2

ESG Policies at the Intersection between Competition and Corporate Law

Marco Corradi and Julian Nowag

2.1 INTRODUCTION

The last decade has witnessed a radical shift in both the corporate governance and competition law debate: while profit maximisation was core and centre, its interaction with other objectives has come into focus.

Starting from the end of the 1970s,[1] and until just after the ENRON scandal, corporate governance was heavily focused on agency costs.[2] Nowadays, the leitmotiv inspiring the academic debate and catalysing the attention of the policy-makers is 'environmental, social and corporate governance' (ESG).[3] Obviously, this does not mean that the ESG debate was previously absent in the corporate law and governance debate.[4] The debate was simply not mainstream and had developed at the margin, as fuelled especially by management literature.[5] Beyond academia, the legal practice had already started adopting corporate social responsibility (CSR) codes in the early 1990s.[6] 'By the beginning of the twenty-first century, most large companies in the U.S. and Western Europe [had] formed their own policies CSR'.[7] As a matter of fact, the main tenets of CSR may be as ancient as civilisation.[8] And this is due to the fact that any human action is likely to produce externalities both on other human beings and on the environment. Nonetheless, the novelty that the recent preponderance of the ESG debate may bring is the degree to which logics not based

[1] M Jensen and W Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 J Financ Econ 305.

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

[3] See for instance the vast set of papers collected on the European Corporate Governance Institute official website https://ecgi.global/content/sustainable-corporate-governance.

[4] See Section 2.3.

[5] See Section 2.3.

[6] F Madrakhimova, 'History of Development of Corporate Social Responsibility' (2013) 4 J Bus Econ 509, 515.

[7] *Ibid*.

[8] K Aggarwal, The Origins of CSR, https://medium.com/@krishaggarwaldosco/the-origins-of-csr-c1fd65102147.

https://doi.org/10.1017/9781108899956.004 Published online by Cambridge University Press

on profit maximisation need to coordinate from a practical perspective and in day-to-day corporate strategy with the profit maximisation rationale, which has become mainstream in corporate finance.

In competition law, a similar shift in focus can be observed. The last decade(s) were marked by a focus on economics and competition law.[9] While the debate about ESG and competition law started in the EU back in the 2000s,[10] it seems that in the last years[11] the debate is becoming more mainstream. Overall, it might still be said that the discussion has been a very European discussion. Yet, more recently, the debate takes place more globally[12] with discussions and work at international fora such as the OECD and the International Competition Network.[13] In terms of agencies, the European focus is characterised by the Dutch and the Greek authorities taking the lead[14] and the European Commission aiming to update its horizontal guidelines.[15] 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;[16]

[9] See eg A 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 Compet 475–496.

[10] 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).

[11] See eg 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 (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper, www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf (accessed 16 Feb 2022); European Commission, Directorate-General for Competition, Competition policy brief 2021-01 in September 2021, European Commission, 2021, https://data.europa.eu/doi/10.2763/962262 (accessed 16 Feb 2022); OECD (2021), Environmental Considerations in Competition Enforcement, OECD Competition Committee Discussion Paper, www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm (accessed 16 Feb 2022), and the near exponential growth of literature since 2020.

[12] See, for example, A Miazad, 'Prosocial Antitrust' (March 11, 2021) *Hastings Law Journal* (forthcoming, 2021), available at SSRN: https://ssrn.com/abstract=3802194 (accessed 16 Feb 2022).

[13] See OCED papers in (n 11); Hungarian Competition Authority, 'Sustainable Development and Competition Law – Survey Report: Special Project for the 2021 ICN Annual Conference' (30.09.2022) www.gvh.hu/en/gvh/Conference/icn-2021-annual-conference/special-project-for-the-2021-icn-annual-conference-sustainable-development-and-competition-law (accessed 16 Feb 2022).

[14] ACM, 2nd Draft Guidelines Sustainability Agreements: Opportunities Within Competition Law (2021) www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf (accessed 16 Feb 2022); HCC, 'Staff Discussion Paper on Sustainability Issues and Competition Law' www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html (accessed 16. Feb 2022); R Inderst, E Sartzetakis, and A Xepapadeas, Joint Technical Report on Sustainability and Competition for the HCC and the ACM (Jan 2021) www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/2165_f998b905c20c0426f068e512186c6ec4.html (accessed 16 Feb 2022).

[15] See European Commission (n 11).

[16] See I Lianos with 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 www.ucl.ac.uk/cles/sites/cles/files/cles-policy-paper-1-2017.pdf (accessed 16 Feb 2022).

or the anticompetitive effects of common ownership, a theory that was originally developed exclusively based on finance,[17] and which is now heavily affected by the ESG debate.[18]

Although much has been written about ESG until now, little (if anything at all) has been said about the interaction between competition and corporate governance policies in the area of ESG. In this chapter, we explore the intersection between competition policy and corporate policies in the area of ESG. We focus on ESG, sustainability, and innovation and highlight core research areas that require thorough academic enquiry in the sustainability/growth conundrum. We suggest that well-suited ESG policies for companies must take into consideration the possibility to operate through a multiplicity of policy tools, in particular corporate law, corporate governance, and competition policy tools. This chapter first provides a basic overview of the ESG debate and corporate behaviour. It then focuses on the interaction between ESG and corporate law and governance, as well as ESG and competition law. The final section explores the interaction of competition law and corporate law in the area of ESG policies. We highlight the necessity of coordinated policies, especially in the field of research and development (R&D) and innovation – that is dynamic efficiency.

