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Abuse of dominance and sustainability:

Using article 102 TFEU as a sword against unsustainable conduct

LLM Thesis

Law & Economics

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Table of contents

Chapter 1 - Introduction

1.1 - Introduction

As the world faces the looming threat of irreversible climate catastrophe, the European Union ("EU") must step up to establish a more sustainable Union.[1] The current efforts in tackling this crisis are painfully inadequate, as shown by the 2020 United Nations Environment Programme Emissions Gap Report.[2] Achieving this objective demands a strategic focus on integrating sustainability into the EU's policy domains. Among these policy domains, competition law provides a potential avenue for fostering sustainability within the Union. Consequently, the intersection of sustainability and competition law has gained significant attention in recent years, capturing the attention of both academics and practitioners alike.

Current research into sustainability and competition law in general has focused on article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Additionally, the European Commission ("Commission") has recently published its Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Horizontal Guidelines 2023") and the Autoriteit Consument & Markt (the Dutch Authority for Consumers and Markets, "ACM") has

[1] Katherine Calvin and others, 'IPCC, 2023: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (Eds.)]. IPCC, Geneva, Switzerland.' (First, Intergovernmental Panel on Climate Change (IPCC) 2023) <https://www.ipcc.ch/report/ar6/syr/> accessed 7 February 2024.

[2] UNEP, 'Emissions Gap Report 2020' (2020) <http://www.unep.org/emissions-gap-report-2020> accessed 5 May 2024.

published its own guidelines.[3] Despite these advancements, research into integrating sustainability considerations into article 102 TFEU has been relatively scarce compared to article 101 TFEU.[4] For instance, in its call for contributions on how competition law can aid the European Green Deal, the Commission did not mention the use of article 102 TFEU.[5]

[3] Autoriteit Consument & Markt, 'Guidelines Sustainability Claims | ACM.Nl' (28 January 2021) <https://www.acm.nl/en/publications/guidelines-sustainability-claims> accessed 19 December 2023; European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements 2023.

[4] Christoper Thomas, 'Exploring the Sustainability of Article 102', *Competition law, climate change & environmental sustainability* ('Concurrences', Institute of competition law 2021); Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016) <https://academic.oup.com/book/12186> accessed 7 February 2024; Simon Holmes, Dirk Middelschulte and Martijn Snoep, *Competition Law, Climate Change & Environmental Sustainability* ('Concurrences', Institute of competition law 2021); 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' (2022) 10 Journal of Antitrust Enforcement 32; Marios Iacovides and Chris Vrettos, 'Radical for Whom? Unsustainable Business Practices as Abuses of Dominance' (7 January 2021) <https://papers.ssrn.com/abstract=3815630> accessed 7 February 2024; Helen Lindenberg, 'Will sustainability and environmental considerations be the next big hit for shaping the application of Article 102 TFEU?' (2022) 20 Zeitschrift für Wettbewerbsrecht 320; Valentin Mauboussin, 'Environmental Defences as a Shield from Article 102 TFEU'; Suzanne Kingston (ed), 'Article 102 TFEU', *Greening EU Competition Law and Policy* (Cambridge University Press 2011) <https://www.cambridge.org/core/product/5DEDA6E7F9A9A66C56FDF83D25499416>; Roman Inderst and Stefan Thomas, 'Abuse of Dominance and Sustainability' [2023] Journal of European Competition Law & Practice lpad041; Marios Iacovides and Valentin Mauboussin, 'Sustainability Considerations in the Application of Article 102 TFEU: State of the Art and Proposals for a More Sustainable Competition Law' (7 January 2023) <https://papers.ssrn.com/abstract=4319866> accessed 7 February 2024; Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354.

[5] 'The European Green Deal & Competition Policy - Call for Contributions on How EU Competition Rules and Sustainability Policies Can Work Together' (*Kluwer Competition Law Blog*, 19 October 2020) <https://competitionlawblog.kluwercompetitionlaw.com/2020/10/19/the-european-green-deal-competition-policy-call-for-contributions-on-how-eu-competition-rules-and-sustainability-policies-can-work-together/> accessed 5 May 2024.

Some authors, adopting a more proactive stance, have proposed utilizing article 102 TFEU to address unsustainable conduct, effectively wielding it as a "sword" against such practices.[6] This topic has gained additional attention following the Meta/Bundeskartellamt case, wherein non-competition factors – though not specifically sustainability factors - were considered under article 102(a) TFEU.[7]

This thesis aims to investigate the feasibility of incorporating sustainability considerations within the framework of article 102 TFEU, specifically by framing unsustainable conduct as a unique form of abuse. Thus, the research question is as follows: To what extent can and should a sustainability-focused theory of harm be considered under article 102 TFEU?

This thesis will first set out the normative framework, which informs if sustainability should be integrated into competition law by virtue of being one of its goals. After setting out this normative framework (chapter 2), the current state of play on article 102 TFEU and integrating sustainability into it under the consumer welfare standard will be explored, focusing on the sword function of article 102 TFEU. Additional attention will be paid to the Meta/Bundeskartellamt case, as this may provide an avenue for the purpose of integrating sustainability into the sword function of article 102 TFEU (chapter 3). Subsequently, this thesis will reflect on the outcome of this descriptive part considering the normative framework. Suggestions will be made as to what potential theories of harm can inform the usage of article 102 TFEU as a sword while integrating sustainability in a context where sustainability is a goal of competition law (chapter 4). This thesis will conclude by answering the research question (chapter 5).

[6] Iacovides and Vrettos, 'Radical for Whom?' (n 4); Lindenberg (n 4); Holmes (n 4).

[7] Lindenberg (n 4); Case C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt* ECLI:EU:C:2023:537.

1.2 - Methodology

This legal-doctrinal thesis is of a descriptive and normative evaluative nature, being based on a study of legal and quasi-legal documents, national and EU case law and academic literature. Furthermore, it engages in legal design. No empirical analysis was undertaken, although such research from other authors was used in certain sections and no comparative methods were also not used either.[8] The thesis aims to answer a research question that is twofold, namely, "To what extent can and should a sustainability-focused theory of harm be considered under article 102 TFEU?"

Firstly, a normative framework will be set out framework (chapter 2).[9] This establishes the angle at which the outcome of the descriptive part of the thesis is viewed. To this end, socio-economic literature will be analyzed to inform the importance of sustainability, meaning this thesis is in part interdisciplinary. Furthermore, the goals of competition law and possible standards will be analyzed based on academic literature, of which some uses empirical research, treaty provisions and case law. The reason for taking a normative approach is because this part of the research asks a normative question.

Afterwards, this thesis employs a descriptive approach to answer if sustainability can currently be integrated into both functions of article 102 TFEU under the consumer welfare standard.[10] This part (chapter 3) thus describes if this is currently a possibility by critically analyzing the legal rule found in article 102 TFEU, the relevant case law that informs its use

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[8] Ian Curry-Sumner and others, *Research skills: Instruction for lawyers* (Eerste editie, Juridische Uitgeverij Ars Aequi 2010) 4–7.

[9] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' [2018] Law and Method <https://www.lawandmethod.nl/tijdschrift/lawandmethod/2018/02/lawandmethod-D-17-00010#content_lawandmethod-D-17-00010.lawandmethod-D-17-00010_0002> accessed 29 May 2024.

[10] Curry-Sumner and others (n 8) 4.

and academic literature. A descriptive methodology is used to answer this part of the research since this is a question about positive law, asking if sustainability can currently be integrated into article 102 TFEU. This can only be answered by describing the current situation and thus answering this part of the research question.

Lastly, the thesis employs a normative evaluative approach to answer the question if sustainability should be integrated into the sword function of article 102 TFEU. For this purpose, the evaluation looks at the outcome of the descriptive part and reviews if this suffices against the backdrop of the normative framework (chapter 4).[11]

In the case that the outcome of the descriptive analysis (chapter 3) does not fall in line with the normative framework (chapter 2), for instance if there is no possibility of integrating sustainability into the two functions of article 102 TFEU even though it should be possible according to the normative framework, the thesis will engage in legal design.[12] This will be done by looking back at the normative framework, seeing whether an alternative standard (other than the consumer welfare standard) may provide avenues to develop new theories of harm for integrating sustainability into the sword function of article 102 TFEU. This legal design will be based on the assertion that there are two general avenues of using article 102 TFEU as a sword. The first avenue is based on the consumer welfare standard. This avenue has two general types, the first being competition based and the second being sustainability based. The second avenue is based on the citizen welfare standard, also containing two types. The first one still has a link to competition. Conversely, the second has no, or a limited, link to competition. Sources for this legal design will be prior academic works suggesting new theories of harm and other academic works.

[11] ibid 21.

[12] ibid 22.

1.3 - Definitions

Sustainability

Sustainability and (un)sustainable conduct will be defined in line with Iacovides and Vrettos as they provide a comprehensive definition based on sound academic socio-economic literature.[13] They use the planetary boundaries concept as a departure point, which emphasizes that society and the environment are intricately connected and mutually interdependent systems.[14] Accordingly, sustainable will be defined as "any action that both respects ecological boundaries (do no harm) and delivers societal benefits (do well)".[15]

To operationalize their comprehensive understanding of sustainability, they employ a practical tool developed by ecological economist Kate Raworth known as the Doughnut Framework. This framework integrates the concept of planetary boundaries with the 17 UN Sustainable Development Goals (SDGs).[16] The Doughnut Framework outlines a safe and equitable operational zone wherein the basic societal needs of every individual are fulfilled - such as healthcare, housing, employment, access to essential resources like water, food, and energy, as well as justice, equality, and social equity - while ensuring that human activities remain within the earth's ecological limits, thus avoiding exacerbating the climate crises.[17]

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[13] Iacovides and Vrettos, 'Radical for Whom?' (n 4) 4.

[14] Johan Rockström and others, 'A Safe Operating Space for Humanity' (2009) 461 Nature 472.

[15] Iacovides and Vrettos, 'Radical for Whom?' (n 4) 4.

[16] Martin, 'The Sustainable Development Agenda' (*United Nations Sustainable Development*) <https://www.un.org/sustainabledevelopment/development-agenda/> accessed 5 May 2024.

[17] Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Reprint edition, Chelsea Green Publishing 2018).

