

## **Global Antitrust and Sustainability: Law, Economics, Enforcement\***

Julian Nowag

*Reviewed by Benedita Sequeira\*\**

### ***Introduction***

The topic of sustainable development, “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”<sup>1</sup>, has recently gained the attention of competition authorities. Indeed, with the business sector increasingly being called on to participate in sustainability initiatives, it is important to acknowledge that although there are many instances where competition is beneficial for this purpose, there are others where private actors may only advance sustainability objectives by coordinating their business strategies and practices, for instance, where first-mover disadvantages, information asymmetries or other externalities take place.

In the competition and sustainability field, enforcers seem to be placed at cross-roads: on the one hand, they should avoid obstructing sustainability initiatives that are anti-competitive, provided their benefits outweigh the detriment caused to competition, and ensure that sustainability is not used as a cover for anticompetitive conduct, e.g., in the case of *greenwashing*; on the other hand, they should avoid going beyond their legitimate democratic mandate to analyse competition infringements in the market.

This is where Nowag’s recently published work comes into play, providing competition authorities, legal specialists, and policymakers with some

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<sup>1</sup> World Commission on Environment and Development, “Report of the World Commission on environment and development: Our common future” (1987).

food for thought and new insights. By identifying diverse tools used in different jurisdictions to handle the matter, this book allows one to “think more creatively about the interplay between sustainability and antitrust”, ensuring that competition policy contributes to a more sustainable world.<sup>2</sup>

### ***Description and structure***

This work is divided into six chapters, covering the most relevant aspects of the sustainability and antitrust debate. The introduction cleverly states some of the most important definitions and structures the following analysis. In the second section, the economics of competition and sustainability are explored from a theoretical and empirical perspective. Chapters three and four go on to study the activity of competition authorities in the sustainability field, either as “guardians of sustainability” (Chapter 3) or as “public enablers of private sustainability efforts” (Chapter 4). The fifth part deals with process matters, meaning the set of tools available for competition authorities to deal with sustainability issues. Finally, chapter six draws conclusions and leaves some open questions for further discussion.

We are pleased with the overall structure of the book and believe that each chapter is concisely organised to allow for a smooth reading of its entirety, urging the reader to reflect on the problems of antitrust enforcement in relation to sustainability. We are especially pleased with the inclusion, at the beginning of each chapter, of a small case-study or example, with which the corresponding chapter is also wrapped up. This is a very useful tool to understand, in practical terms, what issues are under discussion. It is also important to point out that each part finishes with a set of conclusions, making the transition between chapters smoother.

### ***Chapter I: Introduction – Scope and limits of sustainability and antitrust law***

The first chapter of the book introduces the overlap between antitrust and sustainability, providing definitions and setting the frame for the latter analysis.

The definition of the term sustainability, taking into account the historical context and its many different characterisations across jurisdictions, is particularly noteworthy. We have unfortunately found that many articles

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<sup>2</sup> Julian Nowag, *Global antitrust and sustainability: Law, economics, enforcement* (Oxford University Press 2026), 259.

and studies dealing with the same topic do not undertake this framing endeavour, simply redirecting the reader to another imprecise definition or constantly shifting from one definition to another, thus ignoring the complexity of the concept and its intersection with private initiative.

On the contrary, in this book, sustainability is broadly defined as having its roots in environmental protection but expanding its reach to take into account social and economic development. The essential idea, as the author points out, is that “environmental degradation and depletion of natural resources will limit and reduce economic growth and social development”, and that these should take place within, rather than beyond, planetary boundaries.<sup>3</sup>

## ***Chapter II: The economics of competition and sustainability: Good and bad competition***

Part II of the book is devoted to the economics of competition and sustainability, which are analysed from a theoretical and an empirical point of view.

The first part of the chapter looks at situations where sustainability is valued by consumers (demand side) or by producers or distributors (supply side), and where competition can promote sustainability outcomes. The in-depth analysis of economic studies provided throughout these pages is a great asset for legal professionals working in the field, compiling the relevant information in a clear, simple, and concise manner.

The second part analyses situations where cooperation or monopolies provide more sustainable outcomes due to issues such as first-mover disadvantage or biases such as hyperbolic discounting, heuristics or coordination failures. Monopoly situations, where the production of a good is associated with negative effects on sustainability, are also analysed in this chapter.

The third part looks into economic practice and engages with empirical studies, rather than with theoretical ones. We found the part on measuring sustainability in the context of competition law (pp. 62 ff.) to be particularly helpful for competition law lawyers and enforcers.

Finally, Nowag draws some conclusions on the role competition law has to play in achieving a more sustainable society, which will be more relevant the weaker or more imperfect a government is. We believe this analysis, of

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<sup>3</sup> Ibidem, 20.

the utmost importance for the field, should have been more extensive and that the author could have considered including it in a separate devoted part.

