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COMPETITION LAW AS A FUNDAMENTAL POLICY TOOL FOR A TRANSITION TOWARDS MORE SOCIALLY AND ENVIRONMENTALLY SUSTAINABLE SOCIETIES

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Abstract

Competition law represents a pillar of the European Union's Internal Market and it is a fundamental part of the acquis communautaire that all the member States and Countries willing to join the Union shall implement in their legal system. According to the traditional economic thinking, which refers to the so-called Chicago School, competition law is directed at promoting economic efficiency of the marker, but it should not address other broader societal problems. However, the economic crisis before, and an increasing concentration rate on the market, especially in case technology and, more in general, digital gatekeepers are involved, put the neoclassical economics' assumptions into question. Indeed, other problems, such as rising indexes of income inequality and poverty – also in developed economies – together with the big challenge represented by climate change, urged a rethinking of all the traditional policies, by putting less attention on market and efficiency, and more focus on the society and on citizens' fundamental rights. Competition law, as well, did not fall outside this 'policy reshuffling', which aims at creating a sort of complementarity, or multi-tool level playing field, directed at improving our societies. A question may arise in this realm, having in mind the traditional conception of competition law: What is the role that this policy has to pursue? And, especially, why has it to deal with issues such as income Inequalities and environmental protection? At a first sight, linking competition law to these broad policy objectives may appear a mere academic exercise, but in reality it is not. The reason lies exactly in the economic reasons behind how income Inequalities can be addressed and how more sustainable products can be developed. The present paper shows how competition law can play a fundamental role in pursuing these two fundamental policy objectives of every democratic society, with particular reference to the European Union. It will also address, in light on the planned and expected enlargement of the EU.

***Key words**: Competition Law, Sustainability, Environment, European Union, Internal Market, Enlargement*

1. INTRODUCTION: WHY COMPETITION LAW MATTERS FOR SUSTAINABILITY

1.1. The EU Treaties system

Focusing the analysis on the European Union legal system, competition law, especially after the adoption of the so-called 'more economic approach' by the European Commission,[1] has often been portrayed and characterised as a self-standing subject, a sort of niche, where economic issues and evaluations were almost the only ones to be taken into account. In fact, the debate was focused on price-centric parameters, econometric tests, and a particular attention was given to economic efficiency and the so-called 'consumer welfare'. In particular, the latter expression was introduced in the U.S. through the publication of 'The Antitrust Paradox' by Robert Bork[2] and it soon was endorsed by the U.S. Supreme Court as lodestar of the antitrust legislation,[3] although no references were made to it in the preparatory works for the Sherman Act's enactment.[4] Notwithstanding a very active scholar debate, the consumer welfare's concept remained shrouded in a veil of uncertainty. However, its very strong economic and efficiency-centred connotation was undoubtable, at the point that some conducts which were previously deemed as *per se* violations were then evaluated according to a *rule of reason* approach based on efficiency evaluations.[5]

Competition law in the European Union was affected by the influence of this conception in the context of the 'renovation' process occurred in the first years of the current century. It is worth underlining that the European conception of competition rules and of the consumer welfare standard never went as far as it happened on the other side of the Atlantic Ocean, and for sure it had the merit of having reinforced certainty in the application of competition rules. Anyhow, under a more general viewpoint, it had the consequence of relegating competition provisions in a niche made by experts for experts, and where the importance of

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1 See, *inter alia*, Commissioner Mario Monti, *Competition for Consumers' Benefit*, speech delivered at the European Competition Day, Amsterdam, 22 October 2004, [https://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf], Accessed 30 September 2024.

2 Bork, R., *The Antitrust Paradox*, Free Press, New York, 1978.

3 U.S. Supreme Court, decision 11 June 1979, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), at 343.

4 Thorelli, H.B., *The federal antitrust policy: Origination of an American Tradition*, Allen & Unwin, London, 1954, p. 227.

5 See, *inter alia*, U.S. Supreme Court, decision 3 April 1911, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), at III C and IV B; Fox, E.M., *The Efficiency Paradox*, in Pitofsky, R. (Ed.), How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust, Oxford University Press, Oxford, 2008, p. 77.

this subject was not fully perceived outside its own specific field and the related community of scholars and practitioners.

This contributed to partially 'defuse' competition law vis-à-vis the existential transformation which are ongoing in our societies. Indeed, a 'soft touch' (or, maybe better, *laissez-faire*) approach to competition matters had the consequence of relegating this policy tool to the analysis of single transactions or conducts, but without a perspective view on the broader policy context of which competition rules are part (with a quite feeble link to the evolution that the markets and society were experiencing). This led, for instance (and it is well known history), to the approval of the acquisition of WhatsApp by Facebook,[6] with all the consequences that this brought, but also to a scarce awareness of the role that competition law can play with regard to sustainability.

The concept of sustainability – broadly intended – lies at the foundations of the whole European Union's structure. Indeed, Article 3, paragraph 3, of the Treaty on the European Union (hereinafter, TEU) establishes that the Internal Market *shall work for the sustainable development of Europe*. The same provision, in enucleating the well-known and fundamental concept of social market economy, makes reference, in the same sentence, to a *balanced economic growth*, to *social progress*, and to *a high level of protection and improvement of the quality of the environment*. In a single sentence, the TEU includes almost all the main dimensions of the concept of sustainability, *i.e.*, economic sustainability, social sustainability, and environmental sustainability. The last perspective that is worth mentioning is that of institutional sustainability, which can find its best expression in the reference to rule of law contained in Article 2 of the same TEU. These principles are echoed in various provisions of the Treaty on the Functioning of the European Union (hereinafter, TFEU) and of the Charter of Fundamental Rights of the European Union. In particular, Article 37 of the Charter establishes the right to environmental protection, in line with Article 11 TFEU. Article 9 TFEU states that in *defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion*.

Therefore, it is clear that the EU Treaties system establishes a space were all the forms of sustainability referred to above are recognised and protected. As a guarantee for the respect of these values lies the already mentioned institutional sustainability, which is immanent in the articulation of the same EU, under the already mentioned rule of law principle.

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6 European Commission, decision 3 October 2014, Case No COMP/M.7217 – *Facebook/Whatsapp*.