Accordingly, they define unsustainable as "any practice that contributes to the transgression of the Planetary Boundaries and/or contravenes the SDGs", or in other words, any action that pushes the world towards a more unsafe and unjust space.[18]

Sword and shield function of competition law

Aside from sustainability, this thesis holds the view that competition law provisions can be used as a sword and a shield. The sword function of article 102 TFEU will be defined as "the use of article 102 TFEU to attack certain practices".[19] It is quite an unorthodox use of article 102 TFEU and will be the focus of this thesis. Conversely, the shield function of article 102 TFEU will be defined as "the use of article 102 TFEU to avoid liability for practices that could have been considered anticompetitive".[20] This is a use of article 102 TFEU that is a less unorthodox and will be discussed in the thesis but will not be the focus. Both of these two functions have previously also been described as preventative or supportive.[21]

[18] Iacovides and Vrettos, 'Radical for Whom?' (n 4) 4.

[19] Iacovides and Vrettos, 'Falling through the Cracks No More?' (n 4) 45; Holmes (n 4) 384.

[20] Iacovides and Vrettos, 'Falling through the Cracks No More?' (n 4) 45; Holmes (n 4) 388.

[21] Nowag (n 4).

Chapter 2 - Normative framework

In this chapter, the normative framework will be set out. This normative framework will function as the reflection point for the evaluation (chapter 4) of the current possibilities of integrating sustainability into the sword function of article 102 TFEU under the consumer welfare standard (chapter 3) later in this thesis. This chapter will start off by describing why the climate crisis provides a significant moral imperative to do everything we can to tackle it, including integrating sustainability into article 102 TFEU (section 2.1). After that, the limiting factor of this moral imperative, the goals of competition law, will be described as they are currently perceived to be. This will be done by first looking at the consumer welfare standard and then looking at the goals of competition law in practice based on an empirical study (section 2.2). After describing the goals of competition law currently, this thesis will argue that there is a legal basis for making sustainability a goal of competition law, removing the limiting factor on integrating sustainability into article 102 TFEU (section 2.3). Lastly, a new standard that can consider sustainability will be suggested and described (section 2.4), allowing for a new basis for the legal design of potential sustainability-based theories of harm (chapter 4).

2.1 - Importance of sustainability

As mentioned prior, humanity is facing a climate emergency that acts as an existential threat with the capacity to cause the collapse of many interconnected and complex aspects of the Earth system.[22] This crisis emphasizes and worsens global inequalities. For instance, the countries who are the first to experience the effects of the climate crisis are countries in the

[22] Iacovides and Vrettos, 'Falling through the Cracks No More?' (n 4); Calvin and others (n 1).

global south.[23] Furthermore, the emissions of the richest 1 percent of the global population account for more than twice the combined share of the poorest 50 percent.[24] Although the EU will experience less consequences of climate change than the global south, it must play its part to curb this imminent threat to humankind. Accordingly, the EU has committed itself to become climate neutral and sustainable by 2050.[25] The existential threat to humanity provides a significant economical, practical, and most importantly moral, imperative for the EU to do everything it can to prevent this crisis from progressing any further. Saving humanity is not only morally the right thing to do but preventing the crisis early is cheaper and more practical than reversing it later on or mitigating the damage when its already too late.

Importantly, a substantial part of the climate crisis originates from the pollution caused by undertakings. For instance, 100 fossil fuel producers are responsible for 71% of all global greenhouse gas emissions.[26] Prior research in other areas of economic law has already shown how large corporations can leverage their market power and influence to aid the transition into a more sustainable society.[27] Furthermore, competition law, being enforced by the

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[23] Robert Mendelsohn, Ariel Dinar and Larry Williams, 'The Distributional Impact of Climate Change on Rich and Poor Countries' (2006) 11 Environment and Development Economics 159.

[24] UNEP (n 2).

[25] 'European Council, 12-13/12/2019 - Consilium' <https://www.consilium.europa.eu/en/meetings/european-council/2019/12/12-13/> accessed 3 May 2024; Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions the (European Green Deal) 2019; 'Paris Agreement on Climate Change' <https://www.consilium.europa.eu/en/policies/climate-change/paris-agreement/> accessed 3 May 2024.

[26] 'New Report Shows Just 100 Companies Are Source of over 70% of Emissions - CDP' <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions> accessed 3 May 2024.

[27] Henrik Österblom and others, 'Transnational Corporations as "Keystone Actors" in Marine Ecosystems' (2015) 10 PLOS ONE e0127533; Victor Galaz and others, 'Finance and the Earth System – Exploring the Links

Commission and giving the Commission significant enforcement powers, can be used as a powerful generalist tool to tackle the negative effects of conduct of undertakings based on their corporate power.[28] However, because it can doesn't mean it should. This raises the normative question of whether competition law should be used combat climate change.

Whether competition law should be used as part of a holistic approach to combat climate change or not depends on what the goals of competition law are. If, as some may suggest, the goal of competition law is purely economic efficiency in the sense of short-term price effects, then competition law, consequently, should not be part of the EU's holistic approach to combat climate change. However, if the goals of competition law allow for sustainability to be pursued by the tools it has in its arsenal, then it should be part of the EU's holistic approach to combat climate change. Based on this assertion, the following sections will examine the goal(s) of competition law to determine if sustainability itself could be seen as such a goal.

2.2 - Current state of play in competition law

In this section the current state of play in competition law regarding its goals will be described as these goals may act as a limiting factor for integrating sustainability into the sword function of article 102 TFEU.

First, the well-known consumer welfare standard will be described (section 2.2.1). Second, the goals of competition law in practice will be described, based on an empirical study

between Financial Actors and Non-Linear Changes in the Climate System' (2018) 53 Global Environmental Change 296.

[28] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) 2002 (OJ L).

(section 2.2.2). In both situations the possibility of considering sustainability will be analyzed to review if sustainability can already be integrated under article 102 TFEU.

2.2.1 - Consumer welfare

Much ink has been spilled over what the goal(s) of competition are and ought to be.[29] A major contender for this has been consumer welfare. Although there is disagreement on what the consumer welfare standard should be defined as,[30] a general definition is that the consumer welfare standard aims to maximize consumer welfare by means of economic efficiency, looking at the economic effects of the conduct of the parameters of competition, namely: price, quality, and quantity statically. This means that there is no room for sustainability by itself. A key characteristic of the consumer welfare standard is that it places more importance on the welfare of consumers of the market in question, ignoring, for example, consumers in other markets.[31]

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[29] Rosita B Bouterse, *Competition and Integration : What Goals Count? EEC Competition Law and Goals of Industrial, Monetary, and Cultural Policy* (Kluwer 1994) <https://cadmus.eui.eu/handle/1814/24728> accessed 3 May 2024; Christopher Townley, *Article 81 EC and Public Policy* (Hart 2009) <https://cadmus.eui.eu/handle/1814/23975> accessed 3 May 2024; Okeoghene Odudu, 'The Wider Concerns of Competition Law' (2010) 30 Oxford Journal of Legal Studies 599; Anne C Witt, 'Public Policy Goals Under EU Competition Law—Now Is the Time to Set the House in Order' (2012) 8 European Competition Journal 443; Pınar Akman, 'Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-Efficiency Considerations Under Article 101 TFEU. Ben Van Rompuy.' [2013] European Competition Journal <https://www.tandfonline.com/doi/abs/10.5235/17441056.9.3.759> accessed 3 May 2024; Eleanor Fox, 'Against Goals' (2013) 81 Fordham Law Review 2157; Oles Andriychuk, *The Normative Foundations of European Competition Law : Assessing the Goals of Antitrust through the Lens of Legal Philosophy* (Edward Elgar Publishing 2017) <https://cadmus.eui.eu/handle/1814/74192> accessed 3 May 2024; Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (4 December 2020) <https://papers.ssrn.com/abstract=3735795> accessed 1 May 2024.

[30] Herbert Hovenkamp, 'Antitrust: What Counts as Consumer Welfare?' [2020] All Faculty Scholarship <https://scholarship.law.upenn.edu/faculty_scholarship/2194>.

[31] Competition Committee, 'The Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards - Background Note' (OECD 2023) paras 31–35 <https://one.oecd.org/document/DAF/COMP(2023)4/en/pdf> accessed 5 May 2024.

This standard was popularized by the "Chicago School" in the 1960s. Robert Bork was one of the main academics related to the Chicago School.[32] In his infamous work *The Antitrust Paradox* Bork wrote about how American Antitrust had lost its way and is often harming consumers rather than benefiting them by being overly interventionist. Consequently, Bork argued that antitrust should focus on economics, of which the narrow consumer welfare standard was a key suggestion. Many of the arguments brought by the Chicago School are based on trust in *laissez-faire* market mechanisms that would automatically correct any market problems. This belief justified the usage of a narrow standard, such as the consumer welfare standard.[33]

Following Bork's book, the consumer welfare standard became widespread in the global competition world.[34] This includes the EU, as the Commissioner Neelie Kroes stated in 2005: "Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources."[35] This has also been labeled the "more economic approach" as undertaken by the Commission.[36]

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[32] Although Bork actually referred to a total welfare standard but confusingly used the term consumer welfare standard. Kenneth Heyer, 'Consumer Welfare and the Legacy of Robert Bork' (2014) 57 The Journal of Law & Economics S19.

[33] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (1993).

[34] Richard Whish and David Bailey, *Competition Law* (Tenth Edition, Oxford University Press 2021) 18–20.

[35] European Commission, 'Neelie Kroes
 Member of the European Commission
European Competition Policy – Delivering Better Markets and Better Choices
 European Consumer and Competition Day
London, 15 September 2005' (*European Commission - European Commission*, 15 September 2005) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512> accessed 3 May 2024.

[36] Anne C Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016).

Although there is no room for sustainability by itself under the consumer welfare standard, sustainability can sometimes be considered if it is seen as a parameter of competition such as quality or choice. Furthermore, if consumers care about sustainability, as may be derived from a willingness to pay like in the Chicken of Tomorrow case,[37] the consumer welfare standard can also consider it.[38] However, consumers often do not care enough (in the sense that they are not willing to pay for a more sustainable product) and in article 102 TFEU cases a theory of harm based on sustainability as quality or choice has limited scope (section 3.2.1.2). Nevertheless, the scope of this type of consideration of sustainability under the consumer welfare standard will be explored further later in this thesis (section 3.2). However, for this thesis's purpose, it is important to be able to integrate sustainability by itself, without seeing it as quality or basing a theory of harm on willingness to pay.

In short, the consumer welfare standard looks at economic effects of conduct on consumers. Consequently, this standard expressly rejects the idea of incorporating goals other than economic efficiency expressed in effects on consumer surplus.[39]

2.2.2 - Actual broader current standard endorsed in practice

European competition law has, in practice, always tried to achieve multiple goals, not only consumer welfare. For instance, in the T-Mobile case, the Court of Justice of the European

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[37] Autoriteit Consument & Markt, 'ACM's Analysis of the Sustainability Arrangements Concerning the "Chicken of Tomorrow" | ACM.Nl' (26 January 2015) <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow> accessed 12 June 2024.

