6. ESG: The Corporate and Antitrust Puzzle

Marco Corradi and Julian Nowag

1. INTRODUCTION

The debate around sustainability and the pursuance of ESG (environmental, social and governance)[1] strategies by corporations has become central in policy making.[2] Corporate law and competition law were not spared by the exponentially growing stream of literature that pushes for the inclusion of ESG into both areas of the law.[3]

In general, it might be said that while corporate law and governance typically focus on what happens within a company, competition law regulates how a company behaves externally in the market.[4] Yet, internal measures regarding organization and actions will also affect the outside behavior of a company, particularly with regard to ESG strategies. It is precisely this interaction that provides the basis for the study of this chapter on how ESG efforts are treated by the different areas of law and how this treatment affects the other area.

In corporate governance and in corporate law, the debate about ESG is in large parts about changing companies' behavior in a way that will make companies generate more ESG benefits, while limiting companies' existing negative externalities and harmful practices in ESG-related areas such as, pollution, child slavery and discrimination based on race, culture, and gender.[5] Thus, corporate law and governance set the directions for what companies will do and identify how they will develop.

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[1] According to the UN, 'ESG standards: represent principles focused on environmental, social and governance impacts of businesses; apply primarily to the business sector, companies, and investors; do not have a standardised global framework.' (See UN, *Building a Sustainable Future: ESG Business Handbook*, UNDP, 2023, available at https://www.undp.org/sites/g/files/zskgke326/files/2023-08/building_a_sustainable_future_esg_business_handbook.pdf (accessed 15 December 2023) 26). Hence, there is no fully standardized definition of ESG. At the moment, ESG seem to be a rather open conceptual framework, which welcomes any contribution to social advancement in these areas.

[2] See Section 2 below.

[3] Ibid.

[4] See in this regard A Tzanaki, 'Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law: Looking Through the Past to Return to the Future?' in Marco Corradi and Julian Nowag (eds.), *The Intersections between Antitrust and Corporate Law* (Cambridge University Press 2023).

[5] See in general T Li et al., 'ESG: Research progress and future prospects' (2021) 13 Sustainability 11663. It goes without saying that the increasing interest of the corporate world in ESG-oriented corporate strategies has raised skepticism among some top corporate lawyers. See for instance L Bebchuk and R Tallarita, 'The illusory promise of stakeholder governance' (2020) 106 Cornell Law Review 91. An alternative perspective is offered by S Gadinis and A Miazad, 'Corporate law and social risk' (2020) 73 Vanderbilt Law Review 1401, who propose the idea that,

By contrast, competition law sets out what corporations cannot do. Thus, reforms of corporate law and of corporate governance can achieve objectives that cannot normally be achieved by competition law. Yet, competition law might prevent such achievements. For example, if a corporation concludes an agreement with other corporations as part of its ESG mission, competition law might prohibit such action. A good recent example is provided by a Uruguayan case.[6] Supermarkets wanted to reduce the amount of single-use plastic carrier bags. They agreed to charge a small amount for these bags, instead of providing them for free. The Uruguayan competition authority found this to be in violation of competition law.[7] We can thus say that competition law acts as a limitation as to where corporate law and corporate governance can lead corporations. Corporate directors will be forced to abide by competition law decisions under their duty of compliance.

In this chapter, we explore these interactions in greater detail. We examine how ESG influences corporate law and governance and how it can affect competition law. Our focus is on the mutual interaction between these two fields of law in light of the ESG movement. In Section 2, we explain some of the basic terms and assumptions upon which our analysis rests. Section 3 maps entry points for ESG considerations in the corporate and competition law systems. In Section 4, we explore how a fundamental rethink in light of ESG in one area of law would affect the other, and then how an adaptation of existing principles in these systems would affect the interaction between corporate and competition law. We argue that a fundamental rethink might require exactly that: fundamentally rethinking not only of one or the other fields, but also of their interaction and possibly of the liberty-based institutional environment as it is currently designed. The adaptation of existing principles might thus be preferable although not without challenges.

2. ESG, SUSTAINABILITY, CORPORATE LAW AND GOVERNANCE, AND COMPETITION LAW

Before delving into the substantive analysis of the relevant ESG policies pertaining to corporate law and governance and to competition law, we need to clarify a few assumptions and terms upon which this chapter rests.

Firstly, we take a wide definition of corporate law and governance, as encompassing financial markets law, and including the role of institutional investors in corporate governance. Yet, when we speak of competition law, we use a narrower definition. We mean rules addressing coordinated behavior, unilateral conduct (antitrust law) and merger rules, while we exclude

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while pursuing the idea of ‘doing social good’, companies are presently pursuing ESG-oriented policies in order to safeguard themselves against downside risk.

[6] *Resolucion 330 / 2021 (Plastic Bags Case)* (Comisión de Promoción y Defensa de la Competencia).

[7] Contrast this with a similar case in Japan, where the only discernible difference is that the municipality was also involved in setting up the scheme to charge for the plastic bags. See OECD, ‘Horizontal Agreements in the Environmental Context’ (2010) DAF/COMP(2010)39, 149.

for example State aid or other areas of law[8] that some jurisdictions might include as part of competition law.

Secondly, we acknowledge the difference between ESG and sustainability, as well as the difference in the timing of the ESG debate within the two areas of the law. Corporate practice started producing corporate social responsibility (CSR) codes in the early 1990s.[9] 'By the beginning of the [21st] century, most large companies in the U.S. and Western Europe [had] formed their own […] CSR [policies]'.[10] But CSR was not the core interest of corporate law scholars in the 20th century. Starting from the iconic piece by Jensen and Meckling,[11] and until the first decade of the 21st century, the core concern of corporate law and governance scholarship has been agency costs.[12] The second and third decades of the 21st century have witnessed an unparalleled emersion of ESG.[13] In competition law, a similar shift in focus can be observed. The last decade(s) of the 20th century were marked by a focus on economics and competition law.[14] While the debate about ESG and competition law started in the EU back in the 2000s,[15] it seems that in the past few years[16] the debate is becoming more mainstream. Overall, it might still be said that it has been a very European discussion. In Europe, the

8 Thus, leaving aside matters like State aid/subsidies, bid-rigging, or various rules addressing specific competition challenges such as those in digital markets.

9 F Madrakhimova, 'History of development of corporate social responsibility' (2013) 4 Journal of Business and Economic 509, 515. Note that with regard to corporate conduct, the environmental concern was seen as less pressing a few decades ago. CSR was originally intended as a positive way for the corporation to contribute to the well-being and development of society at large.

10 Ibid.

11 M Jensen and W Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305.

12 J Armour and J McCahery (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Hart Publishing 2006).

13 See also a collection of research papers on ESG by top scholars on the European Corporate Governance Institute's official website: https://ecgi.global/content/sustainable-corporate-governance.

14 See e.g. A C Witt, *The More Economic Approach to EU Antitrust Law* (Hart 2016); J Blockx, 'The Limits of the "More Economic" Approach to Antitrust' (2019) 42(4) World Competition 475.

15 See *CECED* (IV.F.1/ 36.718) Commission Decision 2000/ 475/ EC [2000] OJ L187/ 47; H Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?* (Europa Law Publishing 2003).

16 See, e.g., S Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012); J Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2017); OECD, 'Sustainability and Competition' (2020) OECD Competition Committee Discussion Paper, available at https://laweconcenter.org/wp-content/uploads/2023/03/sustainability-and-competition-2020.pdf (accessed 30 November 2023); European Commission, Directorate-General for Competition, Competition policy brief. 2021-01, September 2021, available at https://data.europa.eu/doi/10.2763/962262 (accessed 30 November 2023); OECD, Environmental considerations in competition enforcement (2021) OECD Competition Committee Discussion Paper, available at https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm (accessed 16 February 2022), and the near exponential growth of the literature since 2020.