1.2. The Member States' constitutional foundations

Analogous considerations can be advanced with regard to the constitutional values recognised and protected at the Member States' level. For the sake of exemplifying, the reformed[7] Article 9 of the Italian Constitution provides that the Republic *shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals*.[8] More specifically, Article 41 (reformed altogether with Article 9) affirms that *private economic enterprise shall have the right to operate freely. It cannot be carried out in conflict with social utility or in such a manner as may harm health, the environment, safety, liberty and human dignity. The law shall determine appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and coordinated for social and environmental purposes*. This provision is of particular interest as it provides an almost perfect and balanced synthesis among all the concepts of sustainability posed at the basis of the present work. In fact, by regulating how private economic activities must operate, it matches the need for a socially responsible business activity, sustainable in its operations also from an economic viewpoint, and careful with reference to the impact on the environment. This provision may be regarded as a lens for both understanding and legitimating the role of competition law in the field of sustainable practices. Indeed, Article 41 of the Italian Constitution's focus is on private economic activity, therefore understanding and representing the main role played by the market in our societies. It establishes in a very clear manner how these activities cannot be directed to the bare profit only, with disregard to other societal concerns, such as environmental protection or social inequalities. In a way, the *summa* contained in this Article (although the part regarding the environment was added in 2022) 'anticipated' – since the Italian Constitution entered into force in 1948 – what is now recognised as the common definition of sustainability, *i.e.*, the one proposed by the so-called Brundtland Report, where sustainable development is defined as the one which *meets the needs of the present without compromising the ability of future generations to meet their own needs*.[9] The same Report outlines the link between

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7 Legge Costituzionale of 11 February 2022, No. 1, in Gazzetta Ufficiale No. 44, of 22 February 2022, provided, by Art. 1, par. 1, for the insertion of two new sentences at the end of Article 9; Article 2, par. 1, letter a), for the amendment of Article 41, par. 2; and, by Article 2, par. 1, letter b), for the amendment of Article 41, par. 3.

8 Official English translation by the Italian Constitutional Court, available at [https://www.cortecostituzionale.it/documenti/download/pdf/The_Constitution_of_the_Italian_Republic.pdf], Accessed 30 September 2024.

9 Report of the World Commission on Environment and Development: Our Common Future, point 27, [https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf], Accessed 30 September 2024.

social and environmental issues as an obstacle to reach a sustainable development path.

In addition, sustainability – especially from the environmental standpoint – is formally recognised also in the French Constitution through the 'appendix' added in 2005, the *Charte de l'environnement*,[10] and in the German Constitution by means of Article 20a, introduced in 1994 (and amended in 2002 in order to include protection of animals in its scope), and where it is recalled the responsibility of the State towards future generations.

1.3. The role of Courts

If once upon a time the abovementioned rights appeared to be just 'law in the books', or however a declamation of good principles, this is not the case anymore, since Courts are starting to directly enforce them.

The active role of Courts in this field became particularly clear in April 2024 when the European Court of Human Rights issued a decision affirming that Switzerland failed to comply with its duties under the Convention with regard to climate change, and recognising the right of an association to bring a claim accordingly.[11] What is interesting is that, in absence of a specific right to protect the environment in the Convention, the Strasbourg Court configured environmental protection as deriving from the protected rights to private and family life and health.[12]

A similar approach was followed also by the Italian Constitutional Court prior to the 2022 reform mentioned above. Recently, the Italian *Consulta* proved to be aware of the importance of the rights contained in Articles 9 and 41 of the Italian Constitution through a decision issued in June 2024.[13] In particular, in this ruling, the Corte Costituzionale held that governmental measures requiring the continuation of production activities of strategic importance for the national economy or for safeguarding employment levels – despite the seizure of plants ordered by the judicial authorities due to the lack of the necessary safeguards towards health and environmental protection – are constitutionally legitimate only for the time strictly necessary to complete the indispensable environmental clean-up measures. This decision states a sort of milestone principle for the topic here at stake, as

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10 LOI constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement (JORF n°0051 du 2 mars 2005 page 3697).

11 ECHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC]* - 53600/20, 9 April 2024.

12 Council of Europe, *Protecting the Environment using human rights law*, [https://www.coe.int/en/web/portal/human-rights-environment], Accessed 30 September 2024.

13 Corte Costituzionale, decision 7 May 2024, no. 105.

it clearly prioritises environmental and health protection over business interests (even if of national strategic interest), thus safeguarding also social sustainability by conceding a temporary (and this is the key aspect) prorogation aimed at, *inter alia*, safeguarding occupational levels during the period necessary to adequate the plant to the necessary environmental sustainability standards. This decision perfectly represents the direct role that the reformed Article 41 (in this case, but, generally, also 9) of the Italian Constitution can play, and it perfectly applies this provision in the context of the case at stake, as it strikes a balance between all the forms of sustainability that we have analysed.

In addition, it is worth reporting that also other European national Courts directly enforced rights related to (especially environmental) sustainability. In particular, the German Federal Climate Change Act was enacted in 2019,[14] in order to implement the obligations stemming from the Paris Treaty. However, in 21 March 2021 the German *Bundesverfassungsgericht* intervened with an order that deemed the Act unconstitutional with regard to the provisions governing climate targets and the annual amount of gas emissions allowed until 2030, since they did not specify how emissions would be reduced beyond 2030.[15] As a result, the Court ordered the German legislator to amend the Act with more precise provisions regarding the after-2030 period. The Act was amended in June 2021.[16]

In France, in October 2021 the *Tribunal Administratif de Paris* issued a decision where it stated that France must compensate the non-compliance with the carbon emission targets fixed for the 2015-2018 term.[17] The Court imposed a short term,

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14 Federal Climate Change Act, 12 December 2019, published in OJ I S. 2513. The Act's English translation is available at [https://www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html], Accessed 30 September 2024.

15 Bundesverfassungsgericht, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, pars. 1-270, available in English at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html], Accessed 30 September 2024. The relevant press release, No. 31/2021, 29 April 2021, *Constitutional complaints against the Federal Climate Change Act partially successful*, is available in English at [https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html], Accessed 30 September 2024. See also Jahn, J., *Domestic courts as guarantors of international climate cooperation: Insights from the German Constitutional Court's climate decision*, International Journal of Constitutional Law, 21, 3, 2023, pp. 859-883.

