Functions, Objectives and Uses of Competition Law for the Market Economy in a Polycrisis Society

Abstract: This article examines the functions, objectives and uses of competition law through the lens of legal theory in order to clarify its role within the market economy and its contribution to society in a context marked by an unfolding polycrisis. Drawing on François Ost's framework, the analysis shows that competition law, like law in general, binds, limits and measures social relationships, pursues intrinsic and extrinsic aims, and is strategically mobilised by public and private actors. Applied to competition law, this triadic structure reveals a dialogical dynamic: one of complementarity when the law integrates economic, social, democratic and environmental considerations; one of competition when narrow efficiency-driven interpretations constrain its broader purposes; and one of antagonism when intrinsic and/or extrinsic aims encroach upon and distort its proper functions. The article argues that, in a polycrisis society, competition law should not merely expand the list of objectives it pursues, but should reorient its functions, objectives, and uses toward a clearly specified societal horizon. Through the thought experiment of a hypothetical post-growth society, it proposes that competition law should be directed toward non-domination, ecological balance and the protection of vulnerable consumers.

Keywords: Competition law; Legal Theory, Polycrisis

« Le droit tisse des liens et fixe des limites ; ce faisant, il est la mesure du social[1] »

i. INTRODUCTION

[1] François Ost, *À quoi sert le droit ? usages, fonctions, finalités* (Bruylant 2016) 240–241.

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Competition law has been torn for several years by questions regarding its nature and/or characteristics, in particular the objectives it should pursue in order to best fulfil its mission in society.[2] The purpose of this article is to take a detour through legal theory, specifically the question of the role of law in society, in order to shed new light on the debate concerning the

[2] For example: Eleanor M Fox, 'Against Goals' (2013) 81 Fordham Law Review 2157; Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9 Journal of European Competition Law & Practice 131 <https://doi.org/10.1093/jeclap/lpy020>; Ioannis Lianos, 'Polycentric Competition Law' (2018) 71 Current Legal Problems 161 <https://doi.org/10.1093/clp/cuy008>; Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 Legal Studies 620 <https://doi.org/10.1017/lst.2022.8>; Herbert Hovenkamp, 'The Slogans and Goals of Antitrust Law' (2023) 25 N.Y.U. Journal of Legislation and Public Policy 705; David J Teece, 'The Dynamic Competition Paradigm: Insights and Implications' (2023) 2023 Columbia Business Law Review <https://doi.org/10.52214/cblr.v2023i1.11895> accessed 25 November 2025; Elias Deutscher, 'The Competition-Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy' (2023) 41 Yearbook of European Law 197 <https://doi.org/10.1093/yel/yeac003>; Aurelien Portuese, *The Battle for the Future of Antitrust: Brandeis, Bork, and Schumpeter* (Springer Nature Switzerland 2024) <https://doi.org/10.1007/978-3-031-75794-5> accessed 25 November 2025; Stavros Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' [2025] The Modern Law Review 1468 <https://doi.org/10.1111/1468-2230.12948>.

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raison d'être of competition law. In doing so, it will be important to understand that it is not enough to address the objectives of competition law in order to debate its usefulness in society, but that it is also necessary to consider its specific functions and its uses by social actors. Furthermore, using an appropriate reasoning borrowed from systems theory, it will also be necessary to study the complex relationships between the functions, objectives and uses of competition law. It is on this basis, then, that we can contribute to the evolution of competition law in the face of the multiple crises (hereinafter the polycrisis) that now challenge its core objectives, and thereby meaningfully reassess its utility and limitations for the market economy, for society and for the planet.

According to Edgar Morin and Anne Brigitte Kern, a polycrisis refers to a configuration in which multiple, distinct crises (economic, ecological, geopolitical, social, technological, etc.) unfold simultaneously and interact through mutual amplification, producing systemic disruptions that are more severe than the sum of their individual components[3]. Because shocks in one domain (such as climate degradation, financial instability, pandemics, energy insecurity or democratic backsliding) cascade into others through dense global interdependencies, societies are confronted with overlapping vulnerabilities that challenge traditional regulatory paradigms[4]. Indeed, competition law, like many other branches of law, is being profoundly

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[3] Edgar Morin and Anne Brigitte Kern, *Homeland Earth: A Manifesto for the New Millennium* (Sean M Kelly and Roger Lapointe trs, Hampton Press 1999) 47–74.

[4] Bishoy L Zaki, Valérie Pattyn and Ellen Wayenberg, 'Policymaking in an Age of Polycrises: Emerging Perspectives' (2024) 7 Policy Design and Practice 377 <https://doi.org/10.1080/25741292.2024.2432048>.

affected by the polycrises facing human societies across the globe.[5] And unlike past crises that have affected competition law (crises which were mainly analysed from an economic perspective) the main driving force behind the current polycrisis is the impact of human economic activities on global ecological balances.[6] In a sense, competition law too finds itself at the heart of this crisis. Thus, the polycrisis in itself justifies a renewed discussion[7], in the light of legal theory, of the raison d'être of competition law in society and, on this basis, a contribution to the normative horizon that this branch of law might embrace.

Before analysing, in the first part, the functions, objectives and uses of law, and then, in the second part, applying this analysis to competition law, and, in the third part, reorienting competition law in light of the current polycrisis, it seems appropriate to conclude this introduction with a few words on, on the one hand, the definition of law as an institution by researchers in the humanities and social sciences and, on the other hand, the presentation of

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[5] Bruce Wardhaugh, *Competition Law in Crisis: The Antitrust Response to Economic Shocks* (1st edn, Cambridge University Press 2022) <https://doi.org/10.1017/9781108987707> accessed 24 June 2026; Ioannis Lianos, '"Polycrisis" and the Changing "Life" of Competition Authorities' *Wirtschaft und Wettbewerb* (2 February 2024) 61.

[6] Andreas Malm, *Fossil Capital: The Rise of Steam-Power and the Roots of Global Warming* (Verso 2016); Christophe Bonneuil and Jean-Baptiste Fressoz, *The Shock of the Anthropocene: The Earth, History and Us* (David Fernbach tr, Verso 2017).

[7] Marek Martyniszyn, 'Competition Law and Policy in Crisis and the Rise of the Expansive State' [2025] Journal of Antitrust Enforcement jnaf020 <https://doi.org/10.1093/jaenfo/jnaf020>.

dialogical reasoning through the explanation of the relationship between competition and competition law.[8]

The law is a secondary institution[9], that is to say, a supplement that redoubles and exceeds reality.[10] The secondary nature of law proves to be creative because, by distancing itself from reality, it acts in turn upon it to liberate possibilities.[11] Thus, competition should not be confused with competition law. The first refers, in the context of natural sciences, to the struggle for existence that living beings engage in. The second refers, in the context of legal sciences, to regulations aimed at ensuring free competition within and between markets where economic actors compete with each other to attract customers.

It is nevertheless possible to explain the link between competition and competition law using dialogical reasoning.[12] Competition and competition law are related in a complementary, competitive and antagonistic manner. Complementary because the struggle for existence waged by living beings is prolonged in society by the rivalry between economic actors in the markets.

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[8] This reasoning will subsequently be applied to examine the relationships between the functions, objectives and uses of law in general and competition law in particular.

[9] Paul Bohannan, 'The Differing Realms of the Law' (1965) 67 American Anthropologist 33.

[10] Ost (n 1) 123–136.

[11] ibid 131.

[12] Edgar Morin, 'Method. 1: The Nature of Nature / Transl. and Introd. by J. L. Roland Bélanger' (Lang 1992) 77-78. Dialogic refers to the complementary, competing, and antagonistic connection and interaction between two elements. Unlike dialectics, where contradictions are resolved in a higher unity, dialogic accepts the contradictions that remain within a complex unity.

Competitive because this struggle for existence is limited by the rules governing free competition in the markets: it is no longer a fight to the death for individuals living in society. Antagonistic because the rules governing free competition in the markets suppress some of the emotions that grip individuals struggling for existence in nature: with few exceptions, individuals participating in economic competition do not kill each other.

Therefore, the logic of natural competition explains, only in part, the logic that operates within competition law. Furthermore, the redoubling and exceeding of natural competition by competition law allows legal actors (in this case, economic actors) to free themselves from the constraints of reality (the struggle for existence) and explore multiple possible worlds (in this case, markets). Finally, free competition, being a secondary reality, nonetheless operates at the heart of the natural, social, economic, cultural, etc. reality, while liberating its potentialities.[13] By its very nature, this legal framework establishes a new reality for economic actors. The task now is to identify some of these characteristics by looking at the functions[14], objectives[15] and uses[16] of competition law. To do this, we should begin our work with a summary of François Ost's theory of law, which, in an original way, characterises the phenomenon of law through its functions, objectives and uses in society.

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[13] Ost (n 1) 192–193.

[14] The function is defined, on the one hand, as the specific activity assigned to an element of a set or to the set itself and, on the other hand, as the specific role played by an element within a set whose parts are interdependent.

[15] The objective is defined as the determined goal of an action.

[16] Usage is defined as the established practice specific to an individual or group.

ii. FUNCTIONS, OBJECTIVES AND USES OF LAW

Among the many legal theorists, I have chosen to focus on the work of François Ost for several reasons. Firstly, in his book he tackles a question that few theorists address: what is the purpose of law?[17] In other words, what are the functions of legal systems in human societies and what specific objectives do they pursue in relation to other social subsystems? Classical theorists such as Hans Kelsen[18], Herbert Hart[19] and Joseph Raz[20] are more concerned with the nature and structure of law than with the role this system plays and the objectives it pursues within societies. As François Ost himself observes, these theorists leave "the question of functions and uses to the social sciences, and that of purposes to philosophers."[21]

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[17] Ost (n 1) 18.

[18] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Repr, The Lawbook Exchange, LTD 2009).

[19] Herbert Lionel Adolphus Hart and Leslie Green, *The Concept of Law* (3rd edition, Oxford University Press 2012).

[20] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Repr, Clarendon Press 1978).

[21] Thus, for Kelsen, law is a system of coercion capable of serving the most diverse ends. Ost (n 1) 18 (free translation).

However, other legal theorists have addressed the issues of the functions, objectives and uses of law, such as Nicolas Bobbio[22], Niklas Luhmann[23], Vincenzo Ferrari[24], Alain Supiot[25] and Pierre Noreau[26]. François Ost's study is, however, the most recent and comprehensive, as it addresses the functions, objectives and uses of law collectively rather than separately, as his predecessors did. In this respect, it best aligns with our aim of exploring, in the light of the 'polycrisis', the raison d'être of competition law based on a robust and well-established theory.[27]

a. Functions of law: to bind, to limit, to measure[28]

[22] Norberto Bobbio, *De la structure à la fonction: nouveaux essais de théorie du droit* (David Soldini tr, Dalloz 2012).

[23] Niklas Luhmann, *A Sociological Theory of Law* (Routledge & Paul 1985).

[24] Vincenzo Ferrari, *Funzioni del diritto: saggio critico-ricostruttivo* (Laterza 1989).

[25] Alain Supiot, *Homo juridicus: essai sur la fonction anthropologique du droit* (Éd du Seuil 2009).

[26] Pierre Noreau (ed), *Le droit à tout faire: explorations des fonctions contemporaines du droit = All purpose law* (Éd Thémis 2008).

[27] It should be noted, however, that this theory is regarded as a major one within the European scientific community, particularly in the French-speaking world. It is less well known to English-speaking readers. Let us hope that this article will serve as a modest introduction to the author's thinking in the English-speaking world.

[28] Ost (n 1) 240–245.

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The law *weaves* together the legal relationships between social actors within a society. Thus, for example, at the outset, it authenticates individuals' lineages and establishes the structures of social life. Along the way, it builds legal relationships between actors and/or institutions. In times of disintegration, it ensures the continuity of social life by ultimately reconnecting and linking actors and/or institutions. The law sets the limits within which social interaction is to take place. Thus, for example, it orders fundamental prohibitions and, with the help of its definitions and qualifications, regulates the exercise by individuals of their freedoms and capacity, and by public authorities of their power and competences. By weaving together the legal relationships between actors and institutions and limiting the actions of the former and the exercise of power by the latter, the law *provides a measure* of society. By building relevant social ties, selecting desirable behaviours and prohibiting reprehensible ones, the law is understood as the benchmark instrument that inspires and guides individual and collective action. After establishing, in an abstract and synthetic manner, the functions of law, it is necessary to examine the objectives that these functions serve and then the ways in which actors use the law.

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b. Objectives of the law

Intrinsically, the purpose of law is to define a general social equilibrium that is effective through regulated constraints that generate trust, while ensuring that this equilibrium is regularly challenged; extrinsically, its purpose is to pursue more general aims such as justice, democracy, etc..[29] The first intrinsic purpose of law is *to define a general social balance that is operational in nature*, i.e., on the one hand, to weigh up the interests and values of actors and/or institutions and, on the other, to arbitrate social conflicts using impartial instruments. The concept of

[29] ibid 329 and following.

general social equilibrium is complex to grasp.[30] It essentially means that the law aims to achieve a general compromise between the various interests and values of social actors. This equilibrium is not harmonious, but unstable and dynamic. Indeed, it very often arises from conflict between social actors (including legal professionals[31]) and the legal claims they assert against one another. Thus, whilst each branch of law fulfils its own specific functions (environmental law aims to protect the environment, competition law aims to ensure the competitive functioning of markets), the legal system ensures the resolution of conflicts both within and between these different branches through the balancing of interests and values. In other words, the law is a 'secondary' sphere of mediation which mirrors social subsystems and resolves conflicts within them (by applying their specific rules) and between these subsystems, by prioritising and balancing the various specific rules.

The second intrinsic purpose of law is *to impose* itself on actors through regulated constraints that generate trust, i.e., on the one hand, to instil fear of coercive action in legal subjects and, on the other hand, to generate adherence to established norms among those same legal subjects.

The third intrinsic purpose of law is *to regularly challenge* the general social balance, i.e. to restart the social game using its specific instruments such as legal action, constitutionality and conventionality checks, reversals of case law, doctrinal controversies, but also parliamentary debates and petitions.

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[30] ibid 355–414.

[31] Yves Dezalay and Mikael Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 Annual Review of Law and Social Science 433, 814–828 <https://doi.org/10.1146/annurev-lawsocsci-102811-173817>.

Extrinsically, the law may strive to achieve supreme aims that are external to it and over which it has no monopoly.[32] For François Ost, human institutions, justice and democracy are the three supreme goals, characteristic of Western societies, which are pursued by the law. For Friedrich Hayek, achieving maximum compatibility between the personal initiatives of different social actors is the ultimate goal of law[33]. Thus, the purposes extrinsic to the law vary over time and space. They result from the social game itself: a predominantly liberal society will favour one goal over another; similarly, a socialist society will prefer one aim over another; an ecological society will also prioritise one end over others, and so on. In contemporary societies, however, the goal of economic growth appears to be the most widespread 'paradigmatic' cross-cutting objective, shared by political and ideological systems that are otherwise divergent, to the extent that it has been described as a central organising principle of modern public policy and global governance.[34]

c. Uses of law

The law is mobilised by social actors according to their interests and in accordance with the expected purposes of the law, but also by circumventing or overturning these purposes. Thus, when viewed from a sociological perspective, the legal system appears as a set of resources (institutions, norms, actors, etc.) that can be mobilised by social actors when they defend their

[32] Ost (n 1) 95–103.

[33] Friedrich A von Hayek, *The Mirage of Social Justice* (University of Chicago Press 1976) 132.

[34] Matthias Schmelzer, 'The Growth Paradigm: History, Hegemony, and the Contested Making of Economic Growthmanship' (2015) 118 Ecological Economics 262 <https://doi.org/10.1016/j.ecolecon.2015.07.029>.

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interests in a more or less strategic manner. For example, individuals may invoke the law to defend their interests *in accordance* with the current legal system in force, including its intrinsic and extrinsic purposes. Similarly, they may defend a collective interest, including their individual interest, in accordance with the legal system in force (class action). Inversely, individuals can further their interests by strategically circumventing the legal system in force: they can abuse their rights (anti-social use of the law), grant themselves privileges (opportunistic use of the law) or even corrupt public authorities (malicious use of the law). Differently, social actors can achieve their interests by circumventing, more or less voluntarily, the legal system in force: they can develop norms and/or institutions that are alternative to the legal system in force, such as infralegal norms (customs and practices not recognised by the legal system in force), paralegal norms (norms that are contrary to the existing legal system but effective and legitimate from the point of view of the actors who apply them within that same legal system), and supralegal norms (norms that bypass existing legal systems (law and forum shopping)). All of this also applies to public authorities when they pursue the public interest through the exercise of their powers.

d. Differences between the functions, objectives and uses of law

A first difference must be noted between function and objective. Function always forms part of an instrumental relationship. The question is whether the function is relevant to the objective. In more general terms, it is a question of whether the means are appropriate to the end. On the other hand, the objective is justified in itself. It is intrinsically desirable. A second difference must be noted between function, purpose and use. While function is part of an instrumental relationship and objective is justified in itself, the use of law is revealed through the concrete practice of legal actors. Thus, the law proves to be both a binding order for subjects *of law* (function of the law pursuing certain objectives) and an emancipatory order for *subjects* of law

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who contribute to the evolution of the legal system according to their interests (use of the law with or without regard for the functions and/or objectives of the law).

e. Dialogic relationship between the functions, objectives and uses of law

The functions, objectives and uses of law maintain a dialogical relationship of complementarity, competition and antagonism. Complementary to one another, the specific functions of law – to bind, to limit, to measure – contribute to the intrinsic[35] and extrinsic[36] objectives of law. In this situation, observed legal practices confirm this complementarity. Competing with each other, the specific functions of law encroach upon and parasitise its intrinsic and/or extrinsic objectives: in this situation, by becoming absolute and rigidifying social interaction, law restricts the use that can be made of it by social actors. Similarly, and conversely, intrinsic and/or extrinsic objectives that parasitise and encroach upon the proper functions of the law lead to a situation where society breaks down and actors exploit the legal system in force abusively, opportunistically and/or maliciously. Antagonistic, the specific functions of law oppose its intrinsic and/or extrinsic objectives: in this situation, law, having become absolute, suppresses social interaction and transforms social actors into automatons who mechanically, automatically and blindly apply legal norms until the legal system collapses. Similarly, but conversely, intrinsic and/or extrinsic objectives that conflict with the proper functions of law generate disorder and chaos: by no longer making use of the law, social actors seriously undermine social peace.

iii. FUNCTIONS, OBJECTIVES AND USES OF COMPETITION LAW

[35] General social balance, regulated constraints and trust generated.

[36] Democracy, justice, etc.

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a. Functions of competition law: to bind, to limit, to measure

Competition law regulates the relationships that operators establish in the markets. As a matter of principle, and in accordance with freedom of enterprise, it allows players to freely enter into business and economic relationships, whether local or remote, in the short, medium or long term. This essential function concerns all types of economic relationships: simple events (such as a business dinner) and the most complex contractual arrangements (such as the merger of several companies).

This first point, which seems obvious, is rarely mentioned in legal doctrine. For example, Frank H. Easterbrook points out that a competitive market "is not necessarily the one with the most rivalry moment-to-moment. {…} Every market entails substantial cooperation over some domain in order to facilitate competition elsewhere. Every firm has webs of internal cooperation. Exxon entails far more coordination than the average cartel. Every joint venture, every partnership, indeed every contract creates cooperation among people who might otherwise be rivals. Markets themselves are organized."[37]

This point can also be illustrated by competition cases in the agricultural sector. In the case of *Milk Producers Ass'n v. United States*, the US Supreme Court recognised that farmers could legitimately cooperate within marketing co-operatives, whilst holding that such coordination became unlawful when it served to monopolise markets.[38] Similarly, in the *French endive case* before the Court of Justice of the European Union, the Court recognised that producer organisations inherently rely on coordination to stabilise agricultural markets, but limited such cooperation to what is strictly necessary within the framework of the Common Agricultural

[37] Frank H Easterbrook, 'The Limits of Antitrust' (1984) 63 Texas Law Review 1, 1.

[38] *Maryland and Virginia Milk Producers Ass'n, Inc. v United States* 362 US 458 (1960).

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Policy.[39] These cases confirm that competition law does not prohibit cooperation as such: rather, it structures markets by organising the relationships between economic operators.

Competition law imposes limits on the behaviour of market operators. It prohibits certain types of relationship (sections 1 and 3 of the Sherman Anti-Trust Act; Article 101 of the Treaty on the Functioning of the European Union (TFEU); etc.) and certain types of behaviour (section 2 of the Sherman Anti-Trust Act; Article 102 of the TFEU; etc.). In other words, it regulates, through the technique of prohibition, the behaviour and type of relationships that market players can form or adopt.

This prohibitive effect is illustrated by landmark case law on both sides of the Atlantic. In the United States, the Supreme Court ruled that agreements aimed at fixing prices are unlawful per se, regardless of their justification or effects, thereby ruling out certain forms of coordination outright.[40] Similarly, in the European Union, the Court of Justice clarified that certain types of agreements may be prohibited by their very nature under Article 101 of the TFEU.[41] These cases confirm that competition law functions, amongst other things, as a system of prohibitions which determines which forms of economic relations are legally unacceptable.

For some legal experts, such as David Gerber, this function lies at the heart of competition law, which he defines as follows: "a general domain of law whose object is to deter private restraints on competitive conduct."[42] Nevertheless, in keeping with Edgar Morin's complex thinking, it

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[39] Case C-671/15 *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others* EU:C:2017:860

[40] *United States v Socony-Vacuum Oil Co* 310 US 150 (1940)

[41] Case C-67/13 P *Groupement des cartes bancaires (CB) v European Commission* EU:C:2014:2204.

[42] David J Gerber, *Competition Law and Antitrust: A Global Guide* (Oxford University Press 2020) 14.

should be added that this is one of the three functions of competition law. Each of these functions is important. They complement each other.

The final function of competition law is that it provides a measure of the market economy. By promoting relevant economic relationships, selecting desirable behaviours and prohibiting undesirable ones, competition law inspires and guides individual and collective economic action. This function, which builds on the previous two, is important because it appears to be an emerging and dynamic function. Its status is not fixed. It evolves in line with market transformations, particularly changes in economic power relations, as well as the social and environmental expectations of citizens and the political demands of social actors.

From a different conceptual perspective,[43] this function can also be described as a market-structuring function: a significant body of literature[44] emphasises that competition law does not merely regulate markets, but actively contributes to shaping their architecture, the distribution of power within them and the forms of coordination between economic actors (for example,

[43] Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First Century Capitalist Societies* (2. print., and 1. paperback print, Princeton Univ Press 2002).

[44] Eleanor M Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46 Legal Issues of Economic Integration 317 <https://doi.org/10.54648/LEIE2019020>; Herbert Hovenkamp, 'Antitrust and Platform Monopoly' 130 *The Yale Law Journal* (29 June 2021) 1952; Ioannis Lianos, 'The Social Texture and Structure of Competition: Implications for Competition Law' [2025] SSRN Electronic Journal <https://doi.org/10.2139/ssrn.5073143> accessed 25 June 2026.

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through merger control, rules on abuses of a dominant position or the design of remedial measures).[45]

Giuliano Amato has clearly demonstrated how competition law has evolved over time: while he notes that antitrust remains a vital tool for preventing the emergence of uncontrolled private powers, he observes that this area remains caught in an unstable balance between economic efficiency, market justice and democratic vigilance.[46] This structural tension is clearly illustrated in certain high-profile cases such as *United States v Microsoft Corp*.[47] Whilst Microsoft argued that the integration of its browser into its operating system reflected an innovation aimed at improving efficiency, the courts held that such practices constituted an

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[45] In this sense, the idea of "structure" can be understood as an operational and sector-specific translation of the broader notion of "measure" developed by François Ost. Ost (n 1) 240–246 Law does not simply reflect social relations; it reconfigures them through a double operation. At a general level, it "measures" the social world by selecting acceptable behaviours, defining prohibitions and organising relevant relationships – a process akin to setting the overall proportions of social interaction. At a particular level, it measures individual situations against these general standards, not mechanically but through contextualised judgment. Through this articulation between general structuring and case-by-case calibration, law places social relations within a framework of commensurability, balance and symbolic ordering.

[46] Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart 1997) 95–108.

[47] *United States v Microsoft Corp* 253 F3d 34 (DC Cir 2001)

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abuse of a dominant position intended to exclude competitors.[48] However, the final decision not to impose the break-up initially envisaged, in favour of a more moderate settlement, reveals the precarious balance highlighted by Amato: competition law aims simultaneously to preserve economic efficiency, to ensure a fair competitive process and to prevent the consolidation of excessive private power. The decision not to impose the break-up thus demonstrates the importance, at that time, of prioritising economic efficiency over other considerations.

For Sanjukta Paul, this is the central function of competition law. The author thus considers that the "central function of antitrust law is to allocate economic coordination rights. This means that private decisions to engage in economic coordination are always subject to public approval, which antitrust law grants either expressly or tacitly. Currently, its methods for accomplishing this function have the effect of anointing control and concentrated power as the preferred form of economic coordination, and to frown upon forms of economic coordination in which power and decisionmaking are more broadly dispersed."[49] A similar line of reasoning can be observed in European competition law, as illustrated by the *Wouters*'s case.[50] In that case, the rules

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[48] Microsoft was, in principle, allowed to bundle its Internet Explorer (IE) web browser with its Windows operating system as part of product integration and innovation. However, the courts found that Microsoft had gone beyond legitimate integration by using this capability as a strategic tool to exclude competitors, notably Netscape, through restrictive agreements and technical practices. While bundling as such was not automatically unlawful, it became problematic where it contributed to the maintenance of monopoly power.

[49] Sanjukta Paul, 'Antitrust as Allocator of Coordination Rights' (2020) 67 UCLA Law Review 378, 380.

[50] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98.

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adopted by the Dutch Bar Association prohibited partnerships between lawyers and chartered accountants, thereby restricting certain forms of cooperation between professionals. Whilst such a practice would normally infringe Article 101(1) of the TFEU, the Court of Justice held that, having regard to the proper functioning of the legal profession, this restriction might nevertheless fall outside the scope of that article. This case demonstrates that coordination between market participants is not simply prohibited or permitted, but is subject to a legal assessment process that determines its legitimacy. In this sense, competition law acts as a body for allocating coordination rights, since it decides which forms of cooperation are permitted in light of broader institutional objectives. This also illustrates the structural bias identified by Paul, in that certain forms of coordinated activity, when they fall within recognised institutional frameworks and are linked to a professional or organisational authority, are more readily accepted than more decentralised or purely horizontal forms of coordination.

To resume, competition law enables market relationships, restricts harmful conduct, and guides the organisation of the market economy, with these three functions working together in a complementary and mutually reinforcing way.

b. Objectives of competition law

i. Intrinsic objectives

Intrinsically, competition law contributes to the operationalisation of general social equilibrium by regulating the market economy, in particular by regulating the behaviour and relationships of economic actors in the markets, as well as the structure of those markets. In this respect, it can be said, in substance, that competition law aims at preserving the competitive process

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between market actors.[51] In a call to redefine antitrust's goals[52], Tim Wu argues that the consumer welfare standard is both historically unsupported and practically dysfunctional. Rather than focusing narrowly on prices, courts should return to the classic standard articulated by Louis Brandeis: whether the conduct in question promotes competition or tends to suppress or destroy it. This standard, rooted in process rather than quantitative welfare metrics, aligns far more closely with US legislative intent and with antitrust's democratic function. For Oles Andriychuk, this intrinsic objective must even be understood in stronger terms: the competitive process is not merely an instrument for achieving extrinsic objectives, but constitutes an autonomous normative value, so that the preservation of competition can itself be analysed as a fully-fledged intrinsic objective of competition law.[53] It is precisely through the regulation of this competitive process that public authorities structure markets, organise the behaviour and relationships of market participants and, more broadly, regulate the functioning of the market economy, alongside other legal instruments, thereby contributing, from this specific field of law, to the operationalisation of general social equilibrium.

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[51] Eleanor M Fox, 'Response to Professor Jonathan B. Baker On The Competitive Process Goal' [2022] Network Law Review; Contra Jonathan B Baker, 'A Competitive Process Goal Won't Strengthen Antitrust Antitrust Law, Guests' (2022) 2022 Network Law Review 55.

[52] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018) 135–139.

[53] Oles Andriychuk, *The Normative Foundations of European Competition Law: Assessings the Goals of Antitrust through the Lens of Legal Philosophy* (Edward Elgar Publishing 2017) 121–177.

As Martin J. Sklar points out, originally, the "great antitrust debates of the late 1890s and the early years of the twentieth century, including the measures proposed and adopted, were, in essence, debates about the role and power of the large corporations in the market and in society at large, and debates about the corresponding role and power of government in relation to the emergent corporate order."[54]

Authors such as Sanjukta Paul and Or Brook have recently revealed the importance of competition law's impact on how economic actors behave in markets, i.e. not only how they compete with each other, but also how they cooperate. Sanjukta Paul considers that public authorities, by applying competition rules, directly and indirectly, allow economic actors to coordinate with each other in the market. For the author, the "reigning antitrust paradigm authorizes large, powerful firms as the primary mechanisms of economic and market coordination, while largely undermining others: from workers' organizations to small business cooperation to democratic regulation of markets."[55] Or Brook, in conducting an in-depth study on the application of Article 101 TFEU by European public authorities, demonstrates how the latter achieve, in a more or less consistent manner, a balance between competition objectives

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[54] Martin J Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge University Press 1988) 179 <https://doi.org/10.1017/CBO9780511528781> accessed 11 February 2026.

[55] Paul (n 49) 380.

and other public objectives.[56] Under the old regime (Regulation 17/62), the Commission carried out ex ante scrutiny of all notified agreements and was able to centralise the balancing of competition and public policy objectives. This centralisation, which limited conflicts and ensured a certain degree of consistency, promoted coordination between European economic operators in line with the industrial priorities of the moment.[57]

In order to approach the quality of these behaviours and relationships in a complex manner, it is important not to reduce the actions of market players to the competitive dimension alone (from which competition law derives its name), but to add, from a dialogical perspective, the complementary and antagonistic dimensions of these actions.

Actors do not only compete in markets. They also cooperate and, sometimes, they 'kill' each other. Competition law, by regulating competition, also affects the types of complementary and antagonistic relationships between market players. In concrete terms and by way of example, this means that regulators must allow and/or authorise, where appropriate, the establishment of new economic relationships between operators (the creation, merger and acquisition of companies (Section 7 of the Clayton Act; Regulations 4064/89 and 139/2004)) as well as not applying behavioural prohibitions (rule of reason; Article 101(3) TFEU)). It is also a matter of prohibiting, a priori and on principle, the relationships and/or behaviours that are most harmful to the competitive functioning of the market economy (restrictions per se in US law; restrictions by object (101§1) and hardcore restrictions (101§3) in European Union (EU) law).

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[56] Or Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge University Press 2022) 7–12 <https://doi.org/10.1017/9781108946674> accessed 10 October 2025.

[57] ibid 57–59.

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From a broader perspective, the cumulative effect of these individual decisions leads to the gradual structuring of specific markets and, ultimately, of the market economy as a whole. Market structures do not arise out of nowhere: they are the result of a continuous accumulation of individual choices, strategic interactions and legal assessments that unfold over time and across space. In this sense, market structure reflects the accumulation of permitted, prohibited or conditional forms of coordination, competition and concentration, as 'filtered' by competition law.

In this way, competition law exerts a regulated constraint on the actions of market players. It acts as a deterrent. Similarly, and to a certain extent, this law generates confidence among market players. It is a source of predictability. Louis Brandeis could not have said it better when he stated that "Regulation is essential to the preservation and development of competition, just as it is necessary to the preservation and best development of liberty. We have long curbed physically the strong, to protect those physically weaker. More recently we have extended such prohibitions to business."[58]

Finally, the interpretation and application of this law ensure, in a dynamic manner, that the economic and social balances underlying the actions of market players are regularly challenged. By distancing itself from the natural economic game, competition law acts upon it to unlock possibilities. Either it allows market players to return to the *status quo ante*, or it leads them towards new horizons. Such horizons, which complexify the prospects for market activity, are outlined by public authorities, particularly when they enforce competition law.

Tim Wu, in proposing his neo-Brandesian agenda, thus recalls the usefulness of structural remedies specific to competition law, such as breakups, to revitalise an economic sector:

[58] Louis D Brandeis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (Osmond K Fraenkel ed, The Viking Press 1934) 104.

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"Breakups and the blocking of mergers (also known as "structural relief") are at the historic core of the antitrust program, and should not be shied away from unduly. Breakups, done right, have clear effects. They can completely realign an industry's incentives, and can, at their best, transform a stagnant industry into a dynamic one."[59]

Competition law thus pursues the intrinsic (and substantive) objective of protecting the competitive process, through which it regulates individual behaviour and the relationships between economic actors, while more generally shaping the structure of markets; in doing so, it contributes, like any branch of law, to defining a broader social equilibrium governing the functioning of the market, exercising a constraint that generates both trust and discipline, yet remains constantly open to reassessment and transformation.

ii. Extrinsic objectives

Extrinsically, competition law may strive to achieve certain overarching goals over which it does not have a monopoly. These aims, and the objectives that form the necessary steps to achieve them, are decided individually, collectively and publicly by the members of a society. For example, the supreme purpose of American society is 'to form a more perfect Union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.'[60] Similarly, European society, through the voice of the EU, has as its ultimate goal 'to promote peace, its values and the well-being of its peoples', in particular its 'values of respect for human dignity,

[59] Wu (n 52) 132.

[60] Preamble to the United States Constitution.

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freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[61]

Based on these values and overarching aims – the vagueness of whose definitions ensures that they are open to broad and dynamic interpretation (philosophical, political, legal, etc.) capable of adapting to changes in society[62] – social actors pursue more concrete objectives within their respective social spheres, drawing in particular on the decisions of policymakers. In the economic sphere, social actors pursue a wide range of objectives, both individually and collectively. At an individual level, the pursuit of profit[63], recognition[64], cooperation or mutual

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[61] Articles 2 and 3 of the Treaty on European Union.

[62] Timothy Endicott, 'Vagueness and Law' in Giuseppina Ronzitti (ed), *Vagueness: A Guide* (Springer Netherlands 2011) <https://doi.org/10.1007/978-94-007-0375-9_7> accessed 1 July 2026; Andrei Marmor, Scott Soames and Joanne Scott (eds), 'The Value of Vagueness' *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) <https://doi.org/10.1093/acprof:oso/9780199572380.001.0001> accessed 7 January 2026.

[63] Milton Friedman, *Essays in Positive Economics* (Nachdr, Univ of Chicago Press 2001) 3–43.

[64] Richard Swedberg, 'The Economic Sociologies of Pierre Bourdieu' (2011) 5 Cultural Sociology 67 <https://doi.org/10.1177/1749975510389712>.

support[65] are considered legitimate. At a collective level, growth[66], (consumer) welfare[67], or solidarity[68] are equally justified. From an analytical perspective, these extrinsic objectives lie outside the scope of the law, since the law does not have a monopoly over them.[69] Thus, both the law and politics pursue these objectives using the tools and instruments at their disposal. Furthermore, several areas of law (and politics) may pursue the same objective. For example, consumer welfare is pursued by both competition law and consumer law. The same applies to other collective objectives (growth, solidarity), which are not monopolised by any particular branch of law. The same applies, moreover, to individual objectives which, in order to be achieved by individuals, require the application of numerous branches of law (e.g. profit requires property law, contract law, company law, etc.).

Using François Ost's analytical and conceptual framework therefore allows us to put the debate on the objective(s) of competition law into perspective.[70] Indeed, either one considers that the concept of competition is sufficiently broad to include, for example, consumer welfare or the

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[65] Johnston Birchall, *People-Centred Businesses: Co-Operatives, Mutuals and the Idea of Membership* (Palgrave Macmillan 2011) <https://doi.org/10.1057/9780230295292>.

[66] Schmelzer (n 34).

[67] Roger Backhouse, Tamotsu Nishizawa and Antoinette Baujard (eds), *Welfare Theory, Public Action, and Ethical Values: Revisiting the History of Welfare Economics* (Cambridge University Press 2021) <https://doi.org/10.1017/9781108882507>.

[68] Jean-Louis Laville, *The Solidarity Economy* (University of Minnesota Press 2023).

[69] Ost (n 1) 95 and following.

[70] Fox, 'Against Goals' (n 2).

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protection of competitors, in which case this analysis will still need to link the tools of this law (general social equilibrium, constraint, challenge) with one or more of these objectives; or, as is the case here, one may choose to analyse the specific objective of competition law and then articulate it to other, more general objectives (such as consumer welfare or the protection of competitors). The process is the same. However, the second option, which is more rigorous from an analytical perspective, also provides greater clarity regarding the values, interests and intentions held by the author. It avoids reducing a specific objective to the meaning of a broader concept and thereby obscuring the author's position. Furthermore, this analytical framework may prove useful to public authorities (including policymakers) seeking to justify the application and interpretation of competition law. As in all branches of law, it is legitimate to pursue specific economic, social, and ecological objectives within a broader horizon of overarching aims and shared values.

This perspective finds strong support in Stavros Makris's analysis of competition law as a form of "responsive law".[71] Indeed, Stavros Makris demonstrates that the persistent disagreements surrounding the objectives of competition law are not pathologies to be eliminated, but structural features stemming from the law's intrinsically open and purposive character. In this sense, competition law cannot be reduced to a closed system organised around a single, all-encompassing objective; rather, it operates within a broader normative environment in which multiple values, interests and policy considerations coexist and interact. This confirms the relevance of distinguishing analytically between the specific objective of competition law and the wider set of extrinsic objectives it may contribute to, since the openness of the legal system

[71] Stavros Makris, 'Openness and Integrity in Antitrust' (2021) 17 Journal of Competition Law & Economics 1, 35 and following <https://doi.org/10.1093/joclec/nhaa018>.

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necessarily entails that legal reasoning involves value judgments and trade-offs that must be made explicit.

To resume, the objectives of competition law are, intrinsically, to regulate the market economy by structuring the behaviours and relationships of economic actors, and extrinsically, to pursue broader societal goals that complement but exceed the competitive process itself. In doing so, competition law contributes to the operationalisation of general social equilibrium.

iii. Tension between intrinsic and extrinsic objectives of competition law

Whilst a distinction can be drawn between the intrinsic objective of competition law and its extrinsic objectives, this distinction immediately gives rise to a tension that must be addressed rather than dissolved. Competition law is never applied in a normative vacuum: its internal objective of preserving the competitive process must constantly be confronted with the broader economic, social and ecological objectives that public authorities seek to pursue through, alongside, or sometimes despite competition law.[72] This tension can be partly resolved by answering this question: how can the process of competition (that is, the competitive functioning of markets) best serve broader societal objectives? History shows that there have been several answers to this question.

In the United States, this articulation has historically taken different forms. The Brandeisian tradition conceived antitrust as a constitutional and political tool for preventing excessive concentrations of private economic power: in this view, the intrinsic objective of antitrust was closely connected to extrinsic objectives such as democracy, liberty, fairness and the prevention

[72] Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 University of Pennsylvania Law Review 1051 <https://doi.org/10.2307/3311791>.

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of domination.[73] The Chicago School profoundly transformed this articulation from the 1970s onwards: it sought to make antitrust more "scientific" by reducing its objectives to economic efficiency and, more specifically, to consumer welfare.[74] Drawing on more sophisticated industrial organisation theory, game theory and models of strategic behaviour, Post-Chicago scholars showed that practices previously treated as benign (such as tying, exclusive dealing, predatory pricing, raising rivals' costs or certain vertical restraints) may, under particular market conditions, produce exclusionary effects and durable market power: in this sense, the Post-Chicago School broadened the internal understanding of competitive harm without fully reopening competition law to the wider political and democratic objectives emphasised by the Brandeisian tradition.[75] The recent neo-Brandeisian revival in the United States reopens this settlement. Authors argue that the consumer welfare standard is too narrow to capture the full social and political harms produced by concentrated private power, especially in digital markets, labour markets and platform economies: they therefore seek to reconnect the intrinsic objective of antitrust with broader extrinsic objectives such as democracy, equality, labour protection, innovation and resilience.[76]

A similar, though distinct, movement can be observed in European Union competition law. Its foundations were shaped by the project of market integration and, in part, by ordoliberal

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[73] Wu (n 52) 14–23.

[74] Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008) 3–6.

[75] Christopher S Yoo, 'THE POST-CHICAGO ANTITRUST REVOLUTION: A RETROSPECTIVE' (2020) 168 University of Pennsylvania Law Review 2145.

[76] Khan (n 2).

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concerns with maintaining an economic order in which private power remains legally constrained.[77] The competitive process was therefore linked from the outset to broader institutional objectives of the Union, notably the construction of the internal market. In *Établissements Consten*, the Court thus judged that "what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States *in a manner which might harm the attainment of the objectives of a single market between State*".[78] More recently, debates on digital markets[79],

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[77] David Gerber, *Law and Competition in Twentieth-Century Europe* (Oxford University Press 2001) 334–391 <https://doi.org/10.1093/acprof:oso/9780199244010.001.0001> accessed 29 June 2026.