[38] Autoriteit Consument & Markt, 'Second Draft Version: Guidelines on Sustainability Agreements – Opportunities within Competition Law | ACM.Nl' (26 January 2021) <https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law> accessed 12 June 2024; European Commission Horizontal Guidelines (n 3).

[39] Ariel Ezrachi and Maurice E Stucke, 'The Fight over Antitrust's Soul' (2018) 9 Journal of European Competition Law & Practice 1.

Union ("CJEU") stated: "In any event, as the Advocate General pointed out at point 58 of her Opinion, Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[40]

This clearly states that competitive structure is also a goal of competition law. Furthermore, a goal which is specific to the EU is market integration. As the EU is based on the idea of the single market, competition law also tries to aid in achieving this. In Consten/Grundig, the CJEU stated: "In this connection, 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 states."[41]

These two examples show that competition law has in practice not only tried to attain consumer welfare but also other goals. One can wonder if sustainability has been a goal of competition law in practice as well.

Important in this regard is the study of Iacovides and Stylianou. They conducted an empirical study on what goals the EU competition law practice has pursued, where they found that sustainability is not currently a goal of competition law. Their analysis was based on 1,802 CJEU & General Court ("GC") decisions, 485 Advocate General ("AG") opinions, 1,015 Commission decisions, and 447 Commissioner speeches dating back to 1962. In this analysis, they found that EU competition law has been trying to attain more than just

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[40] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECLI:EU:C:2009:343 [38].

[41] Joined cases 56 and 58-64 *Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* ECLI:EU:C:1966:41, [1966] ESE 00299 341.

consumer welfare. Seven general goals could be distilled: efficiency, (consumer) welfare, economic freedom and protection of competitors, competition structure, fairness, single market integration, and competition process.[42] This means that the use of competition law to achieve multiple goals is not only possible, but already a reality for the EU. Nevertheless, sustainability is not currently seen as a goal of competition law in empirical data.

2.2.3 - Interim conclusion

Both the consumer welfare standard and the practice of EU competition law do not see sustainability itself as a goal. The consumer welfare standard expressly rejects the idea of incorporating sustainability by itself besides when consumers care or when sustainability is seen as a marker of quality or choice. Furthermore, the empirical data has shown that practice has not deemed sustainability as a goal of competition law. However, just because it is currently not the case, does not mean it should not be in the future.

2.3 – Sustainability as a goal of competition law

Whether sustainability should be a goal of competition law or not is a complex question. One way to answer this question is to ask the second question "was the intention of the EU legislator to have the competition regime try to create sustainable outcomes for EU citizens?", relying on the intention of the EU legislator as a decisive factor in this normative debate.

Taking this perspective, one can look at the current EU legislation to determine if there are grounds for finding that sustainability should be a goal of competition law. There are

[42] Stylianou and Iacovides (n 29) 5.

multiple relevant provisions in the EU Treaties that support the notion that competition law should indeed try to pursue sustainability.

First, the environmental integration requirement can be found in article 11 TFEU.[43] This article states: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."

Article 11 TFEU has horizontal application, meaning it should be considered when applying other TFEU provisions, like article 101 and 102 TFEU. Furthermore, the article uses the word "must", meaning there is a strong imperative to apply this article.[44]

Second, article 191 TFEU states the EU's environmental policy. This includes preserving, protecting, and improving the quality of the environment, protecting human health, and using national resources prudently and rationally. While exercising its competence in environmental policy, the EU must aim at a high level of protection.[45]

Third, article 37 of the Charter of Fundamental Rights ("the Charter") provides a positive requirement to improve the environment in a way which aligns with the principle of sustainable development. This article has the status of primary EU law based on article 6(1) TEU. Additionally, the Commission has a duty to apply article 37 of the Charter based on article 51(1) of the Charter.

Article 7 and 8 TFEU connect the abovementioned environmental framework to sustainability more broadly. Article 7 TFEU mandates consistency between all policy areas of

[43] Nowag (n 4).

[44] ibid 31–48.

[45] Iacovides and Vrettos, 'Falling through the Cracks No More?' (n 4) 41.

the EU. Article 8 TFEU requires the EU to aim to eliminate all inequalities in its activities. Again, like article 11 TFEU, these provisions have horizontal application and are mandatory, using the term "shall". Article 7 TFEU creates the link to article 3 TEU as article 7 TFEU refers to the EU's "objectives". Article 3 TEU states, amongst others that "The Union […] shall work for the sustainable development of Europe based on balanced economic growth […] and a high level of protection and improvement of the quality of the environment." And "it shall contribute to.[…] the sustainable development of the earth' and to 'free and fair trade'".

Holmes also argues that article 9 TFEU, which states: "In defining and implementing its policies and activities, the Union shall take into account […] the 'protection of human health'", is also capable of encompassing sustainability by "taking into account having enough to eat and producing basic foodstuff on a sustainable basis."[46]

Interestingly, article 11 TFEU and 37 of the Charter have already played a role in a recent judgement by the General Court ("GC") regarding state aid. In Austria v Commission the GC states that state aid for a nuclear power plant that went against the EU's rules on the environment, such as article 11 TFEU and 37 of the Charter, cannot be declared compatible with the internal market.[47] Additionally, the GC stated that no EU law, such as competition law, can exclude the application of primary or secondary rules of EU environmental protection or any general principles of EU law.[48] It is not far-fetched, to apply the same logic to competition law.[49]

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[46] Holmes (n 4) 360–361.

[47] Case C-594/18 P *Republic of Austria v European Commission* ECLI:EU:C:2020:742 [45].

[48] ibid 43–44.

[49] Iacovides and Vrettos, 'Falling through the Cracks No More?' (n 4) 41.

From this "constitutional" sustainability framework of primary EU law flows the conclusion that the intention of the legislator was for sustainability to be integrated into all EU policies, including competition law. This means that sustainability by itself should be considered a goal of competition law, and the interpretation of article 102 TFEU be in line with this assertion.

2.4 – A new standard: Citizen welfare standard

To consider sustainability by itself in article 102 TFEU, an adequate standard should be used in the application of this provision. As the consumer welfare standard does not allow for sustainability by itself to be considered, a different standard must be explored.

A potential contender which should be able to consider sustainability was suggested by Cengiz in 2021, called the "citizen welfare standard". This standard, contrary to the consumer welfare standard, considers the effect on "citizens in their entirety as a holistic group, rather than focusing on the interests of the narrow category of consumers".[50] Cengiz provides this new standard in response to the conflict arising from competition law and labor rights in the context of collective bargaining. Here, the values of competition and solidarity oppose each other. However, Cengiz suggests that this standard can be used outside of the context of labor rights. He suggests that this standard could be used when competition law comes into conflict with public interest or other policy objectives, such as cases involving industrial policy, environmental policy or other social objectives in which competition authorities and courts are yet to produce a consistent approach.[51] Since livable wages for workers and environmental policy do play a sizable part in sustainability efforts,

[50] Firat Cengiz, 'The Conflict between Market Competition and Worker Solidarity: Moving from Consumer to a Citizen Welfare Standard in Competition Law' (2021) 41 Legal Studies 73, 16.

[51] ibid; Witt (n 29).

this standard will be considered for the purposes of this thesis. It is, however, unclear precisely how this standard would solve conflicts between competition law and sustainability considerations in the context of article 102 TFEU, although it is generally suggested to be capable of doing so.[52]

Although still vague, for a practical application of the citizen welfare standard, this thesis looks towards the work of Ioannis Lianos. Using his conceptualization of consumer preferences and citizen preferences allows for the integration of sustainability effects into the citizen welfare standard. Lianos' conceptualization of a polycentric competition law describes the difference between consumer preferences and citizen preferences. Rather than caring purely for price, quality, quantity, and innovation, as consumers would, citizens care more broadly about their wellbeing, including sustainability. Taking this into considerations, one can thus view the citizen welfare standard as assessing citizens preference-based on the Kantian approach on what 'we ought to do', rather than a utilitarian consumer preference-based approach which is used by the price-based preferences approach. This allows for the incorporation of sustainability into the citizen welfare standard through assessing citizen preferences. In the context of article 102 TFEU, this can show itself in the fact that conduct that has negative effects on citizens by virtue of its unsustainable nature can be considered to infringe the provision.[53]

[52] Competition Committee (n 31) para 49.

[53] Ioannis Lianos, 'Polycentric Competition Law' (2018) 71 Current Legal Problems 161, 173.

Chapter 3 - Current state of article 102 TFEU and sustainability

This chapter will describe the current status of integrating sustainability into article 102 TFEU under the consumer welfare standard. The chapter will start off by describing the relevant legal framework, article 102 TFEU, to lay the groundwork for analyzing the possibility of integrating sustainability into it (section 3.1). Special attention will be paid to the sword function aspect of this legal framework, going in depth into the notion of abuse and its scope (section 3.1.1). Although not the focus of the thesis, the chapter continues by briefly describing the shield function to give a complete overview of both functions of article 102 TFEU (section 3.1.2). Then, the Meta/Bundeskartellamt case will be examined, as this case specifically could be relevant to this thesis by offering a potential avenue for integrating non-competition concerns into the sword function of article 102 TFEU (section 3.1.3).

After having described the general framework of article 102 TFEU and both functions, the chapter will continue by describing the current state of play regarding the possibility of integrating sustainability into both functions under the consumer welfare standard, based on the legal framework set out prior (section 3.2). This section will start by illustrating why, in general, it is hard to integrate sustainability into the sword function of article 102 TFEU (3.2.1). However, a novel theory of harm will be introduced, which does make the integration possible (3.2.1.2). This section will continue by showing that integrating sustainability into the shield function of article 102 TFEU is not only theoretically possible but also done in practice (section 3.2.2).

This chapter will conclude by summarizing the possibility of integrating sustainability into article 102 TFEU under the consumer welfare standard (section 3.3).

3.1 - Legal framework of article 102 TFEU

Article 102 TFEU is one of the two main antitrust provisions together with article 101 TFEU. Where article 101 TFEU considers agreements or concerted practices between multiple undertakings, article 102 TFEU considers the unilateral conduct of a singular or joint, dominant undertaking.