16 White & Case LLP, *Reshaping Climate Change Law*, 14 July 2021, [https://www.whitecase.com/publications/alert/reshaping-climate-change-law], Accessed 30 September 2024; Dentons, *Parliament passes first law amending the German Federal Climate Protection Act*, 18 June 2021, [https://www.dentons.com/en/insights/articles/2021/june/18/first-draft-law-amending-the-german-federal-climate-protection-act], Accessed 30 September 2024.

17 Tribunal Administratif de Paris, decision 14 October 2021, no. 1904967-1904968-1904972-1904976, available (in French) at [http://paris.tribunal-administratif.fr/content/download/184990/1788790/version/1/file/1904967BIS.pdf], Accessed 30 September 2024. See the relevant press release by the same Tribunal Administratif de Paris, *L'Affaire du Siècle: l'Etat devra réparer le préjudice écologique dont*

set on 31 December 2022, within which the French State must have compensated the carbon dioxide's excess. However, this order was not supported by means of *astreinte* measures, thus rendering its enforcement less effective.[18]

What reported above shows the growing and fundamental importance of sustainability – of every kind – issues in the contemporary social and legal context. Indeed, the respect of rights such as equality of opportunities, the respect of the environment, etc., represents a cornerstone of the social contract founding the structure of modern democracies.[19] The provisions, declarations and judicial decisions analysed above show how the link between sustainability and the market is indissoluble. Indeed, the market represents the place in which people and entrepreneurs exchange goods and services, and therefore is one of the main institutions where people interact in the society. This point, as already underlined, has been brilliantly synthetized by the Italian constitutional legislator in the drafting of the renewed Article 41 of the Italian Constitution. Therefore, competition provisions, and in particular Articles 101 and 102 TFEU (together with the corresponding rules at the Member States' level) cannot be relegated in a niche, since they represent the cornerstone of the regulation of market in a liberal system, as the TEU itself reminded. Hence, although not being (of course) the solution for every issue, competition provisions have to figuratively exit the sole rooms of econometric measurement and debate and walk in the society, in order to establish a level playing field, together with other policies (such as the proper environmental protection law, social-security provisions, taxation, etc.), so as to renew our societies along the lines of the social contract underlying them, which, in the end, is built upon our Constitutions. The call for this intervention is more than urgent, because data show that we are close to the system's limit point,[20] to the *collapse*, to call it in light of the seminal book published by Jared Diamond.[21] The environment is providing us with serious advice about the unsustainability of the current business and living models, and deforestation, fires, violent floods and the continuous regression of

il est responsable, 14 October 2021, [http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiques-de-presse/L-Affaire-du-Siecle-l-Etat-devra-reparer-le-prejudice-ecologique-dont-il-est-responsable], Accessed 30 September 2024.

18 *Ibidem*.

19 Having particular regard to competition law, see Gal, M.S., *The Social Contract at the Basis of Competition Law. Should We Recalibrate Competition Law to Limit Inequality?*, in Gerard, D. and Lianos, I. (Eds.), Reconciling Efficiency and Equity: A Global Challenge for Competition Policy, Cambridge University Press, Cambridge, 2019, p. 88.

20 Giovannini, E., *L'utopia sostenibile*, Laterza, Bari, 2024, p. 11.

21 Diamond, J., *Collapse. How Societies Choose to Fail or Succeed*, Penguin, London, 2011.

glaciers are just some of the (very clear) signals the planet is sending to us.[22] Concurrently, the rising inequalities in society are putting into stress the conception of State that we had until now, returning to a system where the majority of wealth is concentrated in few hands and where the State's welfare system is not capable of providing the necessary levels of assistance to the less advantaged levels of the population (in Italy, for instance, a G7 Country, the absolute poverty rate is 9.8% of the individuals[23]). The question which emerges from this portrait is why did we get to this point? The answer is for sure more complex than what can be written in few lines, but for sure it can be summarised with 'lack of societal vision': Policies became too complex and referred to narrow sectors, without a higher coordination (only in words), and in this situation individual interests prevailed over the general well-being. How to get back? By returning to our societies' key values, and by constituting a coordinated policy net aimed at guiding the transition towards a more sustainable development model. Competition law must be part of this policy net. This paper will briefly analyse the role that competition law must play in all the forms of sustainability enucleated above, in order to provide an organic framework for the contribution of this policy to the sustainable transition.

2. COMPETITION LAW AND ENVIRONMENTAL SUSTAINABILITY

Until now, the most debated field regarding the sustainability implications of competition law is without doubt that of environmental sustainability.[24] The anal-

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22 It is worth considering that on 28 October 2019 the Plenary Session of the European Parliament declared climate emergency and urged the Commission to stick to the abovementioned 1.5 Celsius degree target, together with cutting emissions in the EU by 55% within 2030, in order to become climate neutral in 2050. See European Parliament, The European Parliament declares climate emergency, 29 October 2019, [https://www.europarl.europa.eu/news/en/press-room/20191121IPR67110/the-european-parliament-declares-climate-emergency], Accessed 30 September 2024. The text of the European Parliament's Plenary Session resolution, P9_TA(2019)0079, European Parliament resolution of 28 November on the 2019 UN Climate Change Conference in Madrid, Spain (COP 25) (2019/2712(RSP)), [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0079_EN.pdf], Accessed 30 September 2024.

23 ISTAT, *Resta stabile la povertà assoluta, la spesa media cresce ma meno dell'inflazione*, 25 March 2024, [https://www.istat.it/wp-content/uploads/2024/03/STAT_TODAY_POVERTA-ASSOLUTA_2023_25.03.24.pdf], Accessed 30 September 2024.

