21. Unilateral conduct and sustainability under EU competition law

Marios Iacovides and Valentin Mauboussin

I. BIG COMPANIES AND THEIR IMPACT ON SUSTAINABILITY

There are over 213 million companies worldwide according to the latest statistical estimates.[1] Of those, just 100 companies are responsible for 71 percent of global industrial greenhouse gas emissions since 1988.[2] Merely 20 fossil fuel companies can be directly linked to more than one third of all greenhouse gas emissions since 1965,[3] when those emissions' possible impact on the climate was already starting to become known to them.[4] A global study that traced financial and material flows of single-use plastic production back to their source has shown that a small group of 20 companies across various sectors are responsible for the majority of single-use plastic waste.[5] Even *individually*, some companies in the agriculture, forestry, seafood, cement, minerals and fossil energy sectors have grown so large that they effectively influence critical functions of the biosphere through their impacts on 'the world's ocean, the global atmosphere and terrestrial biomes, system components that serve critical functions of the Earth's dynamics'.[6]

These large companies can be understood as keystone actors,[7] alluding to keystone species that have a significant influence on the structure and function of ecosystems. Their negative impact on people and the planet, through their contribution to the great acceleration[8] that has

[1] Statista Research Department, 'Number of companies worldwide 2000-2021' (Statista) www.statista.com/statistics/1260686/global-companies/.

[2] Paul Griffin, "The Carbon Majors Database – CDP Carbon Majors Report 2017" (CDP, July 2017), www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions.

[3] Climate Accountability Institute Press Release on Carbon Majors Update, 1965-2017 (9 October 2019) available at https://climateaccountability.org/publications.html.

[4] *See*, e.g., Geoffrey Supran, 'Assessing ExxonMobil's climate change communications' Presentation at a Hearing at the European Parliament (21 March 2019), www.europarl.europa.eu/cmsdata/162144/Presentation%20Geoffrey%20Supran.pdf.

[5] Dominic Charles and others, Report 'The Plastic Waste Makers Index – Revealing the Source of the Single-Use Plastics Crisis' (The Minderoo Foundation, 2021), available at www.minderoo.org/plastic-waste-makers-index/.

[6] Carl Folke and others, 'Transnational Corporations and the Challenge of Biosphere Stewardship' (2019) 3 Nature Ecology & Evolution 1396.

[7] Henrik Österblom and others, 'Transnational Corporations as "Keystone Actors" in Marine Ecosystems' (2015) 10 PLOS ONE e0127533.

[8] Will Steffen and others, *Global Change and the Earth System: A Planet under Pressure* (1st edn, Springer 2004).

pushed the Earth system into an unsafe and unjust state,[9] is disproportionate and difficult to deny. Unfortunately, this impact is probably on a course to rise even further, as markets are becoming increasingly concentrated, meaning companies are getting bigger and there is consolidation across sectors.[10]

Conversely, together with governments and international organisations, large companies are also some of the main actors in the fight against environmental issues. In as much as they generate plenty of gas emissions, therein lies more room for them to take concrete actions and implement behavioural changes that can earnestly reduce the level of worldwide emissions. Thanks to their resources and capabilities, they might also be the only entities capable of bringing in timely and paradigm-shifting innovations.

Not every large company is necessarily complacent about the impact of its business operations on people and the planet, and some may genuinely want to do the right thing.[11] Besides their potential goodwill, it is also in the own interest of big companies to ensure the living conditions of the planet are sustainable to safeguard their long-term income and profits.[12] Additionally, pursuing environmental objectives can also help these companies get additional benefits by crafting for themselves a positive image in the perception of the public and investors.[13] Any resulting benefits for the environment do not necessarily have to fill solely the pockets of big companies, most notably via energy-saving practices. Ideally, through the right tax and distributive policies, they would also trickle down and be distributed to societies at large.[14]

Simply put, whether because of regulation, voluntarily, or thanks to the application of some generalist law applicable to their conduct, such as human rights,[15] constitutional law, or competition law, large companies can help accelerate change for the better,[16] and their market power can be leveraged to enhance environmental stewardship.[17]

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[9] Johan Rockström and others, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14 Ecology and Society 32.

[10] Yeran Ma, 'New Data Shows the Rise of Corporate Concentration in the US in the Past 100 Years' ProMarket contribution (21 April 2022), www.promarket.org/2022/04/21/new-data-shows-the-rise-of-corporate-concentration-in-the-us-in-the-past-100-years/; Gabor Koltay, Szabolcs Lorncz and Tommaso Valletti, 'Concentration and Competition: Evidence from Europe and Implications for Policy' (CESifo 2022) https://EconPapers.repec.org/RePEc:ces:ceswps:_9640.

[11] *See* 'About Climate Action 100+' (*Climate Action 100+*) www.climateaction100.org/about/.

[12] Madison Condon, 'Externalities and the Common Owner' (2020) 95 Washington Law Review 1, 6. *See also* Konstantinos Stylianou, 'Can Common Business Practices Ever Be Anticompetitive? Redefining Monopolization' (2020) 57 American Business Law Journal 169, 185–6.

[13] Mark J Roe, 'Corporate Purpose and Corporate Competition' (2021) 99 Washington University Law Review 223; SquareWell Partners, 'The Changing Climate on Investor Behavior' (2021) Insights https://squarewell-partners.com/insights/.

[14] Valentin Mauboussin, 'Environmental Defences as a Shield from Article 102 TFEU' (2022) 3–2022 Concurrences 30, 33.

[15] *See* e.g., Dutch Supreme Court Case 19/00135 *Netherlands v Urgenda* NL:HR:2019:2007; Case STC4360-2018 Colombian Supreme Court Opinion of 5 April 2018.

[16] Österblom and others (n 7).

[17] Victor Galaz and others, 'Finance and the Earth System – Exploring the Links between Financial Actors and Non-Linear Changes in the Climate System' (2018) 53 Global Environmental Change 296.

In this chapter, we present the state of the art in the research field of unilateral conduct in antitrust and sustainability and set out a research agenda for the future. To proceed, we rely on a common distinction made on the use of sustainability in the application of Article 102 TFEU, either as a sword or as a shield.[18] Given that the topic of environmental considerations in antitrust has received the most attention in the European sphere and that the field of unilateral conduct in this regard remains in its infancy, we have approached the topic of this chapter from a European lens. Nonetheless, its content will also be useful for the development of sustainable antitrust in other jurisdictions.

The chapter is organised as follows. First, in section II, we provide a very brief overview of Article 102 TFEU, which prohibits abuses of dominance in EU competition law. In section III, we discuss how Article 102 TFEU can be relied on as a sword in cases relating to sustainability, i.e. how sustainability can be used as a cause of action to tackle dominant undertakings' unsustainable conduct. Subsequently, in section IV, we explore how sustainability can be used as a shield from the enforcement of Article 102 TFEU, meaning how dominant undertakings could avail themselves of objective justifications to exempt their conduct on account of its redeeming positive impact on sustainability. We conclude in section V, with a short discussion and a few ideas as to a possible research agenda for unilateral conduct in antitrust and sustainability.