[78] Case 56/64 and 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission, ECLI:EU:C:1966:41, p.341,

[79] Oles Andriychuk, 'EU Digital Competition Law: The Socio-Legal Foundations' (2023) 25 Cambridge Yearbook of European Legal Studies 81 <https://doi.org/10.1017/cel.2023.12>.

fairness[80], sustainability[81] and strategic autonomy[82] have intensified the question of how competition law should contribute to wider social objectives.

These developments show that the articulation between intrinsic and extrinsic objectives never fully dissolves the tension between them. Even where external objectives are economic in nature, such as productivity, innovation or growth, they do not necessarily coincide with the internal objective of preserving the competitive process. Competition law is therefore not confronted only with a conflict between "economic" and "non-economic" values; it is also confronted with conflicts between different economic rationalities. The question is therefore not simply whether competition law should pursue external objectives, but how much competition, of what kind, and in which market structure, is considered necessary or desirable in light of the broader economic, social and ecological objectives pursued elsewhere.

In this respect, competition law protects a certain institutional form of competition, whose intensity and modalities vary according to the market concerned and the normative horizon within which public authorities operate. In some markets, public authorities may seek intense rivalry, low barriers to entry and price discipline as illustrated by liberalised air transport

[80] Marios C Iacovides and Konstantinos Stylianou, 'The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy' (2024) 3 European Law Open 587 <https://doi.org/10.1017/elo.2024.31>.

[81] Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354 <https://doi.org/10.1093/jaenfo/jnaa006>.

[82] Ioannis Lianos, 'Polycentric Competition Law : The Geo-Economic Turn' (SSRN, 2026) <https://doi.org/10.2139/ssrn.6556220> accessed 29 June 2026.

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markets.[83] In others, such as renewable energy, they may tolerate or even encourage certain forms of cooperation, concentration or coordination where these are considered necessary to generate innovation or to facilitate environmental transition for instance.[84] The internal objective of competition law is constantly adjusted through a broader judgment about the socially desirable degree of rivalry and coordination. The decisive task is therefore to identify the relevant social objectives, to establish priorities among them, and to adopt a coherent method for articulating the internal objective of competition law with the external objectives that it may be called upon to serve.[85]

c. Uses of competition law

Competition law can be mobilised in various ways by social actors according to their interests and in accordance with the intended purposes of the law, but also by circumventing or overturning those purposes.

[83] Ugo Arrigo, Massimo Beccarello and Giacomo Di Foggia, 'Strategic Response of European Airlines to Market Dynamics: A Comparative Analysis' (2023) 13 Administrative Sciences 255 <https://doi.org/10.3390/admsci13120255>.

[84] Julian Nowag and Wolf Sauter, 'Climate Change and the Energy Transition: What Role for Article 101(3) TFEU?' in Leigh Hancher and Ignacio Herrera Anchustegui (eds), *Research Handbook on EU Competition Law and the Energy Transition* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781803922591.00015> accessed 29 June 2026.

[85] This methodological exercise will be undertaken in Section 4.

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i. Public uses

Competition law must be enforced by public authorities. In principle, they must defend the public interest in accordance with current competition law, including its intrinsic and extrinsic objectives. Because competition authorities operate under limited financial, human and informational resources, they cannot investigate every possible infringement or address every market failure. Their action necessarily involves choices: which sectors to monitor, which complaints to pursue, which cases to open ex officio, which theories of harm to prioritise, which remedies to seek, and which forms of market conduct to treat as especially harmful. In this sense, public enforcement always presupposes a competition policy, understood as the strategic orientation through which public authorities translate the objectives of competition law into concrete enforcement priorities.[86] The OECD thus observes that case prioritisation and prosecutorial discretion play a fundamental role in shaping the effectiveness of competition policy, because such decisions determine which actions authorities take and reflect their broader strategy and priorities.[87] This can be observed in the Commission's own practice. The Commission's guidance on Article 102 TFEU, for instance, explicitly presents itself as a

[86] Nicolas Petit, 'How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of Their Enforcement Activities? A Multi-Jurisdictional Assessment' (2010) 1–2010 Concurrences 44; Wouter PJ Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 World Competition 353 <https://doi.org/10.54648/WOCO2011033>.

[87] OECD, 'Case Prioritisation and Prosecutorial Discretion by Competition Authorities' (333rd edn, 2026) OECD Competition Law and Policy Working Papers <https://doi.org/10.1787/0ce3398f-en> accessed 30 June 2026.

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statement of enforcement priorities, explaining how the Commission intends to prioritise exclusionary abuse cases and thereby shaping the practical application of the prohibition of abuse of dominance.[88] As Or Brook and Katalin Cseres show, the choice of which cases, sectors and practices to prioritise is not a neutral technical exercise, but a discretionary process with significant socio-economic and democratic consequences: for the authors, competition authorities therefore need to develop a responsive and accountable competition policy capable of linking enforcement priorities to broader public-interest concerns, without abandoning their legal mandate or institutional independence.[89] The "public use" of competition law therefore consists not merely in applying prohibitions, but in constructing an enforcement agenda through which the intrinsic objective of competition law and its extrinsic objectives are operationalised in practice.

Exceptionally, public authorities may support the particular interests of certain private individuals by strategically circumventing the competition law in force. A well-known illustration of this perception is the Commission's controversial decision to prohibit the *GE/Honeywell* merger.[90] Widely publicized at the time, this case became emblematic of alleged European protectionism because it stood in sharp contrast to the U.S. authorities' position: the U.S. Department of Justice had approved the deal, while the European Commission blocked it

[88] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20.

[89] Or Brook and Katalin Cseres, 'Beyond Consumer Welfare: Responsive Priority-Setting in the Public Interest in Competition Law Enforcement' [2026] Legal Studies 1 <https://doi.org/10.1017/lst.2026.10119>.

[90] Case COMP/M.2220 - General Electric/Honeywell

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on competition grounds. The decision fuelled accusations that Brussels was using merger control to shield European competitors, most notably Airbus, from the strengthened market position that the combined GE/Honeywell entity might have achieved. However, and drawing on a unique dataset of more than 5,000 merger notifications submitted to the European Commission between 1990 and 2014, Anu Bradford and her co-authors show that the Commission does not challenge mergers involving non-EU acquirers more frequently; in fact, transactions led by foreign buyers appear slightly less likely to be contested. This pattern persists even when focusing exclusively on U.S. acquirers.[91] The authors also demonstrate that the key determinants of Commission intervention lie in the value of the transaction, the degree of market concentration, and the economic structure of the operation, rather than in the nationality of the firms involved.[92]

ii. Private uses

Competition law can be mobilised by private individuals. They can defend their individual and collective interests in accordance with the current legal system in force, including its intrinsic and extrinsic purposes. Thus, individuals can report anti-competitive behaviour by several companies in the same sector to the public authorities, for example, if they collude to raise the price of a basic necessity. In this situation, individuals invoke competition law in accordance

[91] Anu Bradford, Robert J Jackson and Jonathon Zytnick, 'Is E.U. Merger Control Used for Protectionism? An Empirical Analysis' (2018) 15 Journal of Empirical Legal Studies 165 <https://doi.org/10.1111/jels.12176>.

[92] ibid.

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with its functions (restricting certain types of economic behaviour through specific prohibitions) and its intrinsic and extrinsic purposes.

The doctrine states that, whether in the United States, where private actions have long been a cornerstone of the antitrust system, or in Europe, where private enforcement, once marginal, has gradually established itself alongside public enforcement, private enforcement has now become a central component of the competition law framework, essential both for deterrence and for compensation.[93]

This centrality of private enforcement is confirmed by case law. In EU law, *Courage v Crehan* constitutes the foundational judgment: the Court of Justice held that the full effectiveness of Article 101 TFEU would be put at risk if individuals could not claim damages for loss caused by anticompetitive agreements, and expressly stated that such actions strengthen the working of EU competition rules and discourage restrictive agreements or practices.[94] This compensatory dimension was then confirmed in *Manfredi*, where the Court recognised that any individual may claim compensation for harm suffered where there is a causal link between that

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[93] Barry J Rodger, Miguel Sousa Ferro and Francisco Marcos, *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar publishing 2023) 2–27 and 52–80.

[94] Case C-453/99, *Courage v Crehan*, ECLI:EU:C:2001:465, §26: "The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."

harm and an agreement or practice prohibited by Article 101 TFEU.[95] In US law, the importance of private enforcement is illustrated by *Hanover Shoe*, where the Supreme Court allowed a direct purchaser to recover treble damages for monopolisation, rejecting the defendant's "passing-on" defence and thereby preserving strong incentives for private plaintiffs to sue.[96] The same logic appears in *Illinois Brick*, where the Supreme Court limited federal damages actions to direct purchasers partly to avoid diluting enforcement incentives and multiplying recovery problems.[97] More concretely, the *Apple e-books* litigation shows how private enforcement complements public enforcement in practice: after findings that Apple had participated in an unlawful price-fixing conspiracy, private class actions and settlements resulted in hundreds of millions of dollars being paid to consumers who had overpaid for e-books.[98]

Conversely, private individuals can further their interests by strategically circumventing the legal system in force. For example, they may abuse their right to report anti-competitive behaviour by third-party companies to the public authorities for the sole or main purpose of

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[95] Joined Cases C-295/04 to C-298/04, *Manfredi*, ECLI:EU:C:2006:461, §63: "Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm."

[96] *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 392 U.S. 481 (1968)

[97] *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977)

[98] *United States v Apple Inc.,* 791 F.3d 290 (2d Cir. 2015)

undermining the competitiveness of those companies while preserving their own profits.[99] For instance, in *Brunswick*, the Supreme Court prevented private plaintiffs from converting antitrust law into a device for protecting themselves against competition: the plaintiffs' alleged loss resulted from the continued presence of competing bowling centres on the market, whereas antitrust law protects competition, not competitors' expectation of higher profits resulting from rivals' disappearance.[100] *Cargill* similarly illustrates the judicial resistance to strategic antitrust claims by competitors: the plaintiff sought to enjoin a merger because the merged entity might lower prices and reduce its margins; the Supreme Court held that loss caused merely by increased competition is not antitrust injury.[101] Indeed, according to William Baumol and Janusz A. Ordover, antitrust law, designed to protect and promote competition, can be diverted by firms to subvert that very competition, turning it into a strategic tool for protectionism and rent-seeking.[102] Similarly, Daniel Sokol observes that firms can strategically use antitrust, both through private actions and by influencing public enforcement, to sway authorities and raise

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[99] William J Baumol and Janusz A Ordover, 'Use of Antitrust to Subvert Competition' (1985) 28 The Journal of Law and Economics 247 <https://doi.org/10.1086/467083>; Daniel Sokol, 'Strategic Use of Public and Private Litigation in Antitrust as Business Strategy' (2012) 85 Southern California Law Review 689.

[100] *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 1977

[101] *Cargill, Inc. v Monfort of Colorado, Inc.*, 479 U.S. 104, 1986

[102] Baumol and Ordover (n 103) 248–252.

the costs of their dominant rivals, thereby turning antitrust into a tool of strategic competition rather than a mechanism for protecting competition.[103]

Similarly, they may seek to change the definition, application and/or interpretation of competition rules by lobbying public authorities.[104] The OECD explains that legitimate corporate engagement provides valuable expertise to policymakers, but it becomes undue influence when it is opaque, manipulative, or disproportionately shapes policy away from the public interest.[105] Because the boundary is often blurred, the report highlights indicators, such as transparency, intent, independence, epistemic integrity, and balanced stakeholder access, to help distinguish constructive participation from influence that risks distorting competition policy.[106] Thus, in US law, *Noerr* illustrates how firms may seek to influence public authorities in order to obtain regulatory outcomes harmful to rivals: although the Supreme Court protected such petitioning activity from antitrust liability, the case shows how lobbying may be used as a strategic tool to reshape the competitive environment through public decision-making.[107] *Allied Tube* is a clearer example of the limits of legitimate participation in rule-making processes: the Supreme Court refused to protect a coordinated strategy by incumbent firms to manipulate a

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[103] Sokol (n 103) 698–707.

[104] Adrian J Vossestein, 'Corporate Efforts to Influence Public Authorities, and the EC Rules on Competition' (2000) 37 Common Market Law Review 1383 <https://doi.org/10.54648/315052>.

[105] OECD, 'Corporate Influence in Competition Policymaking' (322nd edn, 2025) OECD Competition Law and Policy Working Papers <https://doi.org/10.1787/4f19edd4-en> accessed 21 October 2025.

[106] ibid 11–14.

[107] *Eastern R. Conference v Noerr Motor Freight, Inc.*, 365 U.S. 127, 1961

private standard-setting body whose standards were routinely incorporated into public regulation, thereby preventing rivals' products from entering the market.[108] In EU law, *Bureau national interprofessionnel du cognac* illustrates how private or professional operators may seek to transform a market-restricting arrangement into a generally binding rule through public approval: the Court nevertheless held that the interprofessional agreement fixing minimum prices remained subject to Article 101 TFEU, notwithstanding its institutional setting and submission to public authorities.[109] An EU case similarly shows how a professional body may use a state-backed regulatory framework to transform a collective pricing decision into a compulsory tariff: the Court treated this as a decision by an association of undertakings whose anticompetitive effects were reinforced by national legislation.[110]

A more subtle form of influence concerns the production of academic knowledge itself. As Ioannis Lianos argues[111], competition policy is increasingly shaped by a dense ecosystem linking academic economists, forensic economic consultants, law firms, competition authorities, courts, corporations and corporate-funded research centres. The problem is not simply that firms lobby public authorities directly, but that powerful corporate actors may also seek to influence the intellectual infrastructure through which competition rules are defined, interpreted and applied. Corporate funding of academic research, expert reports, conferences, think tanks or research networks may therefore contribute to shaping the "marketplace of ideas"

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[108] *Allied Tube & Conduit Corp. v Indian Head, Inc.,* 486 U.S. 492, 1988

[109] C-123/83, *Bureau national interprofessionnel du cognac v Guy Clair*, ECLI:EU:C:1985:33.

[110] C-35/96, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1998:303

[111] Ioannis Lianos, 'Academic "Capture"? The Hidden Costs of Corporate Funding in Competition Policy Research and Proposed Remedies' (Centre for Law, Economics and Society, UCL 2024) 7/2024.

in competition economics, especially where the same experts circulate between academia, consultancy, litigation and policy advice. According to the author, this creates risks of professional and intellectual bias, reduces epistemic pluralism, and generates a broader "trust deficit" in competition policy research. In this sense, influence over competition law may operate not only through formal lobbying or manipulation of rule-making processes, but also through the strategic production and dissemination of apparently neutral expertise that affects how public authorities, judges and policymakers understand competition itself.

More recklessly, they may also circumvent competition rules to their advantage by bribing public authorities.[112] For instance, in US law, the *Caltrans* (California Department of Transportation) bid-rigging and bribery prosecutions illustrate how private operators may bypass competition rules altogether by corrupting public procurement officials: contractors submitted sham bids and paid bribes to ensure that contracts were awarded to predetermined firms, thereby replacing competitive allocation with a corrupt administrative allocation.[113] Alternatively, private individuals can pursue their interests by circumventing, more or less voluntarily, the legal system in force. As Antoine Masson points out, competition law is never neutral for the legal strategist: it functions as a double-edged sword, simultaneously imposing strict constraints on firms while offering powerful levers to shape markets, challenge or defend

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[112] OECD, *Anti-Corruption and Integrity Outlook 2024* (OECD 2024) <https://doi.org/10.1787/968587cd-en> accessed 21 October 2025.

[113] *United States v Bill R. Miller / Choon Foo "Keith" Yong / William D. Opp*, U.S. District Court, Eastern District of California, 2022 (Case 2:22)

competitive positions, and influence institutional frameworks.[114] Companies must therefore learn to wield this body of law not merely as a regulatory boundary, but as a strategic asset in its own right. They can, for example, draw up infralegal standards, such as codes of conduct, to relay the competition law in force within a particular sector.[115] In EU law, *Ordem dos Técnicos Oficiais de Contas* shows how a professional body may use internal regulatory or deontological rules to organise a market in its own favour: the Court held that mandatory training rules adopted by a professional association could fall under Article 101 TFEU where they eliminated competition in a substantial part of the relevant market and imposed discriminatory conditions on competing training providers.[116] Similarly, they can develop supra-legal standards, such as law and forum shopping strategies, in order to mobilise, in a specific time and in a specific space, the rules of competition to their advantage.[117] For instance, *Cartel Damage Claims (CDC) Hydrogen Peroxide* illustrates the supra-legal dimension of competition-law strategy in Europe: by aggregating damages claims and bringing proceedings before a selected national

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[114] Antoine Masson, 'Introduction - L'ambivalence du droit, source d'opportunités stratégiques : l'exemple du droit de la concurrence' in Hugues Bouthinon-Dumas and others, *Stratégies d'instrumentalisation juridique et concurrence* (Larcier 2013).

[115] For example, see the website of the Association of the British Pharmaceutical Industry available at https://www.abpi.org.uk/competition-law-rules-and-procedures/

[116] Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, ECLI:EU:C:2013:127

[117] Patrick Krauskopf and Andrea Tkacikova, 'Competition Law Violations and Private Enforcement: Forum Shopping Strategies' (2011) 4 Global Competition Litigation Review 26.

court against cartelists established in several Member States, the claimant used the jurisdictional architecture of EU private international law to maximise the procedural effectiveness of competition damages litigation.[118]

Thus, competition law emerges not as a neutral set of rules, but as a versatile and contested resource: one that can advance the public interest or be strategically repurposed by private and public actors, depending on how, why, and by whom it is mobilised.

d. Dialogic relationship between the functions, objectives and uses of competition law

The preceding distinction between the functions, objectives and uses of competition law remains, at this stage, primarily descriptive. The same applies to their dialogic relationship. This dialogic relationship will be described through three modalities: complementarity (i), competition (ii); and antagonism (iii).

This approach differs from, while remaining complementary to, the one developed by Ioannis Lianos in his theory of polycentric competition law.[119] The author argues that mainstream competition law remains largely trapped in a monocentric model, centred on price, output and consumer welfare within a relevant market, whereas contemporary economic power operates across multiple interconnected spheres: innovation, data, privacy, finance, politics, environmental protection and social justice. His polycentric model is particularly valuable because it offers a complex and rigorous framework for understanding how competition law affects society beyond the immediate market transaction, especially in digital and networked economies where power can be leveraged from one social sphere into another. The present

[118] C-352/13, *Cartel Damage Claims Hydrogen Peroxide SA v Akzo Nobel e.a.*, ECLI:EU:C:2015:335.

[119] Lianos, 'Polycentric Competition Law' (n 2).

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analysis pursues a different, though related, objective. Rather than starting from the polycentric nature of social and economic interactions, it reconstructs competition law through the dialogic relationship between its functions, objectives and uses. This perspective seeks to show how competition law operates as a specific social technique, how it is oriented by intrinsic and extrinsic objectives, and how it is strategically mobilised by private and public actors. It may therefore complement Lianos' polycentric approach by offering a more internal account of how the specific functions, normative aims and practical uses of competition law interact before assessing, in Part 4, how they should be articulated in a coherent prescriptive framework.

i. Complementary relationship

Complementary to one another, the specific functions of competition law – to bind, to limit, to measure – contribute to the intrinsic (regulation of the market economy through the competitive process) and extrinsic objectives (the pursuit of general objectives, including economic ones, such as fairness, freedom, sustainability, etc.) of competition law. In this situation, observed legal practices confirm this complementarity.

Thus, the approaches promoted by several authors strive, each in different ways, to align the application and interpretation of competition law with economic, social and ecological sciences by incorporating into legal reasoning not only strictly economic considerations (price, production, efficiency), but also more general economic considerations (quality of goods and services, consumer welfare, loyalty and power in economic relations, etc.) as well as social considerations (freedom, equality and solidarity among actors inside and outside the markets, democracy, respect for fundamental rights, etc.) and environmental considerations.[120]

[120] ibid; Stylianou and Iacovides (n 2).

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As Ariel Ezrachi states[121], competition law should not be understood as a pure, stable and exclusively economics-based discipline. It operates instead like a "sponge": while economic analysis functions as a membrane that limits the absorption of external values, competition law remains structurally porous to domestic political, social, institutional and economic considerations. The challenge is therefore not to deny this porosity, but to make it transparent and compatible with legal certainty, legitimacy and the rule of law. To draw on François Ost's analysis[122], competition law, like all branches of law, is a secondary reality that frees individuals (in their role as economic actors) from the constraints of reality. The fewer extrinsic objectives there are (for example, by limiting them to the sole well-being of the consumer), the more economic reality imposes itself on social actors, who are unable to inject flexibility into a system that is becoming increasingly rigid. Conversely, the more extrinsic objectives there are to pursue, the less economic reality imposes itself on social actors, who are then able to challenge the system. The contestability of markets is therefore measured by the possibility of pursuing a plurality of extrinsic objectives.

To illustrate this point, we can list, by way of example[123], the authors who advocate for a plurality of extrinsic objectives in competition law, with a view, on the one hand, to improving the way social actors utilise its functions and, on the other hand, to adapting it to the increasingly complex reality of the economic system within society and the biosphere. Drawing on unique theoretical and empirical research, these authors seek to strike an original balance between the

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[121] Ariel Ezrachi, 'Sponge' [2016] Journal of Antitrust Enforcement jnw011 <https://doi.org/10.1093/jaenfo/jnw011>.

[122] Ost (n 1) 123–136.

[123] This research is not exhaustive. See Stylianou and Iacovides (n 2) for an attempt to do so.

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functions, objectives and uses of competition law in light of the crises affecting our societies and our planet.

Several authors argue that the plurality of extrinsic goals is a good in itself. For instance, Maurice Stucke[124] argues that the pursuit of a single economic objective has impoverished US antitrust law by marginalising its political, social and moral dimensions. According to him, consumer welfare, efficiency, economic freedom and the protection of the competitive process cannot be collapsed into one unified goal. Antitrust law should instead acknowledge and integrate its multiple policy objectives through a blended framework capable of restoring its broader social relevance. This pluralist view has a strong pedigree in US antitrust scholarship. Robert Pitofsky[125] famously argued that excluding political values from antitrust interpretation would be bad history, bad policy and bad law. Although economic considerations should remain paramount, antitrust also embodies political values: preventing excessive concentrations of economic power, preserving individual and business freedom, and avoiding the need for more intrusive state control over a highly concentrated economy. Similarly, Anna Gerbrandy[126] argues that nothing in the EU constitutional framework requires competition law to be confined to consumer welfare and economic efficiency. As part of the European economic constitution, competition law should be recalibrated in light of the EU's commitment to a social market economy, so that it can meaningfully engage with non-market concerns such as sustainability,

[124] Maurice E Stucke, 'Reconsidering Antitrust's Goals' (2012) 53 Boston College Law Review 551.

[125] Pitofsky (n 75).

[126] Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 JCMS: Journal of Common Market Studies 127 <https://doi.org/10.1111/jcms.12814>.

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solidarity, vulnerable workers, fundamental rights and democratic risks linked to platform power.

Other authors, whilst acknowledging the diversity of competition law's extrinsic objectives, advocate a more targeted approach to these objectives in light of certain contemporary crises which they consider important for competition law to address using its instruments. This is the case, for example, with the equality crisis. Ioannis Lianos[127] provides a prominent example of this targeted approach. He argues that competition law should respond to the equality crisis by being understood not only as an instrument of economic efficiency, but also as a form of social regulation. In his view, rising market concentration, labour-market power, digital platforms and financialised capitalism may generate structural inequalities that cannot be adequately addressed by taxation or welfare policy alone. Competition law should therefore engage with fairness, equality of opportunity and "complex equality", by preventing economic power from being converted into political, cultural or social domination, while still remaining attentive to the limits and specific institutional function of competition law.[128]

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[127] Ioannis Lianos, 'Competition Law as a Form of Social Regulation' (2020) 65 The Antitrust Bulletin 3 <https://doi.org/10.1177/0003603X19898626>.

[128] This position is also held in the US. See, for example, Lina Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harvard Law & Policy Review 235; Marshall Steinbaum, 'ANTITRUST, THE GIG ECONOMY, AND LABOR MARKET POWER' (2019) 82 Law and Contemporary Problems 45.

This is also the case with the domination crisis. Elias Deutscher[129] provides a closely related account by unpacking the so-called competition-democracy nexus through the lens of republican liberty. He argues that competition law's democratic function cannot be adequately explained only by the risk that large firms capture political institutions, nor by the conventional liberal idea that markets protect freedom from interference. Rather, the deeper concern lies in domination: concentrated economic power may place market participants, citizens and democratic institutions in a position of dependence on private actors capable of arbitrary interference. From this perspective, competition law can operate as an institution of "antipower", preserving polycentric and contestable markets in order to reduce economic domination and sustain the conditions of a republican democracy. Similarly, but differently, Stavros Makris[130] offers a Smithian political economy approach to this problem by rejecting the Chicagoan reading of Adam Smith as a precursor of *laissez-faire* antitrust. Properly understood, Smith valued competitive markets not merely because they generate efficiency or consumer welfare, but because they promote two broader ideals: prosperity, especially for the least fortunate, and freedom as non-domination. On this basis, Makris argues that competition law should move beyond a narrow consumer-welfare paradigm and be recalibrated around the protection of effective competition as a safeguard against economic dependency and domination. He therefore proposes two complementary standards: an effective competitive constraints standard, focused on preserving rivalry and preventing dominant firms from

[129] Deutscher (n 2).

[130] Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' (n 2).

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neutralising meaningful competitive pressure, and a most vulnerable consumers standard, attentive to the effects of market power on those most exposed to economic harm[131].

This is also the case, for example, with the environmental crisis. According to Julian Nowag[132], the relationship between competition and sustainability is neither inherently positive nor inherently negative; instead, it depends strongly on context. Competition can foster sustainability when consumers genuinely value sustainable products and firms are therefore incentivized to differentiate themselves through greener or more responsible practices. However, competition can also undermine sustainability, especially when environmental harm is unpriced, when sustainable investment costs are high, or when firms face strong free-riding risks that discourage them from moving first. Because of these structural limitations, relying on competition alone is rarely sufficient. The author shows that the most effective path toward sustainability usually involves a balanced mix of competitive pressures, cooperative arrangements among firms, targeted regulation, and policy instruments such as taxes, standards, and public R&D support. A similar line of reasoning can be found in recent US scholarship on

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[131] This position is also held in the US. See, for example, Zephyr Teachout and Lina Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2014) 9 Duke Journal of Constitutional Law & Public Policy 37; Lina Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710; K Sabeel Rahman, *Democracy against Domination* (Oxford University Press 2017); Wu (n 52).

[132] Julian Nowag, *Global Antitrust and Sustainability: Law, Economics, Enforcement* (Oxford University Press 2025) 75–114 <https://doi.org/10.1093/9780191955013.001.0001>.

antitrust and sustainability. Authors such as Denise Hearn, Cynthia Hanawalt and Lisa Sachs[133] argue that sustainability challenges cannot be addressed through competition alone, since climate change and environmental degradation often involve coordination problems, externalities, free-riding risks and the need for sector-wide standards. Rather than treating all competitor collaboration as inherently suspect, they call for a clearer and more context-sensitive antitrust framework capable of distinguishing genuinely anticompetitive conduct from cooperation that may be necessary to advance environmental goals.

The complementary relationship between functions, objectives and uses shows that competition law cannot be reduced either to a purely technical instrument of market correction or to an open-ended vehicle for any social or environmental purpose. Rather, the authors discussed above seek, in different ways, to articulate the intrinsic objective of competition law with its extrinsic objectives, such as welfare, equality, freedom, democracy and sustainability. Their common contribution is to show that these objectives need not be understood as mutually exclusive. When properly framed, the binding, limiting and measuring functions of competition law allow legal actors to translate broader societal concerns into competition-law reasoning without dissolving the specificity of the discipline. Furthermore, the use of competition law by social actors opens up new prospects within the economic system: it enables markets to be contested and restructured in response to economic, social and environmental crises. However, this openness must remain legally disciplined.[134] The plurality of extrinsic objectives should not

[133] Denise Hearn, Cynthia Hanawalt and Lisa Sachs, 'Antitrust and Sustainability: A Landscape Analysis' (Columbia Center on sustainable Investment and Sabin Center for Climate Change Law 2023).

[134] Ezrachi (n 131) 64–75.

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lead to a pure instrumentalisation of competition law or transform it into a general tool of social or environmental policy.[135]

ii. Competing relationship

The competitive relationship between the functions, objectives and uses of competition law is principally expressed where one extrinsic objective acquires ascendancy over all other extrinsic objectives and, in doing so, instrumentalises both the intrinsic objective of competition law and the functions through which that law operates. In this situation, competition law becomes absolute: its binding, limiting and measuring functions are no longer used to open up a plurality of legal and social possibilities, but are channelled toward a narrow and predetermined understanding of competition. The result is a rigidification of social interaction and a restriction of the uses that social actors may make of competition law. This is the approach promoted by Robert Bork and Frank H. Easterbrook, which consists of basing the application and interpretation of competition law on neoclassical economics, while removing broader economic considerations, as well as social and environmental considerations, from legal reasoning.

According to Robert Bork[136], modern antitrust law has drifted far from its proper mission, the maximization of consumer welfare, and has instead become internally incoherent, hostile to efficiency, and often destructive of the very competition it claims to protect. He argues that antitrust should intervene only in three situations: horizontal agreements that directly suppress competition, horizontal mergers that leave fewer than three significant competitors, and deliberate predation intended to exclude rivals, while permitting a wide range of business practices (vertical arrangements, conglomerate mergers, resale price maintenance, exclusive

[135] This issue will be addressed in Part 4.

[136] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 405–425.

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dealing, price discrimination, and competitive price-cutting) because these typically enhance efficiency and benefit consumers. The author stresses that antitrust has been corrupted by misguided judicial doctrines, interest-group politics, and regulatory agencies (especially the FTC), all of which have championed egalitarian or producer-protectionist values inconsistent with economic reasoning. He warns that the law's inconsistency, symbolic power, and frequent findings against business distort public understanding of markets and undermine the legitimacy of capitalism itself. Antitrust can be saved, he concludes, only by a disciplined return to economic principles, a reaffirmation of consumer welfare as the exclusive goal, and a narrowing of enforcement to genuinely output-restricting conduct.

This restrictive approach is illustrated in US case law by the progressive narrowing of antitrust intervention around efficiency and consumer welfare. In *Continental T.V. v. GTE Sylvania*[137], the Supreme Court abandoned the per se condemnation of certain vertical restrictions and held that location restrictions imposed by a manufacturer on its distributors should be assessed under the rule of reason, because such restraints may promote interbrand competition and generate procompetitive efficiencies. In doing so, the Court moved away from an approach concerned with the autonomy of distributors or the preservation of decentralized market structures, and instead privileged an effects-based inquiry focused on whether the restraint ultimately enhances or suppresses competition. This movement is even clearer in *Brooke Group v. Brown & Williamson*[138], where the Court sharply limited predatory pricing claims by requiring proof both that prices were below an appropriate measure of cost and that the alleged predator had a reasonable prospect of recouping its losses. The Court reasoned that, absent recoupment, even

[137] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)

[138] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)

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aggressive below-cost pricing produces lower prices and therefore enhances consumer welfare. Together, these decisions reflect the Borkian narrowing of antitrust: competition law is not used to protect market plurality, fairness or broader social values, but only to condemn practices that can be shown, through economic reasoning, to restrict output, raise prices or harm consumers. According to Frank H. Easterbrook[139], antitrust is an inherently imperfect and limited instrument for regulating competition. Its imperfections stem from the simple fact that courts rarely know how much competition is optimal, lack the economic expertise needed to evaluate complex business practices, and often encounter plaintiffs who seek protection from competition rather than the preservation of it. Because modern per se rules have lost most of their scope and the traditional Rule of Reason demands an impossible, open-ended economic inquiry, the existing analytical framework has become both costly and unreliable. The author therefore argues that antitrust should be reorganized around a series of simple filters designed to identify only those practices that are likely to reduce output and raise price[140]. These filters are not intended to achieve perfect precision, because precision is unattainable, but to bias the system toward permitting questionable practices rather than mistakenly condemning efficient ones. This bias is justified because the cost of prohibiting beneficial conduct is high, while many harmful practices dissipate under market pressure long before courts can correct them. Antitrust should therefore become more modest, more rule-based, and more respectful of the market's capacity to discipline firms more effectively and more reliably than judicial intervention.

[139] Easterbrook (n 37) 4–14.

[140] ibid 14–39.

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Frank H. Easterbrook's restrictive approach is, for instance, reflected in the procedural and evidentiary filters developed by the Supreme Court in antitrust litigation. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[141], the Court held that, where the plaintiff's theory of conspiracy is economically implausible, the evidence must "tend to exclude" the possibility of independent conduct before the case can proceed. The decision reflects a strong concern with false positives: courts should not allow speculative antitrust claims to chill aggressive price competition, especially where the alleged predatory strategy appears irrational or unlikely to succeed. This logic was reinforced in *Bell Atlantic v. Twombly*[142], where the Court required antitrust plaintiffs to plead enough factual matter to make the existence of an agreement plausible, holding that parallel conduct alone is insufficient. The concern was again institutional and economic: broad discovery in antitrust cases is costly and may pressure firms into settlement even when their conduct is consistent with lawful, rational market behaviour. Together, these cases illustrate Frank H. Easterbrook's conception of antitrust as an imperfect and potentially dangerous regulatory instrument. Rather than opening competition law to wider social or political uses, the Court constructs threshold filters (economic plausibility, evidentiary sufficiency, and pleading plausibility) that restrict the ability of social actors to mobilise antitrust law unless they can frame their claims in terms compatible with neoclassical assumptions about rational market behaviour, output restriction and consumer harm.

This approach illustrates such a competitive relationship: one extrinsic objective, consumer welfare understood through a narrow neoclassical lens and reduced mainly to price, output and efficiency, acquires ascendancy over the other extrinsic objectives of competition law. In doing so, it instrumentalises both the intrinsic objective of competition law, namely the regulation of

[141] *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)

[142] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)

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the market economy through the competitive process, and the specific functions through which that law operates. The binding, limiting and measuring functions of competition law are then no longer mobilised to structure a plural and contestable market order, but are channelled toward a predetermined economic understanding of competition. The use of competition rules by social actors is diminished. At the same time and correlatively, the exploration of economic possibilities through legal means is impeded: potentialities are stifled, as is the establishment of new realities in the economic sphere.

iii. Antagonist relationship

Similarly, when one extrinsic objective, namely, consumer welfare as interpreted through neoclassical economic theory, comes to dominate the internal objective of competition law and to marginalise its other extrinsic objectives, it instrumentalises the specific functions of competition law in favour of a narrowed use of the discipline. In such a configuration, the binding, limiting and measuring functions of competition law are no longer mobilised to structure a plural and contestable market order, but are channelled toward a single economic rationality. This risks producing a situation in which competition law rigidifies social interactions, restricts the capacity of social actors to challenge economic reality, and ultimately contributes to the disintegration of society's broader normative equilibrium.. For example, Ronald A. Cass, in his article *Competition in Antitrust Regulation: Law Beyond Limits*, considers that the functions of competition law must be subject to neoclassical economic laws, i.e. to one of these extrinsic parameters alone.

According to the author, U.S. antitrust law generally moved toward Frank H. Easterbrook's model of legal modesty, with courts and agencies adopting more economically disciplined, restrained enforcement focused on clear consumer harm rather than "speculative" theories of

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exclusion[143]. He explains that while U.S. law became more aligned with Easterbrook's restrained framework, academic theorists increasingly embraced expansive models that make almost any business conduct by dominant firms appear suspicious, thereby drifting away from the cautious, evidence-based approach Frank H. Easterbrook endorsed[144]. This theoretical shift has been amplified by the rise of "antitrust tourism": firms can now file complaints in multiple foreign jurisdictions whose competition regimes apply lower evidentiary thresholds, rely more heavily on "speculative" economic theories, and are considerably more receptive to intervention than U.S. authorities. The proliferation of global venues enables complainants to shop for the most favourable forum, creating pressure on U.S. agencies and courts to respond to foreign decisions and thereby eroding the stability and predictability that the rule of law requires. This fragmentation of enforcement, combined with incentives for regulators abroad to assert broader authority, threatens to undermine the very gains legal modesty achieved in the United States. The author concludes that these developments make it urgent to reaffirm the limits of antitrust, because without renewed commitment to Frank H. Easterbrook's principles, expansive and interventionist approaches risk pushing antitrust back toward the overreach that The Limits of Antitrust sought to correct.

The author's aim is therefore to circumvent the legal game in favour of the economic game (as interpreted by neoclassical economic theory). The secondary reality of law gives way to the primary reality of economic power relations. Competition replaces competition law. In this situation, legal actors, limited to their economic role alone, cannot completely free themselves

[143] Ronald A Cass, 'Competition in Antitrust Regulation: Law Beyond Limits' (2010) 6 Journal of Competition Law and Economics 119, 135–139 <https://doi.org/10.1093/joclec/nhq002>.

[144] ibid 139–152.

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from the constraints of economic reality, particularly economic power relations. The economic sphere, thus fossilised, severely limits its potential and seriously hinders the transformation of the social sphere.

This can be illustrated by Lina Khan's analysis about Amazon[145]: it's evolution into a dominant, multi-layered platform (at once retailer, marketplace, logistics provider, media producer, and cloud-computing giant) reveals how poorly the current, price-centred antitrust framework captures the forms of power exercised by digital platforms. Because Amazon can use below-cost pricing, data advantages, and vertical integration to entrench its position without ever raising consumer prices, the author argues that antitrust enforcement must be reoriented toward market structure and competitive process rather than short-term price outcomes[146]. For the author, one route is to reinstate a structural antitrust approach that treats Amazon's cross-market leverage, its ability to foreclose rivals, and its control of essential online bottlenecks as signals of competitive harm, even in the absence of demonstrable price increases[147]. Another route is to recognize that Amazon now functions as a form of essential economic infrastructure and may therefore require regulatory obligations similar to those applied to public utilities, such as non-discrimination rules or limits on self-preferencing, to preserve fair access for dependent businesses[148]. Ultimately, Lina Khan concludes that only by

[145] Khan (n 141).

[146] ibid 746–784.

[147] ibid 792–797.

[148] ibid 797–802.

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moving beyond the consumer-welfare paradigm can competition law effectively respond to the durable, cross-sectoral power Amazon has accumulated.

Lina Khan's analysis of Amazon thus vividly illustrates how the over-narrowing of competition law's functions can not only obscure contemporary forms of economic power, but also erode its capacity to fulfil its broader regulatory and societal objectives.

In sum, this dialogic interplay shows that the functions, objectives and uses of competition law may either reinforce one another or enter into relations of competition and distortion. When one extrinsic objective, such as consumer welfare narrowly understood through neoclassical economic theory, acquires ascendancy over the others, it may instrumentalise both the intrinsic objective of competition law and its binding, limiting and measuring functions. Competition law then ceases to operate as a framework through which social actors can contest and reshape economic relations; instead, it becomes channelled toward a single economic rationality that risks obscuring contemporary forms of power, dependency and inequality. The contrast between Cass's defence of legal modesty and Khan's analysis of Amazon illustrates this tension: while the former seeks to preserve antitrust by narrowing its scope, the latter shows that such narrowing may leave competition law unable to address durable forms of private power. The next part therefore moves from description to prescription. It will offer a framework and a set of criteria for orienting, in a particular normative horizon, the functions, objectives and uses of competition law, so that its openness to social, economic, democratic and environmental concerns does not lead either to uncontrolled instrumentalisation or to an excessive reduction of the discipline to a narrow market-efficiency logic.

iv. REORIENTING COMPETITION LAW IN LIGHT OF THE POLYCRISIS

The preceding analysis has shown the descriptive value of approaching competition law through François Ost's framework. Like law more generally, competition law binds, limits and

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measures social relations: it authorises certain forms of market coordination, prohibits certain forms of conduct, and provides a normative measure of the market economy. It also pursues intrinsic and extrinsic objectives and is mobilised, strategically and sometimes controversially, by private and public actors. This framework has therefore made it possible to describe competition law not as a neutral technical device, but as a social mechanism through which societies organise their economic systems.

This descriptive exercise must now be placed against the background of the present polycrisis.[149] As explained above, the polycrisis refers to a configuration in which technological, economic, social, geopolitical and ecological crises unfold simultaneously and reinforce one another. Moreover, the extrinsic aims pursued by law are not fixed once and for all, but vary across time and space; in the present context, they must therefore be redefined in light of the polycrisis itself, so that law contributes not to the reproduction of the conditions that generate these crises, but to their resolution. In this context, the question is no longer merely whether competition law should pursue one objective rather than another in the abstract[150], but how its functions, objectives and uses should be oriented in a world marked by rising inequalities, democratic fragility and ecological catastrophe.

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[149] Edgar Morin and Anne Brigitte Kern, *Homeland Earth: A Manifesto for the New Millennium* (Sean M Kelly and Roger Lapointe trs, Hampton Press 1999) 47–74.