24 See, *inter alia*, Holmes, S., Middelschulte, D., Snoep, M. (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, Concurrences, Paris, 2021; Holmes, S., *Climate change, sustainability and competition law*, Journal of Antitrust Enforcement, 2020, 8, pp. 354-405; Holmes, S., *Climate change, sustainability and competition law in the UK*, European Competition Law Review, 2020, 41(8), pp. 384-399; Iacovides, M.C. and Vrettos, C., *Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice*, Journal of Antitrust Enforcement, 2022, 10, 1, pp. 32-62; Monti, G. and Mulder, J., *Escaping the clutches of*

ysis has mainly regarded Article 101 TFEU, although it is clear that also Article 102 TFEU has a role to play in this context, especially in relation to social and economic sustainability, as it will be explained *infra*.

2.1. Article 101 TFEU

The scope of Article 101 TFEU in promoting sustainability is essential. Indeed, this provision establishes a prohibition with regard to agreements, concerted practices or decisions of associations among undertakings active on the market. The aim is, of course, that of preventing collusion among market operators, which will stifle competition. However, in some circumstances, cooperation among companies could be necessary. One of this fields is without doubt that of innovation, which is an essential characteristic of competition, and it can be also related to innovative products or technologies aimed at improving environmental performances (think at a cleaner engine, or at a less energy-consuming device). However, thus being immanent in competition, innovation requires huge investments and companies could be discouraged to embark in an uncertain (but maybe directed at introducing a more sustainable product) investment by bearing alone the whole risk. In fact, the success of this operation can lead to market domination based on the merits, but the contrary outcome may lead to exiting the market. This is the so-called 'first-mover disadvantage'.[25] Therefore, although not opening the door to hidden collusive practices, the competition law system should be provided with the necessary flexibility in order to accommodate the needs just expressed, as well.

A first flexibility path is represented by paragraph 3 of Article 101 TFEU, which provides for an exemption to the application of the prohibition contained in the first paragraph of the same Article in case certain conditions are met. However, the issue is how these conditions are interpreted and measured.

First, agreements aimed at promoting sustainability shall not amount to agreements which detrimentally distort competition (*hard-core* restrictions). Subsequently, the

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EU competition law. Pathways to Assess Private Sustainability Initiatives, European Law Review, 2017, 42(5), pp. 635-656; Monti, G., *Four Options for a Greener Competition Law*, Journal of European Competition Law & Practice, 2020, 11, 3-4, pp. 124-132; Kingston, S., *Greening EU Competition Law and Policy*, Cambridge University Press, Cambridge, 2011; Kloosterhuis, E. and Mulder, M., *Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants*, Journal of Competition Law & Economics, 2015, 11, 4, pp. 855-880; Majcher, K. and Robertson, V. H.S.E., *The Twin Transition to a Digital and Green Economy: Doctrinal Challenges for EU Competition Law*, February 2021, [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3778107_code3158787.pdf?abstractid=3778107&mirid=1], Accessed 30 September 2024.

[25] Holmes, S., *Climate change, sustainability, and competition law*, cit., p. 14; Piletta Massaro A., *Back to the Treaties: Towards a 'Sustainable' Competition Law*, Revija za Evropsko Pravo, 25, 2023, p. 20.

Treaty provision grants the analysed exemption if the concerned agreements are directed at improving goods' production or distribution or they deliver some sort of economic or technical progress. However, these agreements also need to deliver a 'fair share' of these improvements to consumers. In particular, as stated by the ECJ in *Consten and Grundig*, the benefits brought by the concerned agreement shall *compensate for the disadvantages which they cause in the field of competition*.[26]

More challenging, while assessing the merit of a single case, is the second and overarching positive condition, *i.e.*, the delivery of these benefit's fair share to consumers. According to the newly approved Commission Exemption Guidelines, *Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on the consumers in the relevant market is at least neutral*.[27] This does not amount to a full compensation, but to appreciable objective advantages, as it can be interpreted through the lines of the ECJ *Asnef-Equifax*[28] and *Mastercard*[29] judgements.

The new Commission Guidelines introduce three categories of possible benefits for consumers: The 'individual use value benefit', the 'individual non-use value benefits' and the 'collective benefits'. The first refers to *improved product quality or product variety resulting from qualitative efficiencies or take the form of a price decrease as a result of cost efficiencies*[30]. The second encompasses the appreciation of the consumers whilst consuming a sustainable product in comparison to a non-sustainable one, as it causes a less negative impact on others.[31] The last category of benefits occurs *irrespective of the consumers' individual appreciation of the product* and these benefits *accrue to a wider section of society than just consumers in the relevant market*.[32]

With reference to the aspect concerning the category of consumers who shall receive the fair share required by Article 101, paragraph 3, TFEU, the new Commission Guidelines specify that *the concept of 'consumers' encompasses all direct or indi-*

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26 Joined Cases 56 and 58/64, *Consten and Grundig*, ECLI:EU:C:1966:41, 30 July 1966, page 348.

27 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 (2023/C 259/01), point 569.

28 Case C-238/05, *Asnef-Equifax*, ECLI:EU:C:2006:734, 23 November 2006, par. 72, where the Court stresses that *the overall effect on consumers in the relevant markets must be favourable*.

29 Case C-382/12 P, *MasterCard Inc. at al. v. Commission*, ECLI:EU:C:2014:2201, 11 September 2014, par. 234.

30 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements from the Commission, cit., note 27, point 571.

31 *Ibidem*, points 575, 578.

32 *Ibidem*, point 582.

rect customers of the products covered by the agreement.[33] In this sense, it is important to follow the reasoning of the Commission's new Guidelines with reference to the so-called collective benefits. Here it is stated that *although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same*.[34] Moreover, *where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market that occur outside the market can be taken into account if they are significant enough to compensate the consumers in the relevant market for the harm they suffer*.[35] The analysed Guidelines' approach appears to be consistent with the praxis developed by the European judiciary.[36]

Having regard to the timeframe of materialisation of the concerned benefits, the new Guidelines suggest that *the fact that pass-on to consumers occurs with a certain time lag does not in itself exclude the application of Article 101(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on. In making this assessment, the value of future benefits must be appropriately discounted*.[37]

A second possibility of exemption is represented by the (revitalised) figure of sustainability agreements. In other words, the competent Authority can decide not to apply the prohibition in case certain circumstances occur. In particular, the urgency of sustainability issues led to the introduction of a specific section about 'sustainability agreements' in the abovementioned Guidelines published in 2023. This gives guidance on the assessment of this kind of agreements under article 101, paragraph 1, TFEU.