Dutch and the Greek authorities had taken the lead[17] and the European Commission followed by updating its horizontal guidelines.[18] Yet, more recently, the debate takes place more globally with discussions and work at international fora such as the OECD and the International Competition Network[19] and agencies such as the Japanese[20] and the one from New Zealand[21] adopting guidelines. With ESG becoming more mainstream both in corporate and competition law, the sustainability debate is also colouring other previously 'orthodox' areas of research, at the intersection of competition and corporate law. For instance, this is the case with regard to questions on how to deal with mergers negatively affecting sustainability;[22] or the anticompetitive effects of common ownership, a theory which was originally developed exclusively based on finance,[23] and which is now heavily affected by the ESG debate.[24]

Thirdly, we recognize the problematic conflation of E-S-G – as environmental, social and governance – as forming a full-option package, ready to be installed on any pre-existing

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[17] The Dutch competition agency (ACM), 2nd Draft Guidelines Sustainability agreements: Opportunities within competition law (2021) available at https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf (accessed 30 November 2023); Greek Competition agency (HCC), Staff Discussion Paper On Sustainability Issues And Competition Law available at https://www.epant.gr/en/information/publications/research-publications/item/2706-staff-discussion-paper-on-sustainability-issues-and-competition-law.html (accessed 30 November 2023); Roman Inderst, Eftichios Sartzetakis, and Anastasios Xepapadeas, Joint Technical Report on Sustainability and Competition for the HCC and the ACM (Jan 2021) https://www.acm.nl/en/publications/technical-report-sustainability-and-competition (accessed 30 November 2023).

[18] See European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C259/1.

[19] See OECD papers cited (n 16) above; Hungarian Competition Authority, Sustainable Development and Competition Law – Survey Report: Special Project for the 2021 ICN Annual Conference (30 September 2022) available at https://www.gvh.hu/en/gvh/Conference/icn-2021-annual-conference/special-project-for-the-2021-icn-annual-conference-sustainable-development-and-competition-law (accessed 30 November 2023).

[20] Japan Fair Trade Commission (JFTC), Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act (31 March 2023) available at https://www.jftc.go.jp/file/230331EN_GreenGuidelines.pdf (accessed 30 November 2023).

[21] New Zealand Commerce Commission, Collaboration and Sustainability Guidelines (November 2023) available at https://comcom.govt.nz/__data/assets/pdf_file/0033/335985/Collaboration-and-Sustainability-Guidelines-30-November-2023.pdf (accessed 30 November 2023).

[22] See I Lianos and D Katalevsky, 'Merger Activity in the Factors of Production Segments of the Food Value Chain: A Critical Assessment of the Bayer/Monsanto Merger' CLES Policy Paper Series 2017/1 https://discovery.ucl.ac.uk/id/eprint/10045082/1/Lianos_cles-policy-paper-1-2017.pdf (accessed 16 February 2022); E Deutscher and S Makris, 'Operationalizing Sustainability under EU Merger Control' in J Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar 2024).

[23] J Azar, M Schmalz and I Tecu, 'Anticompetitive Effects of Common Ownership' (2018) 73 The Journal of Finance 1513.

[24] J Azar et al., 'The big three and corporate carbon emissions around the world' (2021) 142 Journal of Financial Economics 674.

policy agenda. The term ESG embodies great flexibility so that its exact contours are hard to define. As such, this is a strength and a weakness of the terms.[25] Yet, it is important to bear in mind that research shows that E, S and G often clash.[26] Therefore, one needs to consider the consequence of a selected policy line on each variable, E-S-G, separately. In this chapter, we mostly focus on environmental and social aspects, where the debate is currently taking place and the fields can be seen as changing recently. Fourthly, given the focus on the environmental and social effect elements of the ESG debate, we assume that they largely overlap with the sustainability debate in competition law. The debate in competition focuses mostly on environmental and social aspects of sustainability.[27]

3. ESG 'ENTRY POINTS' INTO THE PRESENT CORPORATE AND COMPETITION LAW SYSTEMS

The ESG movement is affecting the corporate and competition law debate very widely: it could be said that there is no area of the respective branches of the law that is not being explored as a potential alley for introducing ESG policies. Nonetheless, such alleys or 'entry points' are not all equal. Some may entail a revolution of the respective areas of the law, by redesigning the fundamental principles or general clauses that form the basis of each branch of the law. For instance, the for-profit function of the public company[28] or the consumer welfare objective pursued by competition law. Other 'entry points' may simply require a revision or adaptation of each system of law, leaving untouched the fundamental principles and the general clauses underlying each branch of the law.

In the following sections, we map out such entry points, placing them on a continuum between harder and softer entries. Here we use the term 'harder entries' for those that would entail a modification of the legal system at a statutory level and/or that would completely modify the core assumptions underlying the two systems of law. By contrast, we mean by 'softer entries' those modifications that are made either through soft law or through economic actors' influence (mainly investors') on corporate behavior or action.

In terms of effects on ESG goals, 'harder entries' may produce a rapid effect, once their revolutionary elements[29] are in place. Yet, it should be noted that these effects are not guaranteed, as they could remain 'law on the books and off the records'.[30] This might occur if the enforcer disagrees with the efforts of the lawmaker and if it faces strong opposition by

[25] See Elizabeth Pollman, 'The Making and Meaning of ESG' (2024) 14 Harvard Business Law Review 403.

[26] Ibid.

[27] On the overlaps and the differences between the ESG debate in corporate law and governance and the sustainability debate in competition law, see M Corradi and J Nowag, 'ESG Policies at the Intersection Between Competition and Corporate Law' in M Corradi and J Nowag (eds.), *Intersections Between Corporate and Antitrust Law* (Cambridge University Press 2023).

[28] Or its for-profit use in the form of a listed company. Because in some jurisdictions the limited company form can also be employed for not-for-profit activity.

[29] On the revolutionary elements, see below Section 4.

[30] To paraphrase an old general theory by R Pound, 'Law in books and law in action' (1910) 44 Am. L. Rev. 12.

economic actors. In contrast, 'softer entries' are more likely to take longer before becoming effective, as they may entail a more gradual and more acceptable reform which produces stable changes.

3.1 ESG 'Entry Points' into the Corporate Law System

Firstly, it should be remembered that corporate governance, which is itself one prong of ESG,[31] developed before what is nowadays labelled as 'the ESG debate', namely with the Cadbury Report. The UK Cadbury Report is the first corporate governance code ever to be conceived.[32] In turn, corporate governance has been employed more and more in support of sustainability, as for instance through the modification of the content of the so-called 'stewardship codes'.[33]

As set out in Figure 6.1[34], there can be a variety of potential points of entrance for ESG policies into the corporate law and governance system, ranging from a complete revolution in the basic tenets of corporate law (such as creating a general rule entailing that a corporation becomes a not-for-profit entity) to a mere duty of disclosure of ESG-related corporate actions. Or ESG policies could even be even left entirely to the action of institutional investors.

The harder way through which 'environmental' and 'social' could enter corporate law would entail a complete change of direction of the overall corporate law system. Imagine that a lawmaker decides that environmental and social aims should occupy the first rank among the objectives pursued by corporate law. This would be in total contrast with what happens nowadays in most developed economies, where the chief objective consists of maximizing shareholder value. Such a hypothetical reform could be in line with the stronger pro-ESG stances, such as those proposed by Colin Mayer.[35] This would entail the lawmaker introducing, for instance, a director's duty to advance environmental and social goals against any other

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[31] As recalled by Pollman (n 25) 413 the United Nations Environment Program Finance Initiative equates the term G ('governance') employed in ESG with 'corporate governance'.