[150] As stated by Makris, 'Openness and Integrity in Antitrust' (n 71) 62'antitrust institutions do not operate in an applicative but in a rule-creating manner, and by recognizing that not only positive but also normative economics (and other value judgements) play a crucial role in legal interpretation.'

This question is particularly pressing because the current competitive functioning of markets contributes significantly to these crises.[151] Post-growth research shows that GDP growth remains tightly coupled with increased consumption of raw materials and energy, as well as environmental degradation; that a sustainable and sufficient decoupling (between growth and ecological footprint) has not been demonstrated; that several planetary boundaries have already been exceeded; and that people's well-being is stagnating and even declining in high-income economies.[152] Giorgos Kallis and co-authors therefore argue that the central policy objective should shift from increasing GDP to improving human wellbeing within planetary boundaries. In this sense, competition law cannot remain indifferent to the fact that market competition, as currently organised, often sustains growth dependency, locks social welfare into a fragile growth-oriented economic model and reinforces ecological crises.

The following part proceeds from a normative hypothesis.[153] Methodologically, this hypothesis follows Maksymilian Del Mar's account of legal imagination: it requires entering a distinctive epistemic frame in which certain existing norms and objectives of law are selectively suspended

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[151] Jason Hickel and others, 'Degrowth Can Work — Here's How Science Can Help' (2022) 612 Nature 400 <https://doi.org/10.1038/d41586-022-04412-x>.

[152] Giorgos Kallis and others, 'Post-Growth: The Science of Wellbeing within Planetary Boundaries' (2025) 9 The Lancet Planetary Health e62 <https://doi.org/10.1016/S2542-5196(24)00310-3>.

[153] For example, it is possible to find scientific resources in Tim Jackson, *Post Growth: Life after Capitalism* (Polity Press 2021).

while others are retained and/or replaced.[154] Let us suppose that, individually, collectively and publicly, we decide to move towards a post-growth society, understood as the creation of a social order in which domination between individuals and groups is reduced to a minimum, and in which the freedom of all can be exercised as equally as possible, individually and collectively, while respecting ecological limits and maintaining ecological balance. The aim is not to assume that such a society already exists, nor to claim that competition law alone could bring it about. Rather, the aim is to test what role competition law could play if this normative horizon were taken seriously.

From this perspective, the task is to ask how competition law should be applied and interpreted in a post-growth society. Its intrinsic objective would still be to regulate the market economy through the competitive process. However, that process would need to be understood in light of ecological limits, the reduction of domination, and equal freedom. This involves reorienting certain extrinsic objectives (consumer well-being, efficiency and innovation) in line with the objectives of a post-growth society (sustainability, equality, solidarity, etc.).

This part proposes a canvas and a set of criteria for orienting the functions, objectives and uses of competition law within this normative horizon. The analysis proceeds in three steps. First, it considers how the objectives of competition law should be reformulated and articulated in light of a post-growth society. Second, it examines how its functions (to bind, to limit and to measure) should be oriented toward that horizon. Third, it analyses how the uses of competition law by private and public actors should be disciplined.

a) Formulation and articulation of competition law's objectives

[154] Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020) 125–194.

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The first step in steering the functions, objectives and uses of competition law toward a post-growth society is to formulate explicitly the objectives that this body of law is expected to pursue. Only once these objectives are clarified can public and private actors mobilise the specific functions of competition law (to bind, to limit and to measure) in a coherent manner. This requires asking, openly, transparently and reflexively, what the competitive functioning of markets is for. Setting economic, social and environmental objectives is therefore not a defect in competition-law reasoning, but a necessity for any authority that applies competition law.[155] As Ariel Ezrachi[156] shows through the metaphor of the "sponge", competition law is never a pure and hermetically sealed economic discipline: it is structurally porous to political considerations, even when it presents itself as neutral or exclusively economics-based. Konstantinos Stylianou and Marios Iacovides' empirical work reinforces this point: EU competition law already reflects a plurality of goals in institutional practice, so the task is to clarify their role and relative weight in a transparent and methodologically accountable way.[157] The real question is therefore not whether such objectives enter competition law, but whether they do so implicitly and opaquely, or explicitly, transparently and compatibly with legal certainty, legitimacy and the rule of law. In the present context, this question must be reformulated in light of the post-growth hypothesis. If the overarching objective is no longer economic growth as such, but the construction of a social order in which domination is minimised, equal freedom is maximised, and human activity remains within ecological limits,

[155] Pitofsky (n 75).

[156] Ezrachi (n 131) 64–75.

[157] Stylianou and Iacovides (n 2).

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then public authorities must identify the particular objectives through which competitive markets can contribute to that horizon.

This exercise can proceed by moving from the most general objectives to progressively more precise and operational competition-law criteria. This objective can then be specified through two interrelated sub-objectives. First, competition law should contribute to equality, understood not as formal identity between actors, but as the reduction of relations of dependence and domination between economic and social actors. Secondly, competition law should contribute to the respect of ecological equilibria, by ensuring that economic activities, market structures and competitive dynamics remain compatible with planetary boundaries. On this basis, the following analysis identifies the operational criteria through which these two sub-objectives (equality and ecology) can be implemented in competition-law reasoning, before examining, in a final step, how these objectives and their implementing criteria should be articulated with one another (priority, balance, conflicts, etc.).

i. Equality objective and criteria

The objective of equality should not remain at the level of an abstract moral aspiration. It must be translated into standards capable of being used within the ordinary steps of competition-law reasoning. Consequently, competition authorities should consider whether a practice, agreement or merger reinforces relationships of dependency and dominance between economic operators, or whether those operators have effective alternatives enabling them to carry out their activities independently. Equality is therefore not understood as a formal similarity between economic actors, but as their ability to participate in markets without being subject to arbitrary private power.

The standard of equality can be assessed through the prism of price and, in particular, the distribution of monetary surplus amongst economic agents. This approach is based on Ramsay

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Woodcock's inframarginalist argument.[158] The author shows that, even within the framework of neoclassical economics, there is scope to analyse the redistribution of gains without compromising efficiency. Gains arising from trade create a surplus between the minimum price acceptable to the seller and the maximum price the buyer is willing to pay. Efficiency does not dictate a single 'correct' price; rather, there is a range within which prices can vary without preventing the transaction from taking place. This means that the distribution of the surplus amongst dominant firms, suppliers, workers, consumers, platform users, etc. is not outside the scope of economic analysis. It can be treated as a matter of competition. Economic tools can capture the asymmetry in bargaining power that exists through the analysis of the gains generated by market transactions. Similarly, Kirkwood argues that any analysis of market power must not overlook exploitation and the unfair appropriation of surplus value: dominant firms can secure higher returns, leaving weaker trading partners with reduced margins, fewer opportunities and limited competitive alternatives.[159] Any analysis of equality must therefore include the distribution of surplus value within value chains.

Apart from price, other factors must be taken into account. Zephyr Teachout and Lina Khan show that concentrated market structures can enable dominant firms to exercise forms of private governance by determining the conditions under which dependent actors participate in markets.[160] These firms can set rules, control access, impose contractual terms, discipline

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[158] Ramsi A Woodcock, *Toward an Inframarginal Revolution: Redistributing the Gains from Trade* (Cambridge University Press 2025) 2–30.

[159] John B Kirkwood, 'Market Power and Antitrust Enforcement' (2018) 98 Boston University Law Review 1169.

[160] Teachout and Khan (n 141).

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suppliers or workers, and determine how the value created within a market or ecosystem is distributed. This concern is of particular importance in digital ecosystems. Ionnis Lianos and Bruno Carballa-Smichowski argue that the traditional concept of market power, which focuses on prices and output within a relevant market, is insufficient to capture the forms of power generated by platforms.[161] They propose a broader analysis of economic power, including differential dependence, whereby certain actors are far more dependent on a central platform than the platform is on them. This dependence enables the central actor to capture a disproportionate share of the jointly created value and to set the terms of participation in the ecosystem.

Our point can be illustrated by referring to judicial and administrative decisions in which the authorities' reasoning did not fully take into account either the distribution of profits within value chains or the dominant power exercised by structurally powerful firms. In US law, the case of *Weyerhaeuser v Ross-Simmons* is particularly revealing.[162] This case concerned allegations that Weyerhaeuser had driven up the price of sawlogs in order to make competing sawmills unprofitable, thereby exercising power over the 'input' side of the market. The Supreme Court has, however, applied the restrictive test from the Brooke Group case to predatory bids, requiring proof of both a bid at a price below cost and a likelihood of recouping the investment. From the perspective outlined here, the difficulty lies in the fact that this line of reasoning addresses the problem solely from the angle of predatory behaviour rather than from

[161] Ioannis Lianos and Bruno Carballa-Smichowski, 'A Coat of Many Colours—New Concepts and Metrics of Economic Power in Competition Law and Economics' (2022) 18 Journal of Competition Law & Economics 795 <https://doi.org/10.1093/joclec/nhac002>.

[162] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)

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that of the distribution of surplus value within the value chain. It does not address the fact that a powerful buyer can reshape upstream market conditions, weaken its competitors and alter the distribution of profits amongst timber suppliers, sawmills and downstream players.

On the EU side, the Commission's clearance of the Facebook/WhatsApp merger illustrates the insufficient consideration of domination in digital ecosystems. The Commission approved the transaction in 2014, finding that Facebook Messenger and WhatsApp were not close competitors and that users would continue to have a wide choice of consumer communications apps after the merger.[163] Yet the subsequent 2017 proceedings, in which the Commission fined Facebook for providing incorrect or misleading information concerning the technical possibility of matching Facebook and WhatsApp users, showed that data integration and ecosystem expansion were more significant than the original merger analysis had assumed.[164] From the perspective of equality as non-domination, the central issue was not only whether consumers had alternative messaging apps in the short term, but whether the transaction reinforced Facebook's ability to consolidate data, identity, advertising power and infrastructural control across digital social spaces.

In sum, operationalising equality in competition law requires authorities to move beyond a narrow assessment of prices, output or formal market access, and to examine whether market structures, practices and concentrations preserve effective alternatives, prevent the disproportionate appropriation of surplus, and limit the ability of powerful undertakings to govern the economic conditions of dependent actors.

ii. Ecological objective and criteria

[163] Case M.7217 - *FACEBOOK/ WHATSAPP*

[164] Case M.8228 - *FACEBOOK / WHATSAPP*

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The ecological sub-objective requires competition law to assess whether market conduct, agreements, or concentrations contribute to economic activity compatible with ecological equilibria, rather than merely increasing output, reducing prices or improving short-term efficiency. This does not mean transforming competition law into environmental law. Rather, it means recognising that sustainability can become competition-relevant where environmental degradation, planned obsolescence, extractive production models or pollution-based cost advantages affect the quality of competition itself.

A first set of ecological criteria concerns the quality and sustainability of goods and services.[165] Competition authorities should examine whether firms compete by improving durability, repairability, safety, informational clarity and environmental performance, or whether they gain market share through strategies that degrade quality and externalise ecological costs. Practices such as planned obsolescence, restrictions on repair, misleading sustainability claims, waste-intensive production or reliance on environmentally harmful inputs may distort competition where they create cost advantages for unsustainable firms.[166] In that sense, environmental harm

[165] Suzanne Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 16 European Law Journal 780 <https://doi.org/10.1111/j.1468-0386.2010.00533.x>; Holmes (n 85).

[166] Nowag (n 144) 114–220; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part III: Using Merger Control to Intervene before the Problem Arises or Gets Worse' (2023) 44 European Competition Law Review 148; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part 1. Monopoly Power: A Barrier to a Sustainable Future' (2023) 44 European Competition Law Review; Simon Holmes

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is not merely an externality lying outside competition law: it indicate that rivalry is taking place on degraded terms, because undertakings that internalise sustainability costs are placed at a competitive disadvantage compared with those that shift ecological costs onto society.[167]

The Commission's *Car Emissions* decision provides a particularly important illustration of how ecological quality may become a competition-law parameter. In that case[168], the Commission fined Daimler, BMW and the Volkswagen group for coordinating their conduct so as not to compete on the full use of available Nitrogen Oxide-emission cleaning technology, even though the undertakings possessed the technology needed to reduce harmful emissions beyond the legal minimum. The Commission characterised the conduct as a restriction of competition on product characteristics relevant to consumers and as a limitation of technical development within the

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and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Play a Part? Part II. Using Competition Law to Tackle Unsustainable Practices as Abuses of Monopoly Power' (2023) 44 European Competition Law Review 61.

[167] Stefan Thomas and Roman Inderst, 'The Scope and Limitations of Incorporating Externalities in Competition Analysis Within a Consumer Welfare Approach' (2022) 45 World Competition 351 <https://doi.org/10.54648/WOCO2022015>; Pedro Aránguez-Díaz, 'A Fair Share of Sustainability Benefits for Consumers: The Horizontal Guidelines in the Silent Spring' (2024) 20 European Competition Journal 697 <https://doi.org/10.1080/17441056.2024.2379133>; Nikolaos Pitsos, 'Competition Law and Sustainability in Horizontal Agreements: Complex Boundaries' [2026] Journal of Antitrust Enforcement jnaf031 <https://doi.org/10.1093/jaenfo/jnaf031>.

[168] Case AT.40178 – *CAR EMISSIONS*

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meaning of Article 101(1)(b) TFEU. The case therefore shows that firms may infringe competition law where they collectively prevent competition from taking place on more sustainable product characteristics. More generally, administrative authorities should investigate this type of behaviour whenever companies, trade associations or industry coalitions coordinate the suppression, delay or manipulation of new environmentally friendly goods and services. This could include, where the legal conditions are met, coordinated strategies of climate or ecological disinformation designed to preserve environmentally harmful business models, discourage regulatory intervention, or prevent consumers and public authorities from identifying more sustainable alternatives. As Legg, Hatchard and Gilmore shows[169], corporations may influence science and its use in policy by maximising the volume, credibility and reach of industry-favourable evidence while minimising the influence of industry-unfavourable science, thereby manufacturing doubt and weakening public regulation. Competition law should not become a general law against misinformation[170]; however, when such strategies are coordinated between competitors or embedded in collective industry conduct

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[169] Tess Legg, Jenny Hatchard and Anna B Gilmore, 'The Science for Profit Model—How and Why Corporations Influence Science and the Use of Science in Policy and Practice' (2021) 16 PLOS ONE e0253272 <https://doi.org/10.1371/journal.pone.0253272>.

[170] Gregory Day, 'Competition for Misinformation and Truth' (2025) 66 Boston College Law Review 2531 <https://doi.org/10.70167/FCSC8545>.

that restricts rivalry on environmental quality, they should be treated as potentially competition-relevant.[171]

A second set of ecological criteria concerns the direction of innovation.[172] Competition law should not treat innovation as a monolithic good, measured only by the quantity of R&D expenditure, patents or new products. As Andrew P. McLean argues[173], contemporary competition-law debates are often shaped by a "rhetoric of innovation" through which dominant firms, especially in digital markets, invoke innovation to resist stronger enforcement. The author shows that this rhetoric can operate as a form of "techno-conservatism": innovation is presented as an almost automatic justification for concentration, dominance or non-intervention, even though innovation frequently emerges from smaller firms, deconcentrated markets and publicly supported research, and is not inherently beneficial in itself. The relevant question is therefore not simply whether conduct or a merger produces "more innovation"[174],

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[171] Jorge Alé-Chilet and others, 'Colluding Against Environmental Regulation' (2026) 93 Review of Economic Studies 35 <https://doi.org/10.1093/restud/rdaf024>.

[172] Adrián Almazán, 'A Socio-Historical Ontology of Technics: Beyond Technology' (2024) 33 Environmental Values 12 <https://doi.org/10.1177/09632719231209742>; Mario Pansera, *Post Growth Innovation: Resisting the Pursuit of Endless Economic Growth* (Bristol University Press 2025).

[173] Andrew P McLean, 'Innovation against Change' (2024) 12 Journal of Antitrust Enforcement 378 <https://doi.org/10.1093/jaenfo/jnae002>.

[174] As put forward by the neo-Schumpeterian school: Nicolas Petit and Thibault Schrepel, 'Complexity-Minded Antitrust' (2023) 33 Journal of Evolutionary Economics 541 <https://doi.org/10.1007/s00191-023-00808-8>; Nicolas Petit, Thibault Schrepel and Bowman Heiden, 'Situating the Dynamic

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but what kind of innovation is being promoted, who controls its direction, and whether it contributes to socially and ecologically desirable forms of market development.[175] Elias Deutscher and Stavros Makris argue precisely that EU merger control currently captures only a narrow subset of sustainability-relevant innovation harms because it tends to focus on innovation output and incentives within existing technological paradigms.[176] They propose instead to understand innovation competition as a polycentric process, in which independent actors explore multiple technological trajectories; this approach gives weight to the diversity, quality and direction of innovation, rather than only to its quantity.

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Competition Approach' (2026) 71 The Antitrust Bulletin 3 <https://doi.org/10.1177/0003603X251387744>.

[175] Christian Kerschner and others, 'Degrowth and Technology: Towards Feasible, Viable, Appropriate and Convivial Imaginaries' (2018) 197 Technology and Degrowth 1619 <https://doi.org/10.1016/j.jclepro.2018.07.147>; Lukáš Likavčan and Manuel Scholz-Wäckerle, 'Technology Appropriation in a De-Growing Economy' (2018) 197 Technology and Degrowth 1666 <https://doi.org/10.1016/j.jclepro.2016.12.134>; Jan Cornelius Zoellick and Arpita Bisht, 'It's Not (All) about Efficiency: Powering and Organizing Technology from a Degrowth Perspective' (2018) 197 Technology and Degrowth 1787 <https://doi.org/10.1016/j.jclepro.2017.03.234>.

[176] Elias Deutscher and Stavros Makris, 'Sustainability Concerns in EU Merger Control: From Output-Maximising to Polycentric Innovation Competition' (2023) 11 Journal of Antitrust Enforcement 350 <https://doi.org/10.1093/jaenfo/jnac019>.

The *Bayer/Monsanto* merger illustrates both the progress and the limits of competition-law analysis when innovation is assessed in sustainability-sensitive sectors. In its review[177], the European Commission identified significant concerns regarding competition and innovation in seeds, pesticides and digital agriculture, and approved the transaction only subject to an extensive remedy package covering overlaps in seeds, pesticides, R&D activities and digital farming. The Commission emphasised that the merger, as notified, would have reduced competition on price and innovation across numerous markets, and that the remedies were intended to preserve farmers' choice and innovation incentives. Similarly, in the United States[178], the DOJ required Bayer to divest assets worth approximately $9 billion, including seed businesses, herbicide assets, intellectual property, research capabilities, pipeline R&D projects and digital agriculture assets, in order to preserve competition and innovation in agricultural technologies. However, from the perspective of sustainability-oriented innovation, the analysis remained largely confined to existing agro-industrial markets and technological paradigms. The authorities focused on preserving innovation competition within seeds, crop protection, herbicides, traits and digital agriculture, but did not sufficiently consider whether the merger would affect adjacent or emerging innovation paths linked to organic farming and/or agroecology.[179] In other words, the question was framed mainly as whether competition and

[177] Case M.8084 – *BAYER / MONSANTO*

[178] *United States v. Bayer AG and Monsanto Company, and BASF SE*, No 1:18-cv-01241 (JEB), Final Judgment, 8 February 2019, US District Court for the District of Columbia

[179] Rebecca Bratspies, 'Owning All The Seeds: Consolidation and Control in Agbiotech' (2017) 47 Environmental Law 583; Ioannis Lianos and Dmitry Katalevsky, 'Merger Activity in the Factors of Production Segments of the Food Value Chain: - A Critical Assessment of the Bayer/Monsanto Merger'

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innovation would continue within the dominant agricultural model, rather than whether the merger would entrench that model and crowd out alternative, more ecologically sustainable trajectories. A more sustainability-sensitive approach[180] could therefore have required a broader assessment of the transaction's effects on the diversity of agricultural innovation pathways. This might have justified more substantial or differently targeted divestitures, not only to preserve existing competition in seeds and pesticides, but also to maintain independent innovation capacities capable of supporting organic or agroecological farming systems. The Bayer/Monsanto decisions thus shows that merger control can protect innovation, but also that its analytical framework must move beyond if it is to preserve the ecological direction of innovation.

In sum, the ecological objective requires competition law to treat sustainability as a competition-relevant parameter whenever firms compete through environmental externalisation or the foreclosure of sustainable innovation paths; on this basis, authorities should assess whether competitive dynamics preserve durable goods and services and the diversity of technological trajectories needed for an ecological transition.

iii. Articulation of competition law's objectives

(Centre for Law, Economics and Society (CLES) Faculty of Laws, UCL 2017) CLES Policy Paper Series 2017/1.

[180] Tiziano Gomiero, 'Agriculture and Degrowth: State of the Art and Assessment of Organic and Biotech-Based Agriculture from a Degrowth Perspective' (2018) 197 Technology and Degrowth 1823 <https://doi.org/10.1016/j.jclepro.2017.03.237>.

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The equality and ecological sub-objectives will often operate cumulatively. In many situations, the same practice, agreement or concentration may both reinforce relations of dependency and undermine ecological transition. A dominant firm that restricts repair markets, suppresses interoperability, locks consumers into waste-intensive ecosystems, or forecloses sustainable competitors may simultaneously weaken equality (by creating dependency and reducing effective alternatives) and harm ecology (by degrading product durability, repairability and environmental performance). In such cases, the criteria developed above should be applied together: competition authorities should ask both whether the conduct reinforces private domination and whether it distorts competition on sustainability-related parameters.

However, equality and ecology may also come into tension. This is especially true where ecological measures increase the price of goods or services that are essential for consumers. Thus, the internalisation of ecological costs may improve environmental quality but make food, energy, housing, or transport less affordable. In such cases, competition authorities need a third criterion capable of structuring the relationship between equality and environmental protection, rather than merely weighing them up in the abstract.

This criterion can be drawn from Stavros Makris's Most Vulnerable Consumers standard.[181] The author argues that competition law should not assess welfare only by reference to an average or representative consumer, but should pay particular attention to the position of the least fortunate consumers, especially where vulnerability results from poverty, lack of alternatives, informational asymmetry, cognitive bias or dependence on essential services. Applied here, this standard can operate as a priority rule: where the goods or services concerned are essential to the satisfaction of basic needs, the equality objective should prevail, at least to

[181] Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' (n 2) 43–49.

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the extent necessary to preserve effective access for vulnerable consumers. Conversely, where the goods or services are not essential, the ecological objective may be given priority, because higher prices, reduced output or stricter conditions may be justified if they help prevent environmentally harmful forms of competition.

Such a distinction between essential and non-essential goods need not be developed ex nihilo. Competition authorities can draw on a well-established literature on basic human needs. For instance, Kate Soper distinguishes needs from wants, desires and preferences, and argues that needs refer to what is indispensable rather than merely optional, so that need-claims imply obligations and can ground rights to satisfaction.[182] This approach can be complemented by Len Doyal and Ian Gough's classic *A Theory of Human Need*, which identifies physical health and autonomy as universal basic needs and develops indicators for assessing their satisfaction in practice.[183] Manfred Max-Neef's 'human-scale development framework' also complements this approach by distinguishing between fundamental human needs (which are finite) and 'satisfaction factors' (which vary across different eras and cultures) through which these needs are met.[184] Amartya Sen's capabilities approach, together with Martha Nussbaum's list of essential human capabilities, also provide assessment tools for identifying the goods and

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[182] Kate Soper, 'Conceptualizing Needs in the Context of Consumer Politics' (2007) 29 Journal of Consumer Policy 355 <https://doi.org/10.1007/s10603-006-9017-y>.

[183] Len Doyal and Ian Gough, *A Theory of Human Need* (1st edn, Bloomsbury Publishing Plc 1991) <https://doi.org/10.1007/978-1-349-21500-3> accessed 6 July 2026.

[184] Manfred A Max-Neef, Antonio Elizalde and Martín Hopenhayn (eds), *Human Scale Development: Conception, Application and Further Reflections* (Apex press 1991).

services necessary for individuals to lead a life worth living.[185] Taken together[186], these works can help competition authorities distinguish between markets for essential goods and services, such as food, water, housing, energy, healthcare, education, and basic mobility, and markets that are non-essential and harmful to the environment. This puts the "most vulnerable consumers" criterion into practice by grounding it in objective, scientifically based analyses of human needs, rather than in a conception of consumer well-being dictated by the markets[187], in particular by dominant firms.[188]

Therefore, the Most Vulnerable Consumers standard provides a practical method for articulating the objectives of competition law in a post-growth horizon. It ensures that "ecological competition" does not become socially regressive, while also preventing equality from being reduced to the protection of cheap but environmentally destructive consumption. Competition law would then contribute to prosperity without growth by protecting vulnerable

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[185] Amartya Sen, *Development as Freedom* (1st. ed, Knopf 1999); Martha Craven Nussbaum, *Creating Capabilities: The Human Development Approach* (First Harvard University Press paperback edition, The Belknap Press of Harvard University Press 2013).

[186] For instance, Narasimha D Rao and Jihoon Min, 'Decent Living Standards: Material Prerequisites for Human Wellbeing' (2018) 138 Social Indicators Research 225 <https://doi.org/10.1007/s11205-017-1650-0>.

[187] Michel Callon, *Markets in the Making: Rethinking Competition, Goods, and Innovation* (Martha Poon ed, Olivia Custer tr, Zone Books 2021).

[188] John Kenneth Galbraith, *The Affluent Society* (4th ed. with a new introduction, Penguin 1987).

consumers where access to essential goods is at stake, while supporting ecological transformation where market activity can be ecologically redirected.

b) Reorienting the functions of competition law toward a post-growth horizon

Reorienting competition law toward a post-growth horizon requires rethinking its three functions together: its function of binding, by organising the forms of market relationships that should be legally enabled; its function of limiting, by prohibiting conduct and structures that generate domination and ecological degradation; and its function of measuring, by establishing benchmarks for market behaviour and market structure in a post-growth society.

First, the binding function of competition law should be reoriented toward the legal organisation of decentralised, democratic and socially useful forms of coordination.[189] As Sanjukta Paul argues[190], antitrust law does not merely prohibit coordination; more fundamentally, it allocates coordination rights. The current antitrust paradigm tends to authorise coordination when it takes place within large, hierarchical firms, while treating horizontal coordination beyond firm boundaries, for example between workers, small businesses or independent professionals, as suspicious or unlawful. In this sense, competition law has selected certain institutional forms of economic coordination and delegitimised others.

In a post-growth society, this allocation should be reconsidered. If the aim is no longer to maximise productive efficiency and output growth, but to organise an economy compatible

[189] EF Schumacher, *Small Is Beautiful: Economics as If People Mattered* (HarperPerennial 1989); Matthias Schmelzer, Andrea Vetter and Aaron Vansintjan, *The Future Is Degrowth: A Guide to a World beyond Capitalism* (Verso 2022) 215–224.

[190] Paul (n 49).

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with ecological limits and non-domination, competition law should not automatically privilege large-scale centralised coordination merely because it may be more efficient in terms of cost reduction, output expansion or speed of production. Instead, its binding function should help enable forms of decentralised coordination among autonomous economic actors, such as cooperatives, producer organisations, worker associations, local supply networks, repair networks, community energy initiatives, or small-business alliances.[191] Such forms of coordination may be slower, less productive in the narrow sense, or less capable of generating economies of scale; but precisely for that reason, they may contribute to reducing excessive production, limiting resource throughput, dispersing economic power and strengthening the democratic organisation of economic life. This does not mean that all decentralised coordination should be exempted from competition law. Rather, the legal assessment should ask what kind of coordination is being organised, by whom, for whose benefit, and with what effects on equality and ecology. Coordination among powerful firms that restricts output, raises prices, excludes rivals or preserves environmentally harmful business models should remain prohibited. Conversely, coordination between weaker or smaller players should be viewed more favourably where it helps to preserve the autonomy of economic actors or to support the green transition without being unduly undermined by large, hierarchical companies.

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[191] Giovanni Cunico, Sebastiaan Deuten and I-Chun Huang, 'Understanding the Organisational Dynamics and Ethos of Local Degrowth Cooperatives' (2022) 1 Climate Action 11 <https://doi.org/10.1007/s44168-022-00010-9>; Vasilis Kostakis and Sokratis Seitanidis, 'Design Global, Manufacture Local: Operationalizing Post-Growth Industrial Policy through Cosmolocalism' [2026] Globalizations 1 <https://doi.org/10.1080/14747731.2026.2660493>.

Secondly, the limiting function of competition law should be reoriented toward the systematic containment of economic concentration.[192] In a post-growth society, competition law should not merely prevent the most visible forms of monopoly power; it should more generally limit the accumulation of the different forms of economic power exercised in markets. As many authors argue[193], the traditional concept of market power, centred on price and output within a relevant market, is insufficient to capture contemporary economic power. From this perspective, the limiting function of competition law should be used to prevent markets from being organised around large hierarchical undertakings capable of coordinating production, distribution, innovation, labour and investment in a centralised manner. This does not mean prohibiting size as such, but it does mean treating concentration with far greater suspicion, especially where size enables firms to control essential infrastructures or gain dominance over value chains. Competition law should accordingly limit economic concentration where it reduces the number of autonomous operators or reinforces forms of production incompatible with ecological limits.

Concretely, this would require a substantial lowering of the thresholds at which market structures are treated as oligopolistic or monopolistic. In US merger law, the 2023 Merger Guidelines already move in this direction by returning to stricter structural presumptions.[194]

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[192] Julien Vastenaekels, 'Degrowth and Capitalist Power: A Step towards a Theory of Change' [2024] Degrowth Journal <https://doi.org/10.36399/Degrowth.002.01.04> accessed 7 July 2026.

[193] Teachout and Khan (n 141); Lianos and Carballa-Smichowski (n 179).

[194] U.S. Department of Justice and the Federal Trade Commission, *2023 Merger Guidelines*, 2.1. Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market: markets with an HHI above 1,800 are considered highly concentrated,

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However, these contemporary thresholds remain significantly more permissive than the structural approach that characterised US antitrust law in the 1940s–1960s. For instance, in *Von's Grocery*, the Supreme Court condemned a merger producing only about 7.5% of the Los Angeles grocery market, because it occurred in a sector marked by a steady decline in the number of small firms and a trend toward concentration; the Court stressed that Section 7 of the Clayton Act was designed to arrest concentration "in its incipiency" and to preserve competition among small businesses.[195]

In EU law, the 2004 Horizontal Merger Guidelines introduced a formalised concentration analysis by treating market shares and HHI levels as important indicators: the Commission is generally unlikely to identify horizontal concentration concerns where the post-merger HHI remains below 1,000, or where the increase in concentration remains limited.[196] By contrast, the regimes preceding the 2004 reform were more structuralist and more directly attentive to

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a change of more than 100 points is significant, and a merger creating a firm with more than 30% market share, combined with an HHI increase above 100, is presumed to substantially lessen competition or tend to create a monopoly.

[195] *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966)

[196] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, pp. 5–18, §19-20: namely, a post-merger HHI between 1,000 and 2,000 with a delta below 250, or a post-merger HHI above 2,000 with a delta below 150.

the dangers of excessive concentration. Under Regulation 4064/89[197], the central question was whether the concentration created or strengthened a dominant position as a result of which effective competition would be significantly impeded; apart from the indication that concentrations below a 25% market share were normally unlikely to raise concerns, the analysis was less organised around numerical safe harbours and left greater room for assessing the concrete structure of the market, the power of the undertakings concerned, barriers to entry, buyer power and the broader competitive dynamics of the sector. Even earlier, Article 66 ECSC subjected concentrations in coal and steel to prior authorisation and required the authority to examine whether the transaction would give the undertakings the power to determine prices, control or restrict production or distribution, hinder effective competition, or obtain an artificially privileged position in access to supplies or markets. These earlier regimes were therefore more explicitly concerned with the concentration of economic power as such.[198] For a post-growth competition policy, they provide an important source of inspiration: rather than relying primarily on economised thresholds designed to identify likely price effects, merger control could recover a more structural sensitivity to market power, intervene much earlier against oligopolistic or monopolistic tendencies, and preserve diversified, contestable markets composed of autonomous operators.

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[197] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, pp. 1–12.

[198] Amato (n 46); Gerber (n 80); Ioannis Kokkoris and Howard A Shelanski, *EU Merger Control: A Legal and Economic Analysis* (1. ed, Oxford Univ Press 2014) 15–116 <https://doi.org/10.1093/law/9780199644131.001.0001>.

Thirdly, the measuring function of competition law should be reoriented toward the assessment of market structures and behaviors in light of non-domination and planetary boundaries. Once competition law enforcers have bound economic actors by authorising certain forms of coordination and limited them by preventing excessive concentrations of economic power, they must also provide a measure of what counts as a desirable competitive market in a post-growth society. Such a market should not be assessed on the basis of its ability to maximise output, growth, scale or short-term efficiency. Rather, it should be assessed on the basis of its ability to enable autonomous economic actors, in particular small and medium-sized enterprises, to coordinate their activities, whilst preventing dominant firms from organising markets based on economic dependence.

This requires, first, a rethinking of the temporal horizon of competition analysis. Conventional competition reasoning often discounts future harms and benefits, especially where they are uncertain, difficult to quantify or temporally distant.[199] In a post-growth framework, however, future environmental harms or resilience gains should not be treated as secondary or speculative simply because they emerge beyond the short-term horizon. In the context of merger control, this means, for example, asking whether a merger risks locking a sector into unsustainable

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[199] Max Hjärtström, 'Addressing Sustainability Failures in Economics and Competition Law: Environmental Externalities, Consumers and Quantification' in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781802204667.00018> accessed 7 July 2026; Nowag (n 144) 29–74.

production models.[200] In conduct cases, it means, for example, examining whether a practice produces short-term efficiencies while degrading long-term market sustainability.[201]

Secondly, the measuring function should incorporate systemic-risk considerations more explicitly.[202] Competition law should not assess market structures only through isolated price or product effects, but also through the systemic vulnerabilities generated by long value chains and highly concentrated markets. They may be more efficient in the short run, but they may also be more fragile, less adaptable and more capable of transmitting failures across sectors. Similarly, dominant actors may create systemic risks where their failures affect entire provisioning systems. Consequently, corrective measures should be evaluated based on their ability to reduce "systemic" dependence and strengthen resilience, that is, to maintain the autonomy of market actors and promote green innovations. It is in this sense that the measuring function of competition law makes it possible to determine whether markets are organised, not

[200] Elias Deutscher and Stavros Makris, 'Making Sustainability Visible: A New Framework and Operationalisation Tests for Merger Control' in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781802204667.00032> accessed 7 July 2026.

[201] Simon Holmes, 'Cartels Harming Sustainability (and Those That Don't) in Europe' in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781802204667.00030> accessed 7 July 2026.

[202] Lianos, 'Polycentric Competition Law' (n 2); Andriani Kalintiri, 'EU Antitrust Law's Resilience: The Good, the Bad, and the Ugly' (2024) 43 Yearbook of European Law 184 <https://doi.org/10.1093/yel/yeae009>.

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with a view to maximising productive expansion, but with a focus on non-dominance and ecological sustainability.

In sum, reorienting the functions of competition law toward a post-growth horizon means using its binding function to enable decentralised and democratic coordination, its limiting function to contain and, where necessary, undo excessive concentrations, and its measuring function to assess markets according to their capacity to preserve autonomy, resilience, non-domination and ecological sustainability.

c) Disciplining the Uses of Competition Law by Public and Private Actors

Competition law is not merely enforced; it is strategically deployed. Private actors can use it to defend their interests while either promoting or undermining the public interest. Public authorities enforce competition law in the public interest. Given the ambiguous nature of this interest, the authorities establish general and intermediate objectives. Furthermore, in light of budgetary, administrative, and informational constraints, the authorities set priorities: these reflect extrinsic objectives, that is, objectives over which competition law does not have a monopoly.[203]

In a hypothetical post-growth society, where the external objectives of competition law are oriented toward preventing market dominance and promoting ecological balance, the ways in which public and private actors enforce this law will inevitably change.

Before examining the new uses of competition law by public (i) and private (ii) actors in the context of a post-growth society, a preliminary point regarding the error-cost framework must be raised. While this analytical tool has long been promoted by researchers in economics and

[203] Brook and Cseres (n 93).

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law,[204] it took on a unique normative dimension in Frank H. Easterbrook's writings.[205] By asserting that false positives are almost always more dangerous than false negatives, that is, by arguing that government action is less likely to be corrected than private action within a "self-regulating" market, an anti-interventionist framework was established (and subsequently applied). More recently,[206] authors have demonstrated that, on the one hand, the market's autonomous functioning is no more effective than government intervention in correcting its market failures and, on the other hand, that both positive and negative errors are equally harmful to its functioning. It can thus be said that market corrections result from the actions of private actors, within the framework of competition, and from those of public actors, within the framework of competition law enforcement. This dual process, which complements, competes with, and opposes one another, progresses, much like the scientific process,[207] through trial and

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[204] Richard A Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 The Journal of Legal Studies 399.

[205] Easterbrook (n 37).

[206] Jonathan B Baker, 'Taking The Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right' 80 *Antitrust Law Journal* (2015) 1; Herbert Hovenkamp, 'Antitrust Error Costs' (2022) 24 University of Pennsylvania Journal of Business Law 293.

[207] Karl R Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge 2002).

error.[208] Thus, both the mistakes made by each side and the corrections to those mistakes are necessary to achieve the "proper" competitive functioning of markets.

i. Public enforcement

Public enforcement of competition law necessarily has a political dimension.[209] While competition authorities are independent and impartial, the fact remains that their actions (setting the agenda, decisions to investigate, etc.) have economic, social, and environmental effects on society, since they determine the proper competitive balance of markets, that is, ultimately, they have a political impact (understood in a broad philosophical sense as the choices that individuals and communities make, autonomously, in order to live together).[210] The pursuit of (extrinsic) objectives such as consumer welfare and economic growth are, first and foremost, policy objectives that competition authorities undertake to pursue with the explicit or implicit consent of political authorities. These are not technical objectives specific to competition law, because the intrinsic objective of competition law is the competitive functioning of markets. Therefore, in the hypothetical context of a post-growth society, it is necessary to clarify how competition authorities can implement the objectives of preventing market dominance and ensuring ecological balance using the tools of competition law designed to guarantee the competitive

[208] Charles F Sabel and Michael C Dorf, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267; Marcellus S Snow, 'Competition as a Discovery Procedure' (2002) 5 The Quarterly Journal of Austrian Economics 9 <https://doi.org/10.1007/s12113-002-1029-0>.

[209] Pitofsky (n 75).

[210] David Miller, 'Political Philosophy' *Routledge Encyclopedia of Philosophy* (1st edn, Routledge 2016) <https://doi.org/10.4324/9780415249126-S099-1> accessed 9 July 2026.

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functioning of markets. The goal, therefore, is to establish, at the outset, the scope of discretion available to competition authorities in carrying out their mission and, subsequently, to ensure democratic oversight of that mission.

This clarification is all the more necessary because, as Marek Martyniszyn argues, the enforcement of competition law has long been shaped by the paradigm of the "Limited State", which framed competition authorities primarily as technocratic law-enforcement bodies and encouraged a narrow, efficiency-oriented understanding of their mandate.[211] Within that paradigm, enforcement became increasingly demanding: the move towards rule-of-reason and effects-based analysis, combined with the growing reliance on complex economic and econometric evidence, raised the evidentiary and administrative burden borne by authorities, while their financial and institutional resources often remained limited or even declined. The result, according to the author, was not merely caution but a structural tendency towards under-enforcement, especially where agencies faced powerful firms able to devote substantial resources to resisting investigations. This tendency was reinforced by a permissive approach to dominance and concentration: monopolisation cases became rare in the United States, certain statutory tools were effectively abandoned, excessive pricing remained marginal in EU practice, and merger control often allowed consolidation to proceed on the basis of speculative efficiencies that were rarely verified ex post.[212]

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[211] Martyniszyn (n 7).

[212] In digital and other winner-takes-all markets, these enforcement gaps have been particularly consequential, since network effects and data advantages can entrench dominant positions before public authorities are able to intervene effectively.

Conversely, if the relevant extrinsic objectives were clearly specified as non-domination and ecological balance, stronger enforcement would not necessarily mean granting authorities unlimited discretion or requiring ever more complex economic inquiries. Rather, following Baker's critique,[213] a post-growth approach could therefore justify simpler and more formal presumptions, lower evidentiary burdens, and less costly enforcement tools where certain market structures or practices are likely to generate domination or ecological harm.[214] Instead of requiring authorities to prove, through demanding effects-based and econometric analysis, the precise welfare consequences of each practice, competition law could rely more heavily on administrable categories, structural indicators and rebuttable presumptions.[215] Such an

[213] Baker (n 244).

[214] Donald F Turner and Carl Kaysen, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) <https://doi.org/10.4159/harvard.9780674863941>; Macdonald Flinn and others, 'The Per Se Rule' (1969) 38 Antitrust Law Journal 731; Jeffrey M Perloff, Larry S Karp and Amos Golan (eds), 'Structure–Conduct–Performance' *Estimating Market Power and Strategies* (Cambridge University Press 2007) <https://doi.org/10.1017/CBO9780511753985.003>.