2.2 THE ESG DEBATE AND CORPORATE STRATEGY

The post-WW2 demographic explosion and the unparalleled economic and industrial development are leading our world towards an uncertain future. The ecosystem is highly endangered, which in turn also puts the survival of the human species in question. Big corporations, regardless of who their owners are, put under strain planet Earth and the life that populates it, not only by extracting raw materials up to the level of exhaustion but also by rendering the condition of air, soil, and water less and less suitable for life.

If richer countries have benefited from such overexploitation of the world resources by their economic empires and corporations – raising their living standards at unprecedented levels – poorer countries seem to be paying the price of such reckless entrepreneurial conduct.

The NGOs and international institutions such as the UN have been at the forefront at asking for more sustainable and responsible behaviours by the State, companies, and more generally by every single individual in the face of the present crisis.[19] This is particularly true for those who consume the biggest slices of the world's

[17] J Azar, M Schmalz and I Tecu, 'Anticompetitive Effects of Common Ownership' (2018) 73 J Fin 1513.

[18] J Azar et al., 'The Big Three and Corporate Carbon Emissions around the World' (2021) J Fin Econ; see also Chapter 14, in this book.

[19] See, for example, World Commission on Environment and Development, Our Common Future (Oxford University Press 1987).

cake.[20] While States have been stepping up their game, progress has been slow and the focus has also shifted towards private actors, corporations in particular. However, competition lawyers and economists often seem to express a preference for regulation to achieve sustainability.[21]

For competition lawyers and competition economists, regulation has obvious advantages. Most of the time, regulation is seen as being able to address sustainability more directly with a more uniform (or competitively neutral) effect on market participants than private action. This competition-policy centric view may not be agreed upon by other governmental agencies. The desirability, effectiveness, and efficiency of regulation in specific situations seem to be questionable. For example, regulation, in particular traditional command and control regulation, is often considered inefficient.[22] And, even where regulation might be efficient, other questions around its feasibility and effectiveness might be encountered. These can result, for example, from the political compromises that need to be found at the national or international level, with the effect of favouring the lowest common denominator. Similarly, the most efficient regulation on paper may, in many cases, fall victim to insufficient implementation, jurisdictional/geographical limitations, or other administrative burdens.[23]

In the absence of regulation, private-sector voluntary initiatives have gained importance and are also frequently encouraged by States. Another reason for this shift to private sector initiatives might purely be the scale that such initiatives may achieve. Corporate actions and strategic market choices can have larger effects than State interventions. For example, the environmental improvement derived by Amazon going CO_2-neutral would be slightly bigger than if the whole of Sweden went CO_2-neutral.[24] Thus, it is not surprising that the UN's sustainable development goals directly address private business and their activities.

[20] See, for example, D Schlosberg and L Collins, 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice' (2014) 5(3) WIREs Clim Change, 359–374; H Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014); D Schlosberg, J Dryzek, and R Norgaard, *The Oxford Handbook of Climate Change and Society* (Oxford University Press 2011); L Meyer & D Roser, 'Climate Justice and Historical Emissions', (2010) 13(1) Crit Rev Int Soc Polit Phil, 229–253.

[21] Instead of many see, for example, Maarten Pieter Schinkel and Yossi Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) Int J Ind Org 371–398.

[22] For an overview on see: D Cole and P Grossman 'When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection' (1999) Wisconsin Law Rev 887–938.

[23] Pacheco et al., 'Governing Sustainable Palm Oil Supply: Disconnects, Complementarities, and Antagonisms between State Regulations and Private Standards' (2020) 14:3 Regulat Govern 568–598.

[24] Amazon emitted 2020 around 60.64 million tons of CO_2 in 2020 see, https://fortune.com/2021/06/30/amazon-carbon-footprint-pollution-grew/ (accessed 15 Feb. 2022), Sweden emitted around 45.5 million tons of CO_2 in 2020, see www.statista.com/statistics/449823/co2-emissions-sweden/ (accessed 15 Feb. 2022).

https://doi.org/10.1017/9781108899956.004 Published online by Cambridge University Press

For private business, the ESG debate is nothing new. In fact, the corporate debate[25] – especially as enriched by managerial sciences –[26] has focused for a long time on corporate social responsibility (CSR), that is, a way to embed in management strategy and soft law ESG objectives at large (which at the time were not as precisely detailed as in the modern debate). The older CSR debate was revived several times, decade after decade,[27] until the recent explosion of the ESG-connected literature.[28] But if non-corporate literature may have seen CSR as a promising ally towards a greener and more just future, corporate literature often denounced its limited reach in pursuing such objectives – especially in a transnational context.[29] As a reaction to the often generic and blurred content of CSR codes, corporate governance recently witnessed the emersion of a goal-oriented movement, organised around sustainable development goals (SDG)[30] – once again strongly inspired by management literature.[31] As goals are characterised by benchmarking, CSR objectives can finally be given proper tracks and verifiable milestones to reach.[32]

The shifting focus of the ESG policy discourse to companies and to their strategic interaction on the market entails that both competition and corporate law are relevant to the ESG debate. These two areas of law are crucially shaping the behaviour of companies by setting the inner and outer limits of their action; by being teleologically connected, their paths are inevitably destined to be intertwined.