Article 102 TFEU prohibits the abuse of a dominant position by an undertaking. From this provision multiple cumulative requirements can be distilled for establishing an infringement of article 102 TFEU: (1) an undertaking who is (2) dominant (3) in the internal market (4) abusing its dominant position which (5) affects trade. In the case law of the CJEU, (6) the lack of an objective justification was added to this list.

First, there is the requirement of the undertaking. An undertaking is defined as "any entity engaged in an economic activity regardless of their legal or financial structure."[54] An economic activity can be the offering of goods or services.[55] This requirement has a functional approach, meaning a corporation can be considered an undertaking for some of its activities and not one for others.

Second is dominance. Dominance is defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."[56] Dominance is a legal

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[54] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:161, [1991] ECR I-01979 [21].

[55] Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* ECLI:EU:C:2001:577, [2001] ECR I-08089 [19].

[56] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* ECLI:EU:C:1979:36, [1979] ECR -00461 [38]; Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* ECLI:EU:C:1978:22, [1978] ECR -00207 [65].

threshold; however, it can be equated to the economic concept of substantial market power.[57] An undertaking with a dominant position has a "special responsibility not to allow its conduct to impair undistorted competition" on the internal market.[58]

Dominance is established in two steps. First, the relevant market is defined. Subsequently, the market power of the undertaking in that market is assessed. Defining a relevant market is done through looking at demand side substitution, supply side substitution and potential competition in the product market and the geographical.[59] After having defined the market, the market power of the undertaking is to be assessed in this relevant market.[60] Market power is often inferred from market shares, but they offer only a first indication of market power. Further consideration must be given to the constraints imposed by potential competitors and by consumers. This can be done through looking at barriers to entry and exit and countervailing buyer power.[61]

Third, dominance should be manifested in (a substantial part of) the internal market. However, the test for this requirement is easily met.[62]

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[57] 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 (Text with EEA relevance) 2009 para 10.

[58] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* ECLI:EU:C:1983:313, [1983] ECR -03461 [57].

[59] Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law 2024 paras 22–44.

[60] 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 (Text with EEA relevance) (n 57) para 9.

[61] ibid 12.

[62] Joined cases 40 to 48, 50, 54 to 56 111 113 114-73 *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission of the European Communities* ECLI:EU:C:1975:174, [1975] ECR -01663; Case 226/84 *British Leyland*

Fourth, there must be an abuse of a dominant position. A dominant position in and of itself is not something article 102 TFEU tries to tackle. It is the abuse of this position which is the problem. The exact definition of abuse is a complex issue. The CJEU attempted to give a definition in Hoffmann-La Roche, stating abuse is: "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, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[63]

Three elements can be distilled from this definition: its objective nature, the need for anticompetitive effects and, recourse through methods different from those which condition normal competition.[64] Its objective nature implies that intention is irrelevant. Furthermore, there is a focus on the anticompetitive effects of the conduct its specific context.[65] Additionally, there must be recourse to conduct different from "competition on the

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Public Limited Company v Commission of the European Communities ECLI:EU:C:1986:421, [1986] ECR -03263; Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* ECLI:EU:C:1994:368, [1994] ECR I-05077; Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* ECLI:EU:C:1991:464, [1991] ECR I-05889.

[63] *Hoffmann-La Roche & Co AG v Commission of the European Communities* (n 56) para 91.

[64] Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011) 300 <https://www.cambridge.org/core/books/greening-eu-competition-law-and-policy/DE2E92D56BF773F347CC35359833A838> accessed 7 February 2024.

[65] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172 [24].

merits".[66] Finally, an abuse is compared to the counterfactual.[67] In general, abuse comes in two forms: exploitative or exclusionary.[68] The requirement of abuse is key for determining which conduct is prohibited by article 102 TFEU. Consequently, this requirement is key for the sword function of article 102 TFEU and will be discussed further in the next section.

Fifth, the abuse must affect trade between Member States. The test for this requirement is easily fulfilled.[69] Sixth and last, the *prima facie* abuse of dominance must not be justifiable. The burden of proof for this requirement is on the defendant, meaning that the authority must only consider this point when it is brought up as a defense by the defendant.[70] Justification of *prima facie* abusive conduct can be done through an objective justification based on objective necessity or efficiencies.[71] Through objective justification, liability for anticompetitive conduct can be avoided. Consequently, an objective justification is key in the shield function of article 102 TFEU and will be covered further later in this chapter.

3.1.1 - Sword function

As previously mentioned, article 102 TFEU can be used to attack certain abusive conduct of a dominant undertaking fulfilling all the other mentioned requirements. The key to determining which conduct may be attacked is in formulating such conduct as abusive. The

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[66] Case C-413/14 P *Intel Corp v European Commission* ECLI:EU:C:2017:632 [136].

[67] Case 6-72 *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities* ECLI:EU:C:1973:22, [1973] ECR -00215 [26–27].

[68] 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 (Text with EEA relevance) (n 57) para 7.

[69] Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance) 2004 paras 73–76, 90, 93–96, 101–109.

[70] Tjarda van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of Prima Facie Dominance Abuses?' (2013) 4 Journal of European Competition Law & Practice 121, 125.

[71] *Post Danmark A/S v Konkurrencerådet* (n 65) para 41.

reason for abuse being the key factor in determining which conduct can be attacked by article 102 TFEU is because it is the only factor of article 102 TFEU that assesses conduct. All the other factors assess the classification of the entity, the entity's market position (relative to the internal market) and (the lack of) a possible justification for the conduct. The abuse requirement thus sets out which actual behavior by undertakings is prohibited. Therefore, this factor is of high importance to this thesis as it is key in determining whether unsustainable conduct can be attacked by the sword function of article 102 TFEU.

Abuse can take two forms: exploitative and exclusionary. An exploitative abuse exploits consumers directly by, for instance, charging unfair prices. An exclusionary abuse harms consumers indirectly through excluding competitors from the market. Even though these two categories have many examples, it is important to note that the list of abuses is not exhaustive and new forms of abuse can be found in the future.[72] Here, I will provide an overview of these types of abuses and examples from practice before I go into more depth on the relation to sustainability and abusive behavior (in section 3.2).

Exploitative abuses are the most relevant to the sword function of article 102 TFEU in the context of sustainability because unsustainable conduct does, normally, not foreclose competitors. Exploitative abuses have not been the focus of competition authorities.[73] Article 102(a) gives an example of an exploitative abuse, imposing unfair purchase or selling prices or other unfair trading conditions. Other examples include inefficiency or failure to meet demand.[74] *Unfair or excessive pricing* relates to prices which are too high. According to standard economic theory, monopolists, or undertakings with substantial market power, can

[72] *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities* (n 67) para 26.

[73] Whish and Bailey (n 36) 211.

[74] ibid.

set prices as high as they want to, rationally opting for prices which maximize profit. However, cases involving unfair prices are rarely brought by competition authorities based on prosecutorial discretion.[75] Additionally, some argue that intervening against high prices is not efficient as markets will self-correct due to attracting entry from potential competitors. However, this does not hold when there are barriers to entry.[76] Furthermore, practical problems, like determining what is excessive or unfair, are also reasons for the limited use of the sword function of article 102 TFEU against unfair prices.

The scope of exploitative abuses is very relevant for integrating sustainability into the sword function of article 102 TFEU. In this regard, the Meta/Bundeskartellamt case provides an example of integrating non-competition factors into the sword function of article 102 TFEU in the case of an exploitative abuse. In this case, the German competition authority (the "Bundeskartellamt") decided that Facebook had abused its dominant position by "making the use of its social network conditional on it being allowed to limitlessly amass every kind of data generated by using third party websites and merge it with the user's Facebook account".[77] Importantly, in this case the Bundeskartellamt relied on data protection rules.[78] This case will be examined further below (section 3.1.3).

Aside from exploitative abuses, there are exclusionary abuses. Exclusionary abuses are abuses that do not harm consumers directly but exclude competitors from the market and thus, by

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[75] ibid 756.

[76] Case C-177/16 *Opinion of Advocate General Wahl delivered on 6 April 2017 Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome* ECLI:EU:C:2017:286 [3].

[77] 'Background Information on the Facebook Proceeding' (*Bundeskartellamt*) 1 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html> accessed 24 April 2024.

[78] Marco Botta and Klaus Wiedemann, 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) 10 Journal of European Competition Law & Practice 465, 469.

harming competition, indirectly harm consumers. Examples of exclusionary abuses are exclusive dealing agreements, tying, bundling, refusal to supply, exclusivity rebates, predatory pricing, margin squeezing, and price discrimination. Even though exclusionary abuses are less relevant for the topic of this thesis, I will provide an overview of several types of exclusionary abuses below.

Exclusive dealing agreements concern the situation where a supplier and a customer bind each other to either only sell or buy from each other.[79] *Tying* refers to requiring a customer who wants to buy a first, primary product, the tying product, to also buy a second, tied, product. This allows the dominant undertaking to leverage their market power from the tying market into the tied market.[80] *Bundling* is very closely related to tying and refers to the situation of selling two products as a single package for a single price.[81] *Refusal to supply* refers to the situation where a dominant undertaking refuses to supply goods or services. This is often the case where an infrastructure operator refuses to give access to indispensable infrastructure.[82] *Exclusivity rebates* are closely related to exclusive dealing agreements. Exclusivity rebates are rebates conditional upon the customer buying all, or nearly all, of their demand from the supplier.[83] *Predatory pricing* concerns the practice of pricing at such low costs that competitors would run a loss if they priced the same. This practice is only abusive if the price is below certain thresholds. For instance, pricing below average variable

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[79] Case T-57/01 *Solvay SA v European Commission* ECLI:EU:T:2009:519, [2009] ECR II-04621 [365–383].

[80] Case T-604/18 *Google LLC and Alphabet, Inc v European Commission* ECLI:EU:T:2022:541.

[81] Case T-201/04 *Microsoft Corp v Commission of the European Communities* ECLI:EU:T:2007:289, [2007] ECR II-03601.

[82] 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* ECLI:EU:C:1998:569, [1998] ECR I-07791.

[83] *Intel Corp v European Commission* (n 66); Case C-466/19 P *Qualcomm, Inc and Qualcomm Europe, Inc v European Commission* ECLI:EU:C:2021:76.

costs is presumed abusive. Pricing below average total costs but above average variable costs is only prohibited if there is an intention to exclude competitors.[84] *Margin squeeze* concerns the situation in which a vertically integrated undertaking leaves such a small margin between the upstream price it charges a downstream competitor and the downstream price that the downstream competitor cannot compete.[85] *Price discrimination* concerns the situation in which an undertaking charges different prices to two undertakings who are in the same situation.[86]

Aside from these established types of abuses, new abuses can be established by the Courts. Recently some new abuses have been established. For instance, in the Google Shopping case the fact that Google gave higher search rankings to its own shopping comparison service than to other shopping comparison service providers constituted an abuse called "self-preferencing".[87] This was recently recognized by the Advocate General as a new type of abuse.[88] This shows that, in theory, any conduct can be abusive if it departs from competition on the merits and has an anticompetitive effect.