The agreements at stake may lead to the adoption of sustainability standards, which can also concretise in specific sustainability labels.[38] According to the Commission, sustainability standardisation agreements may lead to the development of new products or markets, to an increase in quality of the concerned products,

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33 *Ibidem*, point 569.

34 *Ibidem*, point 583.

35 *Ibidem*, point 584.

36 Case T-86/95, *Compagnie Générale Maritime v. Commission*, ECLI:EU:T:2002:50, 28 February 2002, par. 343; Case C-382/12 P, *MasterCard Inc. et al. v. Commission*, cit., note 29, par. 242.

37 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, cit., note 27, point 591.

38 *Ibidem*, points 538, 541.

or improve the distribution of products. Moreover, sustainability standards can increase the awareness of consumers on the sustainability of the products they purchase.[39]

The Guidelines establishes what is defined as a 'soft safe harbour', based upon six conditions:

1. Transparency, which means that *all interested competitors must be able to participate in the process leading to the selection of the standard*;[40]
2. No obligation to comply with the standard on undertakings not that are not willing to participate in it;[41]
3. Freedom to apply higher sustainability standards for companies participating in the standard setting, although binding requirements can be imposed on them in order to ensure compliance with such a standard.[42]
4. No exchange among the undertakings participating to the standard setting of sensitive information which are not necessary or proportionate for the purpose of the standard.[43]
5. Effective and non-discriminatory access to the outcome of the standard-setting process must be ensured.[44]
6. Firms must comply with at least one of the following two conditions: *The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned*; *The combined market share of the participating undertakings must not exceed 20% on any relevant market affected by the standard*.[45] This last point is of particular importance, since it allows also firms having a significant market share on the market to pursue sustainability goals, but without harming consumers.

The non-compliance with one of these conditions does not lead to a presumption of anti-competitiveness of the concerned agreements, which will be normally assessed along the lines of Article 101, paragraph 1, TFEU.[46]

After the publication of the mentioned Guidelines, these two approaches represent the main instruments to grant an exemption to a sustainability-enhancing

39 *Ibidem*, point 545.
40 *Ibidem*, point 549.
41 *Ibidem*.
42 *Ibidem*.
43 *Ibidem*.
44 *Ibidem*.
45 *Ibidem*.
46 *Ibidem*, point 522.

agreement among companies. However, it is worth mentioning that the scholar debate highlighted also alternative residual roads, such as ancillary agreements[47] or public policy considerations,[48] to achieve sustainability goals by means of competition law.

However, the picture portrayed above just shows competition law as a 'shield' protecting agreements allegedly sustainability oriented from the application of competition provisions. But the medal is twofold, and competition law, in this field, may also play its original and more usual role, as a 'sword' prohibiting collusive agreements. Here the risk is represented by the so-called 'green washing'. By means of these practices, companies sustain to have the need to cooperate for developing a more sustainable product or service, but, in the end, this need could reveal to be not justified or however not necessary at the extent to which the concerned companies described it. It is in this exact context that competition law must be flexible enough to strike the right balance between what can be allowed and what cannot. A good example is provided by the *Car Emissions* case,[49] where certain car producers agreed not only on crucial aspects related to the development of greener engines, but also about on ancillary details, such as the size of AdBlue storages, which is something that should left to competition.[50]

2.2. Article 102 TFEU

Having regard to Article 102 TFEU, although less debated, it has for sure a role to play in the sustainable transition of the economy.[51] Whilst Article 101 TFEU is concerned about the economic power abusively exercised by a group of companies, Article 102 TFEU focuses on monopolisation conducts put in practice by a single company which is dominant in the relevant market.

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47 Defined by the Commission as *restrictions […] which do not constitute the primary object of the agreement, but are directly related to and necessary for the proper functioning of the objectives envisaged by agreement*. See European Commission, *Glossary of terms used in EU competition policy*, 2002, [https://op.europa.eu/it/publication-detail/-/publication/100e1bc8-cee3-4f65-9b30-e232ec3064d6], Accessed 30 September 2024.

48 Along these lines, competition Authorities and Courts have the possibility of adopting – at a certain extent – a sort of 'multi-value' approach while interpreting competition provisions. See Piletta Massaro, A., *Il diritto della concorrenza tra obiettivi di policy e proposte di riforma: verso un approccio multi-valoriale*, La Cittadinanza Europea Online, 2021, 0, pp. 115-140.

49 European Commission, decision 8 July 2021, case AT.40178, *Car Emissions*.

50 Holmes, S., *Cartels harming sustainability (and those that don't) in Europe*, in Nowag, J. (Ed.), Research Handbook on Sustainability and Competition Law, Edward Elgar, Cheltenham, 2024, pp. 339-341.

51 See, *inter alia*, Iacovides, M. and Mauboussin, V., *Unilateral conduct and sustainability in EU competition law*, in Nowag, J. (Ed.), *op. cit.*, note 50, pp. 352 ff.

It is well known that the abuse of a dominant position can lead to the exclusion from the market (or the acquisition by the incumbent) of small and innovative firms, but it can also slow down the innovation path by releasing innovative technologies in a longer time-lapse. In fact, when it does not reach an excess (therefore turning into toxic, bearing in mind the inverted U-shape advanced by Aghion, Bloom, Blundell, Griffith and Howell, according to whom an increase in the competitive level may deliver more innovation, but an excess of competition may provide the opposite effect[52]), fierce competition among companies should lead to a continuous technological progress aimed at improving the rivals' products, with all the positive consequences for the society as a whole. Contrariwise, when a company is not subject to competitive pressure, it will be encouraged to slow down investments in innovation and release just restyled or refined products instead of brand-new innovative ones. Therefore, a proper application of Article 102 TFEU might for sure lead – although more indirectly – to positive outcomes in terms of sustainability. A practical example is represented by the *Google/EnelX* case decided by the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato, AGCM),[53] where the Italian watchdog sustained that the exclusionary conduct put in place by Google and leading to the exclusion of EnelX's JuicePass app (which enabled users to manage the recharging process of their electric vehicles) from Android Auto brought a *vulnus* to the development of the electric cars market, since it deprived users of a valuable tool to make the recharging process of their cars easier.[54]