2.3 ESG POLICIES, CORPORATE LAW AND GOVERNANCE

The ESG debate has touched upon topics that are not new in the corporate law and in corporate governance fields of research. Examples of such popular topics are as follows: short versus long-termism (together with their connection to the corporate

[25] W Katz, 'Responsibility and the Modern Corporation' (1960) 3 J Law Econ 75–85.

[26] R Eells, 'The Traditional Corporation', in *The Meaning of Modern Business* (Columbia University Press, 1960) 38–49.

[27] J Hetherington, 'Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility' (1968) 21 Stan L Rev 248; A Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) 4 Acad Manag Rev 497–505; E Epstein, 'The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness' (1987) 29 Calif Manage Rev 99–114.

[28] A Carroll and J Brown, 'Corporate Social Responsibility: A Review of Current Concepts, Research, and Issues' (2018) Corp Soc Responsib.

[29] G Frynas, 'The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies' (2005) 81 Int Aff 581–598.

[30] H Grove and M Clouse, 'Focusing on Sustainability to Strengthen Corporate Governance' (2018) 2 Corp Govern Sustain Rev 38–47.

[31] T Tsalis et al., 'New Challenges for Corporate Sustainability Reporting: United Nations' 2030 Agenda for Sustainable Development and the Sustainable Development Goals' (2020) 27 Corp Soc Responsib Environ Manag 1617–1629.

[32] See a practical 'mise en oeuvre' of the relationship between CSR and SDG in the KPMG report titled: 'Sustainable Development Goals (SDGs): Leveraging CSR to Achieve SDGs' https://assets.kpmg/content/dam/kpmg/in/pdf/2017/12/SDG_New_Final_Web.pdf

ownership structure and to the nature and incentives of corporate owners)[33] and the shareholder versus stakeholder theories of the corporate purpose.[34] Ultimately, such topics have been approached in the light of the environmental and social challenges of the twenty-first century. But not only old themes have been revisited and re-coloured. New themes, such as specific ESG-oriented shareholder and bondholder stewardship, now represent a significant share in the corporate governance literature.[35]

Research questioning the desirability of long-termism dates back to the second decade of the twenty-first century; it has represented a prominent voice in the United States[36] and in the UK corporate governance debate.[37] Such debate has crossed the Anglo-American cultural border, reaching the European Union policy-makers[38] and also EU Member States' policy-makers – for instance, the French one, which introduced the Florange Law.[39] Nobel prize Joseph Stiglitz has identified short-termism as one of the adversaries of sustainable policies and widely advocated for the pursuance of long-term oriented policies.[40] Stiglitz notices that

> [i]nequality has increased markedly in the last third of a century, partially because neoliberal doctrines, reflected in the Washington Consensus led to rewriting the rules of the economy in ways which led to more inequality and slower growth (as a result of excessive focus on financialization and the associated short-termism).[41]

Soon a cascade of corporate governance studies analysing short- versus long-termism from an ESG perspective followed. The relationship between short- versus long-termism and corporate governance can be tackled from different angles. Short-termism has been traditionally seen as a consequence of the pressure exercised on corporate directors by shareholders (especially investment funds) which are supposed to pursue a short-term maximisation of their investments – although such an

[33] See infra text corresponding to n 37 ff.
[34] See infra text corresponding to n 56 ff.
[35] Ibid.
[36] M Roe, 'Corporate Short-Termism – in the Boardroom and in the Courtroom' (2013) Bus Lawyer 977.
[37] C Mayer, *Firm Commitment: Why the Corporation Is Failing Us and How To Restore Trust In It* (Oxford University Press 2013).
[38] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards to the encouragement of long-term shareholder engagement, *OJ L 132, 20.5.2017, pp. 1–25*.
[39] LOI no. 2014-384 du 29 mars 2014 *Visant à Reconquérir l'Economie Réelle*, JORF n 0077 du 1 avril 2014, Texte no. 3. See the Florange Act in comparative perspective in F Alogna, et al., 'The Shareholder in France and the United States: A Comparative Analysis of Corporate Legal Priorities', *Business & Law Review, Business & Law Association (Association Droit & Affaires (ADA)) Paris* (2020).
[40] J Stiglitz, *Rewriting the Rules of the American Economy: An Agenda for Growth and Shared Prosperity* (WW Norton & Company, 2015).
[41] J Stiglitz, 'An Agenda for Sustainable and Inclusive Growth for Emerging Markets' (2016) 38 J of Policy Model 693, 702.