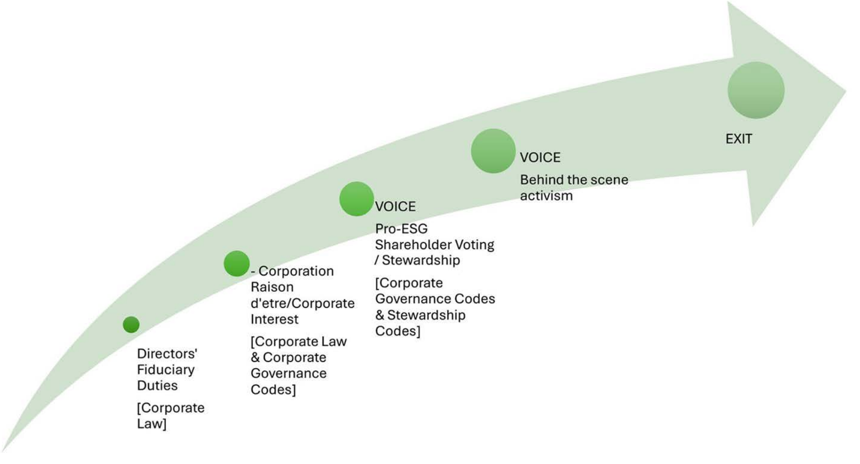
[32] The Cadbury Report can be found at https://www.ecgi.global/code/cadbury-report-financial-aspects-corporate-governance. On the history of the Cadbury code, see L Spira and J Slinn, *The Cadbury Committee: A History* (Oxford University Press 2013).

[33] See for instance, with reference to the 2020 UK reform of the UK stewardship code, P Davies, 'The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?' (2020) European Corporate Governance Institute-Law Working Paper 506. Stewardship codes are special corporate governance codes that were introduced with the purpose of empowering institutional shareholders in their role of monitoring corporate boards. See J Hill, 'Good activist/bad activist: The rise of international stewardship codes' (2017) 41 Seattle UL Rev. 497.

[34] In this figure, we have included some of the interventions depicted in the main text. The first three kinds of interventions are rooted in corporate law. Behind-the-scenes activism and exit are typical ways through which institutional investors interact with the corporate board. Both in the narrative and in the graphical representation, we omit the fact that clearly the actions by institutional investors vis-à-vis the corporation are supported by further rules which lie outside the corporation, namely the fiduciary rules of investment funds' managers vis-à-vis investors. On this point, see the recent paper by G Ferrarini and M Siri, 'Stewardship and ESG in Europe' (2023) European Corporate Governance Institute-Law Working Paper 743.

[35] Although the author has not proposed the introduction of such a duty, he has claimed that corporations should serve consumers first. See, for instance C Mayer, 'The future of the corporation and the economics of purpose' (2021) 58 Journal of Management Studies 887.

variable – including the maximization of shareholder value. Hence, a business corporation would no longer be a profit-maximizer organization; it would be transformed into something completely different – a sort of enterprise pursuing social goals – through a duty that would be enforceable in front of the competent courts.[36]



Source: The authors

Figure 6.1 A progression of 'harder' to 'softer' entries of ESG goals in the corporate debate

Alternatively, such a goal might be pursued in a softer and more flexible way through the transformation of the meaning of general clauses. Such clauses, for instance the 'interesse

[36] Note that this would be a completely different approach from the one corresponding to the so-called 'enlightened shareholder value', already followed in certain jurisdictions such as the UK (see Section 172 of the UK Companies Act 2006). This consists of allowing other interests within corporate governance, insofar as they are functional to the maximization of long-term shareholder value. Note that such an approach has attracted harsh criticism for its illusory promises to shift directors' attention from shareholders' interests to stakeholders' interests, which is unlikely to happen in practice. See L Bebchuk, K Kastiel, and R Tallarita, 'Does Enlightened Shareholder Value Add Value?' (2022) 77 The Business Lawyer 731.

sociale' in Italian law[37] or the 'intérêt social' in French corporate law,[38] i.e. general corporate law clauses referring to the 'corporation's interest'. Although presently such clauses are generally understood as corresponding to the maximization of shareholder value,[39] interpretations of such clauses encompassing a variety of different interests – i.e., stakeholder-oriented interpretations – could be adopted. As a matter of fact, such interpretations already existed in the past, especially before competition law had been introduced in Italy or in France, although of course at that time the focus was not on ESG, but on stakeholders, especially employees and, only marginally, consumers/service users.[40] Refocusing on stakeholder-oriented interpretations of these general clauses could facilitate a smoother transition toward embracing ESG objectives, as it would aim to reconcile these objectives with the maximization of shareholder value. However, it would also introduce a degree of discretion in the balancing process by courts, which in turn could prompt distorted interpretations and, in the worst scenarios, corruption.

Although the harder entry described above is possible in theory, for the time being, ESG entry into the corporate law and governance systems appears to be softer. A central role in the ESG corporate landscape seems to be occupied by corporate governance codes, which mandate ESG disclosure on a comply or explain basis.[41]

But apart from disclosure requirements, corporate directors are also, in general, increasingly subject to another recently emerged duty. In fact, ESG rules may affect directors by requiring a duty of compliance, i.e., the careful monitoring of the relevant legislation and the adaptation of the internal governance system in order to detect and prevent potential breaches of the law.[42] In this sense, for the time being, ESG policies appear to be external to corporate law, as they allowthe corporation to maximize shareholder value while complying with external ESG legislation. An example of a rule that remains external to corporate law but which will definitely affect corporations is the EU Corporate Sustainability Due Diligence Directive proposal, which is expected to be adopted soon.[43] According to the EU Commission, 'the

[37] For Italy, see for instance P Jaeger, *L'interesse sociale* (Giuffre 1964); P Jaeger, 'L'interesse sociale rivisitato (quarant'anni dopo)' (2020) 27 Giurisprudenza commerciale 795; for France, see for instance D Schmidt, *Les droits de la minorité dans la société anonyme* (Sirey 1970) 200ff.

[38] See for instance, A Asquini, *I battelli del Reno* (Giuffre 1959); for France, see J Paillusseau and M. Y. Loussouarn, 'La société anonyme: technique d'organisation de l'entreprise' (Sirey 1967) 196ff. And see, similarly, in pre-WW2 German corporate law, the theory of the 'Unternehmen An Sich', K Geiler, 'Die Konkretisierung des Rechtsgebots der guten Sitten im modernen Wirtschaftsrecht' in *Festschrift Herrn Rechtsanwalt und Notar Justizrat Dr. jur. hc Albert Pinner zu seinem 75. Geburtstag* (De Gruyter 1932) 254.

[39] Cass. 11151/1995, Leprai v Stilgraf s.r.l. in liquidazione.

[40] See (n 30) above.

[41] P Câmara, 'The Systemic Interaction Between Corporate Governance and ESG' in *The Palgrave Handbook of ESG and Corporate Governance* (Springer International Publishing 2022) 3.

[42] Which seems to be a more articulated form of the so-called 'duty of obedience', as described by A Palmiter, 'Duty of Obedience: The Forgotten Duty' (2010) 55 New York Law School Law Review 457; S Griffith, 'Corporate governance in an era of compliance' (2015) 57 William & Mary Law Review 2075.

[43] Proposal for a Directive Of The European Parliament And Of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 final.

proposal also introduces directors' duties to set up and oversee the implementation of due diligence and to integrate it into the corporate strategy. In addition, when fulfilling their duty to act in the best interest of the company, directors must take into account the human rights, climate change and environmental consequences of their decisions.'[44] The latter statement is more ambiguous, and it remains to be seen what it means in the corporate law context and how it will affect directors' duties. Note also that some European countries, such as France, for instance,[45] have adopted sustainability due diligence rules independently and before the enactment of the Directive.