II. ABUSE OF DOMINANCE IN EU COMPETITION LAW

Article 102 TFEU prohibits as incompatible with the internal market any abuse of a dominant position held by one or more undertakings within the internal market or in a substantial part of it, in so far as the abuse may affect trade between Member States. Article 102 TFEU mentions several examples of abuses of dominance,[19] though, as the Court of Justice has repeatedly held, the list is non-exhaustive.[20]

For the purposes of this chapter, two criteria for the application of Article 102 TFEU are relevant; dominance and abuse. Concerning the first criterion, an undertaking must be dominant on a relevant market, i.e. it must be in a position of market power that makes it capable, to a certain extent, of behaving independently from consumers, customers and competitors.[21] The higher the market share of an undertaking on the relevant market, the easier it is for the Commission (or other claimants) to successfully show that the undertaking is in a dominant position and vice versa. Undertakings are presumed to be in a position of dominance if their market share is above 50 per cent in the relevant product and geographic market.[22] Other rel-

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[18] Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354, 384–9.

[19] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C202/13, Art. 102.

[20] Case 6-72 *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities* [1973] ECLI:EU:C:1973:22, para 26.

[21] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22, para 65.

[22] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECLI:EU:C:1991:286, para 60.

evant factors include barriers to entry, exit, and expansion, whether the company is a former monopoly, whether there is countervailing buyer power, how mature the market is, if there is significant competitive pressure from small maverick firms etc.[23]

Concerning the second criterion, the Court of Justice defined "abuse of dominance" in *Hoffmann-La Roche* as "an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where … the degree of competition is weakened and which … has the effect of hindering the maintenance of the degree of competition".[24] Generally, an abuse is committed where the practice of the dominant undertaking does not correspond to "competition on the merits", which, broadly, relates to competing on the basis of price, quality, innovation etc.[25]

Competition authorities often investigate abuses that are capable of foreclosure, thus excluding competitors from the market. Some well-known types of exclusionary abuses include predatory prices,[26] margin squeeze,[27] tying and bundling,[28] and denial of access to essential facilities,[29] whereas new types, such as self-preferencing,[30] have emerged through the decisional practice and case law. These behaviours harm competitors by driving them out of markets and, thus, reinforce the dominant position of the undertaking committing the abuse and weaken the competitive structure of markets.[31] Competition authorities and individuals may also pursue actions against exploitative abuses, which directly harm customers or consumers. The most common type of exploitative abuse is the charging of excessive prices that are unfair in relation to the value of the product sold by the dominant undertaking.[32]

As of now, Article 102 TFEU has been largely ignored in the debate on sustainability considerations in EU competition law. For instance, the Commission's public consultation on the subject focused on certain aspects of state aid, merger control, and exceptions from the pro-

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[23] Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 340–55.

[24] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECLI:EU:C:1979:36, para 91.

[25] Case C-377/20 *Servizio Elettrico Nazionale* EU:C:2022:379, para 85.

[26] *See AKZO Chemie BV v Commission of the European Communities* (n 22); Case C-202/07 P *France Télécom SA v Commission of the European Communities* [2009] ECLI:EU:C:2009:214; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2015:651.

[27] *See* Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECLI:EU:C:2010:603; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83.

[28] *See* Case C-53/92 P *Hilti AG v Commission of the European Communities* [1994] ECLI:EU:C:1994:77; C-333/94 P *Tetra Pak International SA v Commission of the European Communities* [1996] ECLI:EU:C:1996:436.

[29] *See* Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECLI:EU:C:1998:569; Case T-851/14 *Slovak Telekom, as v European Commission* [2018] ECLI:EU:T:2018:929.

[30] *See* Case T-612/17 *Google LLC, formerly Google Inc and Alphabet, Inc v European Commission* [2021] ECLI:EU:T:2021:763.

[31] Jones, Sufrin and Dunne (n 23) 371.

[32] *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (n 21) paras 251–252.

hibition against anti-competitive agreements and contained nothing on abuse of dominance.[33] Likewise, the result of that consultation contains no proposals for the application of Article 102.[34] Be that as it may, there have been academic and stakeholder discussions (national competition authorities (NCAs) and organisations) regarding how sustainability goals can be pursued through Article 102 TFEU. In the next two sections, we present these, focusing first on the matter of abuse of dominance (section III) and second on justifications for alleged abuses of dominance (section IV).

III. ARTICLE 102 TFEU AS A SWORD

There are at least three possible reasons that explain why Article 102 TFEU has been largely overlooked in the discussion of competition policy and sustainability.

The first reason relates to the concept of "dominance". Antitrust policy is concerned with the unilateral conduct of companies when they have – individually or collectively – market power on a relevant market, as noted already in the previous section. Being big in absolute terms, as shown for instance by market capitalisation, does not necessarily mean that a company is also big in *relative* terms on a relevant market; a firm's market power will depend on how big it is in relation to its competitors, how easy or difficult entry and exit are on the market, if the market is mature and a number of other factors. Since bigness does not always entail dominance, a big company's conduct is not necessarily covered by antitrust rules, even if it has the capability of being highly influential on the market. Vice versa, an undertaking may be big in relative terms in a relevant market that is narrow, small, and rather insignificant from a sustainability perspective. In other words, since bigness is unrelated to "dominance", the negative impact that big companies can have on people and planet that we described above in the Introduction, is not always seen as a matter for competition law.[35]

The second reason why Article 102 TFEU has so far been overlooked, and one which is closely related to the first one, is that unsustainable conduct is not inherently endemic to either dominant or big companies. All companies, whether big or small, whether dominant on a relevant market or not, may engage in conduct that has a negative impact on sustainability parameters. Simply put, it is not always clear why or how sustainability considerations have any *specific* relation to the prohibition against abuse of dominance.

The third reason why Article 102 TFEU has so far been overlooked is that certain unsustainable unilateral conduct may have a negative impact on parameters of sustainability, while at the same time having a negative impact on parameters of competition (such as price, quality, or innovation), the competitive process, and ultimately consumer welfare.[36] When that is the case, the sustainability angle may be seen by the enforcer or a private complainant as an unnec-

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[33] Commission public consultation 'Competition Policy supporting the Green Deal' (13 October 2020), available at https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf.

[34] Communication from the Commission, 'A competition policy fit for new challenges' COM(2021) 713 final.

[35] Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part?' [2022] SSRN Electronic Journal 10–12 www.ssrn.com/abstract=4099796.

[36] Holmes (n 18) 384–7.

essary complication to the abuse of dominance case. Why collect evidence and argue a case of abuse of dominance on the basis of, say, evidence of exploitatively low salaries in a foreign jurisdiction, when you can prove an abuse of dominance on more or less the same set of facts on the basis of predatory pricing? Why focus on the environmental and social impact of some conduct, possibly outside the European market, by a dominant undertaking, if you can prove a theory of harm on innovation and an expected decrease in quality for the product or service reaching the hands of European consumers? This has been the Commission's stance on the matter up until recently. Thus, although the Commission has accepted that EU competition law can act supportively of sustainability goals,[37] in practice, it has accepted the relevance of sustainability only when it can be subsumed into parameters of competition such as choice, quality, innovation, etc.[38]

Contemporary research on the topic of sustainability and competition law has addressed these three reasons, both in relation to competition law in general and specifically for abuse of dominance. First, some authors have addressed the general issue of whether sustainability is or should be a goal of competition policy and they have discussed different arguments and legal bases in that regard. Holmes's work, which converses with earlier work by other authors such as Kingston,[39] Nowag,[40] and Vedder[41] focuses on the arguments about the effect of Article 11 TFEU, while combining other legal bases such as Article 7 TFEU and relevant Charter provisions.[42] Iacovides and Vrettos make a similar argument and, by framing the issue of goals in terms of "mainstreaming" theories of human rights protection, argue that there is an EU constitutional law requirement to include sustainability as a goal of competition policy.[43]

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[37] M. Vestager, Speech 'The Green Deal and Competition Policy' (Renew webinar, 22 September 2020), available at https:// ec .europa .eu/ commission/ commissioners/ 2019 -2024/ vestager/ announcements/ green -deal -and -competition -policy _en; Speech 'Competition policy in support of the Green Deal' (25th IBA Competition Conference, 10 Sep. 2021) available at https:// ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy -support -green -deal _en; Commission public consultation 'Competition Policy supporting the Green Deal' (n 33) and Communication from the Commission, 'A competition policy fit for new challenges' (n 34).