[215] John Kwoka, *Controlling Mergers and Market Power: A Program for Reviving Antitrust in America* (1st edn, Competition Policy International 2020); William H. Rooney, Timothy G. Fleming and Michelle A. Polizzano, 'Tracing the Evolving Scope of the Rule of Reason and the Per Se Rule' (2021) 2021 Columbia Business Law Review <https://doi.org/10.52214/cblr.v2021i1.8474> accessed 9 July 2026; Filippo Lancieri and Tommaso Valletti, 'Towards an Effective Merger Review Policy: A Defence of Rebuttable Structural Presumptions' (2024) 40 Oxford Review of Economic Policy 763

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approach would not abandon economic reasoning, but would relocate it from highly case-specific proof of effects to the design of clear legal tests capable of reducing under-enforcement, administrative costs and strategic delay.[216] This is consistent, for instance, with Pablo Ibáñez Colomo's proposal[217], in the context of Article 102 TFEU, that effective enforcement, legal certainty and meaningful judicial review can be reconciled through four principles: substantive standards should be administrable (notably through proxies or bright lines, such as market-share, coverage or duration thresholds, which simplify the assessment), structured around clear legal tests (that is, cumulative and identifiable conditions rather than "liquid" or fluctuating standards varying from case to case), capable of being disproved in practice, and any departure from prevailing standards should be specifically justified. In this sense, broader objectives need not imply more open-ended enforcement; if properly specified, they may instead support a more disciplined, rule-based and practically enforceable competition law.

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<https://doi.org/10.1093/oxrep/grae049>; John M Taladay, 'The Use of Presumptions in Antitrust Enforcement and Jurisprudence' [2024] Concurrences 30.

[216] Arndt Christiansen and Wolfgang Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs Rule of Reason"' (2006) 2 Journal of Competition Law & Economics 215 <https://doi.org/10.1093/joclec/nhl009>.

[217] Pablo Ibáñez Colomo, 'The (Second) Modernisation of Article 102 TFEU: Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review' (2023) 14 Journal of European Competition Law & Practice 608 <https://doi.org/10.1093/jeclap/lpad064>; In a slightly different sense, see also Damien Geradin and Stijn Huijts, 'Abuse of Dominance: Has the Effects-Based Analysis Gone Too Far?' (2024) 40 Oxford Review of Economic Policy 776 <https://doi.org/10.1093/oxrep/grae047>.

Building on this logic, competition authorities should be able to adopt a clear, public and transparent enforcement agenda that translates the post-growth objectives of non-domination and ecological balance into concrete priorities for action. Following Or Brook and Katalin Cseres, priority-setting should not be treated as a merely technical exercise, but as the institutional mechanism through which abstract objectives are converted into enforcement choices, resource allocation and public accountability.[218] Such an agenda could identify priority sectors, market structures and practices where concentration, dependency, exclusion or environmentally harmful competitive dynamics are most likely to undermine non-domination and/or ecological balance. It should also include the protection of vulnerable consumers[219] as a transversal priority: this objective can mediate tensions between non-domination and ecological balance where they point in different directions, by asking whether a given enforcement choice protects those who are most exposed to market power, ecological degradation, essential-goods inflation or unequal access to basic services.

However, to effectively implement such a program, competition authorities would need new tools. As Ioannis Lianos argues[220], the limits of competition law enforcement justify complementing the traditional model with more proactive and prophylactic instruments. These could include market investigation tools, allowing authorities to investigate sectors where there are indications of structural distortions of competition even without first proving a specific infringement, and systematic market-monitoring tools, such as market mapping, concentration and markup surveillance, price comparisons, or regular reports on the state of competition.

[218] Brook and Cseres (n 93).

[219] Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' (n 2).

[220] Lianos, '"Polycrisis" and the Changing "Life" of Competition Authorities' (n 5).

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These instruments would enable authorities to detect early signs of domination, lock-in or failures affecting non-dominate actors or harming ecological equilibria, and to adopt proportionate remedies before harms become entrenched.

The use of these new tools, the establishment of an agenda and priorities, and, more generally, the strengthening of enforcement must be carried out by competition authorities within the framework of a democratic and accountable process.[221] This institutional design resonates with Michael Dorf and Charles Sabel's idea of democratic experimentalism, whose central claim is that public institutions can respond to complexity and uncertainty by decentralising problem-solving, involving affected actors in deliberation, pooling information across comparable experiences, and continuously revising rules through benchmarking and error correction.[222] Competition authorities, located at the interface between political decision-makers, market actors and, increasingly, civil society, are well placed to operate in this experimentalist manner. They should be able to construct enforcement agendas, priority criteria, market studies and

[221] Maria Ioannidou, '"Responsive" Remodelling of Competition Law Enforcement' (2020) 40 Oxford Journal of Legal Studies 846 <https://doi.org/10.1093/ojls/gqaa003>; Stavros Makris, 'EU Competition Law as Responsive Law' (2021) 23 Cambridge Yearbook of European Legal Studies 228 <https://doi.org/10.1017/cel.2021.9>; Wolf Sauter, 'Responsive Competition Law' (2024) 3 European Law Open 768 <https://doi.org/10.1017/elo.2025.10>; Brook and Cseres (n 93); For a more theoretical and general analysis of the democratic functioning of independent authorities, see Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Arthur Goldhammer tr, Princeton University Press 2011).

[222] Sabel and Dorf (n 246); See also Rosanvallon (n 259) 203–218.

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sectoral analyses through open forums in which consumers, workers, firms, environmental organisations, independent academics and public bodies can present facts, contest assumptions and deliberate on possible courses of action.[223] Such participation need not merely be consultative: where appropriate, affected stakeholders could be integrated into monitoring bodies, advisory panels or participatory market investigations, so that their knowledge helps define the problems, evaluate remedies and revise enforcement strategies.[224] At the same time, the authority's action should remain experimental in the pragmatist sense described by Michael Dorf and Charles Sabel: it should proceed through trial and error, adapting continuously to new information, market developments and feedback from those affected.[225] In this way, competition authorities could use the tools of competition law not as fixed commands imposed from above, but as revisable instruments of collective learning aimed at achieving, as effectively as possible, the post-growth objectives of non-domination and ecological balance.

An illustration may clarify how this process could operate in practice. Suppose a competition authority investigates a sustainability practice in the energy, food or transport sector: the ecological objective may support reduced output or higher prices in order to phase out environmentally harmful forms of competition, while the non-domination objective may point

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[223] Ioannidou (n 259) 866–870; Sauter (n 259) 783–792; Brook and Cseres (n 93) 11–15.

[224] Firat Cengiz, 'Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach' (2016) 54 JCMS: Journal of Common Market Studies 826 <https://doi.org/10.1111/jcms.12339>; For authors who support this idea in the context of the Digital Markets Act, see, Katalin J Cseres and Laurens C De Korte, 'Participation of Third Parties in the Public Enforcement of the Digital Markets Act: Between Democracy and Technocracy' (2025) 13 Journal of Antitrust Enforcement 595, 612–619 <https://doi.org/10.1093/jaenfo/jnae051>.

[225] Sabel and Dorf (n 246) 314–323.

in the opposite direction if the measure makes an essential service unaffordable for low-income households. In such a case, the authority should ask, through a transparent and participatory process, whether the good or service concerned is essential for the satisfaction of basic needs. If the product is essential, the authority should give priority to preserving access for the most vulnerable consumers. If, by contrast, the product is non-essential, the ecological objective may legitimately receive priority, even where this leads to higher prices or reduced availability. This assessment should be supported by market studies, sectoral inquiries and stakeholder participation: consumer organisations, environmental groups, workers, firms, independent academics and public bodies should be able to present evidence on needs, affordability, substitutability and ecological impact. In this way, the "most vulnerable consumer" criterion becomes not a rhetorical device, but a practical and pragmatic decision rule.

Accordingly, a post-growth enforcement model would require not only stronger and better-specified competition-law intervention, but also the democratisation and transparency of competition authorities' internal processes: the meaningful participation of civil society would operate as the strongest safeguards against both capture by specific private interests and short-term political or electoral instrumentalisation.[226]

ii. Private enforcement

[226] Ian Ayres and John Braithwaite, 'Tripartism: Regulatory Capture and Empowerment' (1991) 16 Law & Social Inquiry 435 <https://doi.org/10.1111/j.1747-4469.1991.tb00291.x>; Daniel P Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 458–465.

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Private enforcement shows that competition law is not only applied by public authorities, but also mobilised by private actors as a strategic legal resource: it may serve legitimate functions of deterrence, compensation and market correction, but it may also be used to burden rivals or otherwise convert competition law into an instrument of private advantage rather than competitive protection. In a hypothetical post-growth society, the challenge would therefore be to encourage private actors to mobilise competition law in support of the extrinsic objectives of non-domination and ecological balance, while neutralising attempts to use that same law for exclusively private ends, in particular to preserve monetary rents, protect incumbent market positions, or exclude competitors whose innovations contribute to ecological transition.

Thus, it is important to distinguish between legitimate strategic use of competition law and its abusive use by private actors. The goal is not, therefore, to prevent private actors from invoking competition law, since the enforcement of the law by private individuals remains essential for deterrence, compensation, and the correction of market failures.[227] In a post-growth framework, this distinction would be drawn by asking whether the private use of competition law plausibly advances one of the three articulated criteria: whether it reduces relations of market domination, whether it supports ecological balance, and, where the two objectives conflict, whether it protects access to essential goods or services for the most vulnerable consumers. A complaint by an incumbent against an ecological innovator, for instance, should not be treated as legitimate merely because it is framed in competition-law language; if its likely effect is to preserve an existing rent, block sustainable entry or reinforce dependency, it should fail the

[227] Case C-453/99, *Courage v Crehan*, ECLI:EU:C:2001:465; Joined Cases C-295/04 to C-298/04, *Manfredi*, ECLI:EU:C:2006:461; *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977).

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non-domination and ecological criteria. Conversely, a complaint by SMEs against exclusionary conduct by a dominant undertaking that locks users into waste-intensive ecosystems or prevents access to sustainable alternatives would fall within the legitimate post-growth use of competition law. These criteria therefore operate as justiciability filters: they transform broadened objectives into reviewable legal standards, rather than leaving them as open-ended policy preferences.

Procedurally, the risk of capture should be addressed through transparency, evidential discipline and epistemic independence. First, stakeholders invoking non-domination, ecology or vulnerable-consumer protection should be required to disclose their own private interests as well as the public interest they intend to defend; moreover, they should disclose the economic or ecological effects they allege, and the evidential basis of their claims; this would make it harder for private actors to disguise rent-preserving strategies as public-interest claims.[228] Secondly, competition authorities should not accept private and public interests as free-floating assertions, but should require them to be connected to identifiable market structures, practices or harms: domination should be linked to dependency, exclusion, lock-in or asymmetrical power; ecological balance to sustainability-related parameters of competition such as durability, repairability, interoperability or resource use; and vulnerable-consumer protection to access to goods or services satisfying basic needs. Thirdly, because expertise itself may be captured, agency processes should include epistemic-independence safeguards, such as disclosure of conflicts of interest, plural expert panels, balanced stakeholder access and the participation of civil-society organisations, consumer representatives, workers, environmental groups and

[228] Vossestein (n 108) 1392–1400; OECD, 'Corporate Influence in Competition Policymaking' (n 109) 11–14.

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independent academics.[229] Such participation would operate as a counterweight to both private capture and short-term political instrumentalisation.[230] In this way, the broadened objectives of competition law would not become open-ended opportunities for strategic users, but reviewable standards structured by transparency, evidential discipline, epistemic independence and democratic participation.

Ultimately, private enforcement is justified in a post-growth competition regime only insofar as it preserves the autonomy of market actors and fosters economic innovation compatible with planetary boundaries, while ensuring that consumers' basic needs are met.

CONCLUSIONS

The preceding analysis has shown that the functions, objectives and uses of competition law are analytically distinct but practically interdependent.[231] Its functions organise market relationships, limit harmful conduct and provide a measure of how the market economy ought to operate; its objectives determine the normative horizon toward which these functions are directed; and its uses by public and private actors translate those objectives into concrete legal practice. None of these dimensions can therefore be understood in isolation: functions without objectives risk becoming purely formal, objectives without functions risk becoming abstract

[229] This responds to Ioannis Lianos's concern that competition policy is shaped not only by formal lobbying but also by the production of apparently neutral expertise, see Lianos, 'Academic "Capture"? The Hidden Costs of Corporate Funding in Competition Policy Research and Proposed Remedies' (n 115).

[230] Ayres and Braithwaite (n 264); Carpenter and Moss (n 264) 458–465.

[231] Ost (n 1) 49–120.

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political aspirations, and uses without legal discipline risk becoming instruments of strategic capture.

This interdependence becomes especially important in the context of the contemporary polycrisis, where ecological collapse, economic instability, democratic fragility, geopolitical tensions and technological disruption unfold simultaneously and reinforce one another.[232] In such a context, competition law cannot remain oriented only toward inherited assumptions of growth, efficiency or consumer welfare.[233] It must be re-examined as a legal device capable of structuring markets, limiting power and opening alternative economic possibilities in light of the objectives society chooses to pursue in order to resolve the polycrisis.

Imagining the functions, objectives and uses of competition law within the hypothetical horizon of a post-growth society has therefore allowed us to see its inevitably political dimension in a new light. This thought experiment[234] shows that the political character of competition law should not be denied or hidden behind technical language.[235] It should instead be acknowledged and legally disciplined. Competition law always contributes to defining which market structures are desirable, which forms of economic power are tolerable, and which behaviours should be permitted, prohibited or transformed. The decisive question is therefore not whether competition law should pursue political choices, but how those choices should be made explicit and how it should be framed. Properly framed, this political dimension does not undermine the specificity of competition law; it strengthens it by ensuring that its functions (organising

[232] Morin and Kern (n 3) 47–74.

[233] Schmelzer (n 34).

[234] Del Mar (n 171) 125–194.

[235] Pitofsky (n 75).

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economic relations, limiting harmful conduct and measuring the market economy) as well as its uses by public and private actors remain directed toward the objectives that members of a society set for themselves. These objectives may be economic growth and consumer welfare, as in the dominant paradigm of modern competition law, or they may be freedom in equality within planetary boundaries, as in the post-growth hypothesis explored here. In either case, competition law can only fulfil its role if its political orientation is made transparent, legally structured and democratically accountable.

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Functions, Objectives and Uses of Competition Law for the Market Economy in a Polycrisis Society

Abstract: This article examines the functions, objectives and uses of competition law through the lens of legal theory in order to clarify its role within the market economy and its contribution to society in a context marked by an unfolding polycrisis. Drawing on François Ost's framework, the analysis shows that competition law, —like law in general, —binds, limits and measures social relationships, pursues intrinsic and extrinsic aims, and is strategically mobilised by public and private actors. Applied to competition law, this triadic structure reveals a dialogical dynamic: one of complementarity when the law integrates economic, social, democratic and environmental considerations; one of competition when narrow efficiency-driven interpretations constrain its broader purposes; and one of antagonism when intrinsic and/or extrinsic aims encroach upon and distort its proper functions. The article argues that, in a polycrisis society, competition law should not merely expand the list of objectives it pursues, but should reorient its functions, objectives, and uses toward a clearly specified societal horizon.aligning these three dimensions requires broadening both intrinsic objectives (quality, sustainability, innovation, fairness) and extrinsic ones (democratic integrity, power diffusion, societal resilience). Through the thought experiment of a hypothetical post-growth society, it proposes that competition law should be directed toward non-domination, ecological balance and the protection of vulnerable consumersIn a polycrisis society—where ecological, economic, geopolitical and technological disruptions interact—competition law must adapt by expanding the parameters it evaluates and recognising its embeddedness within a wider governance ecosystem.

Keywords: Competition law; Legal Theory, Polycrisis

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« Le droit tisse des liens et fixe des limites ; ce faisant, il est la mesure du social[1] »

i. INTRODUCTION

Competition law has been torn for several years by questions regarding its nature and/or characteristics, in particular the objectives it should pursue in order to best fulfil its mission in society.[2] The purpose of this article is to take a detour through legal theory, specifically the

[1] François Ost, *À quoi sert le droit ? usages, fonctions, finalités* (Bruylant 2016) 240–241.

[2] For example: Eleanor M Fox, 'Against Goals' (2013) 81 Fordham Law Review 2157; Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9 Journal of European Competition Law & Practice 131 <https://doi.org/10.1093/jeclap/lpy020>; Ioannis Lianos, 'Polycentric Competition Law' (2018) 71 Current Legal Problems 161 <https://doi.org/10.1093/clp/cuy008>; Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 Legal Studies 620 <https://doi.org/10.1017/lst.2022.8>; Herbert Hovenkamp, 'The Slogans and Goals of Antitrust Law' (2023) 25 N.Y.U. Journal of Legislation and Public Policy 705; David J Teece, 'The Dynamic Competition Paradigm: Insights and Implications' (2023) 2023 Columbia Business Law Review <https://doi.org/10.52214/cblr.v2023i1.11895> accessed 25 November 2025; Elias Deutscher, 'The Competition-Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy' (2023) 41 Yearbook of European Law 197 <https://doi.org/10.1093/yel/yeac003>; Aurelien Portuese, *The Battle for the Future of Antitrust: Brandeis, Bork, and Schumpeter* (Springer Nature Switzerland 2024) <https://doi.org/10.1007/978-3-

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question of the role of law in society, in order to shed new light on the debate concerning the *raison d'être* of competition law. In doing so, it will be important to understand that it is not

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031-75794-5> accessed 25 November 2025; Stavros Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' [2025] The Modern Law Review 1468 <https://doi.org/10.1111/1468-2230.12948>.For example: Eleanor M Fox, 'Against Goals' (2013) 81 Fordham Law Review 2157; Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9 Journal of European Competition Law & Practice 131 <https://doi.org/10.1093/jeclap/lpy020>; Ioannis Lianos, 'Polycentric Competition Law' (2018) 71 Current Legal Problems 161 <https://doi.org/10.1093/clp/cuy008>; Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 Legal Studies 620 <https://doi.org/10.1017/lst.2022.8>; Herbert Hovenkamp, 'The Slogans and Goals of Antitrust Law' (2023) 25 N.Y.U. Journal of Legislation and Public Policy 705; David J Teece, 'The Dynamic Competition Paradigm: Insights and Implications' (2023) 2023 Columbia Business Law Review <https://doi.org/10.52214/cblr.v2023i1.11895> accessed 25 November 2025; Elias Deutscher, 'The Competition-Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy' (2023) 41 Yearbook of European Law 197 <https://doi.org/10.1093/yel/yeac003>; Aurelien Portuese, *The Battle for the Future of Antitrust: Brandeis, Bork, and Schumpeter* (Springer Nature Switzerland 2024) <https://doi.org/10.1007/978-3-031-75794-5> accessed 25 November 2025; Stavros Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' [2025] The Modern Law Review 1468 <https://doi.org/10.1111/1468-2230.12948>.

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enough to address the objectives of competition law in order to debate its usefulness in society, but that it is also necessary to consider its specific functions and its uses by social actors. Furthermore, using an appropriate reasoning borrowed from systems theory, it will also be necessary to study the complex relationships between the functions, objectives and uses of competition law. It is on this basis, then, that we can contribute to the evolution of competition law in the face of the multiple crises (hereinafter the polycrisis) that now challenge its core objectives, and thereby meaningfully reassess its utility and limitations for the market economy, ~~and~~ for society and for the planet.

According to Edgar Morin and Anne Brigitte Kern, a polycrisis refers to a configuration in which multiple, distinct crises (economic, ecological, geopolitical, social, technological, etc.) unfold simultaneously and interact through mutual amplification, producing systemic disruptions that are more severe than the sum of their individual components[3]. Because shocks in one domain (such as climate degradation, financial instability, pandemics, energy insecurity or democratic backsliding) cascade into others through dense global interdependencies, societies are confronted with overlapping vulnerabilities that challenge traditional regulatory paradigms[4]. Indeed, competition law, like many other branches of law, is being profoundly

Commented [A1]: further discussion of the concept of 'polycrisis'

[3] Edgar Morin and Anne Brigitte Kern, *Homeland Earth: A Manifesto for the New Millennium* (Sean M Kelly and Roger Lapointe trs, Hampton Press 1999) 47–74.

[4] Bishoy L Zaki, Valérie Pattyn and Ellen Wayenberg, 'Policymaking in an Age of Polycrises: Emerging Perspectives' (2024) 7 Policy Design and Practice 377 <https://doi.org/10.1080/25741292.2024.2432048>.

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affected by the polycrises facing human societies across the globe.[5] And unlike past crises that have affected competition law (crises which were mainly analysed from an economic perspective) the main driving force behind the current polycrisis is the impact of human economic activities on global ecological balances.[6] In a sense, competition law too finds itself at the heart of this crisis. Thus, the polycrisis in itself justifies a renewed discussion[7], in the light of legal theory, of the raison d'être of competition law in society and, on this basis, a contribution to the normative horizon that this branch of law might embrace.

Before analysing, in the first part, the functions, objectives and uses of law, and then, in the second part, applying this analysis to competition law, and, in the third part, ~~exploring several avenues for aligning these functions, objectives and uses~~reorienting competition law in light of the current polycrisis, it seems appropriate to conclude this introduction with a few words on, on the one hand, the definition of law as an institution by researchers in the humanities and

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[5] Bruce Wardhaugh, *Competition Law in Crisis: The Antitrust Response to Economic Shocks* (1st edn, Cambridge University Press 2022) <https://doi.org/10.1017/9781108987707> accessed 24 June 2026; Ioannis Lianos, '"Polycrisis" and the Changing "Life" of Competition Authorities' *Wirtschaft und Wettbewerb* (2 February 2024) 61.

[6] Andreas Malm, *Fossil Capital: The Rise of Steam-Power and the Roots of Global Warming* (Verso 2016); Christophe Bonneuil and Jean-Baptiste Fressoz, *The Shock of the Anthropocene: The Earth, History and Us* (David Fernbach tr, Verso 2017).

[7] Marek Martyniszyn, 'Competition Law and Policy in Crisis and the Rise of the Expansive State' [2025] Journal of Antitrust Enforcement jnaf020 <https://doi.org/10.1093/jaenfo/jnaf020>.

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social sciences and, on the other hand, the presentation of dialogical reasoning through the explanation of the relationship between competition and competition law.[8]

The law is a secondary institution[9], that is to say, a supplement that redoubles and exceeds reality.[10] The secondary nature of law proves to be creative because, by distancing itself from reality, it acts in turn upon it to liberate possibilities.[11] Thus, competition should not be confused with competition law. The first refers, in the context of natural sciences, to the struggle for existence that living beings engage in. The second refers, in the context of legal sciences, to regulations aimed at ensuring free competition within and between markets where economic actors compete with each other to attract customers.

It is nevertheless possible to explain the link between competition and competition law using dialogical reasoning.[12] Competition and competition law are related in a complementary, competitive and antagonistic manner. Complementary because the struggle for existence waged by living beings is prolonged in society by the rivalry between economic actors in the markets.

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[8] This reasoning will subsequently be applied to examine the relationships between the functions, objectives and uses of law in general and competition law in particular.

[9] Paul Bohannan, 'The Differing Realms of the Law' (1965) 67 American Anthropologist 33.

[10] Ost (n 1) 123–136.

[11] ibid 131.

[12] Edgar Morin, 'Method. 1: The Nature of Nature / Transl. and Introd. by J. L. Roland Bélanger' (Lang 1992) 77-78. Dialogic refers to the complementary, competing, and antagonistic connection and interaction between two elements. Unlike dialectics, where contradictions are resolved in a higher unity, dialogic accepts the contradictions that remain within a complex unity.

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Competitive because this struggle for existence is limited by the rules governing free competition in the markets: it is no longer a fight to the death for individuals living in society. Antagonistic because the rules governing free competition in the markets suppress some of the emotions that grip individuals struggling for existence in nature: with few exceptions, individuals participating in economic competition do not kill each other.

Therefore, the logic of natural competition explains, only in part, the logic that operates within competition law. Furthermore, the redoubling and exceeding of natural competition by competition law allows legal actors (in this case, economic actors) to free themselves from the constraints of reality (the struggle for existence) and explore multiple possible worlds (in this case, markets). Finally, free competition, being a secondary reality, nonetheless operates at the heart of the natural, social, economic, cultural, etc. reality, while liberating its potentialities.[13] By its very nature, this legal framework establishes a new reality for economic actors. The task now is to identify some of these characteristics by looking at the functions[14], objectives[15] and uses[16] of competition law. To do this, we should begin our work with a summary of François Ost's theory of law, which, in an original way, characterises the phenomenon of law through its functions, objectives and uses in society.

[13] Ost (n 1) 192–193.

[14] The function is defined, on the one hand, as the specific activity assigned to an element of a set or to the set itself and, on the other hand, as the specific role played by an element within a set whose parts are interdependent.

[15] The objective is defined as the determined goal of an action.

[16] Usage is defined as the established practice specific to an individual or group.

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ii. FUNCTIONS, OBJECTIVES AND USES OF LAW

Among the many legal theorists, I have chosen to focus on the work of François Ost for several reasons. Firstly, in his book he tackles a question that few theorists address: what is the purpose of law?[17] In other words, what are the functions of legal systems in human societies and what specific objectives do they pursue in relation to other social subsystems? Classical theorists such as Hans Kelsen[18], Herbert Hart[19] and Joseph Raz[20] are more concerned with the nature and structure of law than with the role this system plays and the objectives it pursues within societies. As François Ost himself observes, these theorists leave "the question of functions and uses to the social sciences, and that of purposes to philosophers."[21]

Commented [A3]: reply to comment "I would have liked some engagement with classical legal theories in that regard (Hart, Raz, Kelsen)."

[17] Ost (n 1) 18.

[18] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Repr, The Lawbook Exchange, LTD 2009).

[19] Herbert Lionel Adolphus Hart and Leslie Green, *The Concept of Law* (3rd edition, Oxford University Press 2012).

[20] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Repr, Clarendon Press 1978).

[21] Thus, for Kelsen, law is a system of coercion capable of serving the most diverse ends. Ost (n 1) 18 (free translation).

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However, other legal theorists have addressed the issues of the functions, objectives and uses of law, such as Nicolas Bobbio[22], Niklas Luhmann[23], Vincenzo Ferrari[24], Alain Supiot[25] and Pierre Noreau[26]. François Ost's study is, however, the most recent and comprehensive, as it addresses the functions, objectives and uses of law collectively rather than separately, as his predecessors did. In this respect, it best aligns with our aim of exploring, in the light of the 'polycrisis', the raison d'être of competition law based on a robust and well-established theory.[27]

a. Functions of law: to bind, to limit, to measure[28]

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[22] Norberto Bobbio, *De la structure à la fonction: nouveaux essais de théorie du droit* (David Soldini tr, Dalloz 2012).

[23] Niklas Luhmann, *A Sociological Theory of Law* (Routledge & Paul 1985).

[24] Vincenzo Ferrari, *Funzioni del diritto: saggio critico-ricostruttivo* (Laterza 1989).

[25] Alain Supiot, *Homo juridicus: essai sur la fonction anthropologique du droit* (Éd du Seuil 2009).

[26] Pierre Noreau (ed), *Le droit à tout faire: explorations des fonctions contemporaines du droit = All purpose law* (Éd Thémis 2008).

[27] It should be noted, however, that this theory is regarded as a major one within the European scientific community, particularly in the French-speaking world. It is less well known to English-speaking readers. Let us hope that this article will serve as a modest introduction to the author's thinking in the English-speaking world.

[28] Ost (n 1) 240–245.

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The law *weaves* together the legal relationships between social actors within a society. Thus, for example, at the outset, it authenticates individuals' lineages and establishes the structures of social life. Along the way, it builds legal relationships between actors and/or institutions. In times of disintegration, it ensures the continuity of social life by ultimately reconnecting and linking actors and/or institutions. The law sets the limits within which social interaction is to take place. Thus, for example, it orders fundamental prohibitions and, with the help of its definitions and qualifications, regulates the exercise by individuals of their freedoms and capacity, and by public authorities of their power and competences. By weaving together the legal relationships between actors and institutions and limiting the actions of the former and the exercise of power by the latter, the law *provides a measure* of society. By building relevant social ties, selecting desirable behaviours and prohibiting reprehensible ones, the law is understood as the benchmark instrument that inspires and guides individual and collective action. After establishing, in an abstract and synthetic manner, the functions of law, it is necessary to examine the objectives that these functions serve and then the ways in which actors use the law.

b. Objectives of the law

Intrinsically, the purpose of law is to define a general social equilibrium that is effective through regulated constraints that generate trust, while ensuring that this equilibrium is regularly challenged; extrinsically, its purpose is to pursue more general aims such as justice, democracy, etc..[29] The first intrinsic purpose of law is *to define a general social balance that is operational in nature*, i.e., on the one hand, to weigh up the interests and values of actors and/or institutions and, on the other, to arbitrate social conflicts using impartial instruments. The concept of

[29] ibid 329 and following.

Commented [A4]: reply to comment " This is a bit cryptic and needs more explanation. I am also not convinced. To me the intrinsic purpose of freedom of expression legislation is free expression, of environmental law the protection of the environment and of competition law the protection of effective competition. Hence, I am not sure how the "general social equilibrium" point enters the scene."

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general social equilibrium is complex to grasp.[30] It essentially means that the law aims to achieve a general compromise between the various interests and values of social actors. This equilibrium is not harmonious, but unstable and dynamic. Indeed, it very often arises from conflict between social actors (including legal professionals[31]) and the legal claims they assert against one another. Thus, whilst each branch of law fulfils its own specific functions (environmental law aims to protect the environment, competition law aims to ensure the competitive functioning of markets), the legal system ensures the resolution of conflicts both within and between these different branches through the balancing of interests and values. In other words, the law is a 'secondary' sphere of mediation which mirrors social subsystems and resolves conflicts within them (by applying their specific rules) and between these subsystems, by prioritising and balancing the various specific rules.

The second intrinsic purpose of law is *to impose* itself on actors through regulated constraints that generate trust, i.e., on the one hand, to instil fear of coercive action in legal subjects and, on the other hand, to generate adherence to established norms among those same legal subjects. The third intrinsic purpose of law is *to regularly challenge* the general social balance, i.e. to restart the social game using its specific instruments such as legal action, constitutionality and conventionality checks, reversals of case law, doctrinal controversies, but also parliamentary debates and petitions.

[30] ibid 355–414.

[31] Yves Dezalay and Mikael Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 Annual Review of Law and Social Science 433, 814–828 <https://doi.org/10.1146/annurev-lawsocsci-102811-173817>.

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Extrinsically, the law may strive to achieve supreme aims that are external to it and over which it has no monopoly.[32] For François Ost, human institutions, justice and democracy are the three supreme goals, characteristic of Western societies, which are pursued by the law. For Friedrich Hayek, achieving maximum compatibility between the personal initiatives of different social actors is the ultimate goal of law[33]. Thus, the purposes extrinsic to the law vary over time and space. They result from the social game itself: a predominantly liberal society will favour one goal over another; similarly, a socialist society will prefer one aim over another; an ecological society will also prioritise one end over others, and so on. In contemporary societies, however, the goal of economic growth appears to be the most widespread 'paradigmatic' cross-cutting objective, shared by political and ideological systems that are otherwise divergent, to the extent that it has been described as a central organising principle of modern public policy and global governance.[34]

c. Uses of law

The law is mobilised by social actors according to their interests and in accordance with the expected purposes of the law, but also by circumventing or overturning these purposes. Thus, when viewed from a sociological perspective, the legal system appears as a set of resources (institutions, norms, actors, etc.) that can be mobilised by social actors when they defend their

[32] Ost (n 1) 95–103.

[33] Friedrich A von Hayek, *The Mirage of Social Justice* (University of Chicago Press 1976) 132.

[34] Matthias Schmelzer, 'The Growth Paradigm: History, Hegemony, and the Contested Making of Economic Growthmanship' (2015) 118 Ecological Economics 262 <https://doi.org/10.1016/j.ecolecon.2015.07.029>.

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interests in a more or less strategic manner. For example, individuals may invoke the law to defend their interests *in accordance* with the current legal system in force, including its intrinsic and extrinsic purposes. Similarly, they may defend a collective interest, including their individual interest, in accordance with the legal system in force (class action). Inversely, individuals can further their interests by strategically circumventing the legal system in force: they can abuse their rights (anti-social use of the law), grant themselves privileges (opportunistic use of the law) or even corrupt public authorities (malicious use of the law). Differently, social actors can achieve their interests by circumventing, more or less voluntarily, the legal system in force: they can develop norms and/or institutions that are alternative to the legal system in force, such as infralegal norms (customs and practices not recognised by the legal system in force), paralegal norms (norms that are contrary to the existing legal system but effective and legitimate from the point of view of the actors who apply them within that same legal system), and supralegal norms (norms that bypass existing legal systems (law and forum shopping)). All of this also applies to public authorities when they pursue the public interest through the exercise of their powers.

d. Differences between the functions, objectives and uses of law

A first difference must be noted between function and objective. Function always forms part of an instrumental relationship. The question is whether the function is relevant to the objective. In more general terms, it is a question of whether the means are appropriate to the end. On the other hand, the objective is justified in itself. It is intrinsically desirable.

A second difference must be noted between function, purpose and use. While function is part of an instrumental relationship and objective is justified in itself, the use of law is revealed through the concrete practice of legal actors. Thus, the law proves to be both a binding order

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for subjects *of law* (function of the law pursuing certain objectives) and an emancipatory order for *subjects* of law who contribute to the evolution of the legal system according to their interests (use of the law with or without regard for the functions and/or objectives of the law).

e. Dialogic relationship between the functions, objectives and uses of law

The functions, objectives and uses of law maintain a dialogical relationship of complementarity, competition and antagonism. Complementary to one another, the specific functions of law – to bind, to limit, to measure – contribute to the intrinsic[35] and extrinsic[36] objectives of law. In this situation, observed legal practices confirm this complementarity. Competing with each other, the specific functions of law encroach upon and parasitise its intrinsic and/or extrinsic objectives: in this situation, by becoming absolute and rigidifying social interaction, law restricts the use that can be made of it by social actors. Similarly, and conversely, intrinsic and/or extrinsic objectives that parasitise and encroach upon the proper functions of the law lead to a situation where society breaks down and actors exploit the legal system in force abusively, opportunistically and/or maliciously. Antagonistic, the specific functions of law oppose its intrinsic and/or extrinsic objectives: in this situation, law, having become absolute, suppresses social interaction and transforms social actors into automatons who mechanically, automatically and blindly apply legal norms until the legal system collapses. Similarly, but conversely, intrinsic and/or extrinsic objectives that conflict with the proper functions of law generate disorder and chaos: by no longer making use of the law, social actors seriously undermine social peace.

[35] General social balance, regulated constraints and trust generated.

[36] Democracy, justice, etc.

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iii. FUNCTIONS, OBJECTIVES AND USES OF COMPETITION LAW

a. Functions of competition law: to bind, to limit, to measure

Competition law regulates the relationships that operators establish in the markets. As a matter of principle, and in accordance with freedom of enterprise, it allows players to freely enter into business and economic relationships, whether local or remote, in the short, medium or long term. This essential function concerns all types of economic relationships: simple events (such as a business dinner) and the most complex contractual arrangements (such as the merger of several companies).

This first point, which seems obvious, is rarely mentioned in legal doctrine. For example, Frank H. Easterbrook points out that a competitive market "is not necessarily the one with the most rivalry moment-to-moment. {…} Every market entails substantial cooperation over some domain in order to facilitate competition elsewhere. Every firm has webs of internal cooperation. Exxon entails far more coordination than the average cartel. Every joint venture, every partnership, indeed every contract creates cooperation among people who might otherwise be rivals. Markets themselves are organized."[37]

This point can also be illustrated by competition cases in the agricultural sector. In the case of *Milk Producers Ass'n v. United States*, the US Supreme Court recognised that farmers could legitimately cooperate within marketing co-operatives, whilst holding that such coordination became unlawful when it served to monopolise markets.[38] Similarly, in the *French endive case* before the Court of Justice of the European Union, the Court recognised that producer organisations inherently rely on coordination to stabilise agricultural markets, but limited such

Commented [A5]: reply to comment "Particular examples from cases would definitely strengthen the author's point"

[37] Frank H Easterbrook, 'The Limits of Antitrust' (1984) 63 Texas Law Review 1, 1.

[38] *Maryland and Virginia Milk Producers Ass'n, Inc. v United States* 362 US 458 (1960).

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cooperation to what is strictly necessary within the framework of the Common Agricultural Policy.[39] These cases confirm that competition law does not prohibit cooperation as such: rather, it structures markets by organising the relationships between economic operators.

Competition law imposes limits on the behaviour of market operators. It prohibits certain types of relationship (sections 1 and 3 of the Sherman Anti-Trust Act; Article 101 of the Treaty on the Functioning of the European Union (TFEU); etc.) and certain types of behaviour (section 2 of the Sherman Anti-Trust Act; Article 102 of the TFEU; etc.). In other words, it regulates, through the technique of prohibition, the behaviour and type of relationships that market players can form or adopt.

This prohibitive effect is illustrated by landmark case law on both sides of the Atlantic. In the United States, the Supreme Court ruled that agreements aimed at fixing prices are unlawful per se, regardless of their justification or effects, thereby ruling out certain forms of coordination outright.[40] Similarly, in the European Union, the Court of Justice clarified that certain types of agreements may be prohibited by their very nature under Article 101 of the TFEU.[41] These cases confirm that competition law functions, amongst other things, as a system of prohibitions which determines which forms of economic relations are legally unacceptable.

For some legal experts, such as David Gerber, this function lies at the heart of competition law, which he defines as follows: "a general domain of law whose object is to deter private restraints

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[39] Case C-671/15 *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others* EU:C:2017:860

[40] *United States v Socony-Vacuum Oil Co* 310 US 150 (1940)

[41] Case C-67/13 P *Groupement des cartes bancaires (CB) v European Commission* EU:C:2014:2204.

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on competitive conduct."[42] Nevertheless, in keeping with Edgar Morin's complex thinking, it should be added that this is one of the three functions of competition law. Each of these functions is important. They complement each other.

The final function of competition law is that it provides a measure of the market economy. By promoting relevant economic relationships, selecting desirable behaviours and prohibiting undesirable ones, competition law inspires and guides individual and collective economic action. This function, which builds on the previous two, is important because it appears to be an emerging and dynamic function. Its status is not fixed. It evolves in line with market transformations, particularly changes in economic power relations, as well as the social and environmental expectations of citizens and the political demands of social actors.

From a different conceptual perspective,[43] this function can also be described as a market-structuring function: a significant body of literature[44] emphasises that competition law does not merely regulate markets, but actively contributes to shaping their architecture, the distribution

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[42] David J Gerber, *Competition Law and Antitrust: A Global Guide* (Oxford University Press 2020) 14.

[43] Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First Century Capitalist Societies* (2. print., and 1. paperback print, Princeton Univ Press 2002).

[44] Eleanor M Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46 Legal Issues of Economic Integration 317 <https://doi.org/10.54648/LEIE2019020>; Herbert Hovenkamp, 'Antitrust and Platform Monopoly' 130 *The Yale Law Journal* (29 June 2021) 1952; Ioannis Lianos, 'The Social Texture and Structure of Competition: Implications for Competition Law' [2025] SSRN Electronic Journal <https://doi.org/10.2139/ssrn.5073143> accessed 25 June 2026.

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of power within them and the forms of coordination between economic actors (for example, through merger control, rules on abuses of a dominant position or the design of remedial measures).[45]

Giuliano Amato has clearly demonstrated how competition law has evolved over time: while he notes that antitrust remains a vital tool for preventing the emergence of uncontrolled private powers, he observes that this area remains caught in an unstable balance between economic efficiency, market justice and democratic vigilance.[46] This structural tension is clearly illustrated in certain high-profile cases such as *United States v Microsoft Corp*.[47] Whilst Microsoft argued that the integration of its browser into its operating system reflected an

Commented [A8]: reply to comment "Particular examples from cases would definitely strengthen the author's point"

[45] In this sense, the idea of "structure" can be understood as an operational and sector-specific translation of the broader notion of "measure" developed by François Ost. Ost (n 1) 240–246 Law does not simply reflect social relations; it reconfigures them through a double operation. At a general level, it "measures" the social world by selecting acceptable behaviours, defining prohibitions and organising relevant relationships – a process akin to setting the overall proportions of social interaction. At a particular level, it measures individual situations against these general standards, not mechanically but through contextualised judgment. Through this articulation between general structuring and case-by-case calibration, law places social relations within a framework of commensurability, balance and symbolic ordering.

[46] Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart 1997) 95–108.

[47] *United States v Microsoft Corp* 253 F3d 34 (DC Cir 2001)

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innovation aimed at improving efficiency, the courts held that such practices constituted an abuse of a dominant position intended to exclude competitors.[48] However, the final decision not to impose the break-up initially envisaged, in favour of a more moderate settlement, reveals the precarious balance highlighted by Amato: competition law aims simultaneously to preserve economic efficiency, to ensure a fair competitive process and to prevent the consolidation of excessive private power. The decision not to impose the break-up thus demonstrates the importance, at that time, of prioritising economic efficiency over other considerations.