Institutional investors may also be vectors of ESG policies, clearly with a different weight in corporations with a dispersed versus concentrated ownership structure. In fact, it is well-known that in companies with a concentrated ownership structure, the final decisions on matters of ESG are almost entirely in the hands of the controlling shareholder.[46]

Institutional investors' actions form another external constraint on the internal functioning of the corporate machine. A significant portion of investment funds are now ESG funds, and their weight is increasingly growing.[47] Even when investment funds are not expressly labelled as ESG funds, they tend to be active promoters of ESG policies[48] (even though this may often be functional to their long-term profit strategy, among other complex reasons).[49] Such promotion can take the form of the exercise of minority shareholders' rights, but more frequently, it can correspond to informal interventions vis-à-vis the board, which is known as 'behind the

[44] EU Commission, 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains', available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145 (accessed 30 November 2023).

[45] The French national law on supply chain due diligence is *statute n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Decree (No. 2012-557) on the Transparency Obligations of Companies in Social and Environmental Matters). Note that France has already developed ESG-oriented legislation. For listed companies, certain obligations pre-date the due diligence obligations for supply chains. For example, a duty to include environmental and social information in annual reports was established in 2001 by Law No. 2001-420. In 2010, the 2001 obligation for listed companies was extended to the largest unlisted companies, with Law (No. 2010-788) on National Commitment for the Environment (so-called "Grenelle II Act").

[46] D Puchniak, 'The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit' (2024) 72 (1) American Journal of Comparative Law 106–169..

[47] According to a PWC report, 'Asset and wealth management revolution 2022: Exponential expectations for ESG' (https://www.pwc.com/gx/en/industries/financial-services/asset-management/publications/asset-and-wealth-management-revolution-2022.html?WT.mc_id=CT11-PL1000-DM2-TR2-LS4-ND1-TTA9-CN_gx-fy22-xlos-esg-awm-esg-revolution-pressrelease (accessed 30 November 2023), ESG assets are on pace to constitute 21.5% of total global assets under management in less than 5 years.

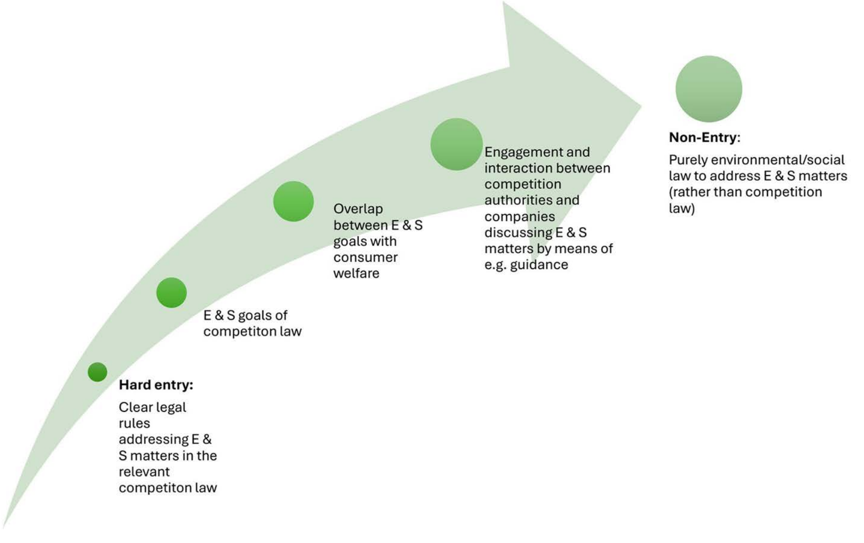
[48] M Barzuza, Q Curtis and D Webber, 'Shareholder value(s): Index fund ESG activism and the new millennial corporate governance' (2019) 93 Southern California Law Review 1243.

[49] K Wang, 'Why Institutional Investors Support ESG Issues' (2021) 22 UC Davis Business Law Journal 129. A literature review on investment funds' ESG activism can be found in B Gerard, 'ESG and socially responsible investment: A critical review' (2019) 33 Beta 61.

scenes activism'.[50] All the institutional investors' actions described above clearly correspond to what Hirschman has defined as 'voice' strategies.[51] Beyond that, institutional investors that disagree with a given corporate strategy in terms of ESG can also revert to what Hirschman calls 'exit'.[52]

3.2 ESG 'Entry Points' into the Competition Law Debate

In competition law, we can equally distinguish between softer and harder entry points. In other words, the environmental and social elements of sustainability can shape the application of competition law in different ways. On the one hand, there is the possibly hardest entry point. This would involve changes to the actual hard law. On the other hand, there are calls to keep such matters completely outside the realms of competition law. In other words, there would be no entry point for such matters



Source: The authors

Figure 6.2 A progression of 'harder' to 'softer' entries of ESG goals in the competition law debate

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50 J McCahery, Z Sautner, and L Starks, 'Behind the scenes: The corporate governance preferences of institutional investors' (2016) 71 The Journal of Financ*e* 2905.

51 See in general A Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1972).

52 Ibid. There is some empirical evidence, at least from the PRC stock market, that fear of institutional investors' exit can actually push corporations to adopt more ESG-oriented strategies. See Y Hu and K Kim, 'Do words speak louder than actions? The effects of institutional investors and voluntary green disclosures' (2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4528794 (accessed 30 November 2023).

into competition law. In the middle, we can observe different softer entry points which relate to the interpretation of the existing competition laws and their enforcement. We will explore the different harder and softer entry points as explained in Figure 6.2 in the following.

One option that always exists is to change the law to ensure social and environmental matters can be taken into account and that in specific cases they can take precedence over maintaining competition. One recent example in this regard is the amendments to the Austrian Competition Act.[53] The amendment concerns the question as to when an agreement that restricts competition is exempted from the prohibition of such agreements. The Austrian legislator changed the wording of the national equivalent to Article 101(3) TFEU (§ 2 of the Federal Cartel Act). Article 101(3) TFEU usually requires that the 'consumers' receive 'a fair share' of the benefits ('improvements to the production or distribution of goods' or the 'promotion of technical or economic progress') that result from the restriction of competition. The amendment added a provision that explains that:

> Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy.[54]

Leaving aside the question of how this provision relates to EU law, which does not contain such a provision,[55] it helps the competition authorities to decide whether or not to consider such benefits that might well appear outside the market affected by the restriction. This question has proved rather controversial,[56] because the benefits are not necessarily[57] directly felt by the consumers of the product where competition has been restricted.

Another example is jurisdictions where the competition law proclaims to foster environmental or social goals. For instance, South Africa's competition law aims to promote 'a greater spread of ownership' in the economy, in particular, to increase the ownership stakes

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[53] For a detailed overview, see V H S E Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law' (2022) 13 Journal of European Competition Law and Practice 426.

[54] § 2 (1) of the Federal Cartel Act.

[55] See in this regard Robertson (n 53).

[56] On different positions regarding out-of-market efficiencies, see e.g., I Lianos and A Darr 'Hunger Games: Connecting the Right to Food and Competition Law' (2019) CLES Research Paper Series 2/2019, available at https://www.ucl.ac.uk/cles/sites/cles/files/cles_2-2019.pdf (accessed 30 November 2023) 27–47; EU Commission, 'Guidelines on the applicability of Article 101' (n 18) para 585.