### ***Chapter III: Competition authorities as guardians of sustainability***

This chapter explores how competition law can foster sustainability, i.e., how competition authorities can promote sustainability objectives by ensuring that competition can deliver a more sustainable outcome. This can be coincidental, when traditional enforcement coincides with sustainability improvements, or it can be the result of deliberate choices made by the enforcers.

We find the inclusion of topics such as protecting price competition to alleviate poverty, preventing restrictions in the labour market and enforcement against exclusionary behaviour of patents and technology, which is vital for sustainability, particularly innovative. These are ideas we have not seen explored elsewhere that could make way for a greater pursuit of sustainability from a competition law angle.

### ***Chapter IV: Competition authorities as public enablers of private sustainability efforts***

Contrary to the previous part, chapter IV turns the attention to efforts by companies to improve sustainability, where a conflict with competition law may arise.

A distinction is drawn between the private initiatives that are *prima facie* anticompetitive and those that are altogether excluded from the scope of competition law. The latter category includes all arrangements within the same undertaking, arrangements between unions and their employers, those falling within the scope of the *De Minimis Notice*, and those that do not affect the parameters of competition. More interestingly, platform agreements, sectoral exemptions and activities that mirror compliance with applicable legal frameworks are reviewed and included under this safeguard.

Situations that are often more contentious, where anticompetitive actions aimed at improving sustainability are within the scope of competition law, are analysed in the second part of this chapter. In particular, attention is drawn to abstract balancing between sustainability as a public interest and a competition law restriction, admissible in certain jurisdictions, under a proportionality test. The examples of several jurisdictions are pointed out,

followed by the balancing undertaken in merger cases and in relation to certain areas of the economy, such as services of general economic interest and agriculture. The less positive aspect regarding the structure of the work (if there is any to point out) would perhaps be the inclusion of the *Wouters* test, which allows for the exclusion of agreements from the scope of application of Article 101(1) of the Treaty on the Functioning of the European Union, under the sub-chapter “Public interest clauses in mergers”. We believe this important safeguard from the application of competition law, and the complexity of the balancing proportionality exercise to be undertaken, especially in the light of more recent case law, should have been devoted more time and thought.

The chapter goes on to analyse the balancing of sustainability factors within the economic frameworks of competition, be that as a quality parameter, as protecting choice for more sustainable alternatives, or as protecting innovation. It also reflects on the assessment of future benefits, benefits that occur in different markets, particularly markets abroad. A very interesting explanation of the difference between individual use-value benefits, non-use value benefits and collective benefits is also provided, as well as the requirements to take each parameter into account in the competition assessment.

### ***Chapter V: Process matters***

This chapter enounces the “broad menu of options” available for competition authorities in relation to sustainability agreements, offering suggestions on how to incorporate this pressing issue in their work.

For instance, objectives and priorities may be set to accommodate sustainability concerns, and enforcers can choose to publish guidelines or to provide informal guidance to undertakings wishing to enter into a sustainability arrangement. Additionally, market inquiries may be conducted, and procedure rules may be adapted to ensure a diverse range of stakeholders and market participants are able to make submissions in procedures where sustainability is relevant. More innovatively, competition authorities can implement sandboxes or more general supervision schemes. Lastly, we find the inclusion of private enforcement in this chapter very interesting, paving the way for new studies on the topic.

## ***Chapter VI: Conclusions***

The last part of the book revisits the previously mentioned problems, summarising its key features and the main conclusions already drawn from their analysis. We see this recapitulation of each chapter's main conclusions as very positive, allowing the reader to redraw their focus to the main issues under discussion.

### ***Critical analysis***

The book “Global antitrust and sustainability: Law, economics and enforcement” is, undoubtedly, a brilliant review of the competition and sustainability debate, particularly in the field of antitrust. This topic has gained much attention recently, and this work provides an unprecedented, multi-faceted and fully contextualised analysis, covering global perspectives by bringing in cases from jurisdictions around the world.

Nowag's notable work, focusing on what can be done to achieve a more sustainable future within the boundaries of the discipline of competition law, comes up with practical suggestions for consistent approaches to this problem and gives insight into the new developments in the field.

Distinguished by its innovative approach, this work is written with exceptional clarity, employing straightforward and accessible language and following a well-structured scheme. It unquestionably deserves a place in the libraries of those engaged with these matters, particularly professionals involved in the enforcement of competition law in relation to sustainability agreements between competitors. This includes members of National Competition Authorities (NCAs), lawyers, undertakings and consumer or sustainability protection organisations. The book under review serves as a key reference for practitioners, as well as for legislators, enforcers, and policy-makers, both within the EU and beyond.