For Sanjukta Paul, this is the central function of competition law. The author thus considers that the "central function of antitrust law is to allocate economic coordination rights. This means that private decisions to engage in economic coordination are always subject to public approval, which antitrust law grants either expressly or tacitly. Currently, its methods for accomplishing this function have the effect of anointing control and concentrated power as the preferred form of economic coordination, and to frown upon forms of economic coordination in which power and decisionmaking are more broadly dispersed."[49] A similar line of reasoning can be observed

Commented [A9]: reply to comment "Particular examples from cases would definitely strengthen the author's point"

[48] Microsoft was, in principle, allowed to bundle its Internet Explorer (IE) web browser with its Windows operating system as part of product integration and innovation. However, the courts found that Microsoft had gone beyond legitimate integration by using this capability as a strategic tool to exclude competitors, notably Netscape, through restrictive agreements and technical practices. While bundling as such was not automatically unlawful, it became problematic where it contributed to the maintenance of monopoly power.

[49] Sanjukta Paul, 'Antitrust as Allocator of Coordination Rights' (2020) 67 UCLA Law Review 378, 380.

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in European competition law, as illustrated by the *Wouters*'s case.[50] In that case, the rules adopted by the Dutch Bar Association prohibited partnerships between lawyers and chartered accountants, thereby restricting certain forms of cooperation between professionals. Whilst such a practice would normally infringe Article 101(1) of the TFEU, the Court of Justice held that, having regard to the proper functioning of the legal profession, this restriction might nevertheless fall outside the scope of that article. This case demonstrates that coordination between market participants is not simply prohibited or permitted, but is subject to a legal assessment process that determines its legitimacy. In this sense, competition law acts as a body for allocating coordination rights, since it decides which forms of cooperation are permitted in light of broader institutional objectives. This also illustrates the structural bias identified by Paul, in that certain forms of coordinated activity, when they fall within recognised institutional frameworks and are linked to a professional or organisational authority, are more readily accepted than more decentralised or purely horizontal forms of coordination.

To resume, competition law enables market relationships, restricts harmful conduct, and guides the organisation of the market economy, with these three functions working together in a complementary and mutually reinforcing way.

b. Objectives of competition law

i. Intrinsic objectives

Intrinsically, competition law contributes to the operationalisation of general social equilibrium by regulating the market economy, in particular by regulating the behaviour and relationships of economic actors in the markets, as well as the structure of those markets. In this respect, it can be said, in substance, that competition law aims at preserving the competitive process

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[50] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98.

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between market actors.[51] In a call to redefine antitrust's goals[52], Tim Wu argues that the consumer welfare standard is both historically unsupported and practically dysfunctional. Rather than focusing narrowly on prices, courts should return to the classic standard articulated by Louis Brandeis: whether the conduct in question promotes competition or tends to suppress or destroy it. This standard, rooted in process rather than quantitative welfare metrics, aligns far more closely with US legislative intent and with antitrust's democratic function.

For Oles Andriychuk, this intrinsic objective must even be understood in stronger terms: the competitive process is not merely an instrument for achieving extrinsic objectives, but constitutes an autonomous normative value, so that the preservation of competition can itself be analysed as a fully-fledged intrinsic objective of competition law.[53] It is precisely through the regulation of this competitive process that public authorities structure markets, organise the behaviour and relationships of market participants and, more broadly, regulate the functioning of the market economy, alongside other legal instruments, thereby contributing, from this specific field of law, to the operationalisation of general social equilibrium.

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[51] Eleanor M Fox, 'Response to Professor Jonathan B. Baker On The Competitive Process Goal' [2022] Network Law Review; Contra Jonathan B Baker, 'A Competitive Process Goal Won't Strengthen Antitrust Antitrust Law, Guests' (2022) 2022 Network Law Review 55.

[52] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018) 135–139.

[53] Oles Andriychuk, *The Normative Foundations of European Competition Law: Assessings the Goals of Antitrust through the Lens of Legal Philosophy* (Edward Elgar Publishing 2017) 121–177.

As Martin J. Sklar points out, originally, the "great antitrust debates of the late 1890s and the early years of the twentieth century, including the measures proposed and adopted, were, in essence, debates about the role and power of the large corporations in the market and in society at large, and debates about the corresponding role and power of government in relation to the emergent corporate order."[54]

Authors such as Sanjukta Paul and Or Brook have recently revealed the importance of competition law's impact on how economic actors behave in markets, i.e. not only how they compete with each other, but also how they cooperate. Sanjukta Paul considers that public authorities, by applying competition rules, directly and indirectly, allow economic actors to coordinate with each other in the market. For the author, the "reigning antitrust paradigm authorizes large, powerful firms as the primary mechanisms of economic and market coordination, while largely undermining others: from workers' organizations to small business cooperation to democratic regulation of markets."[55] Or Brook, in conducting an in-depth study on the application of Article 101 TFEU by European public authorities, demonstrates how the latter achieve, in a more or less consistent manner, a balance between competition objectives

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[54] Martin J Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge University Press 1988) 179 <https://doi.org/10.1017/CBO9780511528781> accessed 11 February 2026.

[55] Paul (n 49) 380.

and other public objectives.[56] Under the old regime (Regulation 17/62), the Commission carried out ex ante scrutiny of all notified agreements and was able to centralise the balancing of competition and public policy objectives. This centralisation, which limited conflicts and ensured a certain degree of consistency, promoted coordination between European economic operators in line with the industrial priorities of the moment.[57]

In order to approach the quality of these behaviours and relationships in a complex manner, it is important not to reduce the actions of market players to the competitive dimension alone (from which competition law derives its name), but to add, from a dialogical perspective, the complementary and antagonistic dimensions of these actions.

Actors do not only compete in markets. They also cooperate and, sometimes, they 'kill' each other. Competition law, by regulating competition, also affects the types of complementary and antagonistic relationships between market players. In concrete terms and by way of example, this means that regulators must allow and/or authorise, where appropriate, the establishment of new economic relationships between operators (the creation, merger and acquisition of companies (Section 7 of the Clayton Act; Regulations 4064/89 and 139/2004)) as well as not applying behavioural prohibitions (rule of reason; Article 101(3) TFEU)). It is also a matter of prohibiting, a priori and on principle, the relationships and/or behaviours that are most harmful to the competitive functioning of the market economy (restrictions per se in US law; restrictions by object (101§1) and hardcore restrictions (101§3) in European Union (EU) law).

[56] Or Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge University Press 2022) 7–12 <https://doi.org/10.1017/9781108946674> accessed 10 October 2025.

[57] ibid 57–59.

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From a broader perspective, the cumulative effect of these individual decisions leads to the gradual structuring of specific markets and, ultimately, of the market economy as a whole. Market structures do not arise out of nowhere: they are the result of a continuous accumulation of individual choices, strategic interactions and legal assessments that unfold over time and across space. In this sense, market structure reflects the accumulation of permitted, prohibited or conditional forms of coordination, competition and concentration, as 'filtered' by competition law.

Commented [A11]: reply to comment "I would suggest however tweaking the theory and refer to a different function e.g. "structuring"."

In this way, competition law exerts a regulated constraint on the actions of market players. It acts as a deterrent. Similarly, and to a certain extent, this law generates confidence among market players. It is a source of predictability. Louis Brandeis could not have said it better when he stated that "Regulation is essential to the preservation and development of competition, just as it is necessary to the preservation and best development of liberty. We have long curbed physically the strong, to protect those physically weaker. More recently we have extended such prohibitions to business."[58]

Finally, the interpretation and application of this law ensure, in a dynamic manner, that the economic and social balances underlying the actions of market players are regularly challenged. By distancing itself from the natural economic game, competition law acts upon it to unlock possibilities. Either it allows market players to return to the *status quo ante*, or it leads them towards new horizons. Such horizons, which complexify the prospects for market activity, are outlined by public authorities, particularly when they enforce competition law.

Tim Wu, in proposing his neo-Brandesian agenda, thus recalls the usefulness of structural remedies specific to competition law, such as breakups, to revitalise an economic sector:

[58] Louis D Brandeis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* (Osmond K Fraenkel ed, The Viking Press 1934) 104.

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"Breakups and the blocking of mergers (also known as "structural relief") are at the historic core of the antitrust program, and should not be shied away from unduly. Breakups, done right, have clear effects. They can completely realign an industry's incentives, and can, at their best, transform a stagnant industry into a dynamic one."[59]

Competition law thus pursues the intrinsic (and substantive) objective of protecting the competitive process, through which it regulates individual behaviour and the relationships between economic actors, while more generally shaping the structure of markets; in doing so, it contributes, like any branch of law, to defining a broader social equilibrium governing the functioning of the market, exercising a constraint that generates both trust and discipline, yet remains constantly open to reassessment and transformation.

Commented [A12]: reply to comment "The author needs to do more work to articulate more clearly the intrinsic v extrinsic distinction."

ii. Extrinsic objectives

Extrinsically, competition law may strive to achieve certain overarching goals over which it does not have a monopoly. These aims, and the objectives that form the necessary steps to achieve them, are decided individually, collectively and publicly by the members of a society. For example, the supreme purpose of American society is 'to form a more perfect Union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.'[60] Similarly, European society, through the voice of the EU, has as its ultimate goal 'to promote peace, its values and the well-being of its peoples', in particular its 'values of respect for human dignity,

[59] Wu (n 52) 132.

[60] Preamble to the United States Constitution.

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freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[61]

Based on these values and overarching aims – the vagueness of whose definitions ensures that they are open to broad and dynamic interpretation (philosophical, political, legal, etc.) capable of adapting to changes in society[62] – social actors pursue more concrete objectives within their respective social spheres, drawing in particular on the decisions of policymakers. In the economic sphere, social actors pursue a wide range of objectives, both individually and collectively. At an individual level, the pursuit of profit[63], recognition[64], cooperation or mutual

[61] Articles 2 and 3 of the Treaty on European Union.

[62] Timothy Endicott, 'Vagueness and Law' in Giuseppina Ronzitti (ed), *Vagueness: A Guide* (Springer Netherlands 2011) <https://doi.org/10.1007/978-94-007-0375-9_7> accessed 1 July 2026; Andrei Marmor, Scott Soames and Joanne Scott (eds), 'The Value of Vagueness' *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) <https://doi.org/10.1093/acprof:oso/9780199572380.001.0001> accessed 7 January 2026.

[63] Milton Friedman, *Essays in Positive Economics* (Nachdr, Univ of Chicago Press 2001) 3–43.

[64] Richard Swedberg, 'The Economic Sociologies of Pierre Bourdieu' (2011) 5 Cultural Sociology 67 <https://doi.org/10.1177/1749975510389712>.

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support[65] are considered legitimate. At a collective level, growth[66], (consumer) welfare[67], or solidarity[68] are equally justified. From an analytical perspective, these extrinsic objectives lie outside the scope of the law, since the law does not have a monopoly over them.[69] Thus, both the law and politics pursue these objectives using the tools and instruments at their disposal. Furthermore, several areas of law (and politics) may pursue the same objective. For example, consumer welfare is pursued by both competition law and consumer law. The same applies to other collective objectives (growth, solidarity), which are not monopolised by any particular branch of law. The same applies, moreover, to individual objectives which, in order to be achieved by individuals, require the application of numerous branches of law (e.g. profit requires property law, contract law, company law, etc.).

Using François Ost's analytical and conceptual framework therefore allows us to put the debate on the objective(s) of competition law into perspective.[70] Indeed, either one considers that the concept of competition is sufficiently broad to include, for example, consumer welfare or the

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[65] Johnston Birchall, *People-Centred Businesses: Co-Operatives, Mutuals and the Idea of Membership* (Palgrave Macmillan 2011) <https://doi.org/10.1057/9780230295292>.

[66] Schmelzer (n 34).

[67] Roger Backhouse, Tamotsu Nishizawa and Antoinette Baujard (eds), *Welfare Theory, Public Action, and Ethical Values: Revisiting the History of Welfare Economics* (Cambridge University Press 2021) <https://doi.org/10.1017/9781108882507>.

[68] Jean-Louis Laville, *The Solidarity Economy* (University of Minnesota Press 2023).

[69] Ost (n 1) 95 and following.

[70] Fox, 'Against Goals' (n 2).

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protection of competitors, in which case this analysis will still need to link the tools of this law (general social equilibrium, constraint, challenge) with one or more of these objectives; or, as is the case here, one may choose to analyse the specific objective of competition law and then articulate it to other, more general objectives (such as consumer welfare or the protection of competitors). The process is the same. However, the second option, which is more rigorous from an analytical perspective, also provides greater clarity regarding the values, interests and intentions held by the author. It avoids reducing a specific objective to the meaning of a broader concept and thereby obscuring the author's position. Furthermore, this analytical framework may prove useful to public authorities (including policymakers) seeking to justify the application and interpretation of competition law. As in all branches of law, it is legitimate to pursue specific economic, social, and ecological objectives within a broader horizon of overarching aims and shared values.

This perspective finds strong support in Stavros Makris's analysis of competition law as a form of "responsive law".[71] Indeed, Stavros Makris demonstrates that the persistent disagreements surrounding the objectives of competition law are not pathologies to be eliminated, but structural features stemming from the law's intrinsically open and purposive character. In this sense, competition law cannot be reduced to a closed system organised around a single, all-encompassing objective; rather, it operates within a broader normative environment in which multiple values, interests and policy considerations coexist and interact. This confirms the relevance of distinguishing analytically between the specific objective of competition law and the wider set of extrinsic objectives it may contribute to, since the openness of the legal system

[71] Stavros Makris, 'Openness and Integrity in Antitrust' (2021) 17 Journal of Competition Law & Economics 1, 35 and following <https://doi.org/10.1093/joclec/nhaa018>.

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necessarily entails that legal reasoning involves value judgments and trade-offs that must be made explicit.

~~Ioannis Lianos thus defends the idea that, historically, competition law has been both an instrument of economic policy and social regulation: although the latter component has, de facto, disappeared since the 1980s, it remains legitimate to pursue this objective today, given the link between the concentration of economic power and the economic inequalities that weigh heavily on society.[72]~~

~~For example, the supreme purpose of American society is 'to form a more perfect Union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.'[73] Similarly, European society, through the voice of the EU, has as its ultimate goal 'to promote peace, its values and the well-being of its peoples', in particular its 'values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[74]~~

To resume, the objectives of competition law are, intrinsically, to regulate the market economy by structuring the behaviours and relationships of economic actors, and extrinsically, to pursue broader societal goals that complement but exceed the competitive process itself. In doing so, competition law contributes to the operationalisation of general social equilibrium.

iii. Tension between intrinsic and extrinsic objectives of competition law

Commented [A13]: reply to commen "I would suggest that the author shows the tension between intrinsic/extrinsic aims or intramural/extramural value disagreements through a few targeted examples."

~~[72] Lianos, 'Competition Law as a Form of Social Regulation' (n 2) 14–18.~~

~~[73] Preamble to the United States Constitution.~~

~~[74] Articles 2 and 3 of the Treaty on European Union.~~

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Whilst a distinction can be drawn between the intrinsic objective of competition law and its extrinsic objectives, this distinction immediately gives rise to a tension that must be addressed rather than dissolved. Competition law is never applied in a normative vacuum: its internal objective of preserving the competitive process must constantly be confronted with the broader economic, social and ecological objectives that public authorities seek to pursue through, alongside, or sometimes despite competition law.[75] This tension can be partly resolved by answering this question: how can the process of competition (that is, the competitive functioning of markets) best serve broader societal objectives? History shows that there have been several answers to this question.

In the United States, this articulation has historically taken different forms. The Brandeisian tradition conceived antitrust as a constitutional and political tool for preventing excessive concentrations of private economic power: in this view, the intrinsic objective of antitrust was closely connected to extrinsic objectives such as democracy, liberty, fairness and the prevention of domination.[76] The Chicago School profoundly transformed this articulation from the 1970s onwards: it sought to make antitrust more "scientific" by reducing its objectives to economic efficiency and, more specifically, to consumer welfare.[77] Drawing on more sophisticated industrial organisation theory, game theory and models of strategic behaviour, Post-Chicago scholars showed that practices previously treated as benign (such as tying, exclusive dealing,

[75] Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 University of Pennsylvania Law Review 1051 <https://doi.org/10.2307/3311791>.

[76] Wu (n 52) 14–23.

[77] Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008) 3–6.

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predatory pricing, raising rivals' costs or certain vertical restraints) may, under particular market conditions, produce exclusionary effects and durable market power: in this sense, the Post-Chicago School broadened the internal understanding of competitive harm without fully reopening competition law to the wider political and democratic objectives emphasised by the Brandeisian tradition.[78] The recent neo-Brandeisian revival in the United States reopens this settlement. Authors argue that the consumer welfare standard is too narrow to capture the full social and political harms produced by concentrated private power, especially in digital markets, labour markets and platform economies: they therefore seek to reconnect the intrinsic objective of antitrust with broader extrinsic objectives such as democracy, equality, labour protection, innovation and resilience.[79]

A similar, though distinct, movement can be observed in European Union competition law. Its foundations were shaped by the project of market integration and, in part, by ordoliberal concerns with maintaining an economic order in which private power remains legally constrained.[80] The competitive process was therefore linked from the outset to broader institutional objectives of the Union, notably the construction of the internal market. In *Établissements Consten*, the Court thus judged that "what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States *in a manner which might harm the attainment of the*

[78] Christopher S Yoo, 'THE POST-CHICAGO ANTITRUST REVOLUTION: A RETROSPECTIVE' (2020) 168 University of Pennsylvania Law Review 2145.

[79] Khan (n 2).

[80] David Gerber, *Law and Competition in Twentieth-Century Europe* (Oxford University Press 2001) 334–391 <https://doi.org/10.1093/acprof:oso/9780199244010.001.0001> accessed 29 June 2026.

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objectives of a single market between State".[81] More recently[82], debates on digital markets[83], fairness[84], sustainability[85] and strategic autonomy[86] have intensified the question of how competition law should contribute to wider social objectives.

These developments show that the articulation between intrinsic and extrinsic objectives never fully dissolves the tension between them. Even where external objectives are economic in nature, such as productivity, innovation or growth, they do not necessarily coincide with the internal objective of preserving the competitive process. Competition law is therefore not

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[81] Case 56/64 and 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission, ECLI:EU:C:1966:41, p.341,

[82] Marios C Iacovides and Konstantinos Stylianou, 'The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy' (2024) 3 European Law Open 587 <https://doi.org/10.1017/elo.2024.31>.

[83] Oles Andriychuk, 'EU Digital Competition Law: The Socio-Legal Foundations' (2023) 25 Cambridge Yearbook of European Legal Studies 81 <https://doi.org/10.1017/cel.2023.12>.

[84] Marios C Iacovides and Konstantinos Stylianou, 'The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy' (2024) 3 European Law Open 587 <https://doi.org/10.1017/elo.2024.31>.

[85] Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354 <https://doi.org/10.1093/jaenfo/jnaa006>.

[86] Ioannis Lianos, 'Polycentric Competition Law : The Geo-Economic Turn' (SSRN, 2026) <https://doi.org/10.2139/ssrn.6556220> accessed 29 June 2026.

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confronted only with a conflict between "economic" and "non-economic" values; it is also confronted with conflicts between different economic rationalities. The question is therefore not simply whether competition law should pursue external objectives, but how much competition, of what kind, and in which market structure, is considered necessary or desirable in light of the broader economic, social and ecological objectives pursued elsewhere.

In this respect, competition law protects a certain institutional form of competition, whose intensity and modalities vary according to the market concerned and the normative horizon within which public authorities operate. In some markets, public authorities may seek intense rivalry, low barriers to entry and price discipline as illustrated by liberalised air transport markets.[87] In others, such as renewable energy, they may tolerate or even encourage certain forms of cooperation, concentration or coordination where these are considered necessary to generate innovation or to facilitate environmental transition for instance.[88] The internal objective of competition law is constantly adjusted through a broader judgment about the socially desirable degree of rivalry and coordination. The decisive task is therefore to identify the relevant social objectives, to establish priorities among them, and to adopt a coherent

[87] Ugo Arrigo, Massimo Beccarello and Giacomo Di Foggia, 'Strategic Response of European Airlines to Market Dynamics: A Comparative Analysis' (2023) 13 Administrative Sciences 255 <https://doi.org/10.3390/admsci13120255>.

[88] Julian Nowag and Wolf Sauter, 'Climate Change and the Energy Transition: What Role for Article 101(3) TFEU?' in Leigh Hancher and Ignacio Herrera Anchustegui (eds), *Research Handbook on EU Competition Law and the Energy Transition* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781803922591.00015> accessed 29 June 2026.

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method for articulating the internal objective of competition law with the external objectives that it may be called upon to serve.[89]

c. Uses of competition law

Competition law can be mobilised in various ways by social actors according to their interests and in accordance with the intended purposes of the law, but also by circumventing or overturning those purposes.

i. Public uses

Competition law must be enforced by public authorities. In principle, they must defend the public interest in accordance with current competition law, including its intrinsic and extrinsic objectives. Because competition authorities operate under limited financial, human and informational resources, they cannot investigate every possible infringement or address every market failure. Their action necessarily involves choices: which sectors to monitor, which complaints to pursue, which cases to open ex officio, which theories of harm to prioritise, which remedies to seek, and which forms of market conduct to treat as especially harmful. In this sense, public enforcement always presupposes a competition policy, understood as the strategic orientation through which public authorities translate the objectives of competition law into concrete enforcement priorities.[90] The OECD thus observes that case prioritisation and

Commented [A14]: Reply to comment "There are private parties but also institutional players that make use of the law and this should be factored into the analysis"

[89] This methodological exercise will be undertaken in Section 4.

[90] Nicolas Petit, 'How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of Their Enforcement Activities? A Multi-Jurisdictional Assessment' (2010) 1–2010 Concurrences 44;

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prosecutorial discretion play a fundamental role in shaping the effectiveness of competition policy, because such decisions determine which actions authorities take and reflect their broader strategy and priorities.[91] This can be observed in the Commission's own practice. The Commission's guidance on Article 102 TFEU, for instance, explicitly presents itself as a statement of enforcement priorities, explaining how the Commission intends to prioritise exclusionary abuse cases and thereby shaping the practical application of the prohibition of abuse of dominance.[92] As Or Brook and Katalin Cseres show, the choice of which cases, sectors and practices to prioritise is not a neutral technical exercise, but a discretionary process with significant socio-economic and democratic consequences: for the authors, competition authorities therefore need to develop a responsive and accountable competition policy capable of linking enforcement priorities to broader public-interest concerns, without abandoning their legal mandate or institutional independence.[93] The "public use" of competition law therefore

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Wouter PJ Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 World Competition 353 <https://doi.org/10.54648/WOCO2011033>.

[91] OECD, 'Case Prioritisation and Prosecutorial Discretion by Competition Authorities' (333rd edn, 2026) OECD Competition Law and Policy Working Papers <https://doi.org/10.1787/0ce3398f-en> accessed 30 June 2026.

[92] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20.

[93] Or Brook and Katalin Cseres, 'Beyond Consumer Welfare: Responsive Priority-Setting in the Public Interest in Competition Law Enforcement' [2026] Legal Studies 1 <https://doi.org/10.1017/lst.2026.10119>.

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consists not merely in applying prohibitions, but in constructing an enforcement agenda through which the intrinsic objective of competition law and its extrinsic objectives are operationalised in practice.

Exceptionally, public authorities may support the particular interests of certain private individuals by strategically circumventing the competition law in force. A well-known illustration of this perception is the Commission's controversial decision to prohibit the *GE/Honeywell* merger.[94] Widely publicized at the time, this case became emblematic of alleged European protectionism because it stood in sharp contrast to the U.S. authorities' position: the U.S. Department of Justice had approved the deal, while the European Commission blocked it on competition grounds. The decision fuelled accusations that Brussels was using merger control to shield European competitors, most notably Airbus, from the strengthened market position that the combined GE/Honeywell entity might have achieved. However, and drawing on a unique dataset of more than 5,000 merger notifications submitted to the European Commission between 1990 and 2014, Anu Bradford and her co-authors show that the Commission does not challenge mergers involving non-EU acquirers more frequently; in fact, transactions led by foreign buyers appear slightly less likely to be contested. This pattern persists even when focusing exclusively on U.S. acquirers.[95] The authors also demonstrate that the key determinants of Commission intervention lie in the value of the transaction, the degree

[94] Case COMP/M.2220 - General Electric/Honeywell

[95] Anu Bradford, Robert J Jackson and Jonathon Zytnick, 'Is E.U. Merger Control Used for Protectionism? An Empirical Analysis' (2018) 15 Journal of Empirical Legal Studies 165 <https://doi.org/10.1111/jels.12176>.

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of market concentration, and the economic structure of the operation, rather than in the nationality of the firms involved.[96]

ii. Private uses

Competition law can be mobilised by private individuals. They can defend their individual and collective interests in accordance with the current legal system in force, including its intrinsic and extrinsic purposes. Thus, individuals can report anti-competitive behaviour by several companies in the same sector to the public authorities, for example, if they collude to raise the price of a basic necessity. In this situation, individuals invoke competition law in accordance with its functions (restricting certain types of economic behaviour through specific prohibitions) and its intrinsic ~~(regulating the market economy)~~ and extrinsic ~~(promoting general welfare (United States); promoting the welfare of its peoples (EU))~~ purposes.

The doctrine states that, whether in the United States, where private actions have long been a cornerstone of the antitrust system, or in Europe, where private enforcement, —once marginal, —has gradually established itself alongside public enforcement, private enforcement has now become a central component of the competition law framework, essential both for deterrence and for compensation.[97]

This centrality of private enforcement is confirmed by case law. In EU law, *Courage v Crehan* constitutes the foundational judgment: the Court of Justice held that the full effectiveness of Article 101 TFEU would be put at risk if individuals could not claim damages for loss caused

Commented [A15]: Reply to comment "I would have liked case law examples demonstrating the different uses."

[96] ibid.

[97] Barry J Rodger, Miguel Sousa Ferro and Francisco Marcos, *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar publishing 2023) 2–27 and 52–80.

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by anticompetitive agreements, and expressly stated that such actions strengthen the working of EU competition rules and discourage restrictive agreements or practices.[98] This compensatory dimension was then confirmed in *Manfredi*, where the Court recognised that any individual may claim compensation for harm suffered where there is a causal link between that harm and an agreement or practice prohibited by Article 101 TFEU.[99] In US law, the importance of private enforcement is illustrated by *Hanover Shoe*, where the Supreme Court allowed a direct purchaser to recover treble damages for monopolisation, rejecting the defendant's "passing-on" defence and thereby preserving strong incentives for private plaintiffs to sue.[100] The same logic appears in *Illinois Brick*, where the Supreme Court limited federal damages actions to direct purchasers partly to avoid diluting enforcement incentives and multiplying recovery problems.[101] More concretely, the *Apple e-books* litigation shows how private enforcement complements public enforcement in practice: after findings that Apple had

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[98] Case C-453/99, *Courage v Crehan*, ECLI:EU:C:2001:465, §26: "The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."

[99] Joined Cases C-295/04 to C-298/04, *Manfredi*, ECLI:EU:C:2006:461, §63: "Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm."

[100] *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 392 U.S. 481 (1968)

[101] *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977)

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participated in an unlawful price-fixing conspiracy, private class actions and settlements resulted in hundreds of millions of dollars being paid to consumers who had overpaid for e-books.[102]

Conversely, private individuals can further their interests by strategically circumventing the legal system in force. For example, they may abuse their right to report anti-competitive behaviour by third-party companies to the public authorities for the sole or main purpose of undermining the competitiveness of those companies while preserving their own profits.[103] For instance, in *Brunswick*, the Supreme Court prevented private plaintiffs from converting antitrust law into a device for protecting themselves against competition: the plaintiffs' alleged loss resulted from the continued presence of competing bowling centres on the market, whereas antitrust law protects competition, not competitors' expectation of higher profits resulting from rivals' disappearance.[104] *Cargill* similarly illustrates the judicial resistance to strategic antitrust claims by competitors: the plaintiff sought to enjoin a merger because the merged entity might lower prices and reduce its margins; the Supreme Court held that loss caused merely by increased competition is not antitrust injury.[105] Indeed, according to William Baumol and

Commented [A16]: Reply to comment " I would have liked case law examples demonstrating the different uses."

[102] *United States v Apple Inc.*, 791 F.3d 290 (2d Cir. 2015)

[103] William J Baumol and Janusz A Ordover, 'Use of Antitrust to Subvert Competition' (1985) 28 The Journal of Law and Economics 247 <https://doi.org/10.1086/467083>; Daniel Sokol, 'Strategic Use of Public and Private Litigation in Antitrust as Business Strategy' (2012) 85 Southern California Law Review 689.

[104] *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 1977

[105] *Cargill, Inc. v Monfort of Colorado, Inc.*, 479 U.S. 104, 1986

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Janusz A. Ordover, antitrust law, designed to protect and promote competition, can be diverted by firms to subvert that very competition,— turning it into a strategic tool for protectionism and rent-seeking.[106] Similarly, Daniel Sokol observes that firms can strategically use antitrust, —both through private actions and by influencing public enforcement, —to sway authorities and raise the costs of their dominant rivals, thereby turning antitrust into a tool of strategic competition rather than a mechanism for protecting competition.[107]

Similarly, they may seek to change the definition, application and/or interpretation of competition rules by lobbying public authorities.[108] The OECD explains that legitimate corporate engagement provides valuable expertise to policymakers, but it becomes undue influence when it is opaque, manipulative, or disproportionately shapes policy away from the public interest.[109] Because the boundary is often blurred, the report highlights indicators, —such as transparency, intent, independence, epistemic integrity, and balanced stakeholder access, —to help distinguish constructive participation from influence that risks distorting competition policy.[110] Thus, in US law, *Noerr* illustrates how firms may seek to influence public

Commented [A17]: Reply to comment " I would have liked case law examples demonstrating the different uses."

[106] Baumol and Ordover (n 103) 248–252.~~Baumol and Ordover (n 96) 248–252.~~

[107] Sokol (n 103) 698–707.~~Sokol (n 96) 698–707.~~

[108] Adrian J Vossestein, 'Corporate Efforts to Influence Public Authorities, and the EC Rules on Competition' (2000) 37 Common Market Law Review 1383 <https://doi.org/10.54648/315052>.

[109] OECD, 'Corporate Influence in Competition Policymaking' (322nd edn, 2025) OECD Competition Law and Policy Working Papers <https://doi.org/10.1787/4f19edd4-en> accessed 21 October 2025.

[110] ibid 11–14.

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authorities in order to obtain regulatory outcomes harmful to rivals: although the Supreme Court protected such petitioning activity from antitrust liability, the case shows how lobbying may be used as a strategic tool to reshape the competitive environment through public decision-making.[111] *Allied Tube* is a clearer example of the limits of legitimate participation in rule-making processes: the Supreme Court refused to protect a coordinated strategy by incumbent firms to manipulate a private standard-setting body whose standards were routinely incorporated into public regulation, thereby preventing rivals' products from entering the market.[112] In EU law, *Bureau national interprofessionnel du cognac* illustrates how private or professional operators may seek to transform a market-restricting arrangement into a generally binding rule through public approval: the Court nevertheless held that the interprofessional agreement fixing minimum prices remained subject to Article 101 TFEU, notwithstanding its institutional setting and submission to public authorities.[113] An EU case similarly shows how a professional body may use a state-backed regulatory framework to transform a collective pricing decision into a compulsory tariff: the Court treated this as a decision by an association of undertakings whose anticompetitive effects were reinforced by national legislation.[114]

A more subtle form of influence concerns the production of academic knowledge itself. As Ioannis Lianos argues[115], competition policy is increasingly shaped by a dense ecosystem

Commented [A18]: Reply to comment "How about corporate funding affecting scholarship and academic research "

[111] *Eastern R. Conference v Noerr Motor Freight, Inc.*, 365 U.S. 127, 1961

[112] *Allied Tube & Conduit Corp. v Indian Head, Inc.*, 486 U.S. 492, 1988

[113] C-123/83, *Bureau national interprofessionnel du cognac v Guy Clair*, ECLI:EU:C:1985:33.

[114] C-35/96, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1998:303

[115] Ioannis Lianos, 'Academic "Capture"? The Hidden Costs of Corporate Funding in Competition Policy Research and Proposed Remedies' (Centre for Law, Economics and Society, UCL 2024) 7/2024.

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linking academic economists, forensic economic consultants, law firms, competition authorities, courts, corporations and corporate-funded research centres. The problem is not simply that firms lobby public authorities directly, but that powerful corporate actors may also seek to influence the intellectual infrastructure through which competition rules are defined, interpreted and applied. Corporate funding of academic research, expert reports, conferences, think tanks or research networks may therefore contribute to shaping the "marketplace of ideas" in competition economics, especially where the same experts circulate between academia, consultancy, litigation and policy advice. According to the author, this creates risks of professional and intellectual bias, reduces epistemic pluralism, and generates a broader "trust deficit" in competition policy research. In this sense, influence over competition law may operate not only through formal lobbying or manipulation of rule-making processes, but also through the strategic production and dissemination of apparently neutral expertise that affects how public authorities, judges and policymakers understand competition itself.

More recklessly, they may also circumvent competition rules to their advantage by bribing public authorities.[116] For instance, in US law, the *Caltrans* (California Department of Transportation) bid-rigging and bribery prosecutions illustrate how private operators may bypass competition rules altogether by corrupting public procurement officials: contractors submitted sham bids and paid bribes to ensure that contracts were awarded to predetermined

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[116] OECD, *Anti-Corruption and Integrity Outlook 2024* (OECD 2024) <https://doi.org/10.1787/968587cd-en> accessed 21 October 2025.

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firms, thereby replacing competitive allocation with a corrupt administrative allocation.[117] Alternatively, private individuals can pursue their interests by circumventing, more or less voluntarily, the legal system in force. As Antoine Masson points out, competition law is never neutral for the legal strategist: it functions as a double-edged sword, simultaneously imposing strict constraints on firms while offering powerful levers to shape markets, challenge or defend competitive positions, and influence institutional frameworks.[118] Companies must therefore learn to wield this body of law not merely as a regulatory boundary, but as a strategic asset in its own right. They can, for example, draw up infralegal standards, such as codes of conduct, to relay the competition law in force within a particular sector.[119] In EU law, *Ordem dos Técnicos Oficiais de Contas* shows how a professional body may use internal regulatory or deontological rules to organise a market in its own favour: the Court held that mandatory training rules adopted by a professional association could fall under Article 101 TFEU where they eliminated competition in a substantial part of the relevant market and imposed discriminatory conditions

Commented [A20]: Reply to comment " I would have liked case law examples demonstrating the different uses."

[117] *United States v Bill R. Miller / Choon Foo "Keith" Yong / William D. Opp*, U.S. District Court, Eastern District of California, 2022 (Case 2:22)

[118] Antoine Masson, 'Introduction - L'ambivalence du droit, source d'opportunités stratégiques : l'exemple du droit de la concurrence' in Hugues Bouthinon-Dumas and others, *Stratégies d'instrumentalisation juridique et concurrence* (Larcier 2013).

[119] For example, see the website of the Association of the British Pharmaceutical Industry available at https://www.abpi.org.uk/competition-law-rules-and-procedures/

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on competing training providers.[120] Similarly, they can develop supra-legal standards, such as law and forum shopping strategies, in order to mobilise, in a specific time and in a specific space, the rules of competition to their advantage.[121] For instance, *Cartel Damage Claims (CDC) Hydrogen Peroxide* illustrates the supra-legal dimension of competition-law strategy in Europe: by aggregating damages claims and bringing proceedings before a selected national court against cartelists established in several Member States, the claimant used the jurisdictional architecture of EU private international law to maximise the procedural effectiveness of competition damages litigation.[122]

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[120] Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, ECLI:EU:C:2013:127

[121] Patrick Krauskopf and Andrea Tkacikova, 'Competition Law Violations and Private Enforcement: Forum Shopping Strategies' (2011) 4 Global Competition Litigation Review 26.

[122] C-352/13, *Cartel Damage Claims Hydrogen Peroxide SA v Akzo Nobel e.a.*, ECLI:EU:C:2015:335.

Competition law must also be enforced by public authorities. In principle, they must defend the public interest in accordance with current competition law, including its intrinsic and extrinsic objectives.[123][124][125]

Exceptionally, they may support the particular interests of certain private individuals by strategically circumventing the competition law in force. A well-known illustration of this perception is the Commission's controversial decision to prohibit the *GE/Honeywell* merger.[126] Widely publicized at the time, this case became emblematic of alleged European protectionism because it stood in sharp contrast to the U.S. authorities' position: the U.S. Department of Justice had approved the deal, while the European Commission blocked it on competition grounds. The decision fuelled accusations that Brussels was using merger control to shield

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[123] Nicolas Petit, 'How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of Their Enforcement Activities? A Multi-Jurisdictional Assessment' (2010) 1–2010 Concurrences 44; Wouter PJ Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 World Competition 353 <https://doi.org/10.54648/WOCO2011033>.

[124] OECD, 'Case Prioritisation and Prosecutorial Discretion by Competition Authorities' (333rd edn, 2026) OECD Competition Law and Policy Working Papers <https://doi.org/10.1787/0ce3398f-en> accessed 30 June 2026.

[125] Or Brook and Katalin Cseres, 'Beyond Consumer Welfare: Responsive Priority-Setting in the Public Interest in Competition Law Enforcement' [2026] Legal Studies 1 <https://doi.org/10.1017/lst.2026.10119>.

[126] Case COMP/M.2220 - General Electric/Honeywell

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~~European competitors—most notably Airbus—from the strengthened market position that the combined GE/Honeywell entity might have achieved. However, and drawing on a unique dataset of more than 5,000 merger notifications submitted to the European Commission between 1990 and 2014, Anu Bradford and her co-authors show that the Commission does not challenge mergers involving non-EU acquirers more frequently; in fact, transactions led by foreign buyers appear slightly less likely to be contested. This pattern persists even when focusing exclusively on U.S. acquirers.[127] The authors also demonstrate that the key determinants of Commission intervention lie in the value of the transaction, the degree of market concentration, and the economic structure of the operation, rather than in the nationality of the firms involved.[128]~~

Thus, competition law emerges not as a neutral set of rules, but as a versatile and contested resource: —one that can advance the public interest or be strategically repurposed by private and public actors, depending on how, why, and by whom it is mobilised.

d. Dialogic relationship between the functions, objectives and uses of competition law

The preceding distinction between the functions, objectives and uses of competition law remains, at this stage, primarily descriptive. The same applies to their dialogic relationship.

Commented [A22]: Reply to comment "But the motivation behind this analysis should be clearer. Is the author engaging in a sociological analysis describing different uses/functions of the law?"

~~[127] Anu Bradford, Robert J Jackson and Jonathon Zytnick, 'Is E.U. Merger Control Used for Protectionism? An Empirical Analysis' (2018) 15 Journal of Empirical Legal Studies 165 <https://doi.org/10.1111/jels.12176>.~~

~~[128] ibid.~~

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This dialogic relationship will be described through three modalities: complementarity (i), competition (ii); and antagonism (iii).

This approach differs from, while remaining complementary to, the one developed by Ioannis Lianos in his theory of polycentric competition law.[129] Lianos argues that mainstream competition law remains largely trapped in a monocentric model, centred on price, output and consumer welfare within a relevant market, whereas contemporary economic power operates across multiple interconnected spheres: innovation, data, privacy, finance, politics, environmental protection and social justice. His polycentric model is particularly valuable because it offers a complex and rigorous framework for understanding how competition law affects society beyond the immediate market transaction, especially in digital and networked economies where power can be leveraged from one social sphere into another. The present analysis pursues a different, though related, objective. Rather than starting from the polycentric nature of social and economic interactions, it reconstructs competition law through the dialogic relationship between its functions, objectives and uses. This perspective seeks to show how competition law operates as a specific social technique, how it is oriented by intrinsic and extrinsic objectives, and how it is strategically mobilised by private and public actors. It may therefore complement Lianos' polycentric approach by offering a more internal account of how the specific functions, normative aims and practical uses of competition law interact before assessing, in Part 4, how they should be articulated in a coherent prescriptive framework.

~~The functions, objectives and uses of competition law maintain a dialogical relationship of complementarity (i), competition (ii) and antagonism (iii).~~

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Perhaps the author could benefit from this work: here and here."

[129] Lianos, 'Polycentric Competition Law' (n 2).~~Ioannis Lianos, 'Polycentric Competition Law' (2018) 71 Current Legal Problems 161 <https://doi.org/10.1093/clp/cuy008>.~~

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i. Complementary relationship

Complementary to one another, the specific functions of competition law – to bind, to limit, to measure – contribute to the intrinsic (regulation of the market economy through the competitive process) and extrinsic objectives (the pursuit of general objectives, including economic ones, such as fairness, freedom, sustainability, etc.) of competition law. In this situation, observed legal practices confirm this complementarity.