[57] Such benefits are not necessarily directly felt, as there are (some) cases where the question is not so much about whether benefits are felt but rather about valuation or measurement. For example, where a car emits fewer toxins and less CO2, this has at least two benefits that can be identified for those affected by the higher prices. On the one hand, they might (subjectively) value such a car as having a higher quality. On the other hand, (objectively) we might see other benefits that they also – as part of a broader group – enjoy, such as reduction in pollution leading to benefits in terms of life expectancy or a reduction in CO2 leading to a reduction of the climate change effects/costs. See also the Commission's distinction between use, non-use, and collective benefits in the new horizontal guidelines (European Commission (n 18) paras 571–591).

of 'historically disadvantaged persons'. This aim of competition law stems from the right to equality as protected by the South African constitution.[58]

While these are harder entry points, as they are specifically spelled out in the law, there are also more categorical approaches that mark the other end of the spectrum. This approach suggests that there are no entry points to competition law for environmental and social goals. In other words, environmental and social goals should be pursued exclusively by other areas of law, such as environmental and social laws.[59] We might identify such a conception in the recent attempts by the US to use antitrust rules to prevent companies from taking climate initiatives.[60]

In between the two extremes of the law mandating inclusion and those advocating the complete exclusion of such considerations, we can find different options of soft entries. One of these entry points is the examination of existing laws to explore in what way these can be (re) interpreted to encompass environmental and social matters.[61] In other words, competition authorities and courts examine the extent to which competition law specific notions, such as consumer welfare, overlap with environmental or social goals. One example in this regard is the protection of sustainability innovation by means of competition law. For instance, the European Commission in the *Adblue*[62] case found that the parties to a cartel had prevented (sustainable) innovation in the form of preventing the emergence of new emissions cleaning technology.

A second, maybe even softer entry point is based on agency discretion. Some agencies may decide[63] to engage with companies directly. Examples in this regard are the provision of formal and informal guidance[64] to companies who wish to pursue environmental or social objectives but fear that it may raise competition issues. This approach of guidance may also be combined in ways that make it harder or softer. On the one hand, it can be paired with the above-described attempt to identify overlaps between, for example, consumer welfare and environmental and social goals. On the other, it can employ more orthodox readings and just

58 See R Das Nair and S Roberts, 'Sustainability and Competition in Eastern and Southern Africa' in J Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar 2024).

59 For such a view, see e.g. C Veljanovski, 'Collusion as Environmental Protection – An Economic Assessment' (2022) 18 Journal of Competition Law and Economics 523; M P Schinkel and L Treuren, 'Green Antitrust: Friendly Fire in the Fight Against Climate Change' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change and Environmental Sustainability* (Concurrences 2021).

60 For an overview, see Latham and Watkins, 'ESG Initiatives Face Increased Pressure From Potential Antitrust Challenges' (15 May 2023) Client Alert 3102, available at https://www.lw.com/admin/upload/SiteAttachments/ESG-initiatives-face-increased-pressure-potential-antitrust-challenges.pdf (accessed 19 November 2023).

61 See Nowag (n 16) chapter 1.

62 *Car Emissions* (Case AT.40178) available at https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022302_3050_5.pdf (accessed 30 November 2023).

63 The discretionary element becomes clear as other competition authorities may decide not to do so.

64 In this regard, see e.g., G Monti, 'Implementing a Sustainability Agenda in Competition Law and Policy' in J Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar 2024).

advise on when agreements should be considered not to have an appreciable effect[65] on competition, for example.

3.3 ESG, Corporate and Competition Law: Incoming Revolution or Progressive Adaptation of Persisting Paradigms?

Having mapped out at least some of the potential entry points of E and S policies into competition and corporate law, we turn to exploring how the changes in one area of the law affect the other area of the law. This also helps us to explore whether corporate law and competition law are ready to welcome the urgent paradigm shift that is emphasized in the ESG literature. It also assists in evaluating in what way such a paradigm shift might be possible. In the first part, we explore the hard entry approach, involving a substantial re-think of fundamentals, and its effects; in the subsequent part, we explore the softer adaptation approach.

4. THE RETHINK/HARD ENTRY APPROACH

4.1 What Might a Complete Rethink of Corporate Law Principles Mean?

As already suggested, a revolutionary change may entail relinquishing the 'maximizing shareholder value' principle and adopting a radically different conception of the corporation, that is, re-imagining the corporation as an institution that pursues chiefly environmental and social goals. As said, strongly stakeholder-oriented models of the corporation have already existed in continental Europe – i.e., models that integrated not-for-profit objectives in the corporate agenda.[66] There are at least three series of problems in relation to the adoption of a stakeholder-oriented approach.

Firstly, in principle, a stakeholder-oriented model introduces a strong degree of discretion in corporate decision-making, especially when such stakeholders bear conflicting interests. Elizabeth Pollman has argued that S and G represent often conflicting goals.[67] Therefore, such a reform may create a high degree of confusion in corporate decision-making. Certainty of the law could be harmed to the extent that courts may support one goal against the other in one decision and vice versa in the following decision.

Secondly, there is a potential political danger intrinsic to a stakeholder-oriented approach. Stakeholderism was employed in harmful ways by pre-WW2 dictatorships. For instance, when the Italian civil code was reformed under fascism, corporate law was disciplined in Civil Code, Book V, which deals with labor law – with explicit conflation of corporate and labor interests. Such a reform was backed by a view of society which was imbued with 'corporativismo,' i.e., the idea that social classes were no longer in conflict and instead they were

[65] See, e.g., European Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*) [2014] OJ C291/1.

[66] See text corresponding to (n 38).

[67] Pollman (n 25).

harmoniously contributing to a common fascist developmental goal.[68] But in fascist times, this also meant that labor law disappeared as such and ended up being integrated within 'corporativismo', rendering any meaningful defense of labor rights non-viable. At present, the ESG version of stakeholderism does not seem to present the political problems that arose in pre-WW2 times, because it mainly consists of promoting non-shareholder constituencies with the hope that they will back ESG policies. Nonetheless, one should remain wary of such potential illiberal repercussions at a political level.

Thirdly and finally, stakeholderism, in contrast to shareholderism, seems rather inefficient. US corporate jurisprudence has promoted shareholderism as leading to efficient corporate decision making, based on the idea that, unlike other corporate constituencies, shareholders have homogeneous interests. Thus, where the role of the board is maximizing shareholder value, one has a very concrete and measurable objective.[69] The shareholder-centered model, based on shareholders as residual claimants, seems far from being surpassed by such rather ambiguous revivals of institutionalist conceptions in the form of stakeholder-centred models.[70]

4.2 Effect of a Corporate Law Rethink on Competition Law

Any such fundamental change in corporate law would also substantially affect competition law in its current form. Competition law relies on economic insights based on industrial organization. The economic and econometric models used in competition law depend on the assumption of the company being a rational profit-maximizer. This assumption in competition economics and law is in part built on the shareholder value maximization axiom in corporate law. Any change in corporate law would alter a whole range of ideas that would require a fundamental re-think in competition law. For instance, Maarten-Pieter Schinkel and his co-authors used a standard model to show why the pursuit of environmental or social objectives by means of cooperation between companies is rarely efficient.[71] They showed that the companies would only produce the least amount of social and environmental benefits at the highest possible cost to consumers. This finding is based on the core assumption that the companies are aiming to maximize their profit from their cooperation. Once this assumption is not in line with the actual working of corporate law, one would have to fundamentally rethink that model and with it the implications for competition law and policy. In other words, where profit maximization is not at the core of corporate law, it is difficult to use it as an assumption in economic models examining the effects of competition to inform competition law and policy.

[68] See for instance, the writings of U Spirito: *Capitalismo, socialismo, corporativismo* (Anonima romana editoriale 1934); *Il corporativismo come liberalismo assoluto e socialismo assoluto* (Pacini Mariotti 1933); *Capitalismo e Corporativismo* (Sansoni 1934); *Dall'economia liberale al corporativismo: critica dell'economia liberale* (Principato 1939).

[69] See for instance, the seminal piece by H Hansmann, 'Ownership of the Firm' (1988) 4 The Journal of Law, Economics, and Organization 267, 269ff, and the foundational paper in corporate finance by E Fama and M Jensen, 'Agency problems and residual claims' (1983) 26 The Journal of Law and Economics 327.