Finally, another fundamental aspect regarding the role of competition in this field represents a linking point between environmental sustainability here discussed, and social and economic sustainability. Indeed, a transition (or maybe, since its magnitude, a 'revolution') such as the environmental one, cannot be pursued by itself. In other words, it cannot be a transition which is 'affordable' only for the few, and exactly this one is a point where Article 101 and 102 TFEU have to play a role. Indeed, as it is well-known, innovative products are generally more expensive, because they imply huge investments in research and development. In particular, these products might be even more expensive in case they are produced by a group of companies which joined their efforts or by a dominant company, which can set its conditions in the market. Competition (together with other tools, such as industrial policy) ought to intervene here in order to ensure fair conditions on

52 Aghion, P., Bloom, N., Blundell, R., Griffith, R., Howitt, P., *Competition and Innovation: An Inverted-U Relationship*, The Quarterly Journal of Economics, 2005, 120, 2, pp. 701-728.

53 Autorità Garante della Concorrenza e del Mercato, decision 27 April 2021, case A529, *Enel X – Android Auto*, available (in Italian only) at [https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf], Accessed 30 September 2024. The relevant press release is available at [https://en.agcm.it/en/media/press-releases/2021/5/A529], Accessed 30 September 2024.

54 *Ibidem*, point 387.

the market and prevent exploitative behaviours which can lead to slowing the pace of the transition. In practice, Article 101 TFEU has to endure (see the abovementioned *Car Emissions* case example) that the agreement among companies is related just to the parts which are essential to the better and proper development of the innovative product, but that competition in the other upstream and downstream parameters (such as, for the sake of exemplifying, distribution or supply) is not impaired. The principle, which is valid also with regard to Article 102 TFEU, is that companies must compete fairly and for sure get the incentive (in terms of profitability) stemming from innovation, but this profits cannot be without limits, since here something more important, that is the conservation of our planet and our society, is at stake and – remind Article 41 of the Italian Constitution – economic activities, although in a free market context, have to be directed towards a societal purpose. This means that the advantages generating from the development of these products must be 'fairly shared' among companies and consumers by means of fair prices, which will allow everyone to take part to the transition. Conversely, failure is the only possible result.

3. COMPETITION LAW AND SOCIO-ECONOMIC SUSTAINABILITY

The socio-economic sphere of sustainability with regard to competition law can include a plethora of concepts and issues.[55] Anyhow, it is worth focusing the attention on two profiles, which are reciprocally linked: Excessive market concentration and income inequalities. The former has regard to the very foundations of competition law, as a tool aimed at tackling excessive economic power in the market, to preserve a competitive structure of the same market so as to allow the entrance of newcomers (with all the innovative features they can introduce) and keeping fair trading conditions. Moreover, a dispersed power in the market is essential for a democratic society's life. This was clear since the enactment of the Sherman Act in the United States. A similar approach was present in the theoretical construction made by the Ordoliberal School in Europe.[56] Anyhow, not being this the venue for discussing the theoretical foundations of competition law, what matters is the role that this subject can play in the two issues identified at the beginning of the present paragraph.

For the sake of this analysis, we would like to define social sustainability as a way of running business *by identifying and managing business impacts, both positive and*

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55 See, *inter alia*, Krause, T., *Social sustainability*, in Nowag, J. (Ed.), *op. cit.*, note 50, pp. 32 ff.

56 Osti, C., *Antitrust: a Heimlich manoeuvre*, in European Competition Journal, 2015, 11, 1, pp. 238-241; Gerber D.J., *Law and Competition in Twentieth Century Europe*, Oxford University Press, Oxford, 1998, pp. 232-265.

negative, on people.[57] Economic sustainability represents a sort of specification of this concept, and it can be defined as *economic development without any loss of ecological or social sustainability*.[58] Therefore, in the context related to competition law, these figures can be read as the maintenance of levels of market power which allow a *fair share* of the market outcomes to the society intended as a whole. In particular, this conception would aim at preventing exploitative business conducts based on the excessive market power held by one or more companies. Anyhow, it is worth specifying that, in our view, the concept of social sustainability goes beyond the mere economic discourse and takes into account also the effects of excessive market power on parameters such as freedom of expression, democracy, health, and, in general, by mentioning a concept proposed by Luigi Einaudi and which we deem should it be the cornerstone of a healthy market economy, the *equality of starting points* among people (which does not mean equality of outcomes, but it means the possibility, for every individual, to have the possibility to realise her/his own capabilities).[59]

At a first sight, competition law could not appear as the right instrument to deal with this kind of issues, whilst other policy tools, such as classic economic regulation, social protection or taxation might appear more suitable. However, this is for sure not the right approach, as it appears evident how an integrated or 'multi-tool' approach is needed in an always more complex societal and economic context.[60] This is exactly what Article 7 TFEU is about. In competition law the need for such an approach has become evident with the advent of digitalisation, and indeed the response has been – after a first phase of understanding of the phenomenon – shaped exactly along the lines of such an integrated policy approach. Good examples are the *Facebook* decision rendered by the German Bundeskartellamt[61] (and confirmed by the Court of Justice[62]) where data protection provisions – and the General Data Protection Regulation (GDPR)[63] – became a parameter for assessing the abuse of a dominant position.

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57 UN Global Compact, *Do business in ways that benefit society and protect people*, [https://unglobalcompact.org/what-is-gc/our-work/social], Accessed 30 September 2024.

58 Jeronen, E., *Economic Sustainability*, in Idowu, S.O., Schmidpeter, R., Capaldi, N., Zu, L., Del Baldo, M., Abreu, R. (Eds.), Encyclopedia of Sustainable Management, Springer, Cham, 2023, p. 1257.

59 Einaudi, L., *Lezioni di politica sociale*, Einaudi, Torino, 1949, pp. 169-246.

60 Piletta Massaro, A., *The Rising Market Power Issue and the Need to Regulate Competition: A Comparative Perspective Between the European Union, Germany, and Italy*, Concorrenza e Mercato, 29, 2022, 2023, p. 42.

