(3) TFEU or otherwise), or even merely affects enforcement priorities of competition authorities. A compelling suggestion was made that the reason for the engagement of competition agencies in the shift of the focus of antitrust law to sustainability is that they want to avoid the impression that their mission is a single-minded one, and that they are only concerned about economic welfare issues (OECD, 2020). Such an approach must be rejected. Apart from the fact that public relations concerns are not a legitimate reason to affect the interpretation of law, such acceptance of competition softening is likely to have indirect negative effects. If the competition authorities decide to promote other aims over competition, the latter will likely be stifled. Since vibrant competition promotes innovation[20], restraining it is bound to negatively affect innovation. Since sustainability ventures are often innovative (Authority for Consumers and Markets, 2021), this may also be the case in innovation that has a positive effect on the environment.

It has to be noted that sustainability can overlap with efficiency and traditionally defined consumer welfare (OECD, 2020). There is a broad range of circumstances in which sustainability agreements will be in line with binding competition law (Hellenic Competition Commission, 2020; Authority for Consumers and Markets, 2021). This includes: arrangements the subject of which is not a commercial activity, actions taken under State compulsion, agreements that do not have an anti-competitive object or effect, FRAND-based standardisation agreements, or which fall outside Article 101(1) TFEU in line with the established interpretation of that norm (for example, ensuring

[20] In view of modern antitrust law, it is suitable to reject the Schumpeterian notion that innovation is more effectively introduced in a monopolistic setup (see Robertson, 2020).

a fair share for consumers defined as economic surplus[21]). However, in such cases, the effect of promoting sustainability goals would be just an accidental and not essential property of the agreements. Their compliance with antitrust regulations would still depend on the fact whether they fulfil the core economic objective of competition law.

In summary of this section, there seems to be no legitimate justification for the proposal that promoting sustainable development should be considered an aim of the currently binding Polish or European competition law.

3. Sustainable development as a future aim of antitrust law

Although sustainability cannot be considered an aim of current competition law, there is nothing inherent in antitrust legislation that would prevent making sustainability its goal. Therefore, it needs to be considered whether and how sustainable development might be introduced as an aim of antitrust law in the future.

The basic question in this context is whether such a change requires the intervention of the relevant legislators, or whether it can be introduced as a result of the application of existing law. The latter option would be an example of the dynamic interpretative approach, which has already been discussed and criticised in the earlier parts of this article. It must be underlined that in jurisprudence, the interpretation of law essentially, ultimately and constantly consists of searching for the intentions of the lawmaker (Pietrzykowski, 2017). Therefore, this requires answering the question of what the law (and the intent behind it) *is* (and why), rather than what the law (and the intent behind it) *should be*, which is more of a problem for the realm of legal policy. A complete *de facto* transformation of a branch of law by the stakeholders at the level of applying the law – whether practicing lawyers or academics, or enforcement authorities, or even courts – would be unacceptable in the Polish system (or, presumably, in the system of any civil-law country observing the rule of law and the separation of powers; it has been accurately pointed out also on the basis of EU law that a change in the approach to the objectives of Article 101 TFEU cannot be just adopted by competition authorities, but it must 'be sensitive to the correct legal process to change' (Townley, 2011)). It follows that such a change might only be legitimately introduced by means of a legislative intervention.

[21] While it is outside the scope of this article, it should be noted that a number of authors argue that consumers do not appreciate the sustainability issue due to their biases, and in consequence, their preferences should be disregarded (see Hellenic Competition Commission, 2020). This view seems deeply flawed, as it expects consumers to suffer the economic burdens while other market participants reap the profits.

But would such an intervention constitute an example of good legislation? There seem to be two methods in which the legislator might introduce sustainability as an aim of competition law. First, it might merely indicate that promoting sustainable development is one of the objectives of competition law. Second, it might expressly introduce a hierarchy of objectives, indicating which of the proposed aims have precedence over the others. In the latter option, the structure could be simple (for instance, sustainability always trumps welfare) or more intricate (such as welfare remains the overall aim but, in case of certain undertakings, types of agreements and circumstances sustainability precedes).

As regards the first of these solutions, sustainability and consumer welfare (surplus) are apparently conflicting objectives (see Part III section 2 of this article). In consequence, their concurrent, non-hierarchical application should be seen as a legislative error (see Part II section 4 of this article) and does not deserve support.

As regards the second of these solutions, if properly introduced, it would not cause the problem of conflicting objectives of sustainability and antitrust. However, it would still have the effect of decreasing efficiency and hindering or softening competition due to the prioritisation of other values. This would be particularly accurate if the legislative intervention would relate not only to environmental sustainability, but to sustainable development in the broader sense of the word. If antitrust was to realise aims relating to environment protection, salary levels, social equality, and many others, it would inevitably depart from its economic basis and devolve into a body of law lacking intellectual coherence and, as Robert Bork poetically put it, 'a policy at war with itself' (Wright and Ginsburg, 2013).