assumption is clearly questionable as there is no homogeneity among institutional investors from this point of view.[42]

Correctives to such short-termism orientation have been proposed. For instance, Bolton and Samama have proposed the introduction of the 'loyalty share', to reward shareholder that engage in long-term commitment to the company.[43] It has also been argued that directors who are more insulated from shareholders are more likely to adopt long-term strategies.[44] Or, that more long-termism would set a remedy to the disempowerment of stakeholders.[45] By contrast, other research has shown that empowering stakeholders in some cases can worsen the effects of short-term strategies.[46] And, evidence has emerged that shareholders' short-termism could actually be seen as a correction to the dark sides of managerial long-termism, that is, over-optimism regarding the success of long-term plans.[47]

The general contrast to short-termism as a potential remedy to unsustainable policies has been embraced in research commissioned by the EU Commission: the Ernst & Young's 'Study on Directors' duties sustainable corporate governance'.[48] But what corporate governance literature has questioned is the very relationship between long-termism and the pursuance of ESG policies. A prominent dissenting opinion against the original identification of short-termism with unsustainable policies has been Mark Roe's one. Based on Roe's previous studies, Roe, Spamann, Fried and Wang have also heavily criticised the Ernst and Young's proposal, not only showing the inappropriate conflation of short-termism with sustainability but also the absence of empirical evidence of such relationship.[49] Roe and Shapira have also explained that the purported connection between short-termism, pro-shareholder policies and unsustainable strategies has found its way into the general discourse on ESG, thanks to the strong narrative inherent to the terminology adopted in the debate. Good, reliable, long-term commitment versus bad, unreliable, short-term strategies[50] prompts policy-makers to adopt the first triad.

[42] And note that the same kind of fund may also adopt differentiated strategies. See K Greenfield, 'The Puzzle of Short-Termism' (2011) 46 Wake Forest L Rev 627, 638–639.

[43] P Bolton and F Samama, 'Loyalty-Shares: Rewarding Long-Term Investors' (2013) 25 J Appl Corp Finance 86.

[44] See the seminal statement by M Lipton, 'Takeover Bids in the Target's Boardroom' (1979) 35 Bus Lawyer 101.

[45] See the literature cited by M Roe, 'Stock Market Short-Termism's Impact' (2018) 167 U Pa L Rev 71, 109.

[46] H Almeida et al., 'Do Short-Term Incentives Affect Long-Term Productivity?', European Corporate Governance Institute–Finance Working Paper 662 (2020).

[47] M Barzuza and E Talley, 'Long-Term Bias' (2020) Colum Bus L Rev 104.

[48] Ernst & Young's 'Study on Directors' Duties Sustainable Corporate Governance' (April 2020), available at https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en, 9–31.

[49] M Roe et al., 'The European Commission's Sustainable Corporate Governance Report: A Critique', available at *SSRN* (2020).

[50] M Roe, and R Shapira. 'The Power of the Narrative in Corporate Lawmaking', available at *SSRN* 3703882 (2020).

Mark Roe has challenged not only the conventional view on the detrimental effects of short-termism for sustainability. He has also demystified another common belief, that is, that short-termism has determined a fall in research and development and consequently in innovation.[51] Roe's position is clearly based largely on the fact that the US hosts the largest number of high-tech companies in the world, which clearly invest large sums in research and development and are leading innovators. Jesse Fried has added another important piece to the short-termism puzzle: he has shown that long-term shareholders may well demand even worse value destruction than short-term ones.[52] This again makes us doubt of the suitability of the promotion of long-term equity holdings for sorting out positive effects on structural investment and innovation.

Fried and Wang have also calculated that the effective distribution of companies' net income to investors (often held responsible for fund depletion and consequent incapability to invest in innovation) is not as significant as it is often claimed.[53] Similar results have been found with reference to EU companies, once taking into account new equity issuances.[54] Short-horizon investors have also been considered as a stimulus to competitiveness, especially with reference to innovation parameters.[55]

Roe's and Freed & Wang's observations are extremely useful when it comes to assess the innovation deriving from R&D. But it is worth remembering that disruptive innovation does not necessarily require significant investments in research and development. And corporate law mechanisms underlying disruptive innovation may require taking into consideration corporate law rules different than the ones mentioned by the mainstream literature that focuses on research and development.[56] Being innovation based upon recombinational dynamics of blocks of knowledge, rules such as the corporate opportunity doctrine, the directors' duty not to compete and other contractual arrangements such as no-compete clauses may become prominent.[57] And we have already highlighted that such rules may escape the EU's competition radar.[58]

Instead of relying on the long-termism argument, part of the ESG debate has invested directly in the shareholder versus stakeholder conundrum – especially tackling the relationship between company and a vast range of stakeholders, among