[70] See Bebchuk and others (n 5).

[71] M-P Schinkel and Y Spiegel, 'Can collusion promote sustainable consumption and production?' (2017) International Journal of Industrial Organization 371; M-P Schinkel, Y Spiegel and L Treuren, 'Production Agreements, Sustainability Investments, and Consumer Welfare' (2022) 216 Economics Letters.

It is hard to say for sure if the changes in Section 4.1 would be beneficial for both the economy and ESG. Since they would completely change the assumptions on which competition law is founded, it is tough to predict their effects. We might need to wait and see how things turn out and study the changes afterward to really understand their impact.

4.3 What Might a Complete Rethink of Competition Law Principles Mean?

A rethink in competition law in the light of environmental and social goals, the E and S of ESG, would mean abandoning the consumer welfare standard[72] and similar standards focused on the competition process. It would allow more and/or other objectives, specifically E and S objectives, to override competition law prohibitions. In other words, it would involve the (re) introduction of (at least) these public policy objectives into competition law, allowing competition authorities to balance anti-competitive effects directly against E or S benefits.

One such proposal suggests replacing the consumer welfare approach with a capability approach, which is based on the ideas of the philosopher Martha Nussbaum and the economist Amartya Sen.[73] This approach would require, in the first step the identification of all stakeholders that can be affected directly or indirectly by the possibly anticompetitive arrangement. Second, it would map out how the arrangement would affect their positions.[74] In a third step, all the effects on these different interests would be weighed against each other. This weighing would then also take into account threshold levels at which these effects take place. For example, a higher weight is put on satisfying basic needs, while the weight is lower on anything that exceeds those basic needs. To put this into a more tangible example, the ability to buy basic food items is weighted higher than buying luxury goods. Such an approach is certainly a radical departure from the current dominant approach in competition law. It would require different skill sets of the competition authorities, and many agencies would certainly struggle with identifying the different stakeholders and considering their interests. However, while such an approach seems challenging, it possibly seems more a question of proceedings and procedure, in other words, of tools. The Australian competition regime, in their assessment of whether a restrictive agreement provides a sufficient 'net public benefit' has developed some procedural tools, like open stakeholder meetings and impact assessments.[75]

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[72] On the recent debate as to whether the consumer welfare standard is still fit for purpose, see e.g. OECD (2023), The Consumer Welfare Standard – Advantages and Disadvantages Compared to Alternative Standards, OECD Competition Policy Roundtable Background Note, available at www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternative-standards-2023.pdf (accessed 30 November 2023).

[73] This approach is suggested by R Claassen & A Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) Utrecht Law Review 1.

[74] On their ability to hold property and to contract (market-constituting capabilities); the effects on essential human requirements (consumptive capabilities) such as health, education, nourishment, housing; finally, the effects on third parties (third-party capabilities). Claassen and Gerbrandy here mention the interests of 'future generations which stand to be harmed by damage to the climate', animal welfare affected by 'intensive pig farming', or 'health of (inter alia) young people [… and] security of inner-city inhabitants' in the case of binge drinking, see ibid 5–6.

[75] See G Foster, 'Australia: Sustainability as a public benefit to be weighed against the anti-competitive detriments of competitor collaborations' in J Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar 2024).

4.4 Effect of a Competition Law Rethink on Corporate Law

Competition law is mandatory, and therefore managers need to take into consideration the guidelines provided by competition authorities in order to be compliant with such reforms. What may not be allowed by the principle of maximizing shareholder value may become mandatory as a consequence of competition law compliance. For instance, companies have to continue maximizing shareholder value, but competition law does not allow them to do so. For example, competition law prohibits companies from forming cartels, even though such activity may be profit-maximizing. Similarly, where competition law is changed to take account of E and S impacts, corporate action that is profitable for shareholders but leads to increased emissions or negative social impacts might be prohibited by competition law.

Where corporate law and competition law may start pursuing diverging goals, competition law would prevail under the duty of compliance. This would definitely generate an external (very expensive) pressure on corporate strategy. Nonetheless, this kind of conflict may not be new. For instance, labor laws mandating the minimum salary and protection for labor may already raise the corporation's costs, therefore making corporate profits fall. To put it differently, competition law may keep on being an externality for corporations, but it would become a more structural and pervasive one, given the totally conflicting goals of the two branches of the law. In turn, such a pervasive pressure may end up thwarting the ordinary functioning of for-profit corporations and push them to adapt to not-for-profit logics, at least in part.

There may also be an alternative reading to the potential effects of such a structural reform to competition law on corporate strategy. In fact, especially with reference to cartels, corporations may expand their potential to conclude anticompetitive agreements. For example, say that competition authorities introduce an interest-balancing procedure as described above. The corporate board may start guessing, also on the basis of the corpus of precedents, whether a given competition authority will allow them to retain an anticompetitive agreement because of the ESG benefit or not. As a consequence, they may introduce ESG goals in anticompetitive agreements instrumentally, i.e., for circumventing competition law. However, such an increased freedom of action enjoyed by corporations would not change the core of corporate law.

4.5 Tentative Conclusions on a Total Rethinking of Corporate or Competition Laws' Basic Tenets

It appears to us that a total rethinking of the main tenets either of competition or of corporate law entails substantial difficulties for the other area of law. It will make a smooth operation with the existing tenets of the other area – if not impossible, at least – substantively more complex. This conclusion might not be particularly surprising as corporate and competition law have developed alongside each other.[76] Thus, a synchronization of any changes in the two fields appears to be a sensible demand. However, the historical antecedents of such a synchronization may seem suspect. There are examples of systems that were adapted to an

[76] For an overview of numerous ways in which they have interacted and still interact, see M Corradi and J Nowag (eds) *Intersections Between Antitrust and Corporate Law* (Cambridge University Press 2023).

institutionalist view of the corporation[77] and that, in the meantime were also highly cartelized (e.g., pre-WW2 Germany or Italy). For instance, in fascist Italy, the promoters of 'corporativismo' pushed both the stakeholder and the cartelization agenda, which they found perfectly consistent with each other.[78] In this sense, the past seems to raise a clear warning against this kind of policy line, as it may serve non-democratic political moves, even if, of course this cannot be stated *a priori*.

5. AN ADAPTION OF EXISTING PRINCIPLES

The adaptation of existing principles might also bring about certain requirements for synchronization, as we will show. In the following, we will explain what forms an adaptation of existing principles can take and how such an adaptation in one area of law would affect another. We first explore how corporate law could be adapted and what it means for competition law. Then we turn to adaptations in competition law and how they will affect corporate law.

5.1 What an Adaptation of Existing Principles in Corporate Law Would Mean?

There can be different attempts by private actors to adopt more ESG-friendly policies without requiring any reform of corporate law, i.e. by way of employing a so-called private ordering approach.[79] For instance, a now popular corporate governance article advocates for market solutions, namely a so-called 'green-pill', that is a clause included in the bylaw that would require a company to disgorge a significant sum of money to a not-for-profit entity when missing a pre-declared milestone in the pursuance of ESG goals.[80]

As already said, institutional investors' pro-ESG activism, while affecting corporate strategy, would not entail a substantial change of the rules internal to the corporation. Stewardship can be curbed to the pursuance of ESG objectives.[81] Institutional investors may express their like or dislike for ESG or non-ESG friendly policies also through exit.[82] What characterizes this kind of action is that (1) it may be discretionary (for instance a corporation or an investment fund may decide to revert to it or not); (2) it may be priced by investors (who normally bear different preferences, also in terms of ESG). Its overall effects may be rather unpredictable to some extent on a larger scale, because the adoption of such a strategy is contingent on the will of each private entity to pursue it. In the worst-case scenario, there may be no effect at

[77] What might in today's lingo be called a stakeholder-oriented approach.