Thus, the approaches promoted by several authors strive, each in different ways, to align the application and interpretation of competition law with economic, ~~and~~ social and ecological sciences by incorporating into legal reasoning not only strictly economic considerations (price, ~~,~~production, efficiency, ~~consumer welfare~~), but also more general economic considerations (~~the~~ quality ~~and sustainability~~ of goods and services, consumer welfare, ~~fairness,~~ loyalty and power in economic relations, etc.) as well as social considerations (freedom, equality and solidarity among actors inside and outside the markets, democracy ~~(notably through the control of economic powers by public authorities)~~, respect for fundamental rights, etc.) and environmental considerations.[130]

As Ariel Ezrachi states[131], competition law should not be understood as a pure, stable and exclusively economics-based discipline. It operates instead like a "sponge": while economic analysis functions as a membrane that limits the absorption of external values, competition law remains structurally porous to domestic political, social, institutional and economic considerations. The challenge is therefore not to deny this porosity, but to make it transparent

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Perhaps the author could benefit from this work: here and here."

[130] ibid; Stylianou and Iacovides (n 2).

[131] Ariel Ezrachi, 'Sponge' [2016] Journal of Antitrust Enforcement jnw011 <https://doi.org/10.1093/jaenfo/jnw011>.

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and compatible with legal certainty, legitimacy and the rule of law. To draw on François Ost's analysis[132], competition law, like all branches of law, is a secondary reality that frees individuals (in their role as economic actors) from the constraints of reality. The fewer extrinsic objectives there are (for example, by limiting them to the sole well-being of the consumer), the more economic reality imposes itself on social actors, who are unable to inject flexibility into a system that is becoming increasingly rigid. Conversely, the more extrinsic objectives there are to pursue, the less economic reality imposes itself on social actors, who are then able to challenge the system. The contestability of markets is therefore measured by the possibility of pursuing a plurality of extrinsic objectives.

To illustrate this point, we can list, by way of example[133], the authors who advocate for a plurality of extrinsic objectives in competition law, with a view, on the one hand, to improving the way social actors utilise its functions and, on the other hand, to adapting it to the increasingly complex reality of the economic system within society and the biosphere. Drawing on unique theoretical and empirical research, these authors seek to strike an original balance between the functions, objectives and uses of competition law in light of the crises affecting our societies and our planet.

~~The following pages illustrate this dynamic by examining how such complementarity operates across several key themes, including the move beyond a narrow consumer-welfare focus, the relationship between sustainability and competition, the links between market concentration and inequality, and the broader balancing of economic and non-economic powers in society.~~

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Commented [A26]: Reply to comment "But the motivation behind this analysis should be clearer. Is the author engaging in a sociological analysis describing different uses/functions of the law?"

[132] Ost (n 1) 123–136.

[133] This research is not exhaustive. See Stylianou and Iacovides (n 2) for an attempt to do so.

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Several authors argue that the plurality of extrinsic goals is a good in itself. For instance, Maurice Stucke[134] argues that the pursuit of a single economic objective has impoverished US antitrust law by marginalising its political, social and moral dimensions. According to him, consumer welfare, efficiency, economic freedom and the protection of the competitive process cannot be collapsed into one unified goal. Antitrust law should instead acknowledge and integrate its multiple policy objectives through a blended framework capable of restoring its broader social relevance. This pluralist view has a strong pedigree in US antitrust scholarship. Robert Pitofsky[135] famously argued that excluding political values from antitrust interpretation would be bad history, bad policy and bad law. Although economic considerations should remain paramount, antitrust also embodies political values: preventing excessive concentrations of economic power, preserving individual and business freedom, and avoiding the need for more intrusive state control over a highly concentrated economy. Similarly, Anna Gerbrandy[136] argues that nothing in the EU constitutional framework requires competition law to be confined to consumer welfare and economic efficiency. As part of the European economic constitution, competition law should be recalibrated in light of the EU's commitment to a social market economy, so that it can meaningfully engage with non-market concerns such as sustainability, solidarity, vulnerable workers, fundamental rights and democratic risks linked to platform power.~~Beyond consumer-welfare~~

[134] Maurice E Stucke, 'Reconsidering Antitrust's Goals' (2012) 53 Boston College Law Review 551.

[135] Pitofsky (n 75).

[136] Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 JCMS: Journal of Common Market Studies 127 <https://doi.org/10.1111/jcms.12814>.

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Other authors, whilst acknowledging the diversity of competition law's extrinsic objectives, advocate a more targeted approach to these objectives in light of certain contemporary crises which they consider important for competition law to address using its instruments. This is the case, for example, with the equality crisis. Ioannis Lianos[137] provides a prominent example of this targeted approach. He argues that competition law should respond to the equality crisis by being understood not only as an instrument of economic efficiency, but also as a form of social regulation. In his view, rising market concentration, labour-market power, digital platforms and financialised capitalism may generate structural inequalities that cannot be adequately addressed by taxation or welfare policy alone. Competition law should therefore engage with fairness, equality of opportunity and "complex equality", by preventing economic power from being converted into political, cultural or social domination, while still remaining attentive to the limits and specific institutional function of competition law.[138]

This is also the case with the domination crisis. Elias Deutscher[139] provides a closely related account by unpacking the so-called competition-democracy nexus through the lens of

[137] Ioannis Lianos, 'Competition Law as a Form of Social Regulation' (2020) 65 The Antitrust Bulletin 3 <https://doi.org/10.1177/0003603X19898626>.~~Lianos, 'Competition Law as a Form of Social Regulation' (n 2).~~

[138] This position is also held in the US. See, for example, Lina Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harvard Law & Policy Review 235; Marshall Steinbaum, 'ANTITRUST, THE GIG ECONOMY, AND LABOR MARKET POWER' (2019) 82 Law and Contemporary Problems 45.

[139] Deutscher (n 2).

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republican liberty. He argues that competition law's democratic function cannot be adequately explained only by the risk that large firms capture political institutions, nor by the conventional liberal idea that markets protect freedom from interference. Rather, the deeper concern lies in domination: concentrated economic power may place market participants, citizens and democratic institutions in a position of dependence on private actors capable of arbitrary interference. From this perspective, competition law can operate as an institution of "antipower", preserving polycentric and contestable markets in order to reduce economic domination and sustain the conditions of a republican democracy. Similarly, but differently, Stavros Makris[140] offers a Smithian political economy approach to this problem by rejecting the Chicagoan reading of Adam Smith as a precursor of *laissez-faire* antitrust. Properly understood, Smith valued competitive markets not merely because they generate efficiency or consumer welfare, but because they promote two broader ideals: prosperity, especially for the least fortunate, and freedom as non-domination. On this basis, Makris argues that competition law should move beyond a narrow consumer-welfare paradigm and be recalibrated around the protection of effective competition as a safeguard against economic dependency and domination. He therefore proposes two complementary standards: an effective competitive constraints standard, focused on preserving rivalry and preventing dominant firms from neutralising meaningful competitive pressure, and a most vulnerable consumers standard, attentive to the effects of market power on those most exposed to economic harm[141].

[140] Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' (n 2).~~Makris (n 2).~~

[141] This position is also held in the US. See, for example, Zephyr Teachout and Lina Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2014) 9 Duke Journal of Constitutional Law & Public

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This is also the case, for example, with the environmental crisis. ~~In a call to redefine antitrust's goals[142], Tim Wu argues that the consumer welfare standard is both historically unsupported and practically dysfunctional. Rather than focusing narrowly on prices, courts should return to the classic standard articulated by Louis Brandeis: whether the conduct in question promotes competition or tends to suppress or destroy it. This standard, rooted in process rather than quantitative welfare metrics, aligns far more closely with US legislative intent and with antitrust's democratic function.~~

~~According to Anna Gerbrandy[143], nothing in the EU Treaties requires competition law to remain confined to a narrow consumer-welfare and efficiency focus. Indeed, the Treaty framework contains no hierarchy placing competition goals above other constitutional objectives such as sustainability or social protection, both of which are explicitly embedded in Article 3 TEU. The author stresses that the EU's economic constitution includes not only competition law but also free movement law, where a flexible balancing between market and non-market interests has long been accepted. Historically, competition law, too, once operated with more generous room for balancing before the shift toward strict economic analysis in the 1990s. The Court of Justice has repeatedly recognized that EU competition law can pursue several goals simultaneously, which shows that the present consumer-welfare focus is a policy choice, not a constitutional imperative. The author advocates recalibrating competition law rather than abandoning it or~~

Policy 37; Lina Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710; K Sabeel Rahman, *Democracy against Domination* (Oxford University Press 2017); Wu (n 52).

~~[142] Wu (n 45) 135–139.~~

~~[143] Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 JCMS: Journal of Common Market Studies 127 <https://doi.org/10.1111/jcms.12814>.~~

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~~leaving it untouched. Competition law should be better integrated into its societal context and interpreted in light of the EU's constitutional commitment to a social market economy. This does not mean replacing the market mechanism but rather ensuring that competition law can engage meaningfully with situations where markets and societal concerns intersect – such as sustainability initiatives, labour protection for vulnerable workers, or the democratic risks posed by dominant digital platforms.~~

~~- The link between sustainability and competition~~

According to Julian Nowag[144], the relationship between competition and sustainability is neither inherently positive nor inherently negative; instead, it depends strongly on context. Competition can foster sustainability when consumers genuinely value sustainable products and firms are therefore incentivized to differentiate themselves through greener or more responsible practices. However, competition can also undermine sustainability, especially when environmental harm is unpriced, when sustainable investment costs are high, or when firms face strong free-riding risks that discourage them from moving first. Because of these structural limitations, relying on competition alone is rarely sufficient. The author shows that the most effective path toward sustainability usually involves a balanced mix of competitive pressures, cooperative arrangements among firms, targeted regulation, and policy instruments such as taxes, standards, and public R&D support. A similar line of reasoning can be found in recent US scholarship on antitrust and sustainability. Authors such as Denise Hearn, Cynthia Hanawalt

[144] Julian Nowag, *Global Antitrust and Sustainability: Law, Economics, Enforcement* (Oxford University Press 2025) 75–114 <https://doi.org/10.1093/9780191955013.001.0001>.

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and Lisa Sachs[145] argue that sustainability challenges cannot be addressed through competition alone, since climate change and environmental degradation often involve coordination problems, externalities, free-riding risks and the need for sector-wide standards. Rather than treating all competitor collaboration as inherently suspect, they call for a clearer and more context-sensitive antitrust framework capable of distinguishing genuinely anticompetitive conduct from cooperation that may be necessary to advance environmental goals.

The complementary relationship between functions, objectives and uses shows that competition law cannot be reduced either to a purely technical instrument of market correction or to an open-ended vehicle for any social or environmental purpose. Rather, the authors discussed above seek, in different ways, to articulate the intrinsic objective of competition law with its extrinsic objectives, such as welfare, equality, freedom, democracy and sustainability. Their common contribution is to show that these objectives need not be understood as mutually exclusive. When properly framed, the binding, limiting and measuring functions of competition law allow legal actors to translate broader societal concerns into competition-law reasoning without dissolving the specificity of the discipline. Furthermore, the use of competition law by social actors opens up new prospects within the economic system: it enables markets to be contested and restructured in response to economic, social and environmental crises. However, this openness must remain legally disciplined.[146] The plurality of extrinsic objectives should not

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of this argument I have to admit that it is not entirely clearly nor fully convincing.
What are the grounds for “alignment” and what is the right “balance”?"

[145] Denise Hearn, Cynthia Hanawalt and Lisa Sachs, ‘Antitrust and Sustainability: A Landscape Analysis’ (Columbia Center on sustainable Investment and Sabin Center for Climate Change Law 2023).

[146] Ezrachi (n 131) 64–75.~~Ezrachi (n 125) 64–75.~~

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lead to a pure instrumentalisation of competition law or transform it into a general tool of social or environmental policy.[147]

- The link between market power and inequality

According to Ioannis Lianos[148], market power and inequality are intertwined. Empirical evidence—including OECD data on rising top-income and top-wealth shares, declining labor shares, declining worker bargaining power, and rising profits of "superstar firms"—suggests that concentrated market structures contribute to both economic and political inequalities. For example, monopoly profits tend to accrue overwhelmingly to the wealthiest actors in the economy, since those who control capital or hold significant equity stakes are the primary beneficiaries of the high returns generated by dominant firms, while ordinary consumers rarely share in these gains. Consumers—particularly those with lower incomes—bear the brunt of supracompetitive prices, as they spend a larger proportion of their income on essential goods and services and have fewer possibilities to avoid or absorb price increases. These distributive consequences are magnified by broader structural transformations such as financialization, common ownership by large institutional investors, and the rise of digital platforms whose network effects entrench market power and allow a small group of firms to extract disproportionate economic value. At the same time, increasing market concentration is closely associated with the emergence of labor monopsony, which depresses wages, limits workers' bargaining power, and contributes to stagnant earnings and declining social mobility. In this way, concentrated markets not only distort competitive processes but also reinforce and deepen existing inequalities across society. Therefore[149], the author argues that competition law must

[147] This issue will be addressed in Part 4.

[148] Lianos, 'Competition Law as a Form of Social Regulation' (n 2) 47–56.

[149] ibid 74–81.

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ensure that market actors are not structurally subordinated due to imbalances of power embedded in institutional arrangements, technological infrastructures, or social dynamics. This shift leads to the development of a fairness-driven competition law centered on structural inequality, understood as the vulnerability of certain actors to domination not because of their own choices but because of conditions beyond their control. Ioannis Lianos outlines how such a revised competition law would operate: it would pursue broader goals than conventional consumer-welfare analysis by integrating fairness, equality of opportunity, and complex equality; it would pay close attention to vertical power and the dynamics of value extraction along supply chains; and it would actively target excessive pricing, algorithmic manipulation, and other exploitative practices, particularly in digital markets characterized by entrenched gatekeepers. A fairness-oriented approach would also recognize labor monopsony as a competition problem, support collective bargaining—including for gig-economy workers—and treat the protection of working conditions as part of sustaining competitive markets. Complementing these changes, competition authorities would conduct systemic market studies and map value chains to reveal entrenched power structures, while institutional reforms would equip them to integrate distributive concerns systematically into enforcement.

- The balance of economic and non-economic powers in society

Indeed, by regulating the market economy, the alignment of the functions, objectives and uses of competition law helps to balance economic and non-economic powers in society. In other words, by authorising relevant relationships and limiting harmful behaviour, competition law measures the market economy in terms of the values that matter to society. For Elias Deutscher[150], both the United States and the European Union possess long and often overlooked

[150] Deutscher (n 2) 200–227.

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republican traditions in their competition law, grounded in the belief that concentrated private economic power endangers a democratic society of free and equal citizens. In the United States, early antitrust law was explicitly shaped by fears that monopolies would create "economic kings" capable of subjugating citizens and corrupting democratic institutions. From Senator Sherman's warnings in 1890 to the progressive ideals of Brandeis and Wilson, antitrust enforcement was initially conceived as a mechanism to disperse economic power and prevent domination. This vision reasserted itself after World War II, when the rise of cartels and conglomerates was linked to the fall of democracies abroad, and it reached its apex under the Warren Court, which treated antitrust law as a structural safeguard for political and economic liberty. The European tradition, shaped by the Ordoliberal thinkers of the Freiburg School—Eucken, Böhm, and Großmann-Doerth—developed in parallel but independently. These scholars argued that economic, social, and political orders are interdependent and that concentrated market power inevitably produces subordination incompatible with democratic citizenship. For them, competition functioned as an "order of freedom" that prevented the emergence of private dominion and guaranteed equal economic opportunities. Their influence is visible in the formation of early EU competition law, particularly in the post-war European Coal and Steel Community, whose rules were designed to prevent the re-emergence of industrial giants implicated in authoritarianism. Early EU case law adopted this structural understanding of competition: the Court of Justice held that EU competition law protects not only consumers but also the competitive market structure itself, reflecting a commitment to preventing domination and ensuring market contestability. Across both jurisdictions, then, the historical foundations of competition law were deeply tied to republican ideals, which viewed the dispersion of economic power as integral to safeguarding democratic self-government.

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Therefore[151], the author argues that the contemporary challenges posed by rising corporate concentration—particularly the power of dominant digital platforms—create the conditions for a renewed form of republican antitrust, a "Republican Antitrust 4.0," capable of restoring the original democratic purpose of competition law. Elias Deutscher contends that competition law must once again take the structural problem of economic concentration seriously and view it not merely through the lens of prices or efficiencies, but through its implications for domination, contestability, and democratic self-government. Reviving republican antitrust would require a more precautionary, structurally sensitive approach that treats concentrated market power as a direct threat to the freedom of market participants across a range of possible futures. This renewed perspective emphasizes that competition law should preserve a polycentric and contestable market order that prevents powerful firms from becoming unavoidable intermediaries capable of foreclosing rivals, controlling essential infrastructures, or arbitrarily shaping the informational and economic environment. While such a turn need not reject the value of welfare analysis, it would recognize that polycentric market structures generate option value, innovation diversity, and long-term societal resilience that consumer-welfare metrics often fail to capture.

Similarly, Stavros Makris and Filip Lubinski argue that Big Tech's unprecedented economic, informational, and regulatory power poses structural threats to democracy that traditional and dynamic neoclassical competition policy cannot address[152]. To build a competition law framework capable of addressing the democratic risks posed by Big Tech, the authors propose

[151] ibid 240–249.

[152] Stavros Makris and Filip Lubinski, 'Antitrust and Complex Democracy: Reclaiming Markets from Technofeudalism' 7 *Concurrences* (2025) 1.

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five interconnected pathways inspired by Innerarity's theory of complex democracy. First, enforcement must adopt a multi-scalar perspective that understands firms not as isolated market actors but as adaptive agents embedded within interdependent micro-, meso-, and macro-level ecosystems; such an approach makes it possible to grasp how platform conduct can simultaneously distort market competition, influence public discourse, and reshape political institutions. Second, competition law must evolve toward ecosystem-centric enforcement, shifting its analytical lens beyond narrow product markets to capture the systemic power of digital ecosystems whose cross-market dependencies, network effects, and infrastructural control allow a single platform to entrench dominance across multiple sectors. Third, antitrust must directly confront the private regulatory power exercised by dominant platforms—forms of technofeudal governance in which digital gatekeepers set rules for speech, access, and economic participation without democratic oversight—by reasserting markets as public domains requiring transparency, contestability, and pluralistic governance structures. Fourth, the authors argue for expanding the traditional consumer welfare standard into a citizen-oriented welfare framework that evaluates how platform conduct affects not only prices or innovation but also civic autonomy, data protection, information quality, and democratic participation. Finally, competition authorities should pursue democracy-integrated enforcement by embedding values such as pluralism, diversity, non-domination, and market resilience into merger review and abuse assessments, ensuring that competition law strengthens rather than undermines the informational and institutional foundations of democratic society.

Consequently, we show that competition law's various functions—binding, limiting, and measuring—progressively converge toward a broader, interdisciplinary vision in which antitrust moves beyond narrow price-based analysis to incorporate economic, social, democratic, environmental, and fairness-oriented considerations, thereby addressing structural

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~~power, inequality, sustainability challenges, and the democratic risks posed by concentrated corporate power.~~

~~The use of competition rules by social actors is therefore complex. Through the legal game, this use encourages the exploration of economic possibilities by drawing on numerous non-economic parameters. The establishment of new realities in the economic sphere is taking shape in parallel with the actualisation of its potentialities. Such a framework promotes not only the freedom of economic actors within markets, but also the freedom of social actors outside markets.~~

ii. Competing relationship

~~Competing with these intrinsic and/or extrinsic objectives, the specific functions of competition law encroach upon and parasitise them: in this situation, competition law, by becoming absolute and rigidifying social interaction, restricts the use that can be made of it by social actors~~The competitive relationship between the functions, objectives and uses of competition law is principally expressed where one extrinsic objective acquires ascendancy over all other extrinsic objectives and, in doing so, instrumentalises both the intrinsic objective of competition law and the functions through which that law operates. In this situation, competition law becomes absolute: its binding, limiting and measuring functions are no longer used to open up a plurality of legal and social possibilities, but are channelled toward a narrow and predetermined understanding of competition. The result is a rigidification of social interaction and a restriction of the uses that social actors may make of competition law. This is the approach promoted by Robert Bork and Frank H. Easterbrook, which consists of basing the application and interpretation of competition law on neoclassical economics, while removing broader economic considerations, as well as social and environmental considerations, from legal reasoning.

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According to Robert Bork[153], modern antitrust law has drifted far from its proper mission, —the maximization of consumer welfare, —and has instead become internally incoherent, hostile to efficiency, and often destructive of the very competition it claims to protect. He argues that antitrust should intervene only in three situations: ~~(1)~~ horizontal agreements that directly suppress competition, ~~(2)~~ horizontal mergers that leave fewer than three significant competitors, and ~~(3)~~ deliberate predation intended to exclude rivals, while permitting a wide range of business practices (—vertical arrangements, conglomerate mergers, resale price maintenance, exclusive dealing, price discrimination, and competitive price-cutting—) because these typically enhance efficiency and benefit consumers. The author stresses that antitrust has been corrupted by misguided judicial doctrines, interest-group politics, and regulatory agencies (especially the FTC), all of which have championed egalitarian or producer-protectionist values inconsistent with economic reasoning. He warns that the law's inconsistency, symbolic power, and frequent findings against business distort public understanding of markets and undermine the legitimacy of capitalism itself. Antitrust can be saved, he concludes, only by a disciplined return to economic principles, a reaffirmation of consumer welfare as the exclusive goal, and a narrowing of enforcement to genuinely output-restricting conduct.

This restrictive approach is illustrated in US case law by the progressive narrowing of antitrust intervention around efficiency and consumer welfare. In *Continental T.V. v. GTE Sylvania*[154], the Supreme Court abandoned the per se condemnation of certain vertical restrictions and held that location restrictions imposed by a manufacturer on its distributors should be assessed under the rule of reason, because such restraints may promote interbrand competition and generate

Commented [A30]: Reply to comment " I would have liked case law examples demonstrating the different uses."

[153] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 405–425.

[154] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)

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procompetitive efficiencies. In doing so, the Court moved away from an approach concerned with the autonomy of distributors or the preservation of decentralized market structures, and instead privileged an effects-based inquiry focused on whether the restraint ultimately enhances or suppresses competition. This movement is even clearer in *Brooke Group v. Brown & Williamson*[155], where the Court sharply limited predatory pricing claims by requiring proof both that prices were below an appropriate measure of cost and that the alleged predator had a reasonable prospect of recouping its losses. The Court reasoned that, absent recoupment, even aggressive below-cost pricing produces lower prices and therefore enhances consumer welfare. Together, these decisions reflect the Borkian narrowing of antitrust: competition law is not used to protect market plurality, fairness or broader social values, but only to condemn practices that can be shown, through economic reasoning, to restrict output, raise prices or harm consumers.

According to Frank H. Easterbrook[156], antitrust is an inherently imperfect and limited instrument for regulating competition. Its imperfections stem from the simple fact that courts rarely know how much competition is optimal, lack the economic expertise needed to evaluate complex business practices, and often encounter plaintiffs who seek protection from competition rather than the preservation of it. Because modern per se rules have lost most of their scope and the traditional Rule of Reason demands an impossible, open-ended economic inquiry, the existing analytical framework has become both costly and unreliable. The author therefore argues that antitrust should be reorganized around a series of simple filters designed to identify only those practices that are likely to reduce output and raise price[157]. These filters

[155] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)

[156] Easterbrook (n 37) 4–14.

[157] ibid 14–39.

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are not intended to achieve perfect precision, —because precision is unattainable, —but to bias the system toward permitting questionable practices rather than mistakenly condemning efficient ones. This bias is justified because the cost of prohibiting beneficial conduct is high, while many harmful practices dissipate under market pressure long before courts can correct them. Antitrust should therefore become more modest, more rule-based, and more respectful of the market's capacity to discipline firms more effectively and more reliably than judicial intervention.

Frank H. Easterbrook's restrictive approach is, for instance, reflected in the procedural and evidentiary filters developed by the Supreme Court in antitrust litigation. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[158], the Court held that, where the plaintiff's theory of conspiracy is economically implausible, the evidence must "tend to exclude" the possibility of independent conduct before the case can proceed. The decision reflects a strong concern with false positives: courts should not allow speculative antitrust claims to chill aggressive price competition, especially where the alleged predatory strategy appears irrational or unlikely to succeed. This logic was reinforced in *Bell Atlantic v. Twombly*[159], where the Court required antitrust plaintiffs to plead enough factual matter to make the existence of an agreement plausible, holding that parallel conduct alone is insufficient. The concern was again institutional and economic: broad discovery in antitrust cases is costly and may pressure firms into settlement even when their conduct is consistent with lawful, rational market behaviour. Together, these cases illustrate Frank H. Easterbrook's conception of antitrust as an imperfect and potentially dangerous regulatory instrument. Rather than opening competition law to wider social or political uses, the Court constructs threshold filters (economic plausibility, evidentiary

Commented [A31]: Reply to comment " I would have liked case law examples demonstrating the different uses."

[158] *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)

[159] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)

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sufficiency, and pleading plausibility) that restrict the ability of social actors to mobilise antitrust law unless they can frame their claims in terms compatible with neoclassical assumptions about rational market behaviour, output restriction and consumer harm.

This approach illustrates such a competitive relationship: one extrinsic objective, consumer welfare understood through a narrow neoclassical lens and reduced mainly to price, output and efficiency, acquires ascendancy over the other extrinsic objectives of competition law. In doing so, it instrumentalises both the intrinsic objective of competition law, namely the regulation of the market economy through the competitive process, and the specific functions through which that law operates, ~~which absolutises the specific functions of competition law with regard to a limited number of economic parameters (regulation of certain behaviours and certain relationships with regard to price and/or production and/or consumer welfare), compresses and thwarts its intrinsic objectives (regulation of the market economy with regard to the many other parameters that affect its functioning, such as quality, sustainability, fairness, loyalty, power, etc.) and extrinsic objectives (the pursuit of general objectives that are not exclusively economic)~~. The binding, limiting and measuring functions of competition law are then no longer mobilised to structure a plural and contestable market order, but are channelled toward a predetermined economic understanding of competition. The use of competition rules by social actors is diminished. At the same time and correlatively, the exploration of economic possibilities through legal means is impeded: potentialities are stifled, as is the establishment of new realities in the economic sphere.

iii. Antagonist relationship

Similarly, when one extrinsic objective, namely, consumer welfare as interpreted through neoclassical economic theory, comes to dominate the internal objective of competition law and to marginalise its other extrinsic objectives, it instrumentalises the specific functions of

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competition law in favour of a narrowed use of the discipline. In such a configuration, the binding, limiting and measuring functions of competition law are no longer mobilised to structure a plural and contestable market order, but are channelled toward a single economic rationality. This risks producing a situation in which competition law rigidifies social interactions, restricts the capacity of social actors to challenge economic reality, and ultimately contributes to the disintegration of society's broader normative equilibrium.~~and conversely, intrinsic and/or extrinsic objectives that parasitise and encroach upon the proper functions of competition law lead to a situation where society breaks down and actors exploit the legal system in force abusively, opportunistically and/or maliciously~~. For example, Ronald A. Cass, in his article *Competition in Antitrust Regulation: Law Beyond Limits*, considers that the functions of competition law must be subject to neoclassical economic laws, i.e. to one of these ex~~in~~trinsic parameters alone.

According to the author, U.S. antitrust law generally moved toward Frank H. Easterbrook's model of legal modesty, with courts and agencies adopting more economically disciplined, restrained enforcement focused on clear consumer harm rather than "speculative" theories of exclusion[160]. He explains that while U.S. law became more aligned with Easterbrook's restrained framework, academic theorists increasingly embraced expansive models that make almost any business conduct by dominant firms appear suspicious, thereby drifting away from the cautious, evidence-based approach Frank H. Easterbrook endorsed[161]. This theoretical shift has been amplified by the rise of "antitrust tourism": firms can now file complaints in multiple

[160] Ronald A Cass, 'Competition in Antitrust Regulation: Law Beyond Limits' (2010) 6 Journal of Competition Law and Economics 119, 135–139 <https://doi.org/10.1093/joclec/nhq002>.

[161] ibid 139–152.

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foreign jurisdictions whose competition regimes apply lower evidentiary thresholds, rely more heavily on "speculative" economic theories, and are considerably more receptive to intervention than U.S. authorities. The proliferation of global venues enables complainants to shop for the most favourable forum, creating pressure on U.S. agencies and courts to respond to foreign decisions and thereby eroding the stability and predictability that the rule of law requires. This fragmentation of enforcement, combined with incentives for regulators abroad to assert broader authority, threatens to undermine the very gains legal modesty achieved in the United States. The author concludes that these developments make it urgent to reaffirm the limits of antitrust, because without renewed commitment to Frank H. Easterbrook's principles, expansive and interventionist approaches risk pushing antitrust back toward the overreach that The Limits of Antitrust sought to correct.

The author's aim is therefore to circumvent the legal game in favour of the economic game (as interpreted by neoclassical economic theory). The secondary reality of law gives way to the primary reality of economic power relations. Competition replaces competition law. In this situation, legal actors, limited to their economic role alone, cannot completely free themselves from the constraints of economic reality, particularly economic power relations. The economic sphere, thus fossilised, severely limits its potential and seriously hinders the transformation of the social sphere.

This can be illustrated by Lina Khan's analysis about Amazon[162]: it's evolution into a dominant, multi-layered platform (—at once retailer, marketplace, logistics provider, media producer, and cloud-computing giant) —reveals how poorly the current, price-centred antitrust framework captures the forms of power exercised by digital platforms. Because Amazon can use below-cost pricing, data advantages, and vertical integration to entrench its position without

[162] Khan (n 141).~~Khan (n 135).~~

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ever raising consumer prices, the author argues that antitrust enforcement must be reoriented toward market structure and competitive process rather than short-term price outcomes[163]. For ~~Lina Khan~~the author, one route is to reinstate a structural antitrust approach that treats Amazon's cross-market leverage, its ability to foreclose rivals, and its control of essential online bottlenecks as signals of competitive harm, even in the absence of demonstrable price increases[164]. Another route is to recognize that Amazon now functions as a form of essential economic infrastructure and may therefore require regulatory obligations similar to those applied to public utilities, ~~—~~such as non-discrimination rules or limits on self-preferencing, ~~—~~ to preserve fair access for dependent businesses[165]. Ultimately, Lina Khan concludes that only by moving beyond the consumer-welfare paradigm can competition law effectively respond to the durable, cross-sectoral power Amazon has accumulated.

Lina Khan's analysis of Amazon thus vividly illustrates how the over-narrowing of competition law's functions can not only obscure contemporary forms of economic power, but also erode its capacity to fulfil its broader regulatory and societal objectives.

In sum, this dialogic interplay shows that the functions, objectives and uses of competition law may either reinforce one another or enter into relations of competition and distortion. When one extrinsic objective, such as consumer welfare narrowly understood through neoclassical economic theory, acquires ascendancy over the others, it may instrumentalise both the intrinsic objective of competition law and its binding, limiting and measuring functions. Competition law then ceases to operate as a framework through which social actors can contest and reshape

Commented [A33]: Reply to comment " Even though I see the value of this argument I have to admit that it is not entirely clearly nor fully convincing. What are the grounds for "alignment" and what is the right "balance"?"

[163] ibid 746–784.

[164] ibid 792–797.

[165] ibid 797–802.

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economic relations; instead, it becomes channelled toward a single economic rationality that risks obscuring contemporary forms of power, dependency and inequality. The contrast between Cass's defence of legal modesty and Khan's analysis of Amazon illustrates this tension: while the former seeks to preserve antitrust by narrowing its scope, the latter shows that such narrowing may leave competition law unable to address durable forms of private power. The next part therefore moves from description to prescription. It will offer a framework and a set of criteria for orienting, in a particular normative horizon, the functions, objectives and uses of competition law, so that its openness to social, economic, democratic and environmental concerns does not lead either to uncontrolled instrumentalisation or to an excessive reduction of the discipline to a narrow market-efficiency logic~~this dialogic interplay shows that competition law's functions, objectives and uses continually shape and reshape one another, revealing a legal field suspended between complementarity, tension and distortion — yet ultimately capable, when properly balanced, of orienting market regulation toward the broader economic, social and democratic values that give it meaning~~.

iv. REORIENTING COMPETITION LAW IN LIGHT OF THE POLYCRISIS~~SOME AVENUES FOR ALIGNING THE FUNCTIONS, OBJECTIVES, AND USES~~

The preceding analysis has shown the descriptive value of approaching competition law through François Ost's framework. Like law more generally, competition law binds, limits and measures social relations: it authorises certain forms of market coordination, prohibits certain forms of conduct, and provides a normative measure of the market economy. It also pursues intrinsic and extrinsic objectives and is mobilised, strategically and sometimes controversially, by private and public actors. This framework has therefore made it possible to describe competition law not as a neutral technical device, but as a social mechanism through which societies organise their economic systems.

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This descriptive exercise must now be placed against the background of the present polycrisis.[166] As explained above, the polycrisis refers to a configuration in which technological, economic, social, geopolitical and ecological crises unfold simultaneously and reinforce one another. Moreover, the extrinsic aims pursued by law are not fixed once and for all, but vary across time and space; in the present context, they must therefore be redefined in light of the polycrisis itself, so that law contributes not to the reproduction of the conditions that generate these crises, but to their resolution. In this context, the question is no longer merely whether competition law should pursue one objective rather than another in the abstract[167], but how its functions, objectives and uses should be oriented in a world marked by rising inequalities, democratic fragility and ecological catastrophe.

This question is particularly pressing because the current competitive functioning of markets contributes significantly to these crises.[168] Post-growth research shows that GDP growth

Commented [A34]: reply to comment "Yet, the connection between the polycrisis framing and the article's concrete reform proposals remains somewhat under-developed."

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[166] Edgar Morin and Anne Brigitte Kern, *Homeland Earth: A Manifesto for the New Millennium* (Sean M Kelly and Roger Lapointe trs, Hampton Press 1999) 47–74.

[167] As stated by Makris, 'Openness and Integrity in Antitrust' (n 71) 62'antitrust institutions do not operate in an applicative but in a rule-creating manner, and by recognizing that not only positive but also normative economics (and other value judgements) play a crucial role in legal interpretation.'~~As stated by Makris (n 71) 62'antitrust institutions do not operate in an applicative but in a rule-creating manner, and by recognizing that not only positive but also normative economics (and other value judgements) play a crucial role in legal interpretation.'~~

[168] Jason Hickel and others, 'Degrowth Can Work — Here's How Science Can Help' (2022) 612 Nature 400 <https://doi.org/10.1038/d41586-022-04412-x>.

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remains tightly coupled with increased consumption of raw materials and energy, as well as environmental degradation; that a sustainable and sufficient decoupling (between growth and ecological footprint) has not been demonstrated; that several planetary boundaries have already been exceeded; and that people's well-being is stagnating and even declining in high-income economies.[169] Giorgos Kallis and co-authors therefore argue that the central policy objective should shift from increasing GDP to improving human wellbeing within planetary boundaries. In this sense, competition law cannot remain indifferent to the fact that market competition, as currently organised, often sustains growth dependency, locks social welfare into a fragile growth-oriented economic model and reinforces ecological crises.

The following part proceeds from a normative hypothesis.[170] Methodologically, this hypothesis follows Maksymilian Del Mar's account of legal imagination: it requires entering a distinctive epistemic frame in which certain existing norms and objectives of law are selectively suspended while others are retained and/or replaced.[171] Let us suppose that, individually, collectively and publicly, we decide to move towards a post-growth society, understood as the creation of a social order in which domination between individuals and groups is reduced to a minimum, and

Commented [A35]: Reply to comment "At the same time, the article's normative vision remains predominantly aggregative and additive."

[169] Giorgos Kallis and others, 'Post-Growth: The Science of Wellbeing within Planetary Boundaries' (2025) 9 The Lancet Planetary Health e62 <https://doi.org/10.1016/S2542-5196(24)00310-3>.

[170] For example, it is possible to find scientific resources in Tim Jackson, *Post Growth: Life after Capitalism* (Polity Press 2021).

[171] Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020) 125–194.~~Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020) 125–194.~~

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in which the freedom of all can be exercised as equally as possible, individually and collectively, while respecting ecological limits and maintaining ecological balance. The aim is not to assume that such a society already exists, nor to claim that competition law alone could bring it about. Rather, the aim is to test what role competition law could play if this normative horizon were taken seriously.

From this perspective, the task is to ask how competition law should be applied and interpreted in a post-growth society. Its intrinsic objective would still be to regulate the market economy through the competitive process. However, that process would need to be understood in light of ecological limits, the reduction of domination, and equal freedom. This involves reorienting certain extrinsic objectives (consumer well-being, efficiency and innovation) in line with the objectives of a post-growth society (sustainability, equality, solidarity, etc.).

This part proposes a canvas and a set of criteria for orienting the functions, objectives and uses of competition law within this normative horizon. The analysis proceeds in three steps. First, it considers how the objectives of competition law should be reformulated and articulated in light of a post-growth society. Second, it examines how its functions (to bind, to limit and to measure) should be oriented toward that horizon. Third, it analyses how the uses of competition law by private and public actors should be disciplined.

~~In light of the multiple, interlocking crises currently affecting our societies, it becomes necessary not merely to reconsider the aims pursued by competition law in the abstract, but to rethink the very scope of the objectives that guide its operation. If, as our analysis has shown, the complementarity of functions, objectives and uses is essential to ensuring that competition law fulfils its regulatory role, then aligning these three elements requires broadening both the intrinsic and extrinsic objectives that structure the legal framework. Expanding the horizon of objectives—by integrating qualitative, sustainability-related, democratic and fairness-oriented considerations—necessarily extends the functions that competition law performs and the uses~~

Commented [A36]: Reply to comment "he article does not specify how competition authorities or courts should prioritise among functions and objectives, nor which "use" of competition law should prevail. Working on this while simultaneously clarifying the extrinsic/intrinsic distinction could really strengthen the article's contribution in my view."

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that social actors can make of it, thereby strengthening its capacity to regulate the market economy in a way that reflects contemporary societal needs.

This need for a wider and more integrated normative framework becomes even more pressing when seen against the backdrop of what contemporary analyses describe as a polycrisis.[172] In such a configuration, distinct crises—economic, ecological, geopolitical, social, technological—mutually reinforce one another, destabilising the conventional boundaries within which competition law traditionally operates. Only by enlarging its objectives, and therefore the functions it performs and the uses it enables, can competition law adapt to this complex environment and continue to serve as an instrument capable of shaping markets in the service of society as a whole.

Because the dynamics of the polycrisis do not merely describe a background condition but fundamentally reshape the constraints under which competition law operates, the analysis must necessarily shift from diagnosis to prescription, identifying how the objectives of this legal framework ought to evolve in response.

[172] Morin and Kern (n 3) 47–74 A polycrisis refers to a configuration in which multiple, distinct crises—economic, ecological, geopolitical, social, technological—unfold simultaneously and interact through mutual amplification, producing systemic disruptions that are more severe than the sum of their individual components. Because shocks in one domain (such as climate degradation, financial instability, pandemics, energy insecurity or democratic backsliding) cascade into others through dense global interdependencies, societies are confronted with overlapping vulnerabilities that challenge traditional regulatory paradigms.

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~~This reflection calls for a two-fold analytical movement. First, it requires broadening the economic parameters taken into account by authorities, moving beyond the narrow triad of price, output and consumer welfare to incorporate more qualitative assessments—such as the quality, durability and societal relevance of goods and services, as well as fairness and loyalty in value-chain dynamics (a). It also requires extending competitive reasoning to non-economic dimensions, by examining how power exercised within markets affects political life, fundamental rights and the social fabric more generally (b).~~

a) Formulation and articulation ~~Broadening the intrinsic objectives~~ of competition law's objectives

The first step in steering the functions, objectives and uses of competition law toward a post-growth society is to formulate explicitly the objectives that this body of law is expected to pursue. Only once these objectives are clarified can public and private actors mobilise the specific functions of competition law (to bind, to limit and to measure) in a coherent manner. This requires asking, openly, transparently and reflexively, what the competitive functioning of markets is for. Setting economic, social and environmental objectives is therefore not a defect in competition-law reasoning, but a necessity for any authority that applies competition law.[173] As Ariel Ezrachi[174] shows through the metaphor of the "sponge", competition law is never a pure and hermetically sealed economic discipline: it is structurally porous to political considerations, even when it presents itself as neutral or exclusively economics-based. Konstantinos Stylianou and Marios Iacovides' empirical work reinforces this point: EU

[173] Pitofsky (n 75).

[174] Ezrachi (n 131) 64–75.~~Ezrachi (n 125) 64–75.~~

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competition law already reflects a plurality of goals in institutional practice, so the task is to clarify their role and relative weight in a transparent and methodologically accountable way.[175] The real question is therefore not whether such objectives enter competition law, but whether they do so implicitly and opaquely, or explicitly, transparently and compatibly with legal certainty, legitimacy and the rule of law. In the present context, this question must be reformulated in light of the post-growth hypothesis. If the overarching objective is no longer economic growth as such, but the construction of a social order in which domination is minimised, equal freedom is maximised, and human activity remains within ecological limits, then public authorities must identify the particular objectives through which competitive markets can contribute to that horizon.