[51] Roe (n 45).
[52] J Fried, 'The Uneasy Case for Favoring Long-Term Shareholders' (2014) 124 Yale LJ 1554.
[53] J Fried and C Wang, 'Short-Termism and Capital Flows' (2019) 8 Rev Corp Finance Stud 207.
[54] J Fried and C Wang, 'Short-Termism, Shareholder Payouts and Investment in the EU' (2021) 27 Eur Financ Manag 389.
[55] M Giannetti and X Yu, 'Adapting to Radical Change: The Benefits of Short-Horizon Investors' (2021) 67 Manag Sci 4032.
[56] M Corradi, *Corporate Opportunities, A Law and Economics Analysis* (Hart, 2021) Ch 5.
[57] Ibid.
[58] See Chapter 8 in this book and also M Corradi and J Nowag, 'Enforcing Corporate Opportunity Rules: Antitrust Risks and Antitrust Failures', forthcoming on *European Business Law Review*.

which consumers – hence impinging deliberately on an area (consumers) that has traditionally been competence of competition policies.[59]

During the age of privatisation, European private companies have taken up the role previously carried out by the state in granting the provision of public goods and services,[60] often achieving questionable results in terms of pricing and efficiency.[61] In the context of privatisation, the Milton Friedman's 'maximising shareholder value' rationale may not provide a correct representation of the corporate positioning vis-à-vis consumers.[62] Colin Mayer has advocated for the acknowledgement that 'a corporation is an employer, investor, consumer, producer and supplier all rolled into one'[63] and that '[t]he repositioning of corporations, capital and control' is 'fundamental implications for business, economics and public policy as the Copernican revolution had for astronomy'.[64] Colin Mayer asserts that companies actually work for solving people's problems, hence viewing consumers as the recipient of a service more than the target of lucrative business activity.[65] It goes without saying that among collective problems, we can easily mention the necessity to build up a sustainable future.

As we have shown, the ESG debate in the field of corporate law and governance is very animated, full of controversies, and overall in its nascent phase – even to the extent to which scholars are still debating about the efficiency of corporate law and governance tools for addressing ESG concerns.

As highlighted in the previous section, public intervention in the ESG arena seems to rely heavily upon private initiative. But given the fact that private initiative is still surrounded by a high degree of uncertainty, it is inevitable that private

[59] On consumer welfare, H Hovenkamp, 'Distributive Justice and the Antitrust Laws' (1982) 51 Geo Wash L Rev 1; B Orbach, 'The Antitrust Consumer Welfare Paradox' (2001) 7 J Compet Law and Econ 133.

[60] D Bös, 'Privatization in Europe: A Comparison of Approaches' (1993) 9 Oxford Rev Econ Policy 95.

[61] K Schmidt, 'The Costs and Benefits of Privatization: An Incomplete Contracts Approach' (1996) 12 J Law, Econ, and Organ 1; For the distributional consequences of privatizations, see N Birdsall and J Nellis, 'Winners and Losers: Assessing the Distributional Impact of Privatization' (2003) 31 World Development 1617.

[62] C Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press, 2018) 2. Mayer's theses were criticized by L Bebchuk and R Tallarita, 'The Illusory Promise of Stakeholder Governance', available at *SSRN 3544978* (2020), to whom Mayer reacted with a further paper: C Mayer, 'Shareholderism Versus Stakeholderism – A Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita', *European Corporate Governance Institute-Law Working Paper* 522 (2020).

[63] *Ibid*. at 4.

[64] *Ibid*. at 5.

[65] C Mayer, 'The Future of the Corporation and the Economics of Purpose', ECGI Finance Working Paper 710/2020. These principles have been adopted by a recent policy document by the British Academy, 'Principles for Purposeful Business', that sets general principles and supports the idea that '[r]egulation should expect particularly high duties of engagement, loyalty and care on the part of directors of companies to public interests where they perform important public functions'; The British Academy, 'Principles for Purposeful Business' (2019) www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/.

and public powers will keep on passing each other the torch. While competition law is often placed among the private law area, it often uses traditional command and control mechanisms known traditionally in the area of public intervention. In contrast, corporate law is more clearly in the realm of private law – although some of its rules – especially those pertaining to securities – can be described as public too. With both fields affecting corporate behaviour substantially, these two fields need increasing dialogue. In certain cases, such a dialogue will end with exacting from each other a degree of intervention that the other area is not able to offer. In other cases, the same dialogue may well end up requiring a common and coordinated intervention in the same field. These two potential kinds of interaction are, respectively, the subject of the two following sections. We will start by highlighting the progress of competition law with reference to the pursuance of ESG objectives, and we will finally highlight the necessity of joint competition and corporate law intervention in the area of technological innovation.

2.4 ESG POLICIES AND COMPETITION POLICY

In the competition field, ESG is not frequently discussed. But a similar debate develops under the heading of competition and sustainability or the more concrete UN implementation of SDGs. Yet, while the exact boundaries between ESG and SDG are sometimes difficult to draw, a certain overlap between SDGs and ESG cannot be denied. One may see SDGs and ESG as overlapping but different in the way they are pursued. And while we have seen some attempts to allow reporting of companies on SDG,[66] the ESG debate has a different origin. To simplify, one may say that SDGs set out goals, while ESG is more about methods and processes within companies and their reporting on a range of environmental and social matters. Given that this area of research is rather new, we also acknowledge that the semantic fields of such new terms may be rather blurred at times, as such terms are given more and more detailed meaning by their contextual application.