61 Bundeskartellamt, decision 6 February 2019, B6-22/16, *Facebook*.

62 Case C-252/21, *Facebook*, ECLI:EU:C:2023:537, 4 July 2023.

63 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR), [2016] OJ L119/1.

The Digital Markets Act (DMA)[64] and all the similar legislative solutions introduced in this field[65] are at the crossroad between proper competition law and regulation,[66] since *ex ante* obligations are imposed just to certain economic actors previously defined as gatekeepers or having paramount economic significant across markets. Moreover, tools like consumer law[67] on one side, but also industrial policy (think about the discourse related to the dispersion of economic power or the creation of 'European champions') on the other side are becoming more and more important in this process. Behind this lies just one aim: To provide the right boundaries to market power, to direct it towards ends which are not only the maximisation of profits, but, as anticipated, the delivery of a fair share of the wellness produced to society. In this context, competition law must play a role as far as it shapes the direction of market power *before* it produces its effects on the markets and society.[68] For the sake of exemplifying, a pluralistic and not concentrated social media market has positive impacts on the quality of news and therefore on the freedom of expression and, consequently, on the democratic process.[69] Along the same lines, a vibrant and not concentrated technological market will bring to consumers more innovative (also from an environmental point of view) products at an affordable price. In synthesis, the role of competition law in this context is not abstract nor far from its own objectives, but it is exactly its core scope (maybe in part forgotten after the advent of the so-called Chicago School): Keeping healthy levels of economic power in the market in order to allow an in-

64 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector, [2022] OJ L265/1.

65 For instance, Section 19a of the German GWB.

66 Botta, M., *Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila*, Journal of European Competition Law & Practice, 2021, 12, 7, pp. 500-512; Piletta Massaro, A., *op. cit.*, note 50.

67 See, for instance, Autorità Garante della Concorrenza e del Mercato, proceeding PS11112, decision 29 November 2018, *Facebook*, available (in Italian only) at [https://www.agcm.it/dotcmsdoc/allegati-news/PS11112_scorr_sanz.pdf], Accessed 30 September 2024. The relevant press release is available at [https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes], Accessed 30 September 2024. See also Botta, M. and Wiedemann, K., *The Interaction of EU Competition, Consumer, and Data Protection Law in The Digital Economy: The Regulatory Dilemma in The Facebook Odissey*, The Antitrust Bulletin, 2019, 64(3), pp. 428-446.

68 Ezrachi, A., Zac, A., Decker, C., *The effects of competition law on inequality – an incidental by-product or a path for societal change?*, Journal of Antitrust Enforcement, 2023, 11, 1, pp. 51-73; A. Zac, *Pre-distribution versus re-distribution: why competition law is much more than a tool to alleviate poverty*, in Nowag, J. (Ed.), *op. cit.*, note 50, p. 121.

69 See, *inter alia*, Stoller, M., *Goliath: The 100-Year War Between Monopoly Power and Democracy*, Simon & Schuster, New York, 2019; Lianos, I., *Competition Law as a Form of Social Regulation*, The Antitrust Bulletin, 65, 2020, pp. 3-86; Deutscher, E., *Competition Law and Democracy*, Cambridge University Press, Cambridge, 2024.

novative development which provides a balanced economic growth benefitting all the actors involved, the society as a whole, and future generations.

At a first sight, this might appear to be a too theoretical or also utopistic discourse, not linked to the daily reality of the market, but it is not. All the abstract concepts expressed above should be transferred to reality through the evaluation of the quality of products.[70] The price, given its easily measurable nature, became too central in the analysis of competition cases, and only recently quality returned to be considered as a key element in the assessment of cases, not subordinated to price evaluations. The difficult issue is about how to measure quality and how to give to this measure what can be called a legal connotation?[71] Being not this the venue for exploring the mainly economic and econometric debate about the measurement of quality, what is important to be understood – after these measurements – is exactly how competition law has to evaluate the role of quality. On this, it appears that the approach based on various kinds of benefits not only to the consumers but also to society introduced by the abovementioned 2023 Guidelines is on the right path in order to take sustainability issues into account, without undermining legal certainty in the assessment of cases. This can be for sure replicated also outside the realm of the mentioned Guidelines, thus becoming a general approach towards sustainability issues in competition law. Last but not least, central in this parcourse (also regarding environmental sustainability) will also be the advocacy role of competition Authorities, so as to raise awareness and compliance with these issues by means of a constructive approach with companies.[72]

4. THE ENFORCEMENT FRAMEWORK: COMPETITION LAW AND INSTITUTIONAL SUSTAINABILITY

The final consideration expressed in the previous paragraph leads to what can be viewed as the last prong of sustainability for the sake of the present analysis. This has regard to the institutional level,[73] which can be summarised and simplified as the way in which competition provisions are applied. In this sense, two aspects can

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70 OECD, *The Role and Measurement of Quality in Competition Analysis*, 28 October 2013, [https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf], Accessed 30 September 2024; OECD, *Quality considerations in digital zero-price markets*, 28 November 2018, [https://one.oecd.org/document/DAF/COMP(2018)14/en/pdf], Accessed 30 September 2024.

71 Some suggestions are proposed by van der Zee, E., *European competition law: measuring sustainability benefits under Article 101(3) TFEU*, in Nowag, J. (Ed.), *op. cit.*, note 50, pp. 412 ff.

72 Monti, G., *Implementing a sustainability agenda in competition law and policy*, in Nowag, J. (Ed.), *op cit.*, note 50, pp. 254-263.

73 The concept of institutional sustainability, in general, is proposed by Giavannini, E., *L'utopia sostenibile*, *op. cit.*, note 20, p. 86.

be considered: One has regard to institutional sustainability as such, that means, by using a *jeu de mots*, how the regulators are regulated. The second relates to the applicability/capability level. Having regard to the former, this can be summarised through the Latin expression *quis custodiet ipsos custodes?*,[74] which can be paraphrased as which rules apply to those who rule. Out of metaphor, this relates to the institutional safeguards and organizational processes which should regulate the operations of competition Authorities. In particular, what is necessary is the respect of a precise procedural framework in all the Member States, exactly in order to maintain the needed level of conformity across the Internal Market. This objective, at least from a formal viewpoint, can be considered achieved by means of the adoption, back in 2019, of the so-called ECN+ Directive.[75] Not being this venue the one for a detailed analysis of the mentioned Directive, it suffices to say that it aimed at 'harmonising' the institutional and organisational structure and duties of the various competition Authorities, and providing for the necessary safeguards to render the enforcement of competition law more effective.