[38] *See* e.g., Commission Decision in Case M.8084 – *Bayer/Monsanto* C(2018) 1709 final (Brussels, 21 March 2018), section XIV – Non-Competition Concerns.

[39] Suzanne Kingston, *Greening EU Competition Law and Policy* (CUP 2011).

[40] Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016); Julian Nowag, 'The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach' in Beate Sjåfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2017).

[41] Hans Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?* (ELP 2003).

[42] Holmes (n 18) 359–62.

[43] Marios C Iacovides and Christos Vrettos, 'Falling through the Cracks No More? Article 102 TFEU and Sustainability: The Relation between Dominance, Environmental Degradation, and Social Injustice' (2021) 10 Journal of Antitrust Enforcement 32, 40–43. In this paper, the authors draw also from the extensive empirical research on goals of EU competition law in Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42(4) Legal Studies 620.

Such a requirement would entail that the Commission, as enforcer of competition rules on the EU level, must not only avoid interfering with sustainability and environmental protection, but must positively pursue such goals through its enforcement of the rules and integrate them in the policy's goals. This would mean that the enforcement of competition rules ought to promote conduct that furthers sustainability and at the same time prevent conduct that leads to unsustainable outcomes.[44] The consequence of seeing sustainability as at least one of the goals of EU competition law is that it does not need to compete with other goals and can instead be pursued directly and independently. Hence, the negative impact big companies can have on people and planet may be seen as relevant for competition law, to the extent competition law would be applicable (i.e., that other criteria for its application are satisfied), as sustainability becomes a goal to be pursued by EU competition policy.

Hence, seeing sustainability as a goal of EU competition law has implications for the enforcement of all EU competition rules in general, but becomes relevant for Article 102 TFEU enforcement only to the extent it concerns "dominant" undertakings. For that reason, researchers have investigated if there exist any links between unsustainable business conduct on the one hand and dominance on the other hand, even though the case law of the Court of Justice does not normally require any causal link between the dominance and the abusive conduct,[45] thus addressing the second issue identified above. On a purely theoretical level, based on the case law of the Court of Justice and its interpretation of the concept of dominance, Iacovides and Vrettos have argued that having the degree of market power that is required in order to be found to be dominant within the meaning of Article 102 is a feature that may enable or facilitate engaging long-term in unsustainable business practices.[46] The authors' reading of the case law is backed up with an economic argument, namely that to the extent there would be demand and willingness to pay for sustainable alternatives on the part of customers or consumers, only the existence of market power would explain an undertaking's offering of unsustainable alternatives instead.[47] At the same time, there is also some economic research by Roe claiming that market power may in fact be good from a sustainability perspective, as firms in possession of market power are able to extract excess rents and therefore may be able to allocate the supracompetitive profits they make towards sustainability goals.[48]

Beyond theory, Iacovides and Vrettos have also made the most comprehensive hitherto empirical attempt within EU competition law to check whether there is a link between market power and unsustainable business conduct, a largely unexplored[49] research area. They first compiled a list with all undertakings (in total, 86 undertakings) that had ever been found to be dominant within the meaning of Article 102 TFEU, using DG COMP's online search

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[44] Iacovides and Vrettos (n 43) 43.

[45] *Hoffmann-La Roche v Commission* [1979] European Court of Justice Case 85/76, ECR 461 (EU:C:1978:36), para 9. A link is required where the abuse and the dominance are found on different markets: *Tetra Pak II* [1996] European Court of Justice Case C-333/94 P, ECR I-5951 (EU:C:1996:436). para 27.

[46] Iacovides and Vrettos (n 43) 46–7.

[47] *ibid* 47.

[48] Mark J Roe, 'Corporate Purpose and Corporate Competition' *ECGI Working Papers Series in Law,* Law Working Paper 601/2021.

[49] Holmes and Meagher (n 35) 15.

tool and the database over DG COMP decisions created by Iacovides and Stylianou.[50] They then checked whether these undertakings had also engaged in unsustainable business practices, which they defined on the basis of ecological economist Kate Raworth's "Doughnut Framework",[51] a heuristic tool that combines planetary boundaries[52] with the UN Sustainable Development Goals (SDGs).[53] These practices were further fine-tuned and categorised in ten principles, based on the UN Global Compact for Corporate Sustainability.[54] In general, Iacovides and Vrettos defined as unsustainable any business practice that contributes to the transgression of the planetary boundaries or contravenes the SDGs, thus pushing the world towards a more unsafe and unjust state of affairs.[55] In order to check whether the dominant undertakings had also engaged in unsustainable business practices, Iacovides and Vrettos used the online database "Environmental Justice Atlas" (EJA), which catalogues socio-ecological conflicts from across the world, including the companies involved and impacts on society and the environment.[56] They found an overlap between dominance and unsustainable business practices, as 31 percent of dominant undertakings also featured in the EJA and were involved in 176 cases of socio-ecological conflict, across all economic sectors. They also observed an overlap between environmental damage and violations of human rights, disregard for basic labour standards, and corruption.[57] According to the authors, although these practices may be something that even non-dominant undertakings engage in, their research shows that addressing them through Article 102 is a possibility that "could make a significant positive impact for people and planet, even if regulation, oversight, setting international standards, and redistribution of wealth through progressive tax policies could prove to be better alternatives, if ever realised".[58]

Commenting on this empirical research, Holmes and Meagher note that it is not surprising that dominant undertakings are responsible for negative environmental impacts, since many of them "are large multinational firms which have the most impact on so many things (good and bad)".[59] Holmes and Meagher choose instead to move the focus away from dominance or market power as defined in competition law towards a broader (and "consciously imprecise") concept of economic power borrowed by Teachout and Khan,[60] which stems both from size and market concentration.[61] This allows them to focus their arguments regarding the application of competition rules on those undertakings that have the greatest impact on the environment.

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[50] This is available at www.db-comp.eu.

[51] 'What on Earth is the Doughnut?…' (Kateraworth) www.kateraworth.com/doughnut/.

[52] For the latest research on planetary boundaries, see www.stockholmresilience.org/research/planetary-boundaries.html accessed 14 July 2022.

[53] 'United Nations Sustainable Development Goals' www.un.org/sustainabledevelopment/.

[54] 'United Nations Global Compact' www.unglobalcompact.org/what-is-gc/mission/principles.

[55] Iacovides and Vrettos (n 43) 36–40.

[56] 'Environment Justice Atlas' https://ejatlas.org/.

[57] Iacovides and Vrettos (n 43) 48–52.

[58] *ibid* 53.

[59] Holmes and Meagher (n 35) 58 endnote 58.