3.1.2 - Shield function

The objective justification can be used as a shield, meaning it can be used to avoid liability for *prima facie* abusive conduct. In practice this means that an undertaking that fulfills the

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[84] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* ECLI:EU:C:1991:286, [1991] ECR I-03359 [65].

[85] Case C-280/08 P *Deutsche Telekom AG v European Commission* ECLI:EU:C:2010:603, [2010] ECR I-09555.

[86] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* ECLI:EU:C:2018:270.

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

[88] European Court of Justice, 'The EU Court of Justice AG Kokott Proposes the Confirmation of the €2.4B Fine Imposed on a Big Tech Company for Favouring Its Own Comparison Shopping Service (Google Shopping)' [2024] e-Competitions Bulletin <https://www.concurrences.com/en/bulletin/news-issues/january-2024/the-eu-court-of-justice-ag-kokott-proposes-the-confirmation-of-the-eur2-4b-fine> accessed 27 April 2024.

other requirements for proving an abuse of dominance can show that they have an objective justification for this abusive conduct.[89] A key requirement is that the abusive conduct is proportional to the justification invoked.

There are two general forms of objective justification: objective necessity and efficiencies. Objective necessity refers to the situation where abusive conduct is necessary to attain a goal which is not necessarily related to economic efficiency. Examples of this are public health or safety.[90] Aside from objective necessity, there is the efficiency defense. This refers to the situation where the conduct that creates anticompetitive effects is (more than) compensated by a gain in efficiency. The key test is whether there is no net consumer harm.[91]

The objective justification is comparable to article 101(3) TFEU. They both provide a justification for *prima facie* abusive conduct, although there are some differences.[92]

3.1.3 - Meta/Bundeskartellamt

As mentioned previously, the Meta/Bundeskartellamt case provides an interesting view into the scope of article 102 TFEU. This case is relevant to the topic of this thesis because it offers a potential pathway to incorporate non-competition concerns, such as sustainability, into the scope of article 102 TFEU. Below the factual events of the case will be explained after which the importance of this case for the purpose of this thesis will be set out and examined.

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[89] *Microsoft Corp v Commission of the European Communities* (n 81) para 688.

[90] Case T-30/89 *Hilti AG v Commission of the European Communities* ECLI:EU:T:1991:70, [1991] ECR II-01439.

[91] 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 (Text with EEA relevance) (n 57) paras 28–31.

[92] TDO van der Vijver, 'Objective Justification and Prima Facie Anti-Competitive Unilateral Conduct: An Exploration of EU Law and Beyond' (Leiden University 2014) 72 <https://hdl.handle.net/1887/29593> accessed 27 April 2024.

In the case, the Higher Regional Court of Dusseldorf ("German court") requested a preliminary ruling in the proceedings between Meta, the parent company of Facebook, and the Bundeskartellamt. The Bundeskartellamt had prohibited Meta from processing data in the way which Meta indicated in the terms of service of its Facebook service. The Bundeskartellamt found that Meta had abused its dominant position on the market for online social networks for private users in Germany. The actual abuse was the excessive processing of data originating from outside of the Facebook platform. The Bundeskartellamt relied in part on the General Data Protection Regulation ("GDPR") to prove the abuse.[93] The German court referred seven questions to the CJEU. Importantly, questions one and seven asked if the GDPR can be used to substantiate the establishment of an abuse of a dominant position or if compliance with the GDPR can aid in this establishment. In this regard, the CJEU establishes that: "[T]he compliance or non-compliance of that conduct with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition and to assess the consequences of a certain practice in the market or for consumers."[94]

Thus, the CJEU established that the GDPR can play a role in the establishment of an abuse under article 102 TFEU. Moreover, it even stated that these rules can play a vital role in this assessment. The following paragraph, the CJEU explicitly states that it may be necessary for a competition authority to consider "rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR" in its assessment of

[93] Or Brook and Magali Eben, 'Another Missed Opportunity? Case C-252/21 Meta Platforms v Bundeskartellamt and the Relationship between EU Competition Law and National Laws' (2024) 15 Journal of European Competition Law & Practice 25, 26.

[94] *Meta/Bundeskartellamt* (n 7) para 47.

an abuse of dominance.[95] The CJEU thus leaves the door wide open for other legal regimes to play a part in the assessment of an abuse of dominance. This means that other legal regimes, such as ones aiming to achieve sustainable outcomes like environmental legislation, can potentially play a role in establishing an abuse.

3.2 - Integrating sustainability into article 102 TFEU under the consumer welfare standard

This section will describe if it is currently possible to integrate sustainability into the sword and shield function of article 102 TFEU under the consumer welfare standard. First, the focus will be placed on the sword function. Potential avenues in the form of theories of harm and their associated problems will be analyzed (section 3.2.1.1). After that, a novel theory of harm, integrating sustainability into the sword function of article 102 TFEU, will be described (section 3.2.1.2). Then the current possibilities of integrating sustainability into the shield function of article 102 TFEU under the consumer welfare standard will be considered (section 3.2.2).

3.2.1 - Integrating into the sword function under the consumer welfare standard

3.2.1.1 – General

In general, there seems to be limited scope to integrate sustainability into article 102 TFEU under the consumer welfare standard. This is because, first, an infringement of environmental law itself does not constitute consumer harm and, second, because integration into existing categories of abuse seems difficult.

[95] ibid 48.

Although the Meta/Bundeskartellamt case does seem to open the door for other legal regimes to inform the establishment of an abuse of dominance, using environmental law for this purpose may prove difficult under the consumer welfare standard. Under the consumer welfare standard, the infringement of environmental laws does not affect consumers *per se*. In this regard, Inderst and Thomas state: "Resorting to the consumer welfare metric, any harm to consumers—either by way of foreclosure or exploitation—is independent of how a particular measure qualifies under environmental legislation. This is true for both sides of the argument. Consumers can suffer harm from being deprived of a more sustainable product even if the deprivation of the more sustainable market outcome does not infringe sustainability laws. On the other hand, the mere fact that dominant firms infringe on sustainability laws does not inform on whether such forecloses a market to (actual or potential) as efficient rivals or whether it deprives consumers of a portion of their rent that they would have derived from the purchase contract had the firm not been dominant."[96]

The key to their argument is that no consumer harm follows from infringing environmental law by itself. Only when consumers care about adherence to environmental laws does the infringement of environmental laws affect consumers' welfare and thus meet the consumer welfare standard.

Consumers can derive value (welfare) from the sustainability of the product and thus be harmed if this value is diminished. The derivation of value can be based on altruism, where the value is derived from the appreciation of a more sustainable product itself. This is also called, non-use value and is recognized in the Horizontal Guidelines 2023.[97] Additionally,

[96] Roman Inderst and Stefan Thomas, 'Abuse of Dominance and Sustainability' [2023] Journal of European Competition Law & Practice lpad041, 49.

[97] European Commission Horizontal Guidelines (n 3) para 575.

more sustainable products can in certain cases be of higher quality. For instance, a vegetable cultivated without the use of pesticides might taste better.[98] However, in this case, the value is related to the quality, not the sustainability of the product. Lastly, although often of limited size, more sustainable products may directly impact the wellbeing of consumers and other persons.[99] Under the consumer welfare standard, a reduction in these consumer value markers may support a coherent theory of harm. This could be established by comparing the consumers' willingness to pay for a product with their willingness to pay for a more sustainable option. The Commission also considered the effects of conduct on other people than the consumers through considering collective benefits.[100] However, Thomas and Inderst mention that these benefits do not fall within the consumer welfare standard.[101] This may imply that the Commission is already adhering to a standard broader than consumer welfare standard.

The consumer welfare standard thus measures if conduct harms consumers through measuring consumer value, which can be derived from non-use value or direct effects sustainability. Both measures are based on the consumers' willingness to pay. However, an infringement of environmental law does not influence the consumers' willingness to pay for a certain product *per se*.[102] Furthermore, the idea that an infringement of environmental law which may create a barrier to entry for an as-efficient rival is not a convincing foreclosure

[98] ibid 572.

[99] Inderst and Thomas (n 96) 50.

[100] European Commission Horizontal Guidelines (n 3) para 582.

[101] Inderst and Thomas (n 96) 51.

[102] ibid 52.

theory of harm under the consumer welfare standard. This is because the competitors can infringe the environmental law as well.[103]

Furthermore, some have argued that unsustainable conduct in itself cannot be abusive for additional reasons. Although it is not mentioned in article 102 TFEU, there needs to be a sufficient link between the conduct concerned and competition for it to infringe competition law. This can be derived from the fact that article 102 TFEU is placed in Chapter 1 Title VII of the Treaty called "Rules on competition".[104] Thus, it would not be in line with the intentions of the legislator to have no link to competition in the assessment of article 102 TFEU. Furthermore, classifying unsustainable conduct as abusive in itself may raise issues regarding the division of powers. For instance, preventing pollution is a matter for environmental legislation. Tackling this issue through competition law would circumvent the division of powers envisioned by the legislator.[105]

Lastly, contrary to article 101 TFEU, there has not been any court decision or Commission action based on article 102 TFEU regarding unsustainable conduct.[106] Although this could just be the case because the Commission, GC and CJEU have not yet come across such a case based on article 102 TFEU. On the other hand, this could also mean that neither the legislative branch, the executive branch, nor the judicial branch or the EU view competition rules as tools to tackle sustainability.

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[103] ibid 55.

[104] Kingston (n 64) 309–310; Inderst and Thomas (n 96) 52.

[105] Nowag (n 4) 142.

[106] 'Antitrust: Commission Sends Statement of Objections to Alcogroup and Agroetanol over Alleged Ethanol Benchmarks Cartel' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4362> accessed 27 April 2024.