The above-mentioned difference in meaning also explains the different focus of the debates in corporate and competition law. The corporate debate and its focus on long-term versus short-termism can be understood if one takes into account the process orientation of ESG. As such, this debate has much less prominence in competition law. In competition law, the debate is more focused on sustainability broadly and only lightly touches upon the SDGs as points of orientation to gain a better understanding of what sustainability actually is.

However, certain elements about the long- versus short-term focus can also be observed in the context of the sustainability debate in competition law. For example, the time horizon for the expected benefit is sometimes a matter of discussion,

[66] See KPMG, 'How to Report On the SDGs: What Good Looks Like and Why It Matters (Feb 2018), https://assets.kpmg/content/dam/kpmg/xx/pdf/2018/02/how-to-report-on-sdgs.pdf

especially with regard to what time horizon should be employed when measuring sustainability benefits such as a reduction in CO_2 emissions. While the time frame, for example, in merger cases is usually short to medium (up to five years), the full benefits of CO_2 reductions now may only be experienced in 50 years. Here, the debate is normative as well as technical. On the normative side, one might question whether the importance of, for example, CO_2 reduction and the delayed nature of benefits derived from action today justify a different approach.[67] From a more technical point of view, the question of the time horizon presents itself as a question of proof rather than policy.[68] Crucial is here the discount rate applied to such future benefit,[69] an argument can be made about 'discounted away' sustainability benefits because future costs might be grossly underappreciated as the example of climate change shows.[70] Recently, the Dutch Competition Authority's draft guidelines address this matter and suggest the use of the standard social-cost-benefit tools of Dutch government agencies. The draft guidelines also suggest that avoided environmental damage should be monetised by means of environmental or 'shadow' prices.[71]

While this area shows the tension between an approach that takes a long-term perspective from short-term ones, the debate in competition law is more outcome-focused. The questions are to what extent the enforcement of competition law can support or hinder the achievement of sustainability.[72] In other words, to what extent competition law can be a sword in the fight for more sustainability or to what extent sustainability outcomes might serve as a shield against prohibitions against certain actions by competition law.[73] The possibly closest link to the debates in corporate governance is stakeholders, that is, constituencies whose interests are affected by corporate action can also be heavily affected by the above-mentioned sword and shield perspective on competition law. The calculation of gains and losses born by different stakeholders can form a bridge between the debates in competition law

[67] It can, for example, be compared to innovation questions where similar questions can arise. Yet, the benefits of CO2 reductions might be their very nature be felt even later. On the comparison to innovation questions see Hellenic Competition Commission, Staff Discussion Paper on Sustainability Issues and Competition Law (2020), available www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html (accessed 05 Oct 2020) para 25.

[68] K Coates & D Middelschulte, 'Getting Consumer Welfare Right: The Competition Law Implications of Market-Driven Sustainability Initiatives' (2019) 15:2–3 Eur Compet J 321.

[69] In general, see also R Inderst, E Sartzetakis, and A Xepapadeas, Joint Technical Report on Sustainability and Competition for the HCC and the ACM (Jan 2021) www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/2165_f998b905c20c0426f068e512186c6ec4.html (accessed 16 Feb 2022).

[70] Hellenic Competition Commission, Staff Discussion Paper on Sustainability Issues and Competition Law (2020), available at www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html (accessed 05 Oct 2020) para 111.

[71] *Ibid.* at para 50.

[72] This framework is developed in Julian Nowag, Environmental Integration in Competition and Free-Movement Laws (Oxford University Press 2017) 1–12.

[73] See Simon Holms, 'Climate Change, Sustainability and Competition Law' 8:2 (2020) *J Antitrust Enforc* 355.

and corporate law, where the sustainability impact on such stakeholders may come under scrutiny. In fact, an analysis of the stakeholder interests can provide grounding for the theoretical debates and help quantifying the overall welfare effects of the combination of competition and corporate law policy on each stakeholder.

The interaction between competition and sustainability as the first point of reference might be provided by economics. Sustainability and competition economics both highlight resource efficiency, innovation, and the role of the private sector. Moreover, economics is the most important tool to understand the market forces at play and this is crucial to determine the dynamics harming or supporting sustainability.