[60] Zephyr Teachout and Lina Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2014) 9 Duke Journal of Constitutional Law & Public Policy 37.

[61] Holmes and Meagher (n 35) 8.

Regarding the third issue, i.e. whether unsustainable business conduct must be subsumed in existing types of abuses or whether it can be seen as abuse of dominance independently, research is not, yet, very developed but some proposals do exist. For instance, Iacovides and Vrettos argue that an abuse of dominance can be found even if the unsustainable practice cannot be "translated" into classic types of abuse. They base this argument on the fact that unsustainable conduct generally affects conditions of competition on the market, for instance distorting input prices, or otherwise raises barriers to entry and expansion for competitors and leads to a lessening of innovation. Essentially, their theories of harm borrow from theories of harm that are well-known in competition law to show that unsustainable business conduct cannot be seen as "competition on the merits", which is the relevant test for abuse in EU competition law.[62] However, they argue that the claimant or the authority should be able to prove the abuse of dominance solely on the basis of evidence showing the dominant undertaking engaging in unsustainable business conduct.[63]

Holmes and Meagher agree that unsustainable business practices are abuses of dominance, noting that whether Article 102 TFEU will be enforced against them is simply a matter of will.[64] They also note that many times such practices can be seen as exploitative forms of abuse, which have traditionally escaped scrutiny and enforcement, given the focus on exclusionary abuses. Thus, a renewed focus on enforcing the prohibition against exploitative forms of abuse ought to also catch unsustainable business conduct.[65]

These ideas have found their way into the advocacy efforts of organisations, arguing for the need to enforce Article 102 against unsustainable conduct in order to specifically further certain rights, such as the right to food.[66]

Finally, we note for the sake of completeness that certain commentators are generally against the idea of integrating sustainability considerations in competition law enforcement, even though their critique does not specifically concern Article 102 TFEU. Loozen has argued that the Commission's role in defining competition policy does not include a competence to balance competition and non-competition interests like sustainability. According to her, the Commission must always prioritise the public competition interest over the general sustainability interest, since EU competition law constitutes single purpose law.[67] However, empirical research by Iacovides and Stylianou has shown that EU competition law has historically

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[62] Marios C Iacovides and Christos Vrettos, 'Radical For Whom? Unsustainable Business Practices As Abuses Of Dominance' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) 99–101.

[63] *ibid* 102–03.

[64] Holmes and Meagher (n 35) 24.

[65] *ibid* 22–4.

[66] Tomaso Ferrando and Claudio Lombardi, 'EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links' Fair Trade Advocacy Office, February 2019; Ayse Yasar, 'EU Competition Law – Cooperation Agreements for Sustainability' Fair Trade Advocacy Office Position Paper, 2020; Right to Repair, Right to Repair campaign submission to the call for contributions (20 November 2020).

[67] Edith Loozen, 'Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability' [2019] Common Market Law Review 1265, 1281.

explicitly pursued a multitude of goals and that no goal has been predominant.[68] This would seem to contravene Loozen's arguments. Others have offered practical reasons for avoiding the incorporation of sustainability considerations in EU competition law enforcement. For instance, Peeperkorn has expressed concerns that the inclusion of sustainability considerations in EU competition law enforcement will make it more complex and costly, will slow down decision-making and will decrease legal certainty.[69] Peeperkorn does not, however, offer any reasons why sustainability considerations are different from other public policy considerations that are already taken into account in EU competition law, or why environmental economics would be different than the economics that are already incorporated in competition law analysis, nor any counterarguments regarding the role of Articles 11 TFEU and 37 of the Charter of Fundamental Rights on which Holmes and Iacovides and Vrettos have based their arguments. Other critique against sustainability considerations in EU competition law has to do with either a fear of "greenwashing", or that sustainability is better furthered by competition rather than cooperation.[70] These arguments are relevant for seeing sustainability as a shield (see next section), but not when sustainability is used as a sword.

IV. ARTICLE 102 TFEU AS A SHIELD

Article 102 TFEU Objective Justifications

Although Article 102 TFEU does not contain an explicit exemption paragraph as Article 101 TFEU does in the form of Article 101(3) TFEU, dominant undertakings can also shield their conduct from the enforcement of Article 102 TFEU. Based on the Guidance on the enforcement of Article 102 TFEU (formerly Article 82 EC), dominant undertakings may rely on objective justifications to defend themselves, meaning that if approved by competition authorities, a conduct initially found to be presumptively abusive would eventually turn out to be lawful because it enhances consumer welfare.[71] To submit an objective justification, and in accordance with paragraph 31 of the Guidance, the burden of proof is on dominant undertakings, which must adduce tangible evidence supporting the laudable nature of their conduct.[72]

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[68] Stylianou and Iacovides (n 43).

[69] Luc Peeperkorn, 'Competition Policy Is Not a Stopgap!' (2021) 12 Journal of European Competition Law & Practice 415, 417.

[70] Bundeskartellamt, 'Sustainability and Competition – Note by Germany' DAF/COMP/WD(2020)63, para 18, and 57–60 available at www.oecd.org/daf/competition/sustainability-and-competition.htm; Cento Veljanovski, 'Collusion as Environmental Protection—An Economic Assessment' [2022] 18:3 Journal of Competition Law & Economics523–550; Maarten Pieter Schinkel and Yossi Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) 53 International Journal of Industrial Organization 371; Maarten Pieter Schinkel and Leonard Treuen, 'Friendly Fire in the Fight Against Climate Change' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021).

[71] 'Communication from the Commission — Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C 45/7 paras 28–31.

[72] *ibid* 31.

As part of this same guidance and the case law,[73] objective justifications are divided into two groupings: "objective necessity" and "efficiency gains".[74] On the one hand, objective necessity justifications may help condone the behaviour of dominant undertakings if they serve public interest-related goals, for example, possibly thanks to the health or safety benefits they may generate. For these justifications to be applicable, the behaviour of dominant undertakings must be proportionate and necessary to reach the objectives pursued by the conduct.[75] On the other hand, the guidelines have stated that efficiency gains justifications can underpin the conduct of undertakings if they enhance consumer welfare. Claims of efficiency gains must comply with distinct criteria, as follows:

- The efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution;
- The conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies;
- The likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and
- The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.[76]

In the realm of Article 102 TFEU, objective justifications are generally perceived as mythical rather than real, in part because the Commission seems to reject all those invoked by dominant undertakings.[77] Bearing in mind that the Commission[78] has priority-setting powers, it is quite possible that it does not pursue cases where an objective justification underpins the conduct of dominant undertakings.[79] As a consequence, if any objective justification has been accepted by the Commission, such a result will not become publicly available information. Nonetheless,

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[73] *Centre belge d'études de marché – Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECJ Case 311/84 [26–27]; *Post Danmark A/S v Konkurrenceråd*et (n 26) paras 41–42.

[74] 'Communication from the Commission' (n 71) paras 29–30.

[75] Miguel de la Mano, Renato Nazzini and Hans Zenger, 'Article 102 TFEU' in Jonathan Faull, Ali Nikpay and Deirdre Taylor (eds), *Faull & Nikpay: The EU Law of Competition* (3rd edn, OUP 2014) 395. Nonetheless, it should be mentioned that the Commission added in paragraph.29° of the abovementioned guidance that it is normally the task of public authorities to set and enforce public health and safety standards, and not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product.

[76] 'Communication from the Commission' (n 71) para 30.