3.2.1.2 – Inverse excessive pricing: Sustainability as quality

A novel approach to abuse in which sustainability can be integrated into the sword function or article 102 TFEU is through a clever use of the unfair pricing doctrine. This idea has, to my knowledge, only been briefly covered by Thomas and Inderst.[107]

The unfair pricing doctrine, as explained before, refers to a situation where a dominant undertaking charges prices so high that they are abusive. The key case regarding this is United Brands.[108] In this case, the CJEU explained that a price is excessive when "it has no reasonable relation to the economic value of the product supplied".[109] This can be assessed based on a price comparison between the selling price and the costs of producing the product.[110] After confirming that the price is excessive, it must be assessed whether the price is unfair "in itself or compared to competing products".[111]

This theory of harm can be flipped, using an unfair (reduction in) quality instead of an unfair (increase in) price to establish an abuse. This was already suggested by Pike regarding a solution for the dumping of wastewater by UK companies.[112] Importantly, the sustainability of a product may be seen as a marker of quality.[113] Therefore, an unfair lack of sustainability could be abusive as it deprives consumers of a more sustainable product for which they are willing to pay, establishing consumer harm. Of course, the unfair lack of

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[107] Inderst and Thomas (n 96) 53.

[108] *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (n 56).

[109] ibid 250.

[110] ibid 251.

[111] ibid 252.

[112] Chris Pike, 'Money Down The Drain, Raw Sewage On The Beach' (*Fideres*, 15 November 2022) <https://fideres.com/money-down-the-drain-raw-sewage-on-the-beach/> accessed 16 February 2024.

[113] European Commission Horizontal Guidelines (n 3) ch 9; Cristina Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)' (1 July 2020) <https://papers.ssrn.com/abstract=3917881> accessed 27 April 2024.

sustainability must be compared to a counterfactual. Furthermore, the extent of the lack of sustainability needs to be unfair compared to the price level. Here the comparison of price and economic value, which is based on quality, is flipped due to the factor which is unfair also being the inverse or regular unfair pricing. So instead of comparing the unfair price to the true economic value (largely based on quality), the comparison is based on the unfair (lack of) sustainability compared to the price.

However, like with regular unfair pricing, there are major practical difficulties regarding the establishment of such an infringement. Determining the level at which a product is unfairly lacking in sustainability or at which the price is excessive and unfair is notoriously complex. Because of these practical issues and the unconventional theory of harm, it is unlikely that an infringement based on a lack of sustainability will occur in the future.

3.2.2 - Integrating into the shield function under the consumer welfare standard

3.2.2.1 - General

As this is not the focus of the thesis, this part will be covered briefly. Contrary to the sword function mentioned above, integrating sustainability into the shield function is more feasible. Based on the objective justification, a firm might be able to use the sustainability benefits derived from its *prima facie* anticompetitive conduct as a defense.[114]

[114] 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 (Text with EEA relevance) (n 57) para 29.

As the sustainability benefits are not economic in nature, the objective necessity category is the most suitable way to claim an objective justification. This category of objective justification is described in paragraph 29 of the Commission's enforcement priorities. In that paragraph, examples of health and safety are provided. However, this is not an exhaustive list of categories of objective necessity defenses.[115]

Both at the EU level and at the national level, there have been many objective necessity defenses in the realm of sustainability.[116] Integration of sustainability in this regard is clearly possible and already ongoing. Although, it is good to mention the Commission's focus has been more on the efficiency defense in article 101(3) TFEU rather than the objective necessity defense in article 102 TFEU. An interesting question is whether the Commission and the EU Courts will apply the principles of the Horizontal Guidelines 2023 regarding an efficiency defense based on sustainability to the efficiency defense category of the objective justification based on sustainability under article 102 TFEU.

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[115] Mauboussin (n 4) 31.

[116] ibid 34–36; 'Decision 05-D-60 of November 08, 2005' (*Autorité de la concurrence*, 8 November 2005) <https://www.autoritedelaconcurrence.fr/en/decision/decision-05-d-60-8-november-2005-practices-implemented-cisterian-order-immaculee> accessed 27 April 2024; 'Decision 12-D-25 of December 18, 2012' (*Autorité de la concurrence*, 18 December 2012) <https://www.autoritedelaconcurrence.fr/en/decision/decision-12-d-25-18-december-2012-practices-implemented-railway-freight-sector> accessed 27 April 2024; 'Svenska Förpacknings- och Tidningsinsamlingen AB' <https://www.konkurrensverket.se/konkurrens/tillsyn-arenden-och-beslut/arendelista/svenska-forpacknings--och-tidningsinsamlingen-ab/> accessed 27 April 2024; Satu-Anneli Kauranen, 'The Finnish Competition Authority Intervenes in the Municipal Waste Management Company's Competition Compromising Practice (Pirkanmaan Jätehuolto)' [2014] e-Competitions Bulletin <https://www.concurrences.com/en/bulletin/news-issues/december-2014/The-Finnish-Competition-and-72358> accessed 27 April 2024; William Simpson and Philippe-Emmanuel Partsch, 'The Luxembourg Competition Council Applies for the First Time the 2009 Communication on Art. 82 EC in a Case Concerning Domestic Fuel Capacities (Tanklux)' [2009] e-Competitions Bulletin <https://www.concurrences.com/en/bulletin/news-issues/august-2009/the-luxembourg-competition-council-applies-for-the-first-time-the-2009> accessed 27 April 2024.

3.3 - Interim conclusion

Article 102 TFEU can be viewed as having two distinct functions. The first function, the sword function, allows article 102 TFEU to be used to attack certain behavior based on the standard requirements of an undertaking abusing its dominant position in the internal market, which affects trade. It is hard to integrate sustainability into this sword function. Although the Meta/Bundeskartellamt case does seem to open the door, the consumer welfare standard obstructs this pathway due to consumers not caring about infringements of sustainability regimes. Furthermore, there might be a possibility to integrate sustainability into the unfair pricing doctrine, creating a novel theory of harm, the application of this theory is unlikely to be seen in practice. The second function of article 102 TFEU, the shield function, can be seen in the objective justification. Here an objective justification based on sustainability benefits can be used as a defense against liability from *prima facie* abusive conduct. Integration of sustainability consideration into this function is conceptually possible and has already been seen in practice.

Chapter 4 - A future for article 102 TFEU and sustainability

In this chapter, the outcome of the prior descriptive chapter, setting out whether sustainability can be currently integrated under the consumer welfare standard (chapter 3), will be normatively evaluated against the backdrop of the normative framework set out in the beginning (chapter 2). This will be done by first reflecting on the outcome of the outcome of the prior chapter, analyzing what possibilities there are for integrating sustainability into the sword function of article 102 TFEU. These possibilities will then be reviewed, considering the normative framework (section 4.1). Seeing that the outcome of this normative evaluation is insufficient considering the normative framework, new theories of harm will be suggested that do allow for the integration of sustainability into the sword function of article 102 TFEU (section 4.2). This second part of this chapter thus engages, partly, in legal design. In this legal design, a staircase framework will be set out, offering different degrees of integration. Then, theories of harm will be placed into the steps of this staircase framework. Lastly, the benefits and potential issues of each step of the staircase will be discussed.

4.1 - Reflecting on the normative framework

In the prior chapter, this thesis set out whether unsustainable conduct can be framed as an abuse under the consumer welfare standard, thereby integrating sustainability into the sword function of article 102 TFEU. It was found that under the consumer welfare standard, integrating sustainability into the sword function of article 102 TFEU proves difficult. Although the Meta/Bundeskartellamt case does seem to provide an avenue for integrating non-competition concerns into the finding of an abuse, the research by Thomas and Inderst

argues that under the consumer welfare standard, an infringement of environmental law cannot constitute an abuse unless consumers care about the infringement. Consumers are assumed not to care about an infringement of sustainability legislation as such as consumers may experience consumer harm when sustainability legislation is not infringed, and consumer harm may not exist when sustainability legislation is infringed. Nevertheless, a novel avenue for a sustainability-based theory of harm was established, based on an inverse excessive pricing theory whereby sustainability is seen as a marker of quality and an excessively low level of quality, in the form of sustainability, could establish consumer harm under the consumer welfare standard. However, this theory of harm is unlikely to be seen in practice due to its novel nature and practical difficulties associated with establishing an infringement of this kind. This means that this theory by itself will therefore not be impactful. These findings will be tested against the normative framework (chapter 2) below.

The usage of the sword function of article 102 TFEU must be altered. The normative framework set out in chapter two argues that sustainability should be integrated into the sword function of article 102 TFEU. This argument is based on the significant moral imperative provided by the climate crisis. A potentially limiting factor to this moral imperative, the goals of competition law, are argued to not stand in the way as, based on multiple provisions in the Treaties and the Charter, sustainability should be seen as a goal of competition law. Based on this viewpoint and the conclusion that article 102 TFEU should be able to tackle unsustainable conduct itself, the findings in chapter three do not suffice. Due to the normative standpoint taken in this thesis that article 102 TFEU should be able to tackle unsustainable conduct, the conclusion that this is only possible for a very novel theory of harm or if consumers care about an infringement of a legal sustainability regime is an inadequate level of integration of sustainability into article 102 TFEU. These two very

narrow avenues will likely lead to no actual usage of article 102 TFEU to combat unsustainable conduct as these two theories of harm only apply in extremely specific and unlikely circumstances. This does not suffice in light of the normative framework, leading to the conclusion that the usage of the sword function of article 102 TFEU must be modified.

To alter the sword function of article 102 TFEU, new theories of harm must be constructed, and a new standard must be applied. Based on the normative framework, the citizen welfare standard, considering the findings of Ioannis Lianos, can provide an avenue for integrating sustainability into the sword function of article 102 TFEU, allowing this provision to tackle unsustainable conduct. However, as shown by the prior criticism by Kingston and Nowag on the idea of an abuse established purely on its sustainability effects, two different degrees of sustainability-based theories of harm can be distinguished. First, theories of harm based on the consumer welfare standard. In this category, there are two types. The first tackles conduct primarily based on its competition effects. The second tackles conduct based primarily on its sustainability effects. The second degree of sustainability-based theories of harm uses the citizen welfare standard. In this category, the first type attacks certain conduct primarily based on its sustainability effects while still having a link to competition. The second type of this degree considers theories of harm that are primarily based on their sustainability effects, with no link to competition as such. Taken together, this leads to four types (or steps) that each allow for different degrees of integration of sustainability into the sword function of article 102 TFEU. This new legal framework for tackling unsustainable conduct by itself will be discussed below.

4.2 - Sustainability-based theory of harm

4.2.1 - General

In the context of article 102 TFEU, multiple theories of harm relating to sustainability have already been developed. In this regard, multiple categories can be distinguished.