[78] See for instance Spirito (n 68).

[79] J Cox, 'Corporate Law and the Limits of Private Ordering' (2015) 93 Wash. UL Rev. 257; also provided that, as explained by Moore, private ordering does not have the same reach in every single jurisdiction. See M Moore, 'Private ordering and public policy: the paradoxical foundations of corporate contractarianism' (2014) 34 Oxford Journal of Legal Studies 693.

[80] J Armour, L Enriques, and T Wetzer, 'Green Pills: Making Corporate Climate Commitments Credible' (2023) 65 Ariz. L. Rev. 285.

[81] See n 34.

[82] See n 35.

all, unless ESG strategies are aligned with for-profit strategies.[83] Moreover, we have to keep in mind the double fiduciary layer that normally characterizes the modern public corporation.[84] Retail investors or other investment funds invest in funds of different kinds, and these in turn invest in corporations. Thus, the retail investors can be the ultimate shareholders who are also bearing interests that are third to the corporation they invested in. Recent events show that there may be a double layer of interests manifesting also in the ESG arena – corresponding to the double-layered fiduciary relationship. An interesting example is provided by Larry Finch's ESG agenda, which is not well-seen by both the Texan government and some Texas investors.[85] The fight between the two has reached a point where the Texan government has put pressure on pension funds to disinvest from BlackRock funds, because their ESG-friendliness may run counter to the interests of prospective pensioners.[86]

5.2 Effect of an Adaptation of Existing Principles in Corporate Law on Competition Law

The just-described adaptations of existing corporate law principles can have rather different effects on competition law. As we will explore in the following, these adaptations may, on the one hand, substantially change some of the underlying economic principles, depending on how they are adopted. On the other hand, they might require rather little adjustment or might invite similar, if not more pernicious, fights on the directions that corporations are allowed to advance in terms of ESG.

The adoption of private ordering, depending on how it is performed, can have a profound effect on the economic principles underlying current competition economics. Depending on the sums of money that need to be disgorged in the case that ESG goals are missed, the incentives of corporations might substantially change. As explained in section 4.2,[87] current competition economics builds its models on the assumption that companies will maximize their profit. However, the adoption of a disgorgement clause that is intended to change the incentives

[83] For a thorough description of the relationship between profit and not-for-profit rationales within modern corporate law, see E Pollman, 'Corporate social responsibility, ESG, and compliance' in D Daniel Sokol & Benjamin van Rooij (eds.), *Cambridge Handbook of Compliance* (Cambridge University Press 2021). As the alignment between profit-maximizing and ESG goals is very unlikely in control transactions, see also J Macey, 'ESG Investing: Why Here? Why Now?' (2022) 19 Berkeley Business Law Journal 258, 287. For this reason, one may wonder whether the introduction of ESG objectives should be better demanded by the law. See Massimiliano Vatiero's chapter 'Varieties of Capitalism, Competition, and Prosocial Corporate Purposes' in this Handbook.

[84] R Gilson and J Gordon, 'The agency costs of agency capitalism: Activist investors and the revaluation of governance rights' (2013) 113 Columbia Law Review 863.

[85] See 'AG Paxton Demands BlackRock Account for its Underperforming, Potentially Illegal 'ESG' State Pension Fund Investments', available at https://www.texasattorneygeneral.gov/news/releases/ag-paxton-demands-blackrock-account-its-underperforming-potentially-illegal-esg-state-pension-fund (accessed 30 November 2023).

[86] See 'Texas Has a Warning for Its Pensions: Sever Ties With BlackRock', available at https://www.bloomberg.com/news/articles/2023-02-23/texas-esg-crackdown-targets-pension-funds-with-blackrock-ties?embedded-checkout=true (accessed 30 November 2023).

[87] See above Section 4.2 .

of the firm would also entail a need to change this assumption. As explained above,[88] traditionally, we expect that companies provide only the bare minimum of ESG benefits where these benefits affect their profits. However, depending on the design of such a green pill disgorgement clause, the situation and the incentives change. In a specific situation, a company that is subject to a disgorgement clause may need to prioritize the ESG benefit over profit maximization even where the ESG benefits reduce its profits. The company has to compare the situation of reduced profit due to investments into ESG benefits with opting for lower ESG benefits due to their costs while taking into account the disgorgement 'fine'. In other words, it has to compare the net-profit after investing little into ESG and thus having to disgorge some profits with the net-profit after investing more into ESG but having no disgorgement.

Pro-ESG activism by institutional investors raises a different set of questions. On the one hand, we might not need to change the framework of competition law at all to let such activism take effect. On the other hand, competition law might be seen as a tool to prohibit such activism. Both of these approaches seem currently on display.

In the UK, the Competition and Markets Authority addressed investor agreements in pursuit of environmental sustainability in their Green Agreements Guidance. It explains that:

> […] An agreement between shareholders of a single business to vote in support of corporate policies that pursue climate change or environmental sustainability agreements or against policies that do not, or to lobby jointly for corporate changes that pursue environmental sustainability objectives, will be unlikely to infringe competition law.[89]
>
> Similarly, where there is an agreement (or network of similar agreements together) covering shareholders' conduct in relation to several businesses that are competitors in a market, there is unlikely to be a negative effect on competition in that market if the corporate policies, or the changes the shareholders are agreeing to, support, encourage or require the adoption of any of the categories of agreement set out in Section 3 of this Guidance.[90]

Yet, it is also possible that competition law will be another venue where States and investors battle out their political disagreements. In other words, it can also be attempted to employ competition law to stop at least joint pro-ESG activism by institutional investors. One such case is currently taking place in the US, where institutional investors who signed up for the Climate Action 100+ initiative[91] are being investigated for a violation of the Sherman Act by a group of State attorney generals (AGs), while another group of AGs writes that there are no antitrust concerns.[92]

Thus, it might be said that even a minor adaptation in corporate law and governance might have substantial effects on competition law. At the same time, depending on the approach

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88 Ibid.

89 UK Competition and Markets Authority (CMA), Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (12 Oct 2023) CMA 185 available at https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf (accessed 19 November 2023) para 3.24.

90 Ibid, para 3.26.

91 The details about this initiative can be found at https://www.climateaction100.org/ (accessed 30 November 2023).

92 For a summary of the different AG actions, see e.g. Latham and Watkins (n 60).

taken under competition law,[93] any corporate law changes might be substantially hampered by competition law.

5.3 What an Adaptation of Existing Principles in Competition Law Would Mean?

In competition law, the debate about adapting competition law in light of E and S is also ongoing, particularly in Europe. Yet, a certain new status has been reached with the adoption of the new horizontal guidelines by the European Commission, which now contain a specific section that addresses sustainability agreements.[94]

Overall, the debate is not so much focused on ESG. Instead, the debate takes the shape of discussing the interaction between sustainability or the sustainable development goals (SDGs)[95] and competition law.[96] As we will explore in the following, the question here is one of identifying overlaps between consumer welfare and sustainability. In light of the climate crisis, there are, moreover, discussions about providing specific rules for climate change agreements, for example easing the burden of proof.[97] Overall, this adaptation can take two strands of engagement.

On the one hand, competition authorities pursue anticompetitive practices that also have negative effects on E or S. For example, the French competition authority has fined a cartel where companies agreed not to pursue marketing campaigns based on their superior environmental performance.[98] Similarly, the European Commission has fined car manufacturers for agreeing not to compete over innovating further in terms of cleaning technology for diesel vehicles.[99] 'Green killer acquisitions' are another example frequently mentioned, where a more sustainable competitor is acquired in order to shut it or its more sustainable technology down.[100]

On the other hand, companies that jointly pursue sustainability objectives might be able to show that the pursuit of these objectives also fulfils the conditions of benefiting consumers. In other words, the conditions of Article 101(3) TFEU are fulfilled, and consumer welfare

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[93] In other words, how competition law approaches such corporate action. For differences in approach, see, for example, the UK's CMA in its guidelines (see CMA (n 89)) or the approach by some of the US AGs to Climate 100+ (see overview in (n 63)).