[77] Vasiliki Brisimi, *The Interface between Competition and the Internal Market* (Hart Publishing 2016) 129–36; Jones, Sufrin and Dunne (n 23) 382; Richard O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd edn, Hart Publishing 2020) 351.

[78] And so do most national competition authorities have priority-setting competences as well, see Or Brook, 'Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy' (2020) 16 Journal of Competition Law & Economics 435, 454.

[79] Nowag, *Environmental Integration in Competition and Free-Movement Laws* (n 40) 241–2; Massimiliano Kadar, 'Article 102 TFEU and Efficiency Pleas: A "Fact-Check"' in Nicolas Charbit

some condoned objective justifications can be retrieved from the decisional practice and case law of NCAs and national courts, as can be observed further below.

The Case Law

Despite the apparent reluctance of competition authorities for the integration of Article 102 TFEU in the discussions on sustainability considerations, there is decisional practice of direct relevance to the topic. The small body of the EU institutions' case law on Article 102 TFEU environmental objective justifications derives essentially from the recycling sector and the fulfilment of a service of general economic interest (SGEI). Therefore, the analysis of EU authorities in some of these cases, most notably *Sydhavnens*[80] and *COBAT*,[81] is mostly concerned with the proportionality of the dominant undertakings' conduct within the meaning of Article 106(2) TFEU rather than Article 102 TFEU.

The most well-known case in this field is *DSD*,[82] which involved only the application of Article 102 TFEU. DSD operated throughout Germany a network ensuring the collection and transport of used sales packaging to recycling centres.[83] The manufacturers and distributors relying on DSD's services were under the obligation of placing DSD's logo – the now commonly found Green Dot trademark – on the products that DSD was supposed to recover, as well as paying a licensing fee to DSD amounting to the numbers of goods having the logo affixed on their packaging.[84] However, the Commission and the Court of Justice condemned this form of exclusive dealing system since it forced companies to pay the same fee even if they decided to dispose of some of their used packaging themselves or via the services provided by DSD's competitors.[85] In any case, it is somewhat erroneous to assert that DSD relied on an environmental justification in this case. Although the fundamental purpose of DSD's business operations had ecological virtues, DSD never put forward a genuine environmental justification to demonstrate that its exclusive dealing strategy was necessary to attain higher environmental goals or that the competing recycling systems were less ecologically respon-

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and Sonia Ahmad (eds), *Richard Whish QC (Hon) Liber Amicorum – Taking Competition Law Outside the Box* (Concurrences 2020) 94.

[80] Case C-209/98 *Sydhavnens Sten & Grus ApS v Københavns Kommune* [2000] ECLI:EU:C:2000:279; *see also* Case C-292/12, *Ragn-Sells AS v Sillamäe Linnavalitsus* [2013] ECLI:EU:C:2013:820.

[81] 'Commission Closes File on COBAT, an Italian Consortium Engaged in Collecting, Storing and Selling Used Lead Batteries' (*European Commission*, 23 November 2000) https://ec.europa.eu/commission/presscorner/detail/en/ip_00_1351.

[82] *DSD* (Case COMP D3/34493) Commission Decision 2001/463/EC [2001] OJ L166/1.; The Commission's decision was upheld in: Case 385/07 *Der Grüne Punkt – Duales System Deutschland v Commission* [2009] ECR I-06155; *see* Vedder (n 41) 215–23; Kingston (n 39) 312–18; Christopher Thomas, 'Exploring the Sustainability of Article 102' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) 105–113.

[83] Kingston (n 39) 312; Thomas (n 82) 106.

[84] Thomas (n 82) 106.

[85] Kingston (n 39) 312–13.

sible than itself.[86] DSD merely contended that its economic operations would be unworkable without a guaranteed licence fee to deal with all the products bearing DSD's green dot mark.[87]

Genuine claims of environmental objective justifications can be found at the national level. Table 21.1, on the next page, gathers all the cases in which an environmental objective justification arose and might have been accepted.

List of Behaviours

As decisional practice is relatively scarce, and on the basis of the existing research on the topic, we provide below examples of various types of individual conduct, otherwise abusive, that could be saved due to their potential environmental benefits. Based on the aims these behaviours pursue, they can be grouped into three different categories, which may sometimes be closely interlinked with each other and partly pursue the same objectives: (i) covering the costs of environmental investments and funding; (ii) increasing the consumption of sustainable products; and (iii) disadvantaging unsustainable undertakings.

Covering the Costs of Environmental Investments and Funding

It may sometimes be unprofitable and risky for firms to venture into a more sustainable model. Innovating and mastering the production of eco-friendly products, as well as scaling up production to achieve economies of scale and reduce the production cost per unit, necessitate high investments. Moreover, competitors may act as free riders by adopting the environmental innovations produced by the investments of dominant undertakings, something that could dissuade dominant undertakings from investing in green innovation to begin with. In these circumstances, environmental objective justifications could help dominant undertakings to solve these types of market failures, finance their future green investments, or recoup their pro-environmental expenditures. Otherwise, these additional funds could also be allocated to external causes or distributed to organisations contributing to environmental protection.

Excessive Pricing: To finance the production of sustainable goods, dominant undertakings could charge higher prices for products whose economic value is perceived to be analogous to competitors' unsustainable products.[88] Such undertakings could claim that even if their prices may be excessive, this is objectively justified on account of the sustainability benefit. Even if that were the cause, however, dominant undertakings should not be allowed to charge excessive prices on essential products (e.g. foodstuffs, energy …) when affordable alternatives are not available to avoid further impoverishing the poorest citizens.[89]

Exclusive dealing: Dominant undertakings could enter into long-term exclusive contracts with customers,[90] for instance, by means of exclusive purchasing arrangements, forcing them to obtain the relevant product or their components only from the dominant undertaking of the

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[86] For other decisions in which the business activities of dominant undertakings contributed to environmental protection, see also *ARA Foreclosure* (Case AT.39759) [2016] OJ C 432/6; *Prokent/Tomra* (Case COMP/E-1/38.113) [2006] OJ C 219/11.

[87] Kingston (n 39) 316.

[88] Kingston (n 39) 323–5; Holmes (n 18) 388.

[89] Mauboussin (n 14) 37.

[90] Kingston (n 39) 323–5.

Table 21.1 Environmental objective justifications in Member States' jurisdiction

Name	Date	Country	Authority	Market	Practice	Justification	Result	Reason
Kølebranchens Miljøordnings[a]	1998	Denmark	NCA	Recycling scheme of refrigerants industry	Refusal to supply non-members of the scheme	Resources and know-how required for proper recycling	Yes	Proportionate, necessary and consumer benefits
Cistercian Congregation of the Immaculate Conception[b]	2005	France	NCA	Touristic boat trips to Saint-Honorat island	Exclusive rights granted to its subsidiary	Safeguard the tranquility and integrity of the island	Yes	Limit the number of tourists
Luftfartsverket[c]	2005 2010	Sweden	NCA+Court	Taxis airport slots	Discriminating access	Incentivise use of green taxis	No	Disproportionate & severe financial loss
Tanklux[d]	2009	Luxembourg	NCA	Fluvial transport of oil products	Exclusive dealing with partners	Prevent environmental accidents	Yes	Proportionate and serve the public interest
Heathrow Airport Limited (HAL)[e]	2011	United Kingdom	Civil Court	Meet and greet airport parking	Refusing access to an essential facility + self-preferencing	Prevent gas emissions from waiting and recirculating vehicles	No	Marginal environmental benefits
Société nationale des chemins de fer français (SNCF)[f]	2012 2014	France	NCA+CA	Rail freight	Below-cost pricing	Development of an alternative green transport	Yes	Proportionate and serve the public interest

Name	Date	Country	Authority	Market	Practice	Justification	Result	Reason
Pirkanmaan Jätehuolto[g]	2014	Finland	NCA	Sorting and processing waste	Discriminatory pricing + breach of competition neutrality	More effort required to prevent ecological damages	No	Less restrictive alternative: demanding declaration of waste
Förpacknings-och Tidningsinsamlingen (FTI)[h]	2019	Sweden	Court	Household packaging and recycling	Refusing access to an essential facility	Required higher ecological & recycling standards	No	Less restrictive alternative: Renegotiation of contract

Notes:

[a] Danish Competition Council, Decision in Case 2:8032-49/TH *Kølebranchens Miljøordnings* (1998).