First, there are theories of harm that are primarily based on their effects on traditional competition parameters, like price, quality, quantity, and innovation, but also have effects on sustainability. Due to primarily affecting traditional competition parameters, these theories of harm work within the consumer welfare standard. It is important to note that in some cases competition and sustainability align and thus theories of harm aiding both can be developed. However, these theories of harm do not have as their primary goal of addressing unsustainable conduct. Rather, their primary aim is to attack the traditional anticompetitive effects of the conduct. This means that these theories of harm are not the primary concern of this thesis.

Second, there are theories of harm primarily based on their effects on sustainability, which do work under the consumer welfare standard. These theories of harm have been described in chapter two. Specifically, the exploitative abuse of inverse excessive pricing using sustainability as a parameter of quality and an infringement of environmental (or other sustainability related) legal regimes when consumers care about an infringement of these legal regimes. However, as has been established based on the normative framework (section 4.1), these two theories of harm do not suffice. Therefore, there need to be additional categories of sustainability-based theories of harm. These will be discussed below.

Third, there are theories of harm that are primarily based on their effects on sustainability by tackling unsustainable conduct by itself under the citizen welfare standard, but which do

have a certain link to competition. These theories of harm use the citizen welfare standard, rather than the consumer welfare standard.

Fourth and last, there are theories of harm which are primarily based on their effects on sustainability by tackling unsustainable conduct by itself under the citizen welfare standard and that do not (need to) have a link to competition. These theories of harm, again, use the citizen welfare standard but unlike the prior category they do not have a link to competition.

Within this four-step staircase framework, theories of harm will be placed to give a coherent overview of theories of harm to tackle unsustainable conduct and allow for a good understanding of how implementing certain theories of harm can relate to what view of article 102 TFEU is taken.

4.2.2 – Staircase framework

This section sets out a framework in the form of a staircase that has multiple steps. Each step goes further in scope of tackling unsustainable conduct. Each section will set out one step of the staircase and will give an overview of relevant theories of harm, practical problems associated with the step and to which extent the step fits with the normative framework and the goal of this thesis.

It is important to note that these steps are cumulative. This means that, for instance, step two compromises the theories of harm stated in both step one and two. It is possible for the theories of harm from steps one and two to be placed under steps three and four even though steps one and two use the consumer welfare standard and steps three and four use the citizen welfare standard. This is possible since the citizen welfare standard is broader than the consumer welfare standard but also encompasses the consumer welfare standard. For instance, citizens care about factors like price, quality, quantity and innovation, which

consumers also care about, but citizens also care about other factors, like sustainability. This means the theories of harm that negatively affect price, quality, quantity, and innovation can be considered under both consumer and citizen welfare standards.

Staircase step	Step Name	Standard	Primary Effect	Secondary Effect	Link to Competition	Theories of harm
1	Traditional theories of harm (sustainability version)	Consumer Welfare	Competition	Sustainability	Yes	Imposing environmentally damaging requirements or discriminating against environmentally friendlier customers
						Limiting the ability of competitors to develop environmentally friendlier production methods or products
						Failing to satisfy a clear demand for an environmental service
						Being extremely inefficient in refusing to use environmentally friendlier technology, thus increasing environmental costs
						Imposing unfair and discriminatory conditions or failing to account for new entrants entering the market in the context of auctions related to the EU's Emission Trading Scheme
2	Sustainability-based theories of harm (consumer welfare)	Consumer Welfare	Sustainability	Competition	Yes	Infringing environmental legislation if consumers care about such infringement
						Inverse excessive pricing theory based on sustainability as a marker of quality
3	Sustainability-based theories of harm (citizen welfare with link to competition)	Citizen Welfare	Sustainability	Competition	Yes	Unfair or predatory pricing based on true costs pricing which includes externality costs
						Unfair purchasing prices paid to farmers not allowing them a fair wage and the opportunity to produce sustainably
						Predatory pricing when securing subsidies, clearing forest for grazing, and avoiding higher labor standards by getting exceptions for lowly paid immigrant workers leading to too low production costs
						Rent-seeking lobbying, leading to regulatory barriers to entry and foreclosure
4	Sustainability-based theories of harm (citizen welfare without a link to competition)	Citizen Welfare	Sustainability	None	No	Bribery
						Extortion
						Human rights violations
						Pollution
						Destruction of habitats and livelihoods
						Offering exploitative salaries and working conditions

A visual overview of the staircase framework can be found above.

4.2.2.1 – Traditional theories of harm (sustainability version)

It is important to remember that in certain circumstances, the sword function of article 102 TFEU can already be used to attain sustainable outcomes. Even under the consumer welfare standard, article 102 TFEU can attack conduct which has primarily an anticompetitive effect but a secondary sustainability effect. Multiple examples of this category were already mentioned by Suzanne Kingston in 2011 in her book Greening Competition law. Most of Kingston's examples of integrating sustainability into article 102 TFEU do so for the shield function by illustrating how sustainability considerations may provide an objective

justification for *prima facie* abusive behavior.[117] However, there are some examples Kingston gives which do use the sword function of article 102 TFEU to attain sustainable outcomes. She mentions that the following conduct could provide an abuse of dominance and should be tackled by article 102 TFEU:

- Imposing environmentally damaging requirements, or conditions, by a dominant undertaking, or discriminating against environmentally friendlier customers. This could happen through, for example, a contractual obligation for a customer not to object to the environmentally harmful nature of a product or service.[118]
- Limiting the ability of competitors to develop environmentally friendlier production methods or products.[119]
- Failing to satisfy a clear demand for an environmental service.[120]
- Being extremely inefficient in refusing to use environmentally friendlier technology, thus increasing environmental costs.[121]
- Imposing unfair and discriminatory conditions or failing to account for new entrants entering the market in the context of auctions related to the EU's Emission Trading Scheme.[122]

[117] Kingston (n 4) 312–324.

[118] ibid 323–324.

[119] ibid 325.

[120] ibid.

[121] ibid.

[122] ibid 326.

Other examples include refusal to license environmentally friendly technology, hindering market entrance of an environmentally friendly product or service or attempts to eliminate such products or services.[123]

Important for the purpose of this thesis though is the comment from Nowag in his book Environmental Integration in Competition and Free-Movement Laws. He notes that the theories of harm expressed above are not theories of harm based on the sustainability effects of the conduct. Rather, these cases "merely reflect general principles of competition law, it is not the environmental effect of the product or behavior but the effect on competition that is decisive".[124] In other words, these are only regular cases of traditional anticompetitive conduct but regarding a sustainable product, service or undertaking. As such, these theories of harm do not suffice for the purpose of using article 102 TFEU as a sword against unsustainable conduct itself as they do not primarily tackle the sustainability aspect but rather the competition aspect.

However, there are three more steps in the staircase framework devised which may provide theories of harm based on a view of article 102 TFEU that do suffice for the purpose of this thesis. These will be discussed next.

4.2.2.2 – Sustainability-based theories of harm (consumer welfare)

As discussed in chapter three of this thesis, there are two additional ways in which sustainable outcomes can be achieved under the consumer welfare standard. What makes these theories of harm different from the prior category of theories of harm is that even though they both use the consumer welfare standard as a basis, this category of theories of harm primarily attacks the sustainability effects of the conduct, rather than the competition

[123] Nowag (n 4) 140.

[124] ibid.

effects. What makes them possible under the consumer welfare standard is that they are molded into existing categories of abuse and transformed into parameters of competition accepted by the consumer welfare standard, such as quality.

The first theory of harm devised in this category in the prior chapter was an inverse excessive pricing theory whereby sustainability is seen as a marker of quality and an excessively low level of quality, in the form of sustainability, could establish consumer harm. Secondly, the infringement of environmental law can constitute an infringement of article 102 TFEU based on the Meta/Bundeskartellamt case if, contrary to what Thomas and Inderst assume, consumers care about whether an undertaking infringes such a secondary legal regime.

Earlier in this chapter (section 4.1) it was explained why these two theories of harm based on the consumer welfare standard do not suffice considering the normative framework. These two theories of harm will not have enough effect in practice. This means that, considering the normative framework, these theories of harm do not allow for a sufficient degree of integration of sustainability into the sword function of article 102 TFEU. Considering this, this category also does not suffice for the purpose of this thesis.

However, it is important to note, as mentioned by Iacovides and Vrettos, that the consumer welfare standard is not set in stone. It is not mentioned by the treaties and was devised by practice.[125] Therefore, theories of harm based on an alternative standard, the citizen welfare standard, will be suggested. The next two sections will review what kinds of theories of harm may be possible under this standard and whether these suffice considering the normative framework set out in chapter two.

[125] Iacovides and Vrettos, 'Radical for Whom?' (n 4) 8.

4.2.2.3 – Sustainability-based theories of harm (citizen welfare with link to competition)

In the normative framework an alternative standard was suggested, the citizen welfare standard. This standard, like the consumer welfare standard, is quite vague. However, for a practical application of this standard, this thesis bases itself on the works of Ioannis Lianos. He states that citizens have different preferences than consumers. Rather than caring purely for price, quality, quantity, and innovation, as consumers would, citizens care more broadly about their wellbeing, including sustainability. This means that the citizen welfare standard allows article 102 TFEU to tackle unsustainable conduct primarily for its sustainability effects.

This step of the staircase is different from the prior step for the following reason. The inverse excessive pricing theory views sustainability as a marker of quality. The conduct is thus attacked by article 102 TFEU because of its effects on quality, which consumers care about. In this sense, it is thus sufficiently molded into a parameter of competition that consumers care about, which allows it to work under the consumer welfare standard. The second theory, as Thomas and Inderst point out, is that the infringement of environmental law based on Meta/Bundeskartellamt only works if consumers care about the infringement of the environmental legal framework. This is assumed to not be the case for consumers. This is where the difference between this narrow interpretation of what consumers care about and what citizens care about comes to light. Contrary to consumers, citizens do by their nature care about environmental legislation and thus this theory of harm is assumed to work under this standard.

This third step of the staircase framework thus uses the citizen welfare standard. However, contrary to the fourth step of the staircase framework, the theories of harm in this category

still have some link to competition and do not attack conduct which has no relation to competition.

In this third step of the staircase framework, some theories of harm fit which have been devised in earlier works by other academics. Namely Simon Holmes has provided multiple fruitful ideas regarding potential theories of harm in his multiple works on article 102 TFEU and sustainability.