Foundational on the interaction between sustainability and competition is Elinor Ostrom's work on the sustainable management of common pool resources.[74] Her Nobel prize-winning work explored the tragedy of the commons. It showed that rational profit maximisers in unfettered competition lead to disastrous outcomes for that commons. It moreover showed that in reality co-operation rather than competition can be expected.[75] Ostrom's foundational work focuses on real-world cases where cooperation takes place. Yet micro-economists do not frequently study sustainability initiatives by private parties. There are theoretical micro-economic studies by even fewer authors[76] which apply the standard assumptions and models used in competition economics, including the rational profit maximiser assumption for firms. These suggest that, in general, competition will lead to greater sustainability gains where consumers value sustainability. These papers highlight that there are only a few situations where cooperation has positive outcomes on sustainability. Instead, they suggest that government regulation is a more efficient solution. This literature attributes such findings mainly to the fact that profit-maximising firms have limited incentives to invest in sustainability. It is here where the first points of interaction with the corporate law and governance become apparent. Where corporate law and governance prescribe profit maximisation, the theories about the relationship between competition and sustainability have the most explanatory force. However, the further corporate law and governance move away from the profit maximisation maxim, the harder it becomes to apply these theories.

[74] See E Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (Cambridge University Press 1990).

[75] Picking up on theme of competition leading to suboptimal outcomes, see Maurice Stucke and Ariel Ezrachi, *Competition Overdose* (Harper Business 2020).

[76] See, for example, M P Schinkel and Y Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) Int J Ind Organ 371–398. L Treuren and M P Schinkel, 'Can Collusion Promote Sustainable Consumption and Production? Not Beneficially Beyond Duopoly' (March 1, 2018) Amsterdam Law School Research Paper No. 2018-02, Amsterdam Center for Law & Economics Working Paper No. 2018-01; F Martinez, S Onderstal and M P Schinkel, 'Can Collusion Promote Corporate Social Responsibility? Evidence from the Lab' (Nov 2019) Tinbergen Institute Discussion Paper TI 2019-034/VII; M P Schinkel and L Tóth, 'Compensatory Public Good Provision by a Private Cartel' (January 2020) Tinbergen Institute Discussion Papers 19-086/VII.

A second important avenue in the sustainability competition debate is the question of sustainable innovation as both sustainability and competition law and policy recognise the importance of companies in driving innovation. Where sustainability is explored as a dynamic parameter of competition – that is, one that consumers value as a non-price quality variable –[77] a dynamic innovation-focused assessment seems adequate. In this context, one may ask whether more competition or more cooperation will foster sustainability innovation. General models from the study of the interaction between competition and innovation suggest that a more nuanced assessment is required: one that takes into account practices and specific situations. In other words, the answer to the Schumpeter-Arrow debate over innovation in a competitive or monopolistic setting is best answered on a case-by-case basis, by examining the concrete situation.[78] Similarly, innovation in sustainability needs to be assessed in a concrete situation.

Equipped with these insights, it becomes clear that competition law needs to take a flexible approach. On the one hand, competition leading to innovation in terms of sustainability needs to be protected; and on the other hand, cooperation needs to be possible where it fosters innovation that leads to sustainability. We will explore the two different scenarios that can, as highlighted before,[79] also be compared to competition law as a sword to protect sustainable innovation and sustainable innovation as a shield.

2.5 ESG POLICIES, COMPETITION LAW, AND CORPORATE LAW: ANOTHER MISSING CONNECTION?

As already stressed, some of the EU research on corporate policy strategies and ESG objectives have been highly criticised for the absence of their consistency and lack of empirical analysis.[80] More thorough research in the field is needed. Given that such research, as well as the research on sustainability and competition law, are *in fieri*, it might not be surprising that there has been no research on the interaction between corporate and competition law. In fact, both policy areas are still heavily occupied with themselves. Nonetheless, we firmly believe that sustainability and ESG objectives are crucial in the long run and that corporate and competition policies will inevitably interact in the ESG area. Hence, it is necessary to anticipate and facilitate such encounters, by foreseeing potential conflicts and by softening sharp edges.

[77] See, for example, C Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)' (July 2020) CPI Antitrust Chronicle 9–18.

[78] For a good overview of the Schumpter-Arrow debate and questions regarding specific market conditions in Pharma, see Michael A. Carrier, 'Two Puzzles Resolved: Of the Schumpeter–Arrow Stalemate and Pharmaceutical Innovation Markets' (2007) Iowa L Rev 393.

[79] See text to n 73.

[80] See Section 2.3.

At the most basic level, the competition law and sustainability debate is a debate about outcomes with a focus on the extent to which competition law is a useful and viable tool. The ESG and SDG debate in corporate law and governance seems more process-focused, aimed at identifying means that allow for measurement and reporting, but academics are also studying contractual tools for forcing the pursuance of such objectives.[81]

Chapter 14 already deals with the potential ESG clash in competition and corporate law policies in the fields of common ownership. Nonetheless, we do not believe that this will necessarily represent the ESG's main stumbling block. We have highlighted and believed in the importance of the special role of dynamic innovation for more sustainable growth. What is essential is that EU policy-makers avoid treating corporate law and governance and competition law in isolation in the pursuance of such a goal. Instead, it needs to be ensured that both legal regimes are streamlined and that potential stumbling blocks presented by their interaction are addressed.