This exercise can proceed by moving from the most general objectives to progressively more precise and operational competition-law criteria. This objective can then be specified through two interrelated sub-objectives. First, competition law should contribute to equality, understood not as formal identity between actors, but as the reduction of relations of dependence and domination between economic and social actors. Secondly, competition law should contribute to the respect of ecological equilibria, by ensuring that economic activities, market structures and competitive dynamics remain compatible with planetary boundaries. On this basis, the following analysis identifies the operational criteria through which these two sub-objectives (equality and ecology) can be implemented in competition-law reasoning, before examining, in a final step, how these objectives and their implementing criteria should be articulated with one another (priority, balance, conflicts, etc.).

i. Equality objective and criteria

[175] Stylianou and Iacovides (n 2).

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The objective of equality should not remain at the level of an abstract moral aspiration. It must be translated into standards capable of being used within the ordinary steps of competition-law reasoning. Consequently, competition authorities should consider whether a practice, agreement or merger reinforces relationships of dependency and dominance between economic operators, or whether those operators have effective alternatives enabling them to carry out their activities independently. Equality is therefore not understood as a formal similarity between economic actors, but as their ability to participate in markets without being subject to arbitrary private power.

The standard of equality can be assessed through the prism of price and, in particular, the distribution of monetary surplus amongst economic agents. This approach is based on Ramsay Woodcock's inframarginalist argument.[176] The author shows that, even within the framework of neoclassical economics, there is scope to analyse the redistribution of gains without compromising efficiency. Gains arising from trade create a surplus between the minimum price acceptable to the seller and the maximum price the buyer is willing to pay. Efficiency does not dictate a single 'correct' price; rather, there is a range within which prices can vary without preventing the transaction from taking place. This means that the distribution of the surplus amongst dominant firms, suppliers, workers, consumers, platform users, etc. is not outside the scope of economic analysis. It can be treated as a matter of competition. Economic tools can capture the asymmetry in bargaining power that exists through the analysis of the gains generated by market transactions. Similarly, Kirkwood argues that any analysis of market power must not overlook exploitation and the unfair appropriation of surplus value: dominant firms can secure higher returns, leaving weaker trading partners with reduced margins, fewer

[176] Ramsi A Woodcock, *Toward an Inframarginal Revolution: Redistributing the Gains from Trade* (Cambridge University Press 2025) 2–30.

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opportunities and limited competitive alternatives.[177] Any analysis of equality must therefore include the distribution of surplus value within value chains.

Apart from price, other factors must be taken into account. Zephyr Teachout and Lina Khan show that concentrated market structures can enable dominant firms to exercise forms of private governance by determining the conditions under which dependent actors participate in markets.[178] These firms can set rules, control access, impose contractual terms, discipline suppliers or workers, and determine how the value created within a market or ecosystem is distributed. This concern is of particular importance in digital ecosystems. Ionnis Lianos and Bruno Carballa-Smichowski argue that the traditional concept of market power, which focuses on prices and output within a relevant market, is insufficient to capture the forms of power generated by platforms.[179] They propose a broader analysis of economic power, including differential dependence, whereby certain actors are far more dependent on a central platform than the platform is on them. This dependence enables the central actor to capture a disproportionate share of the jointly created value and to set the terms of participation in the ecosystem.

Our point can be illustrated by referring to judicial and administrative decisions in which the authorities' reasoning did not fully take into account either the distribution of profits within

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[177] John B Kirkwood, 'Market Power and Antitrust Enforcement' (2018) 98 Boston University Law Review 1169.

[178] Teachout and Khan (n 141). ~~Teachout and Khan (n 135).~~

[179] Ioannis Lianos and Bruno Carballa-Smichowski, 'A Coat of Many Colours—New Concepts and Metrics of Economic Power in Competition Law and Economics' (2022) 18 Journal of Competition Law & Economics 795 <https://doi.org/10.1093/joclec/nhac002>.

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value chains or the dominant power exercised by structurally powerful firms. In US law, the case of *Weyerhaeuser v Ross-Simmons* is particularly revealing.[180] This case concerned allegations that Weyerhaeuser had driven up the price of sawlogs in order to make competing sawmills unprofitable, thereby exercising power over the 'input' side of the market. The Supreme Court has, however, applied the restrictive test from the Brooke Group case to predatory bids, requiring proof of both a bid at a price below cost and a likelihood of recouping the investment. From the perspective outlined here, the difficulty lies in the fact that this line of reasoning addresses the problem solely from the angle of predatory behaviour rather than from that of the distribution of surplus value within the value chain. It does not address the fact that a powerful buyer can reshape upstream market conditions, weaken its competitors and alter the distribution of profits amongst timber suppliers, sawmills and downstream players.

On the EU side, the Commission's clearance of the Facebook/WhatsApp merger illustrates the insufficient consideration of domination in digital ecosystems. The Commission approved the transaction in 2014, finding that Facebook Messenger and WhatsApp were not close competitors and that users would continue to have a wide choice of consumer communications apps after the merger.[181] Yet the subsequent 2017 proceedings, in which the Commission fined Facebook for providing incorrect or misleading information concerning the technical possibility of matching Facebook and WhatsApp users, showed that data integration and ecosystem expansion were more significant than the original merger analysis had assumed.[182] From the perspective of equality as non-domination, the central issue was not only whether consumers

[180] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)

[181] Case M.7217 - *FACEBOOK/ WHATSAPP*

[182] Case M.8228 - *FACEBOOK / WHATSAPP*

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had alternative messaging apps in the short term, but whether the transaction reinforced Facebook's ability to consolidate data, identity, advertising power and infrastructural control across digital social spaces.

In sum, operationalising equality in competition law requires authorities to move beyond a narrow assessment of prices, output or formal market access, and to examine whether market structures, practices and concentrations preserve effective alternatives, prevent the disproportionate appropriation of surplus, and limit the ability of powerful undertakings to govern the economic conditions of dependent actors.

ii. Ecological objective and criteria

The ecological sub-objective requires competition law to assess whether market conduct, agreements, or concentrations contribute to economic activity compatible with ecological equilibria, rather than merely increasing output, reducing prices or improving short-term efficiency. This does not mean transforming competition law into environmental law. Rather, it means recognising that sustainability can become competition-relevant where environmental degradation, planned obsolescence, extractive production models or pollution-based cost advantages affect the quality of competition itself.

A first set of ecological criteria concerns the quality and sustainability of goods and services.[183] Competition authorities should examine whether firms compete by improving durability, repairability, safety, informational clarity and environmental performance, or whether they gain

[183] Suzanne Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 16 European Law Journal 780 <https://doi.org/10.1111/j.1468-0386.2010.00533.x>; Holmes (n 85).

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market share through strategies that degrade quality and externalise ecological costs. Practices such as planned obsolescence, restrictions on repair, misleading sustainability claims, waste-intensive production or reliance on environmentally harmful inputs may distort competition where they create cost advantages for unsustainable firms.[184] In that sense, environmental harm is not merely an externality lying outside competition law: it indicate that rivalry is taking place

[184] Nowag (n 144) 114–220; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part III: Using Merger Control to Intervene before the Problem Arises or Gets Worse' (2023) 44 European Competition Law Review 148; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part 1. Monopoly Power: A Barrier to a Sustainable Future' (2023) 44 European Competition Law Review; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Play a Part? Part II. Using Competition Law to Tackle Unsustainable Practices as Abuses of Monopoly Power' (2023) 44 European Competition Law Review 61.~~Nowag (n 138) 114–220; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part III: Using Merger Control to Intervene before the Problem Arises or Gets Worse' (2023) 44 European Competition Law Review 148; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part 1. Monopoly Power: A Barrier to a Sustainable Future' (2023) 44 European Competition Law Review; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Play a Part? Part II. Using Competition Law to Tackle Unsustainable Practices as Abuses of Monopoly Power' (2023) 44 European Competition Law Review 61.~~

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on degraded terms, because undertakings that internalise sustainability costs are placed at a competitive disadvantage compared with those that shift ecological costs onto society.[185]

The Commission's *Car Emissions* decision provides a particularly important illustration of how ecological quality may become a competition-law parameter. In that case[186], the Commission fined Daimler, BMW and the Volkswagen group for coordinating their conduct so as not to compete on the full use of available Nitrogen Oxide-emission cleaning technology, even though the undertakings possessed the technology needed to reduce harmful emissions beyond the legal minimum. The Commission characterised the conduct as a restriction of competition on product characteristics relevant to consumers and as a limitation of technical development within the meaning of Article 101(1)(b) TFEU. The case therefore shows that firms may infringe competition law where they collectively prevent competition from taking place on more sustainable product characteristics. More generally, administrative authorities should investigate this type of behaviour whenever companies, trade associations or industry coalitions coordinate the suppression, delay or manipulation of new environmentally friendly goods and

[185] Stefan Thomas and Roman Inderst, 'The Scope and Limitations of Incorporating Externalities in Competition Analysis Within a Consumer Welfare Approach' (2022) 45 World Competition 351 <https://doi.org/10.54648/WOCO2022015>; Pedro Aránguez-Díaz, 'A Fair Share of Sustainability Benefits for Consumers: The Horizontal Guidelines in the Silent Spring' (2024) 20 European Competition Journal 697 <https://doi.org/10.1080/17441056.2024.2379133>; Nikolaos Pitsos, 'Competition Law and Sustainability in Horizontal Agreements: Complex Boundaries' [2026] Journal of Antitrust Enforcement jnaf031 <https://doi.org/10.1093/jaenfo/jnaf031>.

[186] Case AT.40178 – *CAR EMISSIONS*

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services. This could include, where the legal conditions are met, coordinated strategies of climate or ecological disinformation designed to preserve environmentally harmful business models, discourage regulatory intervention, or prevent consumers and public authorities from identifying more sustainable alternatives. As Legg, Hatchard and Gilmore shows[187], corporations may influence science and its use in policy by maximising the volume, credibility and reach of industry-favourable evidence while minimising the influence of industry-unfavourable science, thereby manufacturing doubt and weakening public regulation. Competition law should not become a general law against misinformation[188]; however, when such strategies are coordinated between competitors or embedded in collective industry conduct that restricts rivalry on environmental quality, they should be treated as potentially competition-relevant.[189]

[187] Tess Legg, Jenny Hatchard and Anna B Gilmore, 'The Science for Profit Model—How and Why Corporations Influence Science and the Use of Science in Policy and Practice' (2021) 16 PLOS ONE e0253272 <https://doi.org/10.1371/journal.pone.0253272>.

[188] Gregory Day, 'Competition for Misinformation and Truth' (2025) 66 Boston College Law Review 2531 <https://doi.org/10.70167/FCSC8545>.

[189] Jorge Alé-Chilet and others, 'Colluding Against Environmental Regulation' (2026) 93 Review of Economic Studies 35 <https://doi.org/10.1093/restud/rdaf024>.

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A second set of ecological criteria concerns the direction of innovation.[190] Competition law should not treat innovation as a monolithic good, measured only by the quantity of R&D expenditure, patents or new products. As Andrew P. McLean argues[191], contemporary competition-law debates are often shaped by a "rhetoric of innovation" through which dominant firms, especially in digital markets, invoke innovation to resist stronger enforcement. The author shows that this rhetoric can operate as a form of "techno-conservatism": innovation is presented as an almost automatic justification for concentration, dominance or non-intervention, even though innovation frequently emerges from smaller firms, deconcentrated markets and publicly supported research, and is not inherently beneficial in itself. The relevant question is therefore not simply whether conduct or a merger produces "more innovation"[192], but what kind of innovation is being promoted, who controls its direction, and whether it

[190] Adrián Almazán, 'A Socio-Historical Ontology of Technics: Beyond Technology' (2024) 33 Environmental Values 12 <https://doi.org/10.1177/09632719231209742>; Mario Pansera, *Post Growth Innovation: Resisting the Pursuit of Endless Economic Growth* (Bristol University Press 2025).

[191] Andrew P McLean, 'Innovation against Change' (2024) 12 Journal of Antitrust Enforcement 378 <https://doi.org/10.1093/jaenfo/jnae002>.

[192] As put forward by the neo-Schumpeterian school: Nicolas Petit and Thibault Schrepel, 'Complexity-Minded Antitrust' (2023) 33 Journal of Evolutionary Economics 541 <https://doi.org/10.1007/s00191-023-00808-8>; Nicolas Petit, Thibault Schrepel and Bowman Heiden, 'Situating the Dynamic Competition Approach' (2026) 71 The Antitrust Bulletin 3 <https://doi.org/10.1177/0003603X251387744>.

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contributes to socially and ecologically desirable forms of market development.[193] Elias Deutscher and Stavros Makris argue precisely that EU merger control currently captures only a narrow subset of sustainability-relevant innovation harms because it tends to focus on innovation output and incentives within existing technological paradigms.[194] They propose instead to understand innovation competition as a polycentric process, in which independent actors explore multiple technological trajectories; this approach gives weight to the diversity, quality and direction of innovation, rather than only to its quantity.

The *Bayer/Monsanto* merger illustrates both the progress and the limits of competition-law analysis when innovation is assessed in sustainability-sensitive sectors. In its review[195], the European Commission identified significant concerns regarding competition and innovation in

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[193] Christian Kerschner and others, 'Degrowth and Technology: Towards Feasible, Viable, Appropriate and Convivial Imaginaries' (2018) 197 Technology and Degrowth 1619 <https://doi.org/10.1016/j.jclepro.2018.07.147>; Lukáš Likavčan and Manuel Scholz-Wäckerle, 'Technology Appropriation in a De-Growing Economy' (2018) 197 Technology and Degrowth 1666 <https://doi.org/10.1016/j.jclepro.2016.12.134>; Jan Cornelius Zoellick and Arpita Bisht, 'It's Not (All) about Efficiency: Powering and Organizing Technology from a Degrowth Perspective' (2018) 197 Technology and Degrowth 1787 <https://doi.org/10.1016/j.jclepro.2017.03.234>.

[194] Elias Deutscher and Stavros Makris, 'Sustainability Concerns in EU Merger Control: From Output-Maximising to Polycentric Innovation Competition' (2023) 11 Journal of Antitrust Enforcement 350 <https://doi.org/10.1093/jaenfo/jnac019>.

[195] Case M.8084 – *BAYER / MONSANTO*

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seeds, pesticides and digital agriculture, and approved the transaction only subject to an extensive remedy package covering overlaps in seeds, pesticides, R&D activities and digital farming. The Commission emphasised that the merger, as notified, would have reduced competition on price and innovation across numerous markets, and that the remedies were intended to preserve farmers' choice and innovation incentives. Similarly, in the United States[196], the DOJ required Bayer to divest assets worth approximately $9 billion, including seed businesses, herbicide assets, intellectual property, research capabilities, pipeline R&D projects and digital agriculture assets, in order to preserve competition and innovation in agricultural technologies. However, from the perspective of sustainability-oriented innovation, the analysis remained largely confined to existing agro-industrial markets and technological paradigms. The authorities focused on preserving innovation competition within seeds, crop protection, herbicides, traits and digital agriculture, but did not sufficiently consider whether the merger would affect adjacent or emerging innovation paths linked to organic farming and/or agroecology.[197] In other words, the question was framed mainly as whether competition and innovation would continue within the dominant agricultural model, rather than whether the

[196] *United States v. Bayer AG and Monsanto Company, and BASF SE*, No 1:18-cv-01241 (JEB), Final Judgment, 8 February 2019, US District Court for the District of Columbia

[197] Rebecca Bratspies, 'Owning All The Seeds: Consolidation and Control in Agbiotech' (2017) 47 Environmental Law 583; Ioannis Lianos and Dmitry Katalevsky, 'Merger Activity in the Factors of Production Segments of the Food Value Chain: - A Critical Assessment of the Bayer/Monsanto Merger' (Centre for Law, Economics and Society (CLES) Faculty of Laws, UCL 2017) CLES Policy Paper Series 2017/1.

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merger would entrench that model and crowd out alternative, more ecologically sustainable trajectories. A more sustainability-sensitive approach[198] could therefore have required a broader assessment of the transaction's effects on the diversity of agricultural innovation pathways. This might have justified more substantial or differently targeted divestitures, not only to preserve existing competition in seeds and pesticides, but also to maintain independent innovation capacities capable of supporting organic or agroecological farming systems. The Bayer/Monsanto decisions thus shows that merger control can protect innovation, but also that its analytical framework must move beyond if it is to preserve the ecological direction of innovation.

In sum, the ecological objective requires competition law to treat sustainability as a competition-relevant parameter whenever firms compete through environmental externalisation or the foreclosure of sustainable innovation paths; on this basis, authorities should assess whether competitive dynamics preserve durable goods and services and the diversity of technological trajectories needed for an ecological transition.

iii. Articulation of competition law's objectives

~~Firstly, this requires widening the present analytical lens of competition law—focused on price, output and consumer welfare—by incorporating the inframarginalist insight that these indicators describe only a limited portion of how markets actually function. According to Ramsi Woodcock, inframarginalism provides the intellectual foundations for a broader~~

Commented [A37]: reply to comment "The response to the perceived narrowness of consumer welfare is to enrich the list of objectives and parameters that competition law should take into account (quality, sustainability, innovation, fairness, power diffusion, democratic integrity, resilience) without offering a clear account of how conflicts between these aims should be managed in practice. "

[198] Tiziano Gomiero, 'Agriculture and Degrowth: State of the Art and Assessment of Organic and Biotech-Based Agriculture from a Degrowth Perspective' (2018) 197 Technology and Degrowth 1823 <https://doi.org/10.1016/j.jclepro.2017.03.237>.

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reinterpretation of neoclassical economics, one that centres on the gains from trade and reveals that classical microeconomic theory in fact leaves substantial room for redistributive justice without undermining efficiency.[199] The author argues that the central insight of inframarginalism lies in recognising the importance of the gains from trade—the surplus that exists between the seller's minimum acceptable price and the buyer's maximum willingness to pay.[200] This surplus creates a broad space within which prices may vary without jeopardising the transaction, demonstrating that efficiency does not dictate a single "correct" price and that significant distributive choices can be made without deterring trade.[201] He contends that conservative economics attempts to deny this redistributive space by relying on a strong form of marginalism, according to which the marginal buyer's and seller's valuations coincide and competitive forces impose a single uniform market price.[202] For Ramsi Woodcock, this assumption is empirically fragile and theoretically overstated, and once it is relaxed, the possibility of redistributing surplus without harming efficiency reappears clearly.[203] Finally, the author emphasises that concerns about regulatory error or uncertainty—such as not knowing the exact location of buyers' and sellers' valuations—do not eliminate the feasibility of redistribution. Policymakers can learn appropriate price levels through iterative adjustment, and even when regulators are captured by special interests, such capture typically affects who

[199] Woodcock (n 169) 2–30.

[200] ibid 2–6.

[201] ibid 6–10.

[202] ibid 17–22.

[203] ibid 22–23.

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~~receives the surplus, not whether transactions occur at all.[204] In this way, efficiency remains intact, and the only real risk is that distributive aims may be frustrated, not that markets will cease to function.~~

The equality and ecological sub-objectives will often operate cumulatively. In many situations, the same practice, agreement or concentration may both reinforce relations of dependency and undermine ecological transition. A dominant firm that restricts repair markets, suppresses interoperability, locks consumers into waste-intensive ecosystems, or forecloses sustainable competitors may simultaneously weaken equality (by creating dependency and reducing effective alternatives) and harm ecology (by degrading product durability, repairability and environmental performance). In such cases, the criteria developed above should be applied together: competition authorities should ask both whether the conduct reinforces private domination and whether it distorts competition on sustainability-related parameters.

However, equality and ecology may also come into tension. This is especially true where ecological measures increase the price of goods or services that are essential for consumers. Thus, the internalisation of ecological costs may improve environmental quality but make food, energy, housing, or transport less affordable. In such cases, competition authorities need a third criterion capable of structuring the relationship between equality and environmental protection, rather than merely weighing them up in the abstract.

This criterion can be drawn from Stavros Makris's Most Vulnerable Consumers standard.[205] The author argues that competition law should not assess welfare only by reference to an

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~~[204] ibid 23–24.~~

[205] Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' (n 2) 43–49.~~Makris (n 2) 43–49.~~

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average or representative consumer, but should pay particular attention to the position of the least fortunate consumers, especially where vulnerability results from poverty, lack of alternatives, informational asymmetry, cognitive bias or dependence on essential services. Applied here, this standard can operate as a priority rule: where the goods or services concerned are essential to the satisfaction of basic needs, the equality objective should prevail, at least to the extent necessary to preserve effective access for vulnerable consumers. Conversely, where the goods or services are not essential, the ecological objective may be given priority, because higher prices, reduced output or stricter conditions may be justified if they help prevent environmentally harmful forms of competition.

Such a distinction between essential and non-essential goods need not be developed ex nihilo. Competition authorities can draw on a well-established literature on basic human needs. For instance, Kate Soper distinguishes needs from wants, desires and preferences, and argues that needs refer to what is indispensable rather than merely optional, so that need-claims imply obligations and can ground rights to satisfaction.[206] This approach can be complemented by Len Doyal and Ian Gough's classic *A Theory of Human Need*, which identifies physical health and autonomy as universal basic needs and develops indicators for assessing their satisfaction in practice.[207] Manfred Max-Neef's 'human-scale development framework' also complements this approach by distinguishing between fundamental human needs (which are finite) and 'satisfaction factors' (which vary across different eras and cultures) through which these needs

[206] Kate Soper, 'Conceptualizing Needs in the Context of Consumer Politics' (2007) 29 Journal of Consumer Policy 355 <https://doi.org/10.1007/s10603-006-9017-y>.

[207] Len Doyal and Ian Gough, *A Theory of Human Need* (1st edn, Bloomsbury Publishing Plc 1991) <https://doi.org/10.1007/978-1-349-21500-3> accessed 6 July 2026.

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are met.[208] Amartya Sen's capabilities approach, together with Martha Nussbaum's list of essential human capabilities, also provide assessment tools for identifying the goods and services necessary for individuals to lead a life worth living.[209] Taken together[210], these works can help competition authorities distinguish between markets for essential goods and services, such as food, water, housing, energy, healthcare, education, and basic mobility, and markets that are non-essential and harmful to the environment. This puts the "most vulnerable consumers" criterion into practice by grounding it in objective, scientifically based analyses of human needs, rather than in a conception of consumer well-being dictated by the markets[211], in particular by dominant firms.[212]

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[208] Manfred A Max-Neef, Antonio Elizalde and Martín Hopenhayn (eds), *Human Scale Development: Conception, Application and Further Reflections* (Apex press 1991).

[209] Amartya Sen, *Development as Freedom* (1st. ed, Knopf 1999); Martha Craven Nussbaum, *Creating Capabilities: The Human Development Approach* (First Harvard University Press paperback edition, The Belknap Press of Harvard University Press 2013).

[210] For instance, Narasimha D Rao and Jihoon Min, 'Decent Living Standards: Material Prerequisites for Human Wellbeing' (2018) 138 Social Indicators Research 225 <https://doi.org/10.1007/s11205-017-1650-0>.

[211] Michel Callon, *Markets in the Making: Rethinking Competition, Goods, and Innovation* (Martha Poon ed, Olivia Custer tr, Zone Books 2021).

[212] John Kenneth Galbraith, *The Affluent Society* (4th ed. with a new introduction, Penguin 1987).

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Therefore, the Most Vulnerable Consumers standard provides a practical method for articulating the objectives of competition law in a post-growth horizon. It ensures that "ecological competition" does not become socially regressive, while also preventing equality from being reduced to the protection of cheap but environmentally destructive consumption. Competition law would then contribute to prosperity without growth by protecting vulnerable consumers where access to essential goods is at stake, while supporting ecological transformation where market activity can be ecologically redirected.

~~Secondly, it is a question of developing the analysis of the economic parameters on which the authorities rely, beyond price, production and consumer welfare, to incorporate more qualitative considerations. For example, this involves integrating into competitive reasoning a substantive analysis of the quality and sustainability of goods and services.[213] Beyond price-based indicators, competition law must be capable of assessing how firms' conduct affects product durability, repairability, safety, informational clarity, and environmental footprint. Such qualitative dimensions directly influence consumer welfare in a broader sense and determine whether market outcomes genuinely promote long-term societal well-being.[214] Evaluating sustainability also requires examining whether firms rely on extractive production models, generate negative environmental externalities, or adopt practices such as planned obsolescence, all of which may distort competitive conditions by allowing short-term cost advantages that undermine fair rivalry and harm collective interests.[215] Incorporating these considerations~~

~~[213] Kingston (n 176); Holmes (n 85).~~

~~[214] Thomas and Inderst (n 178); Aránguez-Díaz (n 178) 706–711; Pitsos (n 178) 6–10.~~

~~[215] Nowag (n 138) 115–220; Holmes and Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part 1. Monopoly Power: A Barrier to a Sustainable Future' (n 177); Holmes and~~

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therefore means recognising that the competitive process itself can be weakened when firms win market share through reductions in quality or through strategies incompatible with ecological transition.

Another important aspect relates to innovation. This calls for extending competitive analysis to the governance of innovation itself, understood as the technological trajectories and organisational choices through which firms shape the development and diffusion of new products, processes, and business models.[216] Competition law should not treat innovation as a monolithic good but should scrutinise which innovation is produced, how it is steered, and in whose interest it operates.[217] Firms may choose technological trajectories that maximise their own profitability or lock-in advantages, even when alternative innovations would be more socially beneficial—for instance, technologies that enhance privacy, reduce energy consumption, enable interoperability, or support circular-economy models.[218] A refined analytical framework must therefore evaluate whether dominant firms shape innovation pathways in ways that restrict choice, entrench their power, or foreclose superior technological

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Meagher, 'A Sustainable Future: How Can Control of Monopoly Play a Part? Part II. Using Competition Law to Tackle Unsustainable Practices as Abuses of Monopoly Power' (n 177); Holmes and Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part III: Using Merger Control to Intervene before the Problem Arises or Gets Worse' (n 177).

[216] Almazán (n 179); Pansera (n 179).

[217] McLean (n 180).

[218] Pansera (n 179) 13–48; McLean (n 180) 380–386.

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options.[219] Such scrutiny aims to ensure that firms' technological decisions do not undermine market openness, diversity of solutions, and the pursuit of broader social and environmental objectives. For example, Elias Deutscher and Stavros Makris show that EU merger control currently captures only a narrow subset of sustainability-relevant innovation harms, because it focuses almost exclusively on innovation output and on incentives within existing technological paradigms.[220] In their view, this output-maximising conception overlooks how mergers may distort the direction, quality and especially the diversity of innovation paths—effects that can entrench unsustainable technologies and crowd out alternative, more environmentally beneficial ones.[221] They argue instead for understanding innovation as a polycentric process, in which multiple independent actors explore diverse technological trajectories, and propose adapting merger analysis to preserve such diversity—for example by using sustainability-sensitive innovation metrics, assessing industry-wide structural effects, and protecting nascent competitors whose disappearance would diminish the range of future innovation options.[222]

Another key aspect involves power imbalances between economic actors. When analysing power relations, it is important to incorporate tools that can adequately measure fairness and

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[219] McLean (n 180) 386–394; Holmes and Meagher, 'A Sustainable Future: How Can Control of Monopoly Play a Part? Part II. Using Competition Law to Tackle Unsustainable Practices as Abuses of Monopoly Power' (n 177) 66–67.

[220] Deutscher and Makris (n 182) 356–362.

[221] ibid 368–376.

[222] ibid 376–382.

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loyalty, such as profit sharing between actors within value chains. As Zephyr Teachout and Lina Khan show, concentrated market structures often allow dominant firms to impose forms of "private governance" that shape not only prices, but also the distribution of gains across dependent actors—farmers, suppliers, workers—who may lack any real ability to negotiate equitable terms or resist coercive contractual conditions.[223] Such asymmetries translate into unilateral control over rents and surplus appropriation, creating distributional outcomes that are politically and economically consequential. Indeed, John Kirkwood highlights that market power analysis cannot ignore how dominant firms appropriate disproportionate profits—supracompetitive returns—while leaving weaker trading partners with diminished margins, limited opportunities, or suppressed competitive alternatives.[224] Distributional fairness therefore becomes a relevant competitive parameter wherever elevated prices, depressed input prices, or discriminatory terms reflect unequal ability to capture surplus rather than superior performance. For their part, Ioannis Lianos and Bruno Carballa-Smichowski emphasise that modern ecosystems—particularly digital platforms—generate new forms of "differential dependency," where some actors depend far more on a central firm than the central firm depends on them.[225] This asymmetry enables the platform to absorb a disproportionate share of the jointly created value, steering the distribution of rents in ways that may be inefficient, unfair, or systemically destabilising.[226] Together, these contributions suggest that fairness and loyalty are not "external" moral considerations, but intrinsic components of competitive dynamics: the

[223] Teachout and Khan (n 135) 41–60.

[224] Kirkwood (n 170) 1217–1226.

[225] Lianos and Carballa-Smichowski (n 172) 818.

[226] ibid 827–831.

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~~way surplus is divided reveals where power lies, how it is exercised, and whether markets remain open, contestable, and socially legitimate.~~

b) Reorienting the ~~Broadening the extrinsic objectives~~functions of competition law toward a post-growth horizon

Reorienting competition law toward a post-growth horizon requires rethinking its three functions together: its function of binding, by organising the forms of market relationships that should be legally enabled; its function of limiting, by prohibiting conduct and structures that generate domination and ecological degradation; and its function of measuring, by establishing benchmarks for market behaviour and market structure in a post-growth society.

First, the binding function of competition law should be reoriented toward the legal organisation of decentralised, democratic and socially useful forms of coordination.[227] As Sanjukta Paul argues[228], antitrust law does not merely prohibit coordination; more fundamentally, it allocates coordination rights. The current antitrust paradigm tends to authorise coordination when it takes place within large, hierarchical firms, while treating horizontal coordination beyond firm boundaries, for example between workers, small businesses or independent professionals, as suspicious or unlawful. In this sense, competition law has selected certain institutional forms of economic coordination and delegitimised others.

[227] EF Schumacher, *Small Is Beautiful: Economics as If People Mattered* (HarperPerennial 1989); Matthias Schmelzer, Andrea Vetter and Aaron Vansintjan, *The Future Is Degrowth: A Guide to a World beyond Capitalism* (Verso 2022) 215–224.

[228] Paul (n 49).

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In a post-growth society, this allocation should be reconsidered. If the aim is no longer to maximise productive efficiency and output growth, but to organise an economy compatible with ecological limits and non-domination, competition law should not automatically privilege large-scale centralised coordination merely because it may be more efficient in terms of cost reduction, output expansion or speed of production. Instead, its binding function should help enable forms of decentralised coordination among autonomous economic actors, such as cooperatives, producer organisations, worker associations, local supply networks, repair networks, community energy initiatives, or small-business alliances.[229] Such forms of coordination may be slower, less productive in the narrow sense, or less capable of generating economies of scale; but precisely for that reason, they may contribute to reducing excessive production, limiting resource throughput, dispersing economic power and strengthening the democratic organisation of economic life. This does not mean that all decentralised coordination should be exempted from competition law. Rather, the legal assessment should ask what kind of coordination is being organised, by whom, for whose benefit, and with what effects on equality and ecology. Coordination among powerful firms that restricts output, raises prices, excludes rivals or preserves environmentally harmful business models should remain prohibited. Conversely, coordination between weaker or smaller players should be viewed more

[229] Giovanni Cunico, Sebastiaan Deuten and I-Chun Huang, 'Understanding the Organisational Dynamics and Ethos of Local Degrowth Cooperatives' (2022) 1 Climate Action 11 <https://doi.org/10.1007/s44168-022-00010-9>; Vasilis Kostakis and Sokratis Seitanidis, 'Design Global, Manufacture Local: Operationalizing Post-Growth Industrial Policy through Cosmolocalism' [2026] Globalizations 1 <https://doi.org/10.1080/14747731.2026.2660493>.

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favourably where it helps to preserve the autonomy of economic actors or to support the green transition without being unduly undermined by large, hierarchical companies.

Secondly, the limiting function of competition law should be reoriented toward the systematic containment of economic concentration.[230] In a post-growth society, competition law should not merely prevent the most visible forms of monopoly power; it should more generally limit the accumulation of the different forms of economic power exercised in markets. As many authors argue[231], the traditional concept of market power, centred on price and output within a relevant market, is insufficient to capture contemporary economic power. From this perspective, the limiting function of competition law should be used to prevent markets from being organised around large hierarchical undertakings capable of coordinating production, distribution, innovation, labour and investment in a centralised manner. This does not mean prohibiting size as such, but it does mean treating concentration with far greater suspicion, especially where size enables firms to control essential infrastructures or gain dominance over value chains. Competition law should accordingly limit economic concentration where it reduces the number of autonomous operators or reinforces forms of production incompatible with ecological limits.

Concretely, this would require a substantial lowering of the thresholds at which market structures are treated as oligopolistic or monopolistic. In US merger law, the 2023 Merger

[230] Julien Vastenaekels, 'Degrowth and Capitalist Power: A Step towards a Theory of Change' [2024] Degrowth Journal <https://doi.org/10.36399/Degrowth.002.01.04> accessed 7 July 2026.

[231] Teachout and Khan (n 141); Lianos and Carballa-Smichowski (n 179).~~Teachout and Khan (n 135); Lianos and Carballa-Smichowski (n 172).~~

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Guidelines already move in this direction by returning to stricter structural presumptions.[232] However, these contemporary thresholds remain significantly more permissive than the structural approach that characterised US antitrust law in the 1940s–1960s. For instance, in *Von's Grocery*, the Supreme Court condemned a merger producing only about 7.5% of the Los Angeles grocery market, because it occurred in a sector marked by a steady decline in the number of small firms and a trend toward concentration; the Court stressed that Section 7 of the Clayton Act was designed to arrest concentration "in its incipiency" and to preserve competition among small businesses.[233]

In EU law, the 2004 Horizontal Merger Guidelines introduced a formalised concentration analysis by treating market shares and HHI levels as important indicators: the Commission is generally unlikely to identify horizontal concentration concerns where the post-merger HHI remains below 1,000, or where the increase in concentration remains limited.[234] By contrast,

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[232] U.S. Department of Justice and the Federal Trade Commission, *2023 Merger Guidelines*, 2.1. Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market: markets with an HHI above 1,800 are considered highly concentrated, a change of more than 100 points is significant, and a merger creating a firm with more than 30% market share, combined with an HHI increase above 100, is presumed to substantially lessen competition or tend to create a monopoly.

[233] *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966)

[234] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, pp. 5–18, §19-20: namely, a post-merger HHI

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the regimes preceding the 2004 reform were more structuralist and more directly attentive to the dangers of excessive concentration. Under Regulation 4064/89[235], the central question was whether the concentration created or strengthened a dominant position as a result of which effective competition would be significantly impeded; apart from the indication that concentrations below a 25% market share were normally unlikely to raise concerns, the analysis was less organised around numerical safe harbours and left greater room for assessing the concrete structure of the market, the power of the undertakings concerned, barriers to entry, buyer power and the broader competitive dynamics of the sector. Even earlier, Article 66 ECSC subjected concentrations in coal and steel to prior authorisation and required the authority to examine whether the transaction would give the undertakings the power to determine prices, control or restrict production or distribution, hinder effective competition, or obtain an artificially privileged position in access to supplies or markets. These earlier regimes were therefore more explicitly concerned with the concentration of economic power as such.[236] For a post-growth competition policy, they provide an important source of inspiration: rather than relying primarily on economised thresholds designed to identify likely price effects, merger

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between 1,000 and 2,000 with a delta below 250, or a post-merger HHI above 2,000 with a delta below 150.

[235] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, pp. 1–12.

[236] Amato (n 46); Gerber (n 80); Ioannis Kokkoris and Howard A Shelanski, *EU Merger Control: A Legal and Economic Analysis* (1. ed, Oxford Univ Press 2014) 15–116 <https://doi.org/10.1093/law/9780199644131.001.0001>.

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control could recover a more structural sensitivity to market power, intervene much earlier against oligopolistic or monopolistic tendencies, and preserve diversified, contestable markets composed of autonomous operators.

Thirdly, the measuring function of competition law should be reoriented toward the assessment of market structures and behaviors in light of non-domination and planetary boundaries. Once competition law enforcers have bound economic actors by authorising certain forms of coordination and limited them by preventing excessive concentrations of economic power, they must also provide a measure of what counts as a desirable competitive market in a post-growth society. Such a market should not be assessed on the basis of its ability to maximise output, growth, scale or short-term efficiency. Rather, it should be assessed on the basis of its ability to enable autonomous economic actors, in particular small and medium-sized enterprises, to coordinate their activities, whilst preventing dominant firms from organising markets based on economic dependence.

This requires, first, a rethinking of the temporal horizon of competition analysis. Conventional competition reasoning often discounts future harms and benefits, especially where they are uncertain, difficult to quantify or temporally distant.[237] In a post-growth framework, however,

Commented [A38]: reply to comment "For instance, a more demanding use of the polycrisis frame might
lead to:
• a re-thinking of temporal horizons in competition analysis (for example,
discounting future environmental harms or resilience gains in merger and
conduct cases);
• a more explicit incorporation of systemic-risk considerations into the
assessment of market structures and remedies;"

[237] Max Hjärtström, 'Addressing Sustainability Failures in Economics and Competition Law: Environmental Externalities, Consumers and Quantification' in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781802204667.00018> accessed 7 July 2026; Nowag (n 144) 29–74.~~Max Hjärtström, 'Addressing Sustainability Failures in Economics and Competition Law: Environmental Externalities, Consumers and Quantification' in Julian Nowag (ed), *Research Handbook on*~~

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future environmental harms or resilience gains should not be treated as secondary or speculative simply because they emerge beyond the short-term horizon. In the context of merger control, this means, for example, asking whether a merger risks locking a sector into unsustainable production models.[238] In conduct cases, it means, for example, examining whether a practice produces short-term efficiencies while degrading long-term market sustainability.[239]

Secondly, the measuring function should incorporate systemic-risk considerations more explicitly.[240] Competition law should not assess market structures only through isolated price

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~~*Sustainability and Competition Law* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781802204667.00018> accessed 7 July 2026; Nowag (n 138) 29–74.~~

[238] Elias Deutscher and Stavros Makris, 'Making Sustainability Visible: A New Framework and Operationalisation Tests for Merger Control' in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781802204667.00032> accessed 7 July 2026.

[239] Simon Holmes, 'Cartels Harming Sustainability (and Those That Don't) in Europe' in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (Edward Elgar Publishing 2024) <https://doi.org/10.4337/9781802204667.00030> accessed 7 July 2026.

[240] Lianos, 'Polycentric Competition Law' (n 2); Andriani Kalintiri, 'EU Antitrust Law's Resilience: The Good, the Bad, and the Ugly' (2024) 43 Yearbook of European Law 184 <https://doi.org/10.1093/yel/yeae009>.~~Lianos, 'Polycentric Competition Law' (n 123); Andriani Kalintiri, 'EU Antitrust Law's Resilience: The Good, the Bad, and the Ugly' (2024) 43 Yearbook of European Law 184 <https://doi.org/10.1093/yel/yeae009>.~~

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or product effects, but also through the systemic vulnerabilities generated by long value chains and highly concentrated markets. They may be more efficient in the short run, but they may also be more fragile, less adaptable and more capable of transmitting failures across sectors. Similarly, dominant actors may create systemic risks where their failures affect entire provisioning systems. Consequently, corrective measures should be evaluated based on their ability to reduce "systemic" dependence and strengthen resilience, that is, to maintain the autonomy of market actors and promote green innovations. It is in this sense that the measuring function of competition law makes it possible to determine whether markets are organised, not with a view to maximising productive expansion, but with a focus on non-dominance and ecological sustainability.

In sum, reorienting the functions of competition law toward a post-growth horizon means using its binding function to enable decentralised and democratic coordination, its limiting function to contain and, where necessary, undo excessive concentrations, and its measuring function to assess markets according to their capacity to preserve autonomy, resilience, non-domination and ecological sustainability.

c) Disciplining the Uses of Competition Law by Public and Private Actors

Competition law is not merely enforced; it is strategically deployed. Private actors can use it to defend their interests while either promoting or undermining the public interest. Public authorities enforce competition law in the public interest. Given the ambiguous nature of this interest, the authorities establish general and intermediate objectives. Furthermore, in light of budgetary, administrative, and informational constraints, the authorities set priorities: these

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reflect extrinsic objectives, that is, objectives over which competition law does not have a monopoly.[241]

In a hypothetical post-growth society, where the external objectives of competition law are oriented toward preventing market dominance and promoting ecological balance, the ways in which public and private actors enforce this law will inevitably change.