[b] French Competition Authority, Decision in Case 05-D-60 *Congrégation cistercienne de l'Immaculée Conception* (2014) paras 62–63, 67

[c] Swedish Market Court, Judgment in Case 2010:5 Luftfartsverket mot Konkurrensverket (2010) 2, 4.

[d] Luxembourg Competition Council, Decision in Case 2009-FO-02 *Tanklux* (2009) paras 50–54.

[e] England and Wales High Court of Justice, Judgment in Case HC10C02364 *Purple Parking Ltd and Another v Heathrow Airport Ltd* (2011) para 211. The result of the judgment was given by the Court while the United Kingdom was still part of the European Union, hence the reason of including this judgment in the table.

[f] French Competition Authority, Decision in Case 12-D-25 *Société nationale des chemins de fer français (SNCF)* (2012) [771]; Paris Court of Appeal, Judgment in Case No 2013/01128 *Société Nationale des Chemins de Fer Français contre Autorité de la Concurrence* (2014) 53.

[g] Finnish Competition Authority, Decision in Case 588/KKV14.00.40/2013 *Pirkanmaan Jätehuolto* (2014) paras 27–28, 31.

[h] Swedish Patent and Market Court, Judgment in Case PMÅ 2741-18 *Svenska Förpacknings- och Tidningsinsamlingen AB (FTI)* (2019) 39.

market.[91] The contracts should not cover any products deemed non-sustainable and be reasonably limited in time, meaning they should be applicable only as long as the other enterprises' competing goods are not as sustainable.

Increasing the Consumption of Sustainable Products

Unlike the previous category, in which the conduct tends to increase the price of sustainable goods produced by dominant undertakings, the following behaviours mostly bring down sales prices. This may be necessary to resolve or compensate for the effects of several market failures. Those include, for example, pollution, when its cost is borne by society and is not accounted for in the price of dirty goods.[92] They could also be helpful in cases where consumers are not aware of the ecological virtues of a product,[93] for instance, because they are time-constrained,[94] have a low environmental consciousness,[95] or prices are readily visible and overly impact their purchasing decisions.[96] Consumers may also limit their consumption of sustainable products or refuse to pay more to protect the environment because other customers can freeride on their laudable behaviour.[97]

(Predatory) low pricing: Dominant undertakings might bear significant costs to produce sustainable goods and services, which might even be higher than the selling price of non-sustainable competing goods. As a result, dominant undertakings could be allowed to set sales prices below their production costs during the trial stage when they market brand-new green products,[98] or where other marketing strategies have not been successful in switching the consumption habits of customers.[99] For example, the Court of Appeal of Paris accepted SNCF's below-cost pricing strategy toward its customers because its aim was not predatory although it inflicted economic losses on its competitors and its sales prices were below its long-run average incremental costs.[100] The structural costs of SNCF, most notably the special status of its agents, translated into higher costs compared to its competitors. Therefore, pricing below cost was merely necessary for SNCF to align its prices with those of its competitors in

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[91] *ibid* 312.

[92] Maurits Dolmans, 'Sustainable Competition Policy and the "Polluter Pays" Principle' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) 18.

[93] *ibid* 20.

[94] Roman Inderst and Stefan Thomas, 'Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis' (2021) 17 Journal of Competition Law & Economics 848, 854.

[95] Tilman Kuhn and Laura Arnolds, 'Sustainability Defense for Competitor Collaborations' (2020) 6 CLPD 5, 5; *See also* Dirk Middelschulte, 'Article 101 TFEU in the Decisive Decade' (2020) 4-2020 (on-topic) Concurrences 41, 41–2; 'Lidl Backs Away from Fairtrade Bananas' (*Banana Link*, 20 May 2019) www .bananalink .org .uk/ news/ lidl -backs -away -from -fairtrade -bananas/.

[96] Mauboussin (n 14) 38.

[97] Holmes (n 18) 388.

[98] Kingston (n 39) 322–3; Holmes (n 18) 388.

[99] Mauboussin (n 14) 38.

[100] French Competition Authority, Decision in Case 12-D-25 *Société nationale des chemins de fer français (SNCF)* (2012) 49–52.

order to be competitive.[101] The measure was accepted because it was paramount to safeguarding freight transport as an alternative to road transport, hence contributing to the establishment of a sustainable economy.[102]

Moreover, dominant undertakings should also be allowed to sell obsolete or rapidly depreciating goods at a loss, such as perishable vegetables reaching their expiry date, to avert the accumulation and processing of additional waste. Although this practice is already considered as objectively justifiable in France,[103] it is absent from the EU case law and the Guidance on the enforcement of Article 102 TFEU.

Tying and bundling: Dominant undertakings could bundle together sustainable products or tie the purchase of one product onto the purchase of another green product.[104] Additionally, other aspects should also be considered:

- The products should be offered at a lower price than when sold separately;[105]
- Whether it would be reasonably possible to manufacture the tying product in a certain way to impede the use of non-sustainable products with the tying good, hence making the objective justification inapplicable;[106]
- The products that are part of the bundling or tying practices should be indispensable for each other's functioning to avoid generating unnecessary consumption.[107]

Loyalty and quantity rebates: Dominant undertakings could be allowed to grant loyalty rebates if customers buy a large number of green products.[108] The rebates may take place instantaneously, when customers make a one-time acquisition, or might be loyalty-induced and conditioned to the long-term purchase of the good.[109]

Disadvantaging Unsustainable Undertakings

Regulation and taxation are often perceived as more effective and appropriate tools to tackle environmental issues, for instance, by means of bans, carbon taxation or emission limits.[110] Nonetheless, regulation or taxation are sometimes inexistent or incapable of steering the conduct of market participants towards the global good, for example, due to intense corporate lobbying,[111] lengthy negotiations,[112] or the EU's voting system,[113] which in turn might lead to a political dead-end or minimal harmonisation, hence bringing unsatisfying advances. Neither

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[101] *ibid* 53.
[102] *ibid.*
[103] French Commercial Code, Article L442-5 (2019).
[104] Kingston (n 39) 320–21; Holmes (n 18) 388.
[105] Kingston (n 39) 321.
[106] *ibid.*
[107] Mauboussin (n 14) 37.
[108] *ibid* 38.
[109] *ibid.*
[110] Dolmans (n 92) 21; *see also* the chapters by Torsten Krause, Mariya Senyk, and Hans Vedder in this volume.
[111] Iacovides and Vrettos (n 62) 101.
[112] Dolmans (n 92) 22.
[113] *ibid.*

can Member States always impose more stringent environmental standards at the national level, a process named "green-plating",[114] because they fear this could undermine the capabilities of their national champions to compete with their foreign rivals, where environmental measures might potentially be less far-reaching. As a consequence, when Member States struggle to live up to environmental stakes, dominant undertakings could take over the role of "environmental regulator" normally occupied by public authorities. Most of the environmental defences found in the case law until now have actually aimed at putting unsustainable undertakings at a disadvantage.[115]

Discriminatory pricing: Dominant undertakings may charge higher prices on unsustainable customers, whereas environmentally friendly customers may be granted rebates.[116] To measure the level of sustainability of customers, the assessment framework may focus on the ecological impact of their business operations taking place in the downstream parts of the value chain in question.[117] The discrimination practice could also be exerted on trading conditions other than prices, rendering the contracts or the access to a product less attractive.