The above must be supplemented by a couple of notions on the foreseeable practical consequences of such an intervention. First of all, despite the well-known challenges connected with economic analysis, consumer welfare, defined traditionally as a function of price and possibly choice, is a relatively simple and recognised concept. Many sustainability factors proposed for the economic assessment of antitrust law, such as the intergenerational cost, are apparently incalculable (Schinkel and Treuren, 2020). Secondly, introducing environmental sustainability as an antitrust assessment factor would make the entire economic analysis futile. Such analysis generally should be based on the willingness to pay[22]. However, if the very survival of mankind is at stake (Ellison, 2020; Vedder, 2021), then the willingness to pay in order to prevent this from happening must be unlimited. In such a case, the entire

[22] Some proponents of green antitrust postulate that the willingness to pay standard be abandoned in antitrust law analysis. Due to the constraints of this article, this postulate is not discussed in detail, but in general it falls into the category of ideas that are overtly incompliant with the core economic objective of competition law.

body of antitrust law becomes irrelevant at best and outright harmful at worst. In summary of this section, sustainable development does not seem to be a proper aim of antitrust law for the future. Depending on the adopted model of legislative intervention, it would either be a legislative error, or lead to negative effects for competition.

IV. Conclusions

The current debate on sustainability in antitrust refers to established legal methodologies of interpretation to a very limited extent. In particular, there seems to be no reflection on the teleological (purposive) interpretation of competition law in the context of making sustainable development its aim. This is problematic, because a methodologically sound construction of the aims of law is instrumental not only to the interpretation of its provisions, but also for ensuring the rule of law and safeguarding the rights of individuals.

An analysis of whether promoting sustainability is, or can be, an appropriate aim of antitrust law requires us to ascertain the aim or aims of antitrust law within the existing methodological framework. This makes it possible to consider whether promoting sustainability is currently a legitimate aim of competition law, and if not – whether and how it can, and whether it should, be introduced as such.

The conducted analysis described in this article shows that the aims of antitrust may be elusive, whether explored in line with the objective or the subjective interpretative approach. However, it is reasonable to propose that the aim of competition law should be an economic one. While the specific details may be debatable, a triad of interrelated objectives seems to be the most appropriate: protection of the freedom of competition, promoting economic efficiencies and ultimately protecting consumer welfare (surplus).

However, while establishing precisely the aims of antitrust may be difficult, it may be reasonably concluded that there is no legitimate justification for the proposal that promoting sustainable development is an aim of the currently binding Polish or European competition law, and, furthermore, that it does not seem to be a proper aim of antitrust law for the future. In any case, unless the relevant legislator intervenes, there are no grounds for stakeholders applying the law, including courts, competition authorities, academics and legal practitioners, to introduce a new objective to the antitrust law framework. Additionally, such a legislative intervention would likely have negative effects on competition law.

Promoting sustainable development through antitrust, as it is currently proposed, inevitably leads to decreasing consumer surplus, and it is, at least, highly disputable if it increases consumer welfare. Regardless of the specific tool designed by the proponents of making sustainability the objective of competition law, it is apparent that they assume, or at least allow, that prices will increase, which means that consumer surplus will decrease. Therefore, sustainability and the core economic aim of competition law are apparently in conflict with each other. Additionally, the broadness of the notion of sustainability, and the significant diversity of its parts, leads to the conclusion that in legal terms it is internally contradictory.

The process of analysis, summarised in its core part above, allows us to draw a few additional, more general conclusions regarding the relation of antitrust and regulation in connection with sustainability, the impact of the origin of European antitrust legislation on its nature and the method of debate on sustainability in antitrust.

The focal point of the debate on sustainability has often been whether the correct method of addressing sustainability issues is antitrust or regulation. Such approach was rebutted by pro-sustainability antitrust authors who proposed that both public and private actors need to be involved, in particular due to the fact that regulation is often inefficient (OECD, 2020). However, there is no economic reason to state that allowing cartel-like or other anticompetitive arrangements would be an efficient way of promoting sustainability (Schinkel and Spiegel, 2016).

In fact, the catch-all idea of antitrust law seems to have originated in arguably under-regulated jurisdictions, such as the USA, as can be shown by the example of the living wage (which is one of the social policy elements of sustainability). In Europe, where most jurisdictions set the statutory minimum wage, it is unlikely that an agreement between undertakings on setting a higher wage would be legitimate. In fact, in such circumstances, this would likely be an agreement to curtail wages and decrease competition on these costs.

On a more general level, the review of the aims of European antitrust legislation shows the impact of its origin on its nature. The original rules introduced by the Sherman Act (that constituted a basis for other jurisdictions) were deliberately vague because they originated directly from the common law restraint of trade doctrine, that had developed since the early 18th century and would be interpreted accordingly (Kleit, 1992), which also relates to their aims. It can be argued that sustaining such an approach to legislation in continental Europe, completely detached from the common law corpus, is not an effective regulation model. It may be cautiously concluded that a clearer body of antitrust law would be welcome.

Finally, a number of pro-sustainability authors open the discussion with dramatic questions, such as 'what undistorted competition is worth if there is nothing left to compete for?' (Vedder, 2021, p. 5) and build their arguments in a similar way. Not only is this unhelpful for the debate, but it also distorts the view of the circumstances and the values that are at stake. It is not just some dogmatic, ingrained notion of competition that is on the line, but also vital survival economic interests of multiple market participants, or the rule of law, possibly up to the basics of the democratic system. While sustainable development is in many aspects a valid aim of national and international policy, it is necessary to remember that the road to hell is paved with good intentions.

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