[94] See European Commission (n 18).

[95] The UN, sustainable development goals, available at https://sdgs.un.org/goals (accessed 30 November 2023).

[96] See with regard to the difference between ESG, SDG, and sustainability, M Corradi and J Nowag, 'ESG Policies at the Intersection between Competition and Corporate Law' in M Corradi and J Nowag (eds), *Intersections Between Antitrust and Corporate Law* (Cambridge University Press 2023).

[97] See, for example the UK's CMA approach with regard to climate agreement, CMA (n 89).

[98] See Autorité de la Concurrence, Décision 17-D-20 relative à des pratiques mises en œuvre dans le secteur des revêtements de sols résilients (18 October 2017), available at https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-des-revetements-de-sols-resilients (accessed 30 November 2023).

[99] See *Car Emissions* (n 62).

[100] See e.g. R Maximiano and C Volpin, 'Merger Control for Green Innovation' in J Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar 2024).

is increased by the agreement. For example, the Greek,[101] Dutch,[102] and UK competition authorities[103] suggested that CO2 reductions can offset competitive harm since they can benefit consumers. And while this debate is ongoing, a vocal minority[104] is rather critical and warns that such adaptations are inefficient. They argue that competition authorities are not well placed to balance E & S gains against restrictions of competition. The legislator should adopt specific rules to address any market failures in terms of E & S matters rather than leaving this task in the hands of companies. Companies would only provide the minimum of S & E gains at the highest possible price since they have no incentive to sacrifice their profits. As explained above, the Austrian legislator has taken up that call and changed the Austrian equivalent to Article 101(3) TFEU to include a legal presumption that climate benefits are benefitting consumers.[105] In the absence of legislative changes at the EU level, the European Commission in its horizontal guidelines seemed to have tried to adopt a middle ground. On the one hand, it states the consumers of the affected product must be fully compensated by the benefits of the agreement. On the other hand, it has changed its approach to how such benefits can be shown. The benefits now include use benefits,[106] non-use benefits[107] and collective benefits[108] such as reductions in CO2 emissions. These should normally be quantified, and it should be shown how they compensate the affected consumers. Yet, the EU Commission will also accept qualitative evidence where data is not available.[109]

Another approach that is now commonly seen with regard to such sustainability agreements and competition questions in general is a policy of an open door. Competition agencies like the European Commission,[110] the Dutch,[111] or the UK,[112]and the Japanese[113] agencies make clear that they welcome companies contacting them where they feel that competition law and their S & G aims may be contradictory. The aim of the agencies is to provide companies with informal guidance, often combined with immunity from fines where the companies comply with the guidance issued.

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101 See HCC (n 17).

102 See ACM (n 17).

103 CMA (n 89).

104 See, e.g., the literature (n 63) above.

105 For details see Robertson (n 53).

106 See European Commission (n 18) para 571–574.

107 Ibid para 575–581.

108 Ibid para 582–589.

109 See ibid para 589. This suggests that even where no detailed evidence is provided, but it is clear that the benefits are outweighing the harm by an order of magnitude, the agreement would satisfy the conditions of Article 101(3) TFEU.

110 See European Commission, Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) 2022/C 381/07 [2022] OJ C381/9.

111 See ACM, 'ACM's oversight of sustainability agreements: Competition and sustainability' (4 October 2023) available at https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf (accessed 30 November 2023).

112 See CMA (n 89).

113 See JFTC (n 22).

5.4 Effect of an Adaptation of Existing Principles in Competition Law on Corporate Law and Strategy

In general, directors' conduct that might bring about competitive harm may be seen from at least two different perspectives. Firstly, if borderline and not expressly anticompetitive and if it maximizes shareholder value, it may simply show compliance with directors' duties (maximizing shareholders' value). If expressly anticompetitive, it may damage not only the directors (in case they are deemed individually liable)[114] but also the consumers because of the pass-on effect: this is the rather well-known phenomenon that leads a company that has been fined to increase its price downstream.[115] In the second case, from an economics perspective, there will be a trade-off between gains from anticompetitive practices and sanctions or damage claims imposed as a consequence of anticompetitive breaches. Now, the kind of adaptation depicted in Section (cc) might introduce a degree of ambiguity regarding what is pro- and what is anticompetitive, which could be exploited by companies for pursuing borderline anticompetitive conduct. Nonetheless, the adaptation of competition law principles to ESG objectives may also ease companies' adaptation to new non-corporate rules, such as the one provided by the EU Directive on directors' mandatory ESG due diligence on the supply chain.[116]

5.5 Tentative Conclusion on Adaption of Existing Principles

As a tentative conclusion, we can say that an adaptation of the existing principles to ESG policies may follow two distinct institutional paths in competition versus corporate law. Whereas in competition law such an adaptation would still be rooted in public action, i.e., public ordering, in corporate law it could mostly be introduced through private ordering and/or action by institutional investors through voice or exit. Although such institutional channels are clearly different, there may be a degree of convergence in such public versus private ordering activity. This path seems preferable as it promises a degree of flexibility and better synchronization of the changes occurring in both branches of the law. Yet, even such apparently soft or minor adjustments in one field might still create rather substantial effects and obstacles in the other. Thus, to ensure any effective policy, it needs to be ensured that any change in one field will not be scuppered by the other.

6. CONCLUSIONS

The interactions between corporate and competition law on one side and ESG on the other can entail revolutionizing the two aforementioned branches of the law or may simply require an adaptation, pursued either through soft regulative interventions or through private ordering.

114 See in this regard the chapter by JU Franck and T Seyer, 'Management Liability for Companies' Antitrust Fines' in this Handbook.

115 And it is well-known that the passing-on effects are the cause of rather difficult policy choices. B Durand and I Williams, 'The importance of accounting for passing-on when calculating damages that result from infringement of competition law' (2017) 18(1) ERA Forum.

116 See also above text at (n 46–49).

Although hard entries of ESG into corporate and competition law may sound tempting to those who would like to see an energetic pursuance of ESG objectives, our chapter shows that softer entries are preferable. While not a panacea, softer entries seem to display higher flexibility, which is crucial when applying policies whose overall consequences on collective welfare are rather unknown.[117] A further point of concern in relation to harder entries is represented by the potential disruption of a system based on a liberal economy conception, which in turn is connected to the way modern democracies work – involving leaving as many choices as possible choices to private actors. A different system, where certain substantive values, such as ESG, are strongly and vertically imposed is not *per se* bad. But we need to be mindful of the dangers of the blurred stakeholder conceptions of the corporation and widespread cartelization in the pre-WW2 period, which were often functional to the suppression of labor rights on the one hand and to a centralized control over economic power on the other. Hence, harder entries, although not impossible, require a broader assessment and thorough intellectual work for conceiving rules that preserve the liberty-based institutional environment in which we live.

Yet, the use of soft entry points creates its own challenges as changes in one area affect the other. Thus, any changes in one area need to be closely monitored to ensure that the relevant consequences in the other area are explored. Only in this way can it can be ensured that one area does not counteract the pursuit of ESG in the other area of law. Unsurprisingly, the debate about the value and political desirability of ESG policies also shapes and controls the interaction between these two fields of law. In other words, one area can be used to prevent or direct any progress in the other field of law.

Our chapter provided a very preliminary overview of the basic tenets of this entangled interaction between corporate law, competition, and ESG. We hope that it will help in developing a deeper debate on the need for the coordination of ESG policies in these different branches of the law.

[117] It is known that ESG are 'good' objectives, but less is known about the negative externalities they may produce.