Refusal to supply: For similar reasons, dominant undertakings may restrict access to an essential facility or a product because the third party requesting permission intends to use the good or service for environmentally unfriendly purposes that do not meet the environmental standards of the dominant undertaking.[118] This kind of practice was implemented by the Danish refrigeration industry,[119] whose members jointly agreed that they could only sell certain refrigerants to the customers who were part of their scheme. Membership to the scheme was conditioned to the purchase of specific draining equipment and undergoing a three-day training course. This measure was necessary and accepted by the Danish Competition Council to ensure refrigerant wastes were disposed adequately in order to protect the ozone layer.[120]

Exclusive dealing: Already mentioned in the first category, "Covering the costs of environmental investments and funding", exclusive dealing practices may also be necessary to preserve the environment. Dominant undertakings may prefer dealing with certain customers to prevent other undertakings from harming the environment. Such restrictions were approved in *Tanklux*[121] and *Congrégation Cistercienne de l'Immaculée Conception.*[122] In the former case, which concerned the transport of petroleum products via ships to the storage facilities owned by Tanklux, Tanklux reserved the right to determine which fluvial transportation

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[114] Lorenzo Squintani, *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law* (CUP 2019) 69–71.

[115] Iacovides and Vrettos (n 43).

[116] Kingston (n 39) 318.

[117] Holmes (n 18) 388.

[118] *ibid* 388–9.

[119] Danish Competition Council, Decision in Case 2:8032-49/TH *Kølebranchens Miljøordnings* (1998).

[120] Danish Competition Council, 'Kølebranchens Miljøordnings ansøgning om ikke-indgrebserklæring/fritagelse samt § 11, stk. 4-erklæring' (26 August 1998) www.kfst.dk/media/13982/19980826-afgrelse-klebranchens-miljordnings-ansgning-om-ikkeindgrebserklring fritagelse-samt.pdf.

[121] Luxembourg Competition Council, Decision in Case 2009-FO-02 *Tanklux* (2009) paras 50–54.

[122] French Competition Authority, Decision in Case 05-D-60 *Congrégation cistercienne de l'Immaculée Conception* (2014) paras 62–63, 67.

company would ship the goods of Tanklux's customers at the expense of the latter's freedom. This measure was essential to ensure better compliance with the established environmental standards and avoid oil spills into the Moselle river.[123] In the latter case, the Cistercian Congregation of the Immaculate Conception, which owned the Isle of Saint-Honorat, operated regular touristic shuttles to the island via the exclusive rights it granted to its subsidiary.[124] This practice was condoned to limit the influx of tourists in order to preserve the tranquillity and integrity of the island.[125]

Self-preferencing: Dominant undertakings, whose digital platform serves as an essential facility, could demote polluting products and prioritise green products in their search rankings.[126] This kind of situation may create anti-competitive concerns if the sustainable and higher-ranked products are mainly those of the dominant undertaking. Therefore, the benchmark and criteria set by dominant undertakings to evaluate which products are sustainable or unsustainable should be determined objectively.

Assessment Frameworks

The current legislation allows competition authorities and courts to evaluate the environmental objective justifications of dominant undertakings in accordance with the proportionality test of objective necessity justifications or the effects-based method of efficiency gains justifications.

With their focus on public interest motives, objective necessity justifications present the advantage of being in line with the laudable nature of environmental defences, which both share the aim of enhancing the life and health of all citizens. Given the milder sophistication of the objective necessity framework relatively to its efficiency gains counterpart, competition authorities should preferably enforce the proportionality test of objective necessity justifications if the environmental benefits ensuing from the conduct of dominant undertakings would clearly outweigh the anti-competitive effects endured by their rivals beyond all reasonable doubt. This framework may also be more adapted to review the behaviour of dominant undertakings that are relevant for the category "disadvantaging non-sustainable customers", which corresponds to the provisions of objective necessity justifications in the Guidance on the enforcement of Article 102 TFEU, whereby dominant undertakings replace public authorities in setting and enforcing public health and safety standards.[127] Indeed, this type of conduct generally affects a specific and limited number of customers whose operations are, for all, presumably at odds with the purpose of protecting the environment, which eases the competition authorities' work of identifying potential anti-competitive effects and the positive environmental benefits generated in return. In these circumstances, enforcing the proportionality test might be sufficient to take all parameters into account.

Conversely, the more elaborated effects-based approach of the efficiency gains framework is more appropriate to appraise the legitimacy of environmental claims in more complex cases and where the risk of competition foreclosure is prevalent. Additionally, this framework would

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[123] *Tanklux* (n 121) paras 50–54.

[124] *Congrégation cistercienne de l'Immaculée Conception* (n 122) paras 62–63, 67.

[125] *ibid* 67.

[126] Maurits Dolmans and Henry Mostyn, 'Editor's Preface' in Maurits Dolmans and Henry Mostyn (eds), *The Dominance and Monopolies Review* (9th edn, The Law Reviews 2021).

[127] *See* 'Communication from the Commission' (n 71) para 29.

also apply more particularly to behaviours that are part of the categories "Covering the costs of environmental investments and funding" and "Increasing the consumption of sustainable products". The anti-competitive effects that follow these conducts often affect a wider spectrum of competitors and customers, regardless of any distinction made between those having a high ecological footprint and the undertakings that are relatively more respectful of the environment. Therefore, it is more challenging to measure the environmental benefits that accompany these conducts because their emergence is partly dependent on factors that are external from the control of dominant undertakings, which rests on the decisions and preferences of consumers.

Accordingly, competition authorities should rely on environmental economics methods to ascertain whether the anti-competitive effects are sufficiently compensated by the environmental benefits provided by the behaviour of dominant undertakings. Considering that the efficiency gains structure is inherently implicated in disputes with an economic-related character, using this framework could bring convenience in the analysis of cases combining both environmental and economic considerations that are interdependent. In order to be apt to adjudicate environmental justifications, the provisions of the efficiency gains framework should therefore be refurbished with environmental features, for instance, by rephrasing all the wordings of "efficiency gains" to "economic and environmental benefits".[128]

Nonetheless, the efficiency gains framework has also been vehemently criticised by various experts for setting criteria that are overly difficult to satisfy.[129] Therefore, if policy-makers were to adopt the solution of a semantic greening process of the efficiency gains framework's provisions, they may also remain open to the idea of modifying the current efficiency framework beyond a mere act of environmental rephrasing. The recent developments that have taken place at the Austrian Federal Competition Authority (AFCA) might be pertinent in this regard. Within the Austrian national Cartel Act and Competition Act,[130] a special rule has been inscribed in the legislation which provides a sustainability exemption for agreements that help transition to an ecologically sustainable or climate-neutral economy.[131] In line with the new

[128] On the one hand, the concept of 'sustainability benefits' is commonly used and more understandable than the term 'sustainability gains'. On the other hand, the word 'economic' encompasses broader aspects and better differentiate environmental matters from the abstract 'efficiency', hence the terminology of 'economic and environmental benefits'.