Having regard to the applicability side, this encompasses the formal requirements just outlined (which can be seen as prerequisites) and involves the necessity of reaching a level of enforcement which is effective from a sustainability standpoint. This means the possibility – through adequate structures, *i.e.*, staff and resources – of effectively applying competition rules in an innovative and sustainable way (e.g., by giving much more importance to quality parameters, although this implies costly and lengthy evaluations). This aspect results central also in the discourse related to digital markets and the enforcement of the DMA, since the continuous monitoring over the gatekeepers' compliance with the new provisions requires huge efforts.[76]

Moreover, a key institutional aspect is what we can define as the 'entitlement' of competition Authorities' action, which means the prioritisation of cases which have a clear impact on sustainability. For instance, it could be commendable to prioritise cases related to the development of more sustainable technologies, as already done in the mentioned *EnelX* case from the Italian AGCM and the Commission's *Car Emissions* case. Having regard to social sustainability, a good example of prioritisation is, for instance, a focus on cases regarding goods which are essential for the protection of fundamental rights, such as the right to health. In this case, a commendable example is constituted by the AGCM's decision in

74 Giovenale, *Satire* (VI, 48-49).

75 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3.

76 Piletta Massaro, A., *op. cit.*, note 60, pp. 40-42.

the *Aspen* case,[77] regarding price increases involving pharmaceutical products for cancer treatment. Anyhow, in general, the preservation of a competitive and non-concentrated structure of the market could constitute a safeguard for social rights, such as for the maintenance of employments level by avoiding monopsony power by companies.[78]

Finally, with an effort appears needed to better explain among businesses and citizens the societal benefits of competition. In fact, competition – probably because of the fact that it intrinsically implies the concept of rivalry – is often feared by the general public, because it can be associated with exit from the market of firms, loss of jobs, etc.[79] But this is the non-sustainable conception of competition promoted along the lines of economic efficiency. Therefore, what needs to be promoted is a sustainable approach to competition, where the competitive process represents the instrument through which the whole society can grow through a healthy and sustainable (social) market economy.

5. CONCLUSION

The considerations expressed in this paper aim at providing a sort of theoretical guide to include sustainability considerations in competition law. In particular, sustainability has been analysed under the environmental, socio-economic, and institutional perspectives. What is worth underlining is also how the inclusion of the sustainability dimension in every policy – therefore also competition law – has to be considered an urgency, because of the already mentioned issues which are heavily affecting our society both from an environmental and social standpoint. This is a sort of 'final call' for the society as we know it, and, although not pleasant, we cannot hide it. At this purpose is telling the image proposed by Professor

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77 Autorità Garante della Concorrenza e del Mercato, decision 29 September 2016, case A480, *Aspen*, available (in Italian only) at [https://www.agcm.it/dotcmsDOC/allegati-news/A480_chiusura.pdf], Accessed 12 November 2024. The relevant press release is available at [https://en.agcm.it/en/media/detail?id=1c53b769-446d-4e36-bfed-49e2f7454e03&parent=Press%20releases&parentUrl=/en/media/press-releases], Accessed 12 November 2024.

78 OECD Employment Outlook 2022, *Monopsony and Concentration in the Labour Market*, 2022, pp. 132-199, [https://www.oecd-ilibrary.org/docserver/0ecab874-en.pdf?expires=1731417769&id=id&accname=guest&checksum=D40FBF12EBBCAAA9EFDB9F28B37483C8#:~:text=Monopsony%20is%20the%20situation%20that%20arises%20when%20competitive%20markets%20break,employers%20exist%20%E2%80%93%20labour%20market%20concentration.], Accessed 12 November 2024.

79 Piletta Massaro, A., *Market Integration and Competition as a Way to Strengthen the Rule of Law and Democracy in the Enlarged European Union*, EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 8: EU at the Crossroads – Ways to Preserve Democracy and Rule of Law, 2024, p. 336, [https://hrcak.srce.hr/ojs/index.php/eclic/article/view/32282/16412], Accessed 30 September 2024.

Holmes in the end of a paper, where a group of competition scholars are grouped in a room, discussing about abstract concepts, whilst the room starts being flooded by water.[80]

What emerges as gist of the discourse conducted in the present work has regard to the concept of thresholds. In order to better understand it: We need sustainability to be urgently implemented as every policy's lodestar because we almost reached the capability threshold of our planet in terms of resources and of our societies with regard to other issues, such as, for instance, the share of net personal wealth held worldwide, since in 2022 the richest 10 percent of the population was counting for the 75.85%, whilst the bottom 50% registered just the 1.89%.[81] Analogue is the discourse we have to make about competition and, consequently, competition law: What is the right, healthy, threshold? What is the threshold that makes competition good for society and the planet? This paper aims at providing some suggestion is this sense, along the three sustainability lines above illustrated. Moreover, the achievement of these objective at the EU level can be of particular importance for Countries characterised by less developed environmental or social sustainability standards[82] in order to have a model of reference for the implementation of policies directed at improving their societies. This can be the case of the Western Balkans Countries willing to join the EU and called to align their legislations with the *Acquis Communautaire*, which for sure includes the rules and interpretations directed at the improvement of sustainability levels.

Finally, it is worth bearing in mind that every policy – and therefore competition law, as well – shall respect the Aristotelian concept *in medio stat virtus*. Probably this is the right definition of both sustainability and the guiding principle in its achievement, also regarding competition law.

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[80] Holmes, S., *Climate change, sustainability and competition law*, cit., p. 365.

[81] Statista, Share of net personal wealth held by the richest 10 percent compared to the poorest 50 percent worldwide from 1995 to 2022, [https://www.statista.com/statistics/1417996/wealth-held-richest-percent-world/], Accessed 30 September 2024.

[82] Holmes, S., *Climate change, sustainability and competition law*, cit., pp. 341-349.

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