Before examining the new uses of competition law by public (i) and private (ii) actors in the context of a post-growth society, a preliminary point regarding the error-cost framework must be raised. While this analytical tool has long been promoted by researchers in economics and law,[242] it took on a unique normative dimension in Frank H. Easterbrook's writings.[243] By asserting that false positives are almost always more dangerous than false negatives, that is, by arguing that government action is less likely to be corrected than private action within a "self-regulating" market, an anti-interventionist framework was established (and subsequently applied). More recently,[244] authors have demonstrated that, on the one hand, the market's autonomous functioning is no more effective than government intervention in correcting its market failures and, on the other hand, that both positive and negative errors are equally harmful

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[241] Brook and Cseres (n 93).~~Brook and Cseres (n 119).~~

[242] Richard A Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 The Journal of Legal Studies 399.

[243] Easterbrook (n 37).

[244] Jonathan B Baker, 'Taking The Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right' 80 *Antitrust Law Journal* (2015) 1; Herbert Hovenkamp, 'Antitrust Error Costs' (2022) 24 University of Pennsylvania Journal of Business Law 293.

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to its functioning. It can thus be said that market corrections result from the actions of private actors, within the framework of competition, and from those of public actors, within the framework of competition law enforcement. This dual process, which complements, competes with, and opposes one another, progresses, much like the scientific process,[245] through trial and error.[246] Thus, both the mistakes made by each side and the corrections to those mistakes are necessary to achieve the "proper" competitive functioning of markets.

i. Public enforcement

Public enforcement of competition law necessarily has a political dimension.[247] While competition authorities are independent and impartial, the fact remains that their actions (setting the agenda, decisions to investigate, etc.) have economic, social, and environmental effects on society, since they determine the proper competitive balance of markets, that is, ultimately, they have a political impact (understood in a broad philosophical sense as the choices that individuals and communities make, autonomously, in order to live together).[248] The pursuit of (extrinsic) objectives such as consumer welfare and economic growth are, first and foremost, policy

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subject to strategic instrumentalisation by both private and public actors (through litigation, lobbying, epistemic capture, forum shopping and so on) then any
expansion of its objectives and parameters may increase the degrees of freedom
available for such instrumentalisation. What could be the defence to that? What can ensure that competition law remains/becomes a well-functioning system? "

[245] Karl R Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge 2002).

[246] Charles F Sabel and Michael C Dorf, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267; Marcellus S Snow, 'Competition as a Discovery Procedure' (2002) 5 The Quarterly Journal of Austrian Economics 9 <https://doi.org/10.1007/s12113-002-1029-0>.

[247] Pitofsky (n 75).

[248] David Miller, 'Political Philosophy' *Routledge Encyclopedia of Philosophy* (1st edn, Routledge 2016) <https://doi.org/10.4324/9780415249126-S099-1> accessed 9 July 2026.

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objectives that competition authorities undertake to pursue with the explicit or implicit consent of political authorities. These are not technical objectives specific to competition law, because the intrinsic objective of competition law is the competitive functioning of markets. Therefore, in the hypothetical context of a post-growth society, it is necessary to clarify how competition authorities can implement the objectives of preventing market dominance and ensuring ecological balance using the tools of competition law designed to guarantee the competitive functioning of markets. The goal, therefore, is to establish, at the outset, the scope of discretion available to competition authorities in carrying out their mission and, subsequently, to ensure democratic oversight of that mission.

This clarification is all the more necessary because, as Marek Martyniszyn argues, the enforcement of competition law has long been shaped by the paradigm of the "Limited State", which framed competition authorities primarily as technocratic law-enforcement bodies and encouraged a narrow, efficiency-oriented understanding of their mandate.[249] Within that paradigm, enforcement became increasingly demanding: the move towards rule-of-reason and effects-based analysis, combined with the growing reliance on complex economic and econometric evidence, raised the evidentiary and administrative burden borne by authorities, while their financial and institutional resources often remained limited or even declined. The result, according to the author, was not merely caution but a structural tendency towards under-enforcement, especially where agencies faced powerful firms able to devote substantial resources to resisting investigations. This tendency was reinforced by a permissive approach to dominance and concentration: monopolisation cases became rare in the United States, certain statutory tools were effectively abandoned, excessive pricing remained marginal in EU practice,

[249] Martyniszyn (n 7).

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and merger control often allowed consolidation to proceed on the basis of speculative efficiencies that were rarely verified ex post.[250]

Conversely, if the relevant extrinsic objectives were clearly specified as non-domination and ecological balance, stronger enforcement would not necessarily mean granting authorities unlimited discretion or requiring ever more complex economic inquiries. Rather, following Baker's critique,[251] a post-growth approach could therefore justify simpler and more formal presumptions, lower evidentiary burdens, and less costly enforcement tools where certain market structures or practices are likely to generate domination or ecological harm.[252] Instead

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[250] In digital and other winner-takes-all markets, these enforcement gaps have been particularly consequential, since network effects and data advantages can entrench dominant positions before public authorities are able to intervene effectively.

[251] Baker (n 244).~~Baker (n 237).~~

[252] Donald F Turner and Carl Kaysen, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) <https://doi.org/10.4159/harvard.9780674863941>; Macdonald Flinn and others, 'The Per Se Rule' (1969) 38 Antitrust Law Journal 731; Jeffrey M Perloff, Larry S Karp and Amos Golan (eds), 'Structure–Conduct–Performance' *Estimating Market Power and Strategies* (Cambridge University Press 2007) <https://doi.org/10.1017/CBO9780511753985.003>.~~Donald F Turner and Carl Kaysen, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) <https://doi.org/10.4159/harvard.9780674863941>; Macdonald Flinn and others, 'The Per Se Rule' (1969) 38 Antitrust Law Journal 731; Jeffrey M Perloff, Larry S Karp and Amos Golan (eds), 'Structure–~~

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of requiring authorities to prove, through demanding effects-based and econometric analysis, the precise welfare consequences of each practice, competition law could rely more heavily on administrable categories, structural indicators and rebuttable presumptions.[253] Such an

Conduct-Performance' *Estimating Market Power and Strategies* (Cambridge University Press 2007) <https://doi.org/10.1017/CBO9780511753985.003>.

[253] John Kwoka, *Controlling Mergers and Market Power: A Program for Reviving Antitrust in America* (1st edn, Competition Policy International 2020); William H. Rooney, Timothy G. Fleming and Michelle A. Polizzano, 'Tracing the Evolving Scope of the Rule of Reason and the Per Se Rule' (2021) 2021 Columbia Business Law Review <https://doi.org/10.52214/cblr.v2021i1.8474> accessed 9 July 2026; Filippo Lancieri and Tommaso Valletti, 'Towards an Effective Merger Review Policy: A Defence of Rebuttable Structural Presumptions' (2024) 40 Oxford Review of Economic Policy 763 <https://doi.org/10.1093/oxrep/grae049>; John M Taladay, 'The Use of Presumptions in Antitrust Enforcement and Jurisprudence' [2024] Concurrences 30.John Kwoka, *Controlling Mergers and Market Power: A Program for Reviving Antitrust in America* (1st edn, Competition Policy International 2020); William H. Rooney, Timothy G. Fleming and Michelle A. Polizzano, 'Tracing the Evolving Scope of the Rule of Reason and the Per Se Rule' (2021) 2021 Columbia Business Law Review <https://doi.org/10.52214/cblr.v2021i1.8474> accessed 9 July 2026; Filippo Lancieri and Tommaso Valletti, 'Towards an Effective Merger Review Policy: A Defence of Rebuttable Structural Presumptions' (2024) 40 Oxford Review of Economic Policy 763 <https://doi.org/10.1093/oxrep/grae049>; John M

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approach would not abandon economic reasoning, but would relocate it from highly case-specific proof of effects to the design of clear legal tests capable of reducing under-enforcement, administrative costs and strategic delay.[254] This is consistent, for instance, with Pablo Ibáñez Colomo's proposal[255], in the context of Article 102 TFEU, that effective enforcement, legal

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Taladay, 'The Use of Presumptions in Antitrust Enforcement and Jurisprudence' [2024] Concurrences 30.

[254] Arndt Christiansen and Wolfgang Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs Rule of Reason"' (2006) 2 Journal of Competition Law & Economics 215 <https://doi.org/10.1093/joclec/nhl009>.

[255] Pablo Ibáñez Colomo, 'The (Second) Modernisation of Article 102 TFEU: Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review' (2023) 14 Journal of European Competition Law & Practice 608 <https://doi.org/10.1093/jeclap/lpad064>; In a slightly different sense, see also Damien Geradin and Stijn Huijts, 'Abuse of Dominance: Has the Effects-Based Analysis Gone Too Far?' (2024) 40 Oxford Review of Economic Policy 776 <https://doi.org/10.1093/oxrep/grae047>.Pablo Ibáñez Colomo, 'The (Second) Modernisation of Article 102 TFEU: Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review' (2023) 14 Journal of European Competition Law & Practice 608 <https://doi.org/10.1093/jeclap/lpad064>; In a slightly different sense, see also Damien Geradin and Stijn Huijts, 'Abuse of Dominance: Has the Effects-Based Analysis Gone Too Far?' (2024) 40 Oxford Review of Economic Policy 776 <https://doi.org/10.1093/oxrep/grae047>.

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certainty and meaningful judicial review can be reconciled through four principles: substantive standards should be administrable (notably through proxies or bright lines, such as market-share, coverage or duration thresholds, which simplify the assessment), structured around clear legal tests (that is, cumulative and identifiable conditions rather than "liquid" or fluctuating standards varying from case to case), capable of being disproved in practice, and any departure from prevailing standards should be specifically justified. In this sense, broader objectives need not imply more open-ended enforcement; if properly specified, they may instead support a more disciplined, rule-based and practically enforceable competition law.

Building on this logic, competition authorities should be able to adopt a clear, public and transparent enforcement agenda that translates the post-growth objectives of non-domination and ecological balance into concrete priorities for action. Following Or Brook and Katalin Cseres, priority-setting should not be treated as a merely technical exercise, but as the institutional mechanism through which abstract objectives are converted into enforcement choices, resource allocation and public accountability.[256] Such an agenda could identify priority sectors, market structures and practices where concentration, dependency, exclusion or environmentally harmful competitive dynamics are most likely to undermine non-domination and/or ecological balance. It should also include the protection of vulnerable consumers[257] as a

Commented [A42]: ibidem

[256] Brook and Cseres (n 93).Or Brook and Katalin Cseres, 'Beyond Consumer Welfare: Responsive Priority-Setting in the Public Interest in Competition Law Enforcement' [2026] Legal Studies 1 <https://doi.org/10.1017/lst.2026.10119>.

[257] Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' (n 2).Stavros Makris, 'A Smithian Political Economy Approach for the Competition Law of the 21st Century' [2025] The Modern Law Review 1468 <https://doi.org/10.1111/1468-2230.12948>.

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transversal priority: this objective can mediate tensions between non-domination and ecological balance where they point in different directions, by asking whether a given enforcement choice protects those who are most exposed to market power, ecological degradation, essential-goods inflation or unequal access to basic services.

However, to effectively implement such a program, competition authorities would need new tools. As Ioannis Lianos argues[258], the limits of competition law enforcement justify complementing the traditional model with more proactive and prophylactic instruments. These could include market investigation tools, allowing authorities to investigate sectors where there are indications of structural distortions of competition even without first proving a specific infringement, and systematic market-monitoring tools, such as market mapping, concentration and markup surveillance, price comparisons, or regular reports on the state of competition. These instruments would enable authorities to detect early signs of domination, lock-in or failures affecting non-dominate actors or harming ecological equilibria, and to adopt proportionate remedies before harms become entrenched.

The use of these new tools, the establishment of an agenda and priorities, and, more generally, the strengthening of enforcement must be carried out by competition authorities within the framework of a democratic and accountable process.[259] This institutional design resonates with

Commented [A43]: ibidem

[258] Lianos, '"Polycrisis" and the Changing "Life" of Competition Authorities' (n 5).~~Ioannis Lianos, '"Polycrisis" and the Changing "Life" of Competition Authorities' *Wirtschaft und Wettbewerb* (2 February 2024) 61.~~

[259] Maria Ioannidou, '"Responsive" Remodelling of Competition Law Enforcement' (2020) 40 Oxford Journal of Legal Studies 846 <https://doi.org/10.1093/ojls/gqaa003>; Stavros Makris, 'EU Competition Law as Responsive Law' (2021) 23 Cambridge Yearbook of European Legal Studies 228

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Michael Dorf and Charles Sabel's idea of democratic experimentalism, whose central claim is that public institutions can respond to complexity and uncertainty by decentralising problem-solving, involving affected actors in deliberation, pooling information across comparable experiences, and continuously revising rules through benchmarking and error correction.[260]

<https://doi.org/10.1017/cel.2021.9>; Wolf Sauter, 'Responsive Competition Law' (2024) 3 European Law Open 768 <https://doi.org/10.1017/elo.2025.10>; Brook and Cseres (n 93); For a more theoretical and general analysis of the democratic functioning of independent authorities, see Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Arthur Goldhammer tr, Princeton University Press 2011).Maria Ioannidou, '"Responsive" Remodelling of Competition Law Enforcement' (2020) 40 Oxford Journal of Legal Studies 846 <https://doi.org/10.1093/ojls/gqaa003>; Stavros Makris, 'EU Competition Law as Responsive Law' (2021) 23 Cambridge Yearbook of European Legal Studies 228 <https://doi.org/10.1017/cel.2021.9>; Wolf Sauter, 'Responsive Competition Law' (2024) 3 European Law Open 768 <https://doi.org/10.1017/elo.2025.10>; Or Brook and Katalin Cseres, 'Beyond Consumer Welfare: Responsive Priority-Setting in the Public Interest in Competition Law Enforcement' [2026] Legal Studies 1 <https://doi.org/10.1017/lst.2026.10119>; For a more theoretical and general analysis of the democratic functioning of independent authorities, see Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Arthur Goldhammer tr, Princeton University Press 2011).

[260] Sabel and Dorf (n 246); See also Rosanvallon (n 259) 203–218.Charles F Sabel and Michael C Dorf, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267; See also Pierre

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Competition authorities, located at the interface between political decision-makers, market actors and, increasingly, civil society, are well placed to operate in this experimentalist manner. They should be able to construct enforcement agendas, priority criteria, market studies and sectoral analyses through open forums in which consumers, workers, firms, environmental organisations, independent academics and public bodies can present facts, contest assumptions and deliberate on possible courses of action.[261] Such participation need not merely be consultative: where appropriate, affected stakeholders could be integrated into monitoring bodies, advisory panels or participatory market investigations, so that their knowledge helps define the problems, evaluate remedies and revise enforcement strategies.[262] At the same time,

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Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Arthur Goldhammer tr, Princeton University Press 2011) 203–218.

[261] Ioannidou (n 259) 866–870; Sauter (n 259) 783–792; Brook and Cseres (n 93) 11–15.Maria Ioannidou, '"Responsive" Remodelling of Competition Law Enforcement' (2020) 40 Oxford Journal of Legal Studies 846, 866–870 <https://doi.org/10.1093/ojls/gqaa003>; Wolf Sauter, 'Responsive Competition Law' (2024) 3 European Law Open 768, 783–792 <https://doi.org/10.1017/elo.2025.10>; Or Brook and Katalin Cseres, 'Beyond Consumer Welfare: Responsive Priority-Setting in the Public Interest in Competition Law Enforcement' [2026] Legal Studies 1, 11–15 <https://doi.org/10.1017/lst.2026.10119>.

[262] Firat Cengiz, 'Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach' (2016) 54 JCMS: Journal of Common Market Studies 826 <https://doi.org/10.1111/jcms.12339>; For authors who support this idea in the context of the Digital Markets Act, see, Katalin J Cseres and Laurens C De Korte, 'Participation of Third Parties in the Public Enforcement of the

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the authority's action should remain experimental in the pragmatist sense described by Michael Dorf and Charles Sabel: it should proceed through trial and error, adapting continuously to new information, market developments and feedback from those affected.[263] In this way, competition authorities could use the tools of competition law not as fixed commands imposed from above, but as revisable instruments of collective learning aimed at achieving, as effectively as possible, the post-growth objectives of non-domination and ecological balance.

An illustration may clarify how this process could operate in practice. Suppose a competition authority investigates a sustainability practice in the energy, food or transport sector: the ecological objective may support reduced output or higher prices in order to phase out environmentally harmful forms of competition, while the non-domination objective may point in the opposite direction if the measure makes an essential service unaffordable for low-income households. In such a case, the authority should ask, through a transparent and participatory

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Digital Markets Act: Between Democracy and Technocracy' (2025) 13 Journal of Antitrust Enforcement 595, 612–619 <https://doi.org/10.1093/jaenfo/jnae051>.~~Firat Cengiz, 'Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach' (2016) 54 JCMS: Journal of Common Market Studies 826 <https://doi.org/10.1111/jcms.12339>; For authors who support this idea in the context of the Digital Markets Act, see, Katalin J Cseres and Laurens C De Korte, 'Participation of Third Parties in the Public Enforcement of the Digital Markets Act: Between Democracy and Technocracy' (2025) 13 Journal of Antitrust Enforcement 595, 612–619 <https://doi.org/10.1093/jaenfo/jnae051>.~~

[263] Sabel and Dorf (n 246) 314–323.~~Charles F Sabel and Michael C Dorf, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267, 314–323.~~

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process, whether the good or service concerned is essential for the satisfaction of basic needs. If the product is essential, the authority should give priority to preserving access for the most vulnerable consumers. If, by contrast, the product is non-essential, the ecological objective may legitimately receive priority, even where this leads to higher prices or reduced availability. This assessment should be supported by market studies, sectoral inquiries and stakeholder participation: consumer organisations, environmental groups, workers, firms, independent academics and public bodies should be able to present evidence on needs, affordability, substitutability and ecological impact. In this way, the "most vulnerable consumer" criterion becomes not a rhetorical device, but a practical and pragmatic decision rule.

Accordingly, a post-growth enforcement model would require not only stronger and better-specified competition-law intervention, but also the democratisation and transparency of competition authorities' internal processes: the meaningful participation of civil society would operate as the strongest safeguards against both capture by specific private interests and short-term political or electoral instrumentalisation.[264]

[264] Ian Ayres and John Braithwaite, 'Tripartism: Regulatory Capture and Empowerment' (1991) 16 Law & Social Inquiry 435 <https://doi.org/10.1111/j.1747-4469.1991.tb00291.x>; Daniel P Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 458–465.~~Ian Ayres and John Braithwaite, 'Tripartism: Regulatory Capture and Empowerment' (1991) 16 Law & Social Inquiry 435 <https://doi.org/10.1111/j.1747-4469.1991.tb00291.x>; Daniel P Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 458–465.~~

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ii. Private enforcement

Private enforcement shows that competition law is not only applied by public authorities, but also mobilised by private actors as a strategic legal resource: it may serve legitimate functions of deterrence, compensation and market correction, but it may also be used to burden rivals or otherwise convert competition law into an instrument of private advantage rather than competitive protection. In a hypothetical post-growth society, the challenge would therefore be to encourage private actors to mobilise competition law in support of the extrinsic objectives of non-domination and ecological balance, while neutralising attempts to use that same law for exclusively private ends, in particular to preserve monetary rents, protect incumbent market positions, or exclude competitors whose innovations contribute to ecological transition.

Thus, it is important to distinguish between legitimate strategic use of competition law and its abusive use by private actors. The goal is not, therefore, to prevent private actors from invoking competition law, since the enforcement of the law by private individuals remains essential for deterrence, compensation, and the correction of market failures.[265] In a post-growth framework, this distinction would be drawn by asking whether the private use of competition law plausibly advances one of the three articulated criteria: whether it reduces relations of market domination, whether it supports ecological balance, and, where the two objectives conflict, whether it protects access to essential goods or services for the most vulnerable consumers. A complaint by an incumbent against an ecological innovator, for instance, should not be treated as legitimate merely because it is framed in competition-law language; if its likely effect is to

[265] Case C-453/99, *Courage v Crehan*, ECLI:EU:C:2001:465; Joined Cases C-295/04 to C-298/04, *Manfredi*, ECLI:EU:C:2006:461; *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977).

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preserve an existing rent, block sustainable entry or reinforce dependency, it should fail the non-domination and ecological criteria. Conversely, a complaint by SMEs against exclusionary conduct by a dominant undertaking that locks users into waste-intensive ecosystems or prevents access to sustainable alternatives would fall within the legitimate post-growth use of competition law. These criteria therefore operate as justiciability filters: they transform broadened objectives into reviewable legal standards, rather than leaving them as open-ended policy preferences.

Procedurally, the risk of capture should be addressed through transparency, evidential discipline and epistemic independence. First, stakeholders invoking non-domination, ecology or vulnerable-consumer protection should be required to disclose their own private interests as well as the public interest they intend to defend; moreover, they should disclose the economic or ecological effects they allege, and the evidential basis of their claims; this would make it harder for private actors to disguise rent-preserving strategies as public-interest claims.[266] Secondly, competition authorities should not accept private and public interests as free-floating assertions, but should require them to be connected to identifiable market structures, practices or harms: domination should be linked to dependency, exclusion, lock-in or asymmetrical power; ecological balance to sustainability-related parameters of competition such as durability,

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[266] Vossestein (n 108) 1392–1400; OECD, 'Corporate Influence in Competition Policymaking' (n 109) 11–14.Adrian J Vossestein, 'Corporate Efforts to Influence Public Authorities, and the EC Rules on Competition' (2000) 37 Common Market Law Review 1383, 1392–1400 <https://doi.org/10.54648/315052>; OECD, 'Corporate Influence in Competition Policymaking' (322nd edn, 2025) OECD Competition Law and Policy Working Papers 11–14 <https://doi.org/10.1787/4f19edd4-en> accessed 21 October 2025.

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repairability, interoperability or resource use; and vulnerable-consumer protection to access to goods or services satisfying basic needs. Thirdly, because expertise itself may be captured, agency processes should include epistemic-independence safeguards, such as disclosure of conflicts of interest, plural expert panels, balanced stakeholder access and the participation of civil-society organisations, consumer representatives, workers, environmental groups and independent academics.[267] Such participation would operate as a counterweight to both private capture and short-term political instrumentalisation.[268] In this way, the broadened objectives of competition law would not become open-ended opportunities for strategic users, but reviewable

[267] This responds to Ioannis Lianos's concern that competition policy is shaped not only by formal lobbying but also by the production of apparently neutral expertise, see Lianos, 'Academic "Capture"? The Hidden Costs of Corporate Funding in Competition Policy Research and Proposed Remedies' (n 115).~~This responds to Ioannis Lianos's concern that competition policy is shaped not only by formal lobbying but also by the production of apparently neutral expertise, see Ioannis Lianos, 'Academic "Capture"? The Hidden Costs of Corporate Funding in Competition Policy Research and Proposed Remedies' (Centre for Law, Economics and Society, UCL 2024) 7/2024.~~

[268] Ayres and Braithwaite (n 264); Carpenter and Moss (n 264) 458–465.~~Ian Ayres and John Braithwaite, 'Tripartism: Regulatory Capture and Empowerment' (1991) 16 Law & Social Inquiry 435 <https://doi.org/10.1111/j.1747-4469.1991.tb00291.x>; Daniel P Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 458–465.~~

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standards structured by transparency, evidential discipline, epistemic independence and democratic participation.

Ultimately, private enforcement is justified in a post-growth competition regime only insofar as it preserves the autonomy of market actors and fosters economic innovation compatible with planetary boundaries, while ensuring that consumers' basic needs are met.

~~b) [269][270][271][272][273][274]~~

~~While broadening the intrinsic objectives of competition law already requires expanding the economic parameters through which market behaviour is assessed, this evolution naturally opens onto a second, wider layer of analysis: the extrinsic objectives. Once qualitative factors such as sustainability, fairness, innovation pathways and power asymmetries are recognised as~~

~~[269] Brook and Cseres (n 119).~~

~~[270] Jonathan B Baker, 'Taking The Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right' 80 *Antitrust Law Journal* (2015) 1; Herbert Hovenkamp, 'Antitrust Error Costs' (2022) 24 University of Pennsylvania Journal of Business Law 293.~~

~~[271] Richard A Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 The Journal of Legal Studies 399.~~

~~[272] Frank H Easterbrook, 'The Limits of Antitrust' (1984) 63 Texas Law Review 1.~~

~~[273] Karl R Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge 2002).~~

~~[274] Charles F Sabel and Michael C Dorf, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267; Marcellus S Snow, 'Competition as a Discovery Procedure' (2002) 5 The Quarterly Journal of Austrian Economics 9 <https://doi.org/10.1007/s12113-002-1029-0>.~~

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intrinsic components of competitive dynamics, their social and political implications become impossible to ignore. The very economic mechanisms that competition law regulates are embedded within broader structures of democratic governance, social justice and societal well-being. As a result, the intrinsic expansion of competitive parameters creates a conceptual bridge toward extrinsic aims—revealing that competition law not only shapes how markets function internally, but also how economic power interacts with political equality, social cohesion and the broader conditions of democratic life.

In this context, it is important to consider the power relations between economic and non-economic actors and to examine whether competition law is a relevant tool for countering the use of power by economic actors in the political sphere and in society in general. This broader inquiry echoes what Eleanor Fox and Lawrence Sullivan identify as the core of the traditional antitrust paradigm: a conception of competition law that was never confined to price and output but was fundamentally concerned with the diffusion of economic power, the preservation of open markets, and the protection of democratic and social values.[275] Unlike the later Chicago School reinterpretation, traditional antitrust understood markets as embedded in social and political life and recognised that concentrations of private economic power could distort not only commercial rivalry but also civic equality, political deliberation, and opportunities for economic self-determination.[276] Synthesising their analysis, the traditional paradigm offers three key insights. First, competition is not only an economic process but a political and social

[275] Eleanor M Fox and Lawrence A Sullivan, 'Antitrust--Retrospective and Prospective: Where Are We Coming from--Where Are We Going Papers Presented at the Airlie House Conference on the Antitrust Alternative' (1987) 62 New York University Law Review 936, 937–944.

[276] ibid 944 and 970–971.

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condition: dispersed market power supports a dispersed distribution of opportunities in society. Second, antitrust serves as a counterweight to structural imbalances that can spill over into non-economic domains, including political influence, inequality of bargaining power, or the marginalisation of weaker groups. Third, preserving competition requires attention to the process and conditions of rivalry—not simply to static price outcomes—which implies a willingness to examine exclusion, coercion, strategic dominance, and other practices that shape the real structure of markets.[277] Seen from this perspective, considering non-economic parameters is not an innovation but a return to antitrust's foundational logic. It invites us to see competition law as one of the instruments that can help maintain a balance between economic actors and the broader society, ensuring that markets remain open, contestable, and consistent with democratic values.[278]

Building on Eleanor Fox and Lawrence Sullivan's insight that competition law can serve as an institutional safeguard balancing economic power and democratic values, the following three developments show how this broader perspective materialises concretely—through the articulation between quality and sustainability, the societal orientation of innovation, and the governance of power relations along value chains.

The incorporation of extrinsic environmental goals into competition law does not represent a rupture with the intrinsic analytical framework centred on product quality and durability; rather, it extends and reinforces it. Once qualitative dimensions such as safety, longevity, repairability, informational clarity or ecological footprint are recognised as intrinsic competitive parameters, environmental protection appears as their natural macro-level counterpart. Strategies that undermine durability or generate negative environmental externalities—planned obsolescence,

[277] ibid 970–988.

[278] Fox, 'Antitrust and Democracy' (n 44) 317–319.

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intensive resource extraction, pollution-based cost advantages – alter the conditions of rivalry by enabling firms to win market share through degradation of quality or through the off-loading of ecological costs onto society.[279] A competition system that tolerates such strategies is not merely blind to environmental harms; it is structurally distorted, since undertakings that internalise sustainability costs are penalised vis-à-vis those pursuing extractive or waste-intensive models. Integrating environmental concerns into competition analysis therefore strengthens the intrinsic objective of ensuring that firms compete on the merits. A market in which firms can only prevail by offering sustainable, high-quality products is also a market aligned with broader ecological transition goals. In this sense, environmental objectives and intrinsic qualitative objectives mutually reinforce one another: both aim to safeguard a competitive process oriented toward long-term societal well-being rather than short-term degradation. In addition, integrating sustainability and qualitative dimensions into competition analysis strengthens all three pillars of the triad functions – objectives – uses: it broadens the objectives by recognising environmental and qualitative concerns as legitimate ends of market regulation; it extends the functions of competition law by re-orienting its measuring role toward long-term societal welfare rather than short-term efficiency; and it enriches the uses available to public and private actors, who can then mobilise competition law not only to prevent distortions but also to support durability-enhancing and transition-compatible practices.

A similar form of mutual reinforcement arises when considering innovation.[280] Treating innovation as an intrinsic objective requires going beyond a narrow focus on output levels to examine the direction, quality and diversity of technological trajectories. But once this shift is

[279] Kingston (n 176); Holmes (n 85).

[280] Deutscher and Makris (n 182); McLean (n 180).

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made, the analysis necessarily connects with broader societal questions concerning the type of future economy—and indeed the type of society—that innovation should serve.[281] Innovative activity oriented toward resource-intensive abundance, data extraction or hyper-consumption shapes a socio-technical regime incompatible with environmental limits or with social equity.[282] Conversely, innovation in energy efficiency, privacy-preserving technologies, interoperability infrastructures or circular-economy models supports a society organised around resilience, sufficiency and shared prosperity—what some authors describe as a post-growth orientation.[283] The governance of innovation thus becomes an arena where intrinsic and extrinsic objectives

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[281] Pansera (n 179).

[282] Christian Kerschner and others, 'Degrowth and Technology: Towards Feasible, Viable, Appropriate and Convivial Imaginaries' (2018) 197 Technology and Degrowth 1619 <https://doi.org/10.1016/j.jclepro.2018.07.147>; Lukáš Likavčan and Manuel Scholz-Wäckerle, 'Technology Appropriation in a De-Growing Economy' (2018) 197 Technology and Degrowth 1666 <https://doi.org/10.1016/j.jclepro.2016.12.134>; Jan Cornelius Zoellick and Arpita Bisht, 'It's Not (All) about Efficiency: Powering and Organizing Technology from a Degrowth Perspective' (2018) 197 Technology and Degrowth 1787 <https://doi.org/10.1016/j.jclepro.2017.03.234>; Tiziano Gomiero, 'Agriculture and Degrowth: State of the Art and Assessment of Organic and Biotech-Based Agriculture from a Degrowth Perspective' (2018) 197 Technology and Degrowth 1823 <https://doi.org/10.1016/j.jclepro.2017.03.237>.

[283] Kallis and others (n 163).

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converge: preserving polycentricity, avoiding technological lock-ins, and safeguarding the diversity of innovation paths ensures not only competitive openness but also the availability of technological options compatible with societal priorities. A competition framework that scrutinises how dominant firms steer innovation – especially through mergers, ecosystem strategies or exclusionary design choices – helps prevent the entrenchment of unsustainable or socially undesirable paradigms. Here again, intrinsic and extrinsic objectives reinforce one another: a competitive system favouring plural, sustainable innovation trajectories is also one that preserves society's capacity to choose the futures it values. Overall, situating innovation within a wider socio-technical horizon reframes the three components of the triad functions – objectives – uses: the objectives of competition law must encompass the direction and diversity of innovation, not merely its quantity; the functions of competition law must adapt by scrutinising how firms shape technological pathways and by protecting plural innovation trajectories; and the uses of competition law expand as actors rely on it to preserve openness, resist lock-ins, and ensure that innovation serves broader societal futures rather than narrow profitability.

Power imbalances between economic actors form another area where intrinsic and extrinsic aims converge. Intrinsically, competition law seeks to prevent dominant firms from exploiting asymmetric bargaining power, distorting value chains or appropriating disproportionate shares of surplus.[284] Extrinsically, these same economic asymmetries shape the social conditions under which individuals live, work and participate in democratic life.[285] When dominant firms

[284] Woodcock (n 169) 2–30.

[285] Amato (n 46); Fox, 'Antitrust and Democracy' (n 44); Stavros Makris and Filip Lubinski, 'Antitrust and Complex Democracy: Reclaiming Markets from Technofeudalism' 7 *Concurrences* (2025) 1.

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exercise forms of "private governance" over dependent suppliers, workers or digital users—through unilateral terms, data extraction, algorithmic ranking or exclusionary contracting—these practices influence not only market outcomes but also the distribution of autonomy, dignity and life chances.[286] Concentrated economic power can translate into reduced labour mobility, heightened precarity, restricted choices in essential services, and diminished informational pluralism—features that weaken the foundations of democratic citizenship.[287] Conversely, competitive markets that limit private domination bolster individuals' effective freedom to shape their own livelihoods and to participate meaningfully in civic life.[288] The intrinsic goal of ensuring fair rivalry between firms, and the extrinsic goal of safeguarding democratic modes of life, are thus deeply intertwined. Addressing power asymmetries within markets helps protect the social preconditions of democracy, while democratic values provide normative guidance for identifying when economic power becomes socially and politically excessive. Thus, analysing power asymmetries reveals how deeply the triad functions – objectives – uses is implicated in questions of fairness and democratic legitimacy: the objectives of competition law necessarily include preventing domination and safeguarding equitable participation in markets; its functions must therefore measure the structure of dependencies;

[286] Teachout and Khan (n 135); Khan (n 135).

[287] Wu (n 52); Zephyr Teachout, *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* (1st ed, St Martin's Press 2020); Ariel Ezrachi and Viktoria HSE Robertson, 'Can Competition Law Save Democracy? Reflections on Democracy's Tech-Driven Decline and How to Stop It' (2025) 13 Journal of Antitrust Enforcement 315 <https://doi.org/10.1093/jaenfo/jnae043>.

[288] Brandeis (n 58).

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and its uses by social actors become avenues for countering private governance, reinforcing economic citizenship, and protecting the social conditions of democratic life.

CONCLUSIONS

The right balance between the functions, objectives and uses of competition law benefits society as a whole by helping regulate the market economy. Its functionsselecting which economic relationships matter, distinguishing desirable from harmful behaviourspprovide a normative measure of how markets ought to operate. In doing so, competition law supports the economic, social and environmental aims that a society sets for itself. By mobilising the legal system to defend both their private interests and the general interest, public authorities and private actors enable competition law to serve these objectives in practice. Functions, objectives and uses are therefore inseparable: when they are aligned, competition law—this secondary institution that deliberately distances itself from raw economic forces—fulfils its role as an instrument that opens possibilities, regulates power, and contributes to a more just economic order.

The preceding analysis has shown that the functions, objectives and uses of competition law are analytically distinct but practically interdependent.[289] Its functions organise market relationships, limit harmful conduct and provide a measure of how the market economy ought to operate; its objectives determine the normative horizon toward which these functions are directed; and its uses by public and private actors translate those objectives into concrete legal practice. None of these dimensions can therefore be understood in isolation: functions without objectives risk becoming purely formal, objectives without functions risk becoming abstract

[289] Ost (n 1) 49–120.François Ost, *À quoi sert le droit ? usages, fonctions, finalités* (Bruylant 2016) 49–120.

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political aspirations, and uses without legal discipline risk becoming instruments of strategic capture.

This interdependence becomes especially important in the context of the contemporary polycrisis, where ecological collapse, economic instability, democratic fragility, geopolitical tensions and technological disruption unfold simultaneously and reinforce one another.[290] In such a context, competition law cannot remain oriented only toward inherited assumptions of growth, efficiency or consumer welfare.[291] It must be re-examined as a legal device capable of structuring markets, limiting power and opening alternative economic possibilities in light of the objectives society chooses to pursue in order to resolve the polycrisis.

Imagining the functions, objectives and uses of competition law within the hypothetical horizon of a post-growth society has therefore allowed us to see its inevitably political dimension in a new light. This thought experiment[292] shows that the political character of competition law should not be denied or hidden behind technical language.[293] It should instead be acknowledged

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[290] Morin and Kern (n 3) 47–74.Edgar Morin and Anne Brigitte Kern, *Homeland Earth: A Manifesto for the New Millennium* (Sean M Kelly and Roger Lapointe trs, Hampton Press 1999) 47–74.

[291] Schmelzer (n 34).Matthias Schmelzer, 'The Growth Paradigm: History, Hegemony, and the Contested Making of Economic Growthmanship' (2015) 118 Ecological Economics 262 <https://doi.org/10.1016/j.ecolecon.2015.07.029>.

[292] Del Mar (n 171) 125–194.Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020) 125–194.

[293] Pitofsky (n 75).Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 University of Pennsylvania Law Review 1051 <https://doi.org/10.2307/3311791>.

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and legally disciplined. In the context of an unfolding polycrisis that destabilises markets and amplifies social, political and ecological vulnerabilities, competition law must be realigned with broader societal needs by expanding the economic parameters it considers and by recognising its role within a wider governance framework. This requires broadening both its intrinsic objectives—such as quality, sustainability, innovation and fairness—and its extrinsic aims relating to democratic integrity, power diffusion and societal resilience.

Furthermore, understanding the place of competition law in society also requires recognising its limits. Competition law cannot, and should not, claim to be the sole or principal instrument governing the market economy. Other public tools are equally legitimate and sometimes better suited to regulating specific dimensions of economic activity.[294] Public control of the quality and sustainability of goods and services, for example, can intervene more directly and more frequently than competition law allows.[295] Public price regulation—long marginalised—can also be justified where markets fail persistently or where basic goods require stability and fairness rather than competitive volatility.[296]

Beyond this, certain economic behaviours require forms of continuous monitoring that competition law, by design, cannot provide. Ensuring a fair distribution of the surplus generated

[294] Matt Stoller, *Goliath: The 100-Year War between Monopoly Power and Democracy* (First Simon&Schuster, Simon & Schuster Paperbacks 2020) 173–195; Zephyr Teachout, *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* (1st ed, St Martin's Press 2020) 219–236; Ramsi Woodcock, 'A Progressive Critique of the Law and Political Economy Movement' (SocArXiv, 31 March 2023) <https://doi.org/10.31235/osf.io/twbrk> accessed 24 November 2025.

[295] Barbara Fried (ed), *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Harvard University Press 1998) 160–204.

[296] John Kenneth Galbraith, *A Theory of Price Control* (Harvard University Press 1980) <https://doi.org/10.4159/harvard.9780674333048>; Niamh Dunne, 'Regulating Prices in the European Union' (2018) 37 Yearbook of European Law 344, 373–386 <https://doi.org/10.1093/yel/yey002>.

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by economic activity among consumers, workers, producers, investors and the broader community calls for instruments capable of shaping economic outcomes more dynamically.[297] Taxation, for instance, plays an essential role in indirectly steering firms' behaviour within markets, across markets and even outside markets, particularly in the political realm. It can curb excessive rent extraction, discourage socially harmful activities and redistribute value more equitably.[298]

Finally, reflecting on the limits of the commercial sphere also means acknowledging the importance of renewed public services. Ensuring equal, universal and continuous access to essential goods and services—education, healthcare, energy, mobility, housing, communication—is sometimes better achieved through public provision rather than market mechanisms.[299] Here, the aim is not to improve the functioning of markets, but to limit their scope whenever they prove inadequate for securing fundamental material needs. By establishing or reinforcing a public economy alongside the market economy, societies can ensure that citizens' essential needs are met more fairly, more effectively and more sustainably. Taken together, these reflections show that while competition law remains a crucial tool for structuring fair, open and balanced markets, it is only one component of a broader institutional

[297] Robert L Hale, *Freedom Through Law: Public Control of Private Governing Power* (Columbia University Press 1952) 501–538 <https://doi.org/10.7312/hale91222> accessed 25 November 2025.

[298] Thomas Piketty, Emmanuel Saez and Stefanie Stantcheva, 'Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities' (2014) 6 American Economic Journal: Economic Policy 230 <https://doi.org/10.1257/pol.6.1.230>; Thomas Tørsløv, Ludvig Wier and Gabriel Zucman, 'The Missing Profits of Nations' (2023) 90 The Review of Economic Studies 1499 <https://doi.org/10.1093/restud/rdac049>.

[299] William Boyd, 'Public Utility and the Low-Carbon Future' (2013) 61 UCLA Law Review 1614; K Sabeel Rahman, 'The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept' (2018) 39 Cardozo Law Review 1621; William J Novak, *New Democracy: The Creation of the Modern American State* (Harvard University Press 2022) 108–144.

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~~ecosystem. To address the challenges of the contemporary polycrisis, competition law must be complemented—not replaced—by regulatory, fiscal and public-service instruments capable of governing the economy in all its dimensions, ensuring that markets serve society rather than the reverse.~~ Competition law always contributes to defining which market structures are desirable, which forms of economic power are tolerable, and which behaviours should be permitted, prohibited or transformed. The decisive question is therefore not whether competition law should pursue political choices, but how those choices should be made explicit and how it should be framed. Properly framed, this political dimension does not undermine the specificity of competition law; it strengthens it by ensuring that its functions (organising economic relations, limiting harmful conduct and measuring the market economy) as well as its uses by public and private actors remain directed toward the objectives that members of a society set for themselves. These objectives may be economic growth and consumer welfare, as in the dominant paradigm of modern competition law, or they may be freedom in equality within planetary boundaries, as in the post-growth hypothesis explored here. In either case, competition law can only fulfil its role if its political orientation is made transparent, legally structured and democratically accountable.

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