[129] *See* Denis Waelbroeck, 'The Assessment of Efficiencies under Article 102 TFEU and the Commission's Guidance Paper' in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (OUP 2010) 121–6; Jorge Padilla, 'Whither Article 102 TFEU: A Comment on Akman and Crane' (2016) 81 Antitrust Law Journal 223, 233–4; Hans W. Friederiszick and Linda Gratz, 'Hidden Efficiencies: The Relevance of Business Justifications in Abuse of Dominance Cases' (2015) 11 Journal of Competition Law & Economics 671; Jones, Sufrin and Dunne (n 23) 387–8.

[130] In German: KaWeRÄG 2021

[131] Austrian Federal Competition Authority, 'AFCA Publishes Draft Guidelines on the Application Sustainability-Agreements, Asking for Comments: BWB Bundeswettbewerbsbehörde' (1 June 2022) www.bwb.gv.at/en/news/detail/afca-publishes-draft-guidelines-on-the-application-sustainability-agreements-asking-for-comments.

guidelines, undertakings must comply with the following provisions for their agreements to be eligible for an exemption:[132]

- The cooperation to be assessed leads to efficiency gains, which requires an improvement in social welfare.
- The efficiency gains contribute to an ecologically sustainable or climate-neutral economy.[133]
- This contribution to an ecologically sustainable or climate-neutral economy is substantial. The balancing of positive and negative effects usually done at the level of the consumer's fair share is shifted to the criterion of substantiality under the sustainability-exception, meaning that efficiencies contributing to ecological sustainability or climate neutrality must fully compensate for the negative effects on competition.
- The constraints imposed by cooperation are indispensable to realising the efficiency gains.
- The cooperation does not open up the possibility of eliminating competition for a substantial part of the goods in question.

The phrasing of the second and third criteria might be open to objections on whether broader pro-social sustainable objectives should also be taken into account and as to the decision of replacing the concept of 'consumer's fair share' with the one of 'substantiality'. Nonetheless, these guidelines from the AFCA offer an interesting perspective that could be replicated for the creation of a sustainable exemption in the sphere of unilateral conduct.

V. RESEARCH AGENDA

As of now, Article 102 TFEU has been omitted from all the discussions organised by the Commission on the matter of making EU competition law greener, whereas all the other legal bases have been discussed to a varying extent.[134] In a fairly uniform manner, most of the NCAs that have made some legislative progress on the consideration of sustainability factors in their own jurisdiction have excluded Article 102 TFEU from the scope of their experimentations,[135]

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[132] *ibid.*

[133] "... the new exemption is limited to specific types of sustainability goals, namely a contribution to ecological sustainability (particularly including transition to a circular economy, the prevention and reduction of environmental damage, the protection and restoration of biodiversity and ecosystems, and the sustainable use and protection of water resources) or a climate-neutral economy."

[134] EU Commission, 'Competition Policy Brief 1/2021 – Policy in Support of Europe's Green Ambition' (10 September 2021) https://ec.europa.eu/competition-policy/index/news/competition-policy-brief-12021-policy-support-europes-green-ambition-2021-09-10_en.

[135] *See* Netherlands Authority for Consumers and Markets, 'Guidelines on Sustainability Agreements Are Ready for Further European Coordination' (26 January 2021) https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination; UK Competition and Markets Authority, 'Environmental Sustainability Agreements and Competition Law' (27 January 2021) https://www.gov.uk/government/publications/environmental-sustainability -agreements -and -competition -law/ sustainability -agreements -and -competition -law; Viktoria H.S.E. Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law' (2022) 13:6 Journal of European Competition Law & Practice 426–434.

apart from the Greek[136] and Swedish competition authorities.[137] Nonetheless, as outlined above throughout this chapter, the links between bigness, market power, and unsustainable business conduct are meaningful from a sustainability perspective as several dominant undertakings have relied on an environmental objective justification in various Member states. Therefore, there exists a need to implement pro-sustainable initiatives in the ambit of Article 102 TFEU for EU competition law to be fully aligned with the objectives of the EU Green Deal and be able to tackle today's climate and environment emergency.

When it comes to enforcement regarding environmental objective justifications, the Commission could take some steps forward by performing a sustainable transformation of the Guidance on the enforcement of Article 102 TFEU. Firstly, the Commission may include the motive of "environmental protection" besides "health and safety reasons" as a legitimate purpose to invoke an objective necessity justification. Secondly, the current provisions of the efficiency gains framework may also be altered to reflect the role that environmental considerations could play in disputes of abuse of dominance along with their economic repercussions. Regarding abuse, the Commission could bring a suitable test case where Article 102 TFEU is used as a sword against unsustainable business conduct, as it seems to have done recently in Article 101(1) TFEU.[138]

At the time of authoring this chapter, some developments seemed to be in the right direction and in line with our proposals. In March 2023, the Commission announced that it is in the process of revising its enforcement of Article 102 TFEU as it is currently preparing Guidelines on exclusionary abuses of dominance.[139] Moreover, Linsey McCallum, who is deputy director-general for antitrust at DG COMP, has disclosed that DG COMP is considering the topics of climate change and sustainability in its work on these new guidelines on abuse of dominance.[140]

While awaiting the new Guidelines that will be published in 2025, academia can do its part. We consider that there is ample space for researchers to investigate some of the themes we highlighted in this chapter. For instance, there is a need to further understand the relationship between bigness and unsustainable conduct, the relationship between market power and unsustainable conduct, the effect of market power on the intensity of competition law enforcement, and how unsustainable business conduct can be framed as an abuse of dominance, on

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[136] *See* Hellenic Competition Commission, 'Staff Discussion Paper on Sustainability Issues and Competition Law' (16 September 2020) paras 86–93 www.epant.gr/en/enimerosi/competition-law-sustainability.html.

[137] *See* Swedish Competition Authority, 'Written Contribution: Competition Policy and the Green Deal' (20 November 2020) 11–12.

[138] *See*, e.g., https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4362.

[139] 'Antitrust: Commission Announces Guidelines on Exclusionary Abuses and Amends Guidance on Enforcement Priorities' (*European Commission*, 27 March 2023) https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1911.

[140] European Commission, 'Episode 1 – Let's Talk Competition: New Guidelines on Exclusionary Abuses: What to Expect' https://competition-policy.ec.europa.eu/about/reaching-out/lets-talk-competition/new-guidelines-exclusionary-abuses_en; Francesca McClimont, 'Sustainability Will Be Included in Exclusionary Abuse Guidelines, DG Comp Official Says' (*Global Competition Review*, 22 May 2023) https://globalcompetitionreview.com/article/sustainability-will-be-included-in-exclusionary-abuse-guidelines-dg-comp-official-says.

the basis of theories of harm and economics. There is also a need to better understand the relationship between sustainability and innovation and how sustainable conduct can be efficient and pro-competitive. This research agenda would ideally be interdisciplinary, involving researchers from law, economics, business studies, and sustainability science.