The 2020 COVID-19 crisis illustrates the importance of swift innovation as the necessity of finding a vaccine in a very short time. In such catastrophic events, even a small acceleration towards new inventions can be hugely important and can have beneficial effects on a global scale. Dynamic efficiency is crucial for the future of our planet, for the environment and for increasing productive efficiency – hence producing less waste.[82]

The attention to innovation also brings into focus other questions on border between corporate and competition law. For example, as we have explained in Chapter 8, corporate opportunity rules and the directors' duty not to compete with the company may have a direct effects on innovation. A large incumbent company, often with a corporate venture capital division, is able to purchase a vast array of innovative start-ups and develop or shutdown at its discretion a whole range of different innovations.[83] In these situations, the competition among such different innovative solutions is withdrawn from market mechanisms and market forces. Instead, innovation becomes subject to a balance of interests within the incumbent corporation where the best innovations might not be developed for instance because it does not fit with the incumbent industrial strategy.

The debates around the tech companies and their corporate venture capital divisions have highlighted the problem: and both corporate law and competition law may find themselves unable to sufficiently address any such obstacle to innovation.

[81] J Armour, L Enriques, T Wetzer, 'Green Pills: Making Corporate Carbon Commitments Credible' (November, 2021).

[82] OECD, *Towards a Green Growth* (2011); www.oecd.org/greengrowth/48012345.pdf. But some do not see in innovation a solution to environmental issues. See M Cohen, 'Ecological Modernization and Its Discontents: The American Environmental Movement's Resistance to an Innovation-driven Future' (2006) 38 *Futures* 528. Amore balanced approach in. A Grunwald, 'Diverging Pathways to Overcoming the Environmental Crisis: A critique of Eco-modernism from a Technology Assessment Perspective' (2018) 197 J of Clean Prod 1854.

[83] Corradi, Corporate Opportunities (n 56) Chapter 6.

And as we have highlighted elsewhere[84] corporate opportunity rules may facilitate the exercise of such power by the incumbent company and competition law authorities and courts may find that such arrangements are not subject to competition law as they occur within the corporation. Similar concerns are raised by an alternative version of the same corporate strategy adopted by incumbent corporations. In the case of killer mergers, the incumbent has the intention of shutting down the potential competitor. While in these cases competition law may apply, the tools are not well adjusted to such problems.[85] The potential restriction of competition is carried out through corporate means and seems to be hard to control through the traditional competition law analysis, which may be ill suited for tackling dynamic competition issues at large.

While these specific examples highlight some of the interactions between corporate law and competition law in the in context of innovation for sustainability, we can also take a broader perspective. And if we widen our perspective, we may well see that the interaction between corporate strategy – as affected by corporate law and governance – and competition law is only destined to increase in quality and in dimension. If the core objective of corporate strategy is increasingly found in the reconciliation between profit-maximising strategies and ESG objectives, corporate strategy may more and more depart from the dualistic idea of either competing or colluding on prices. The overall paradigm shifts in the business world that is highlighted by corporations adopting ESG or SDG polices – cannot be without effects on fundamental paradigms of competition law. This is so in particular because competition law risk losing touch with the business reality that is affected by corporate law and governance changes. This risk of a disconnect might occur where competition theory still conceives the corporation as pure profit maximiser – and does not ponder the ESG variables and the way they might modify the conception of the corporate interest in the future.

2.6 CONCLUSIONS

The theoretical challenge represented by the encounter of corporate and competition policies in the ESG area seems considerable – as well as very exciting – given the vast number of issues that must be solved. In this chapter, we have only attempted to sketch out some interesting aspects of a future discussion likely to occupy vast areas of the corporate and competition literature in the coming years. Anecdotally, it is often said that both doctrine and jurisprudence strive to bring within their competence areas of the law that traditionally belong to other fields. But this is not the case for ESG, especially when it comes to find practical real-world solutions. The

[84] See Corradi Nowag (n 58).

[85] M Corradi and J Nowag, 'Enforcing Corporate Opportunity Rules: Antitrust Risks and Antitrust Failures' Eur Bus Law Rev 2022 (forthcoming).

challenge is so that the hope rests upon corporate action. Yet, corporate and competition lawyers seem critical of corporate action and easily denounce them as insufficient and ineffective when it comes to pursuing ESG objectives.[86] Such an attitude, demanding that someone else provides viable and effective solutions, seems a common psychological reaction: when challenges are tough, we may perceive them as insurmountable and are tempted to stand by and look for an external rescuer. But it is equally true that such external rescue is unlikely to come. Therefore, action is needed.

In this paper, we propose that enquiring about the interaction between competition and corporate ESG policies is a good starting point, and that we may need to focus especially on dynamic innovation. This may represent the first step for tackling the wider debate. While it may look like a small step, it is crucial in fact. If the environmental and social challenges are so hard, the best human talents have to be employed. And only well-suited and well-coordinated competition and corporate policies can grant that financial resources and incentives for innovative projects along their path of a more sustainable future.

[86] R. Tallarita, Portfolio Primacy and Climate Change *available at SSRN 3912977* (2021).

https://doi.org/10.1017/9781108899956.004 Published online by Cambridge University Press