Holmes has mentioned the following theories of harm:

- Unfair or predatory pricing while considering externality costs of the conduct. This theory of harm makes use of what is called "true costs pricing" where the costs which normally are not considered, such as the environmental costs of dumping waste or the social costs of using child labor, are considered.[126] These types of conduct may exclude competitors which are competing fairly by not using unsustainable production methods. Like Iacovides and Vrettos state, this type of competition can only be called toxic competition and is unlikely to be considered "on the merits".[127] Examples of this include:
    - Dumping waste in rivers
    - Avoiding tax liabilities
    - Polluting the atmosphere

[126] Holmes (n 4) 384; Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part II. Using Competition Law to Tackle Unsustainable Practices as Abuses of Monopoly Power' (2023) 44 European Competition Law Review 61, 66.

[127] Iacovides and Vrettos, 'Radical for Whom?' (n 4) 9.

- Unfair purchasing prices regarding suppliers, not allowing them a "fair" wage and not allowing them to produce sustainably.[128]

Additionally, Iacovides and Vrettos have also suggested some theories of harm that still have some link to competition:

- Predatory pricing when securing subsidies, clearing forest for grazing, and avoiding higher labor standards by getting exceptions for lowly paid immigrant workers leading to too low production costs. This is like Holmes' true cost pricing. [129]
- Rent-seeking lobbying, leading to regulatory barriers to entry and foreclosure.[130]

These theories of harm provide an extensive scope for the sword function of article 102 TFEU to tackle unsustainable conduct while still being related to competition. Consequently, this category does suffice considering the normative framework as it does allow for tackling unsustainable conduct by itself. The fact that these theories of harm have at least some competition makes it more likely that Courts and authorities are willing to adopt such theories. As such, this step is in line with the arguments by Kingson and Nowag, as there is still a link to competition. As mentioned before, Kingston has argued that there needs to be a sufficient link to competition as derived from a contextual reading of the chapter on competition in the TFEU. Chapter One Title VII of the Treaty is called "Rules on competition". Thus, Kingston argues, it would not be in line with the intentions of the legislator to have no link to competition in the assessment of article 102 TFEU.[131] Furthermore, as argued by Nowag, classifying unsustainable conduct as abusive in itself may

[128] Holmes (n 4) 387; Holmes and Meagher (n 126) 66.

[129] Iacovides and Vrettos, 'Radical for Whom?' (n 4) 10.

[130] ibid.

[131] Kingston (n 64) 309–310; Inderst and Thomas (n 96) 52.

raise issues regarding the division of powers. For instance, preventing pollution is a matter for environmental legislation. Tackling this issue through competition law would circumvent the division of power envisioned by the legislator.[132]

Regardless, the next section will explore exactly what Kingston and Nowag argued against. It will set out the possibilities of using article 102 TFEU to tackle conduct that has no, or an irrelevant, link to competition and establish what theories of harm fitting this step of the staircase could look like.

4.2.2.4 – Sustainability-based theories of harm (citizen welfare without a link to competition)

The fourth and last step of the devised staircase framework looks at what type of theories of harm could be devised for article 102 TFEU to tackle unsustainable conduct under the citizen welfare standard even if there is no, or an irrelevant, link to competition.

This step of the staircase is least likely to be adopted in practice. Not only because of the arguments put forward by Kingston and Nowag regarding the intention of the legislator and the division of power, but also because of the practical problems associated with this stance. When does conduct harm citizens enough? In other words, what is the appropriate test and threshold? What is the limit on the scope of the conduct? Can it punish any conduct by dominant undertakings that negatively affects citizens? These problems are significant, but it is not within the scope of this thesis to tackle all of them.

Nevertheless, Iacovides and Vrettos have made the argument that, in these circumstances, article 102 TFEU can and should be used as a sword to tackle unsustainable conduct. They mention a few examples of conduct that may be attacked by article 102 TFEU:

- Bribery

[132] Nowag (n 4) 142.

- Extortion
- Human rights violations
- Pollution
- Destruction of habitats and livelihoods
- Offering exploitative salaries and working conditions[133]

A potential counterargument to classifying these examples as having no link to competition is that these types of conduct could lead to foreclosure. For instance, bribery may foreclose competitors if an undertaking bribes a regulator to institute a license requirement on a certain market. Furthermore, any of these types of conduct could violate the level playing field principle if the competitors do not engage in such conduct. Nevertheless, the link to competition regarding these types of conduct is very thin. Furthermore, even if there is a link to competition, this step of the staircase suggests attacking this conduct not because they have a link to competition but regardless of whether they have a link to competition. In this sense, this step of the staircase suggests using the sword function of article 102 TFEU against any conduct which is unsustainable. This means, considering the definition of unsustainable conduct set out in the introduction, that article 102 TFEU would attack any conduct which contributes to the transgression of the Planetary Boundaries and/or contravenes the SDGs, or in other words, any action that pushes the world towards a more unsafe and unjust space.[134]

The question then arises whether article 102 TFEU should be used as a sword to attack such conduct. Why not use regulatory measures, as they are typically used for these types of conduct? A potential response to this is that regulatory measures have not proven effective up until now. The world is still approaching the extinction of humanity and regulatory

[133] Iacovides and Vrettos, 'Radical for Whom?' (n 4) 10.

[134] ibid 4.

measures have up until now failed to achieve the aims of reducing CO2 emissions in line with the Paris Agreement.[135] As explained in the normative framework, article 102 TFEU provides an effective and strong tool to alter business conduct. Business conduct plays a significant role in furthering the climate crisis, meaning that it makes sense to use a tool such as article 102 TFEU which directly attacks business conduct.[136] When regulation becomes more effective than the use of article 102 TFEU, it is to be preferred but up until now this is not the case. A recent example is the Professor Carolyn Roberts ("PCR") v Anglian Water Services ("AWS") case before the Competition Appeals Tribunal ("CAT"). PCR alleges that AWS convinced the water regulatory body ("Ofwat") to allow AWS to charge customers higher prices for sewage services. AWS has reported a lower number of pollution incidents than really happened to be allowed to charge higher prices. This shows that regulatory measures aiming to achieve sustainable outcomes by, for instance, incentivizing less pollution incidents causing environmental harm through allowing higher prices, do not work as intended. In the end, PCR needs to rely on the UK's version of article 102 TFEU to fix this issue.[137]

Lastly, one may ask what justifies the usage of competition law tools when there is no link to competition anymore. In this regard, this thesis aligns itself with the argument made by Gerbrandy and Phoa. They have made the argument that the usage of competition tools against harms which are traditionally not within the competition sphere can be justified based on notion that these harms flow from business conduct based on corporate power.[138]

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[135] Calvin and others (n 1).

[136] 'New Report Shows Just 100 Companies Are Source of over 70% of Emissions - CDP' (n 26).

[137] *Professor Carolyn Roberts v Anglian Water Services* [2023] CAT 1631/7/7/23.

[138] Anna Gerbrandy and Pauline Phoa, 'The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-Power', *Wealth and Power* (Routledge 2022) 178–181.

Their argument is in line with the idea that competition law should be used to counter the negative effects from corporate power, even effects which are not narrowly market-based such as their effects on freedom and democracy as put forward by Brandeis.[139]

4.3 – Interim conclusion

As shown, the impossibility of fighting unsustainable conduct using the sword function of article 102 TFEU under the consumer welfare standard does not suffice considering the normative framework set out in chapter two. This means that alternative options must be explored. For this purpose, the staircase framework was devised which sets out four steps that increasingly incorporate sustainability into the sword function of article 102 TFEU.

The first step of the staircase framework looked at traditional theories of harm which may have secondary beneficial sustainability effects. This step of the staircase framework is already currently at play, and the theories of harm placed into this step are likely to be accepted by the Courts if they came before them. This step of the staircase framework is based on the consumer welfare standard and has few hurdles to being implemented. However, it is not in line with the normative framework set out in chapter two. This is because this step and theories of harm do not allow for the sword function of article 102 TFEU to attack unsustainable conduct by itself. This step primarily bases itself on the competition effects, not the secondary sustainability effects.

The second step of the staircase framework looked at sustainability-based theories of harm under the consumer welfare standard. This step of the staircase framework reiterated what is mentioned in chapter three. Namely, that there are two theories of harm that may fit this

[139] 'Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-Examined' [1956] Yale Law Journal 73 <https://openyls.law.yale.edu/handle/20.500.13051/14277> accessed 19 May 2024.

step: the inverse excessive pricing theory based on viewing sustainability as quality and the infringement of environmental legislation based on Meta/Bundeskartellamt and consumers caring about such an infringement. As mentioned prior, this step provides limited scope for attacking unsustainable conduct by itself and thus does not suffice in light of the normative framework.

The third step of the staircase framework explored sustainability-based theories of harm under the citizen welfare standard which still have a link to competition. Much of the academic literature on article 102 TFEU and sustainability is based on this step. Consequently, many theories of harm were placed into this step as well. The fact that this step does require a link to competition means that it evades the critique of Kingston and Nowag regarding the intention of the legislator and the division of powers. This step does provide a reasonable scope for attacking unsustainable conduct by itself using the sword function of article 102 TFEU.

The fourth and last step of the staircase framework analyzed sustainability-based theories of harm using the citizen welfare standard that do not necessarily (need to) have a link to competition. Some theories of harm suggested by Iacovides and Vrettos can be placed in this step, such as bribery and extortion. However, there are multiple hurdles regarding this step. First, and most importantly, what legitimizes the use of article 102 TFEU if there is no link to competition? This thesis argues that this legitimization stems from the fact that the conduct attacked stems from corporate power. Aside from this point, multiple practical problems arise like the determination of the scope and thresholds for article 102 TFEU to apply. Importantly, one may wonder why it would not be preferred to use regulation over this broad scope of article 102 TFEU. This thesis argues that regulation may indeed be better placed to tackle unsustainable conduct. However, regulation has up until now proven

ineffective, which means that competition law must step in to attain the outcome necessary, preventing the climate catastrophe. When regulation becomes more effective at attaining this goal, the usage of article 102 TFEU in this way becomes redundant.

All these steps have benefits and drawbacks. However, based on the normative framework, only the two last steps using the citizen welfare standard suffice. Both have their benefits and drawbacks. Step three allows for less conduct to be attacked, meaning a less sustainable outcome will present itself but it has less practical and theoretical hurdles to apply. Conversely, step four does provide extensive scope to prevent the climate crisis. However, many practical and theoretical hurdles are associated with this step.

I believe step four is the most fitting. The climate catastrophe is such a significant crisis that the EU must do everything it can to prevent it from happening. Using article 102 TFEU as a sword against unsustainable conduct can provide a significant avenue to attain this outcome. Consequently, the step that provides the broadest scope to attain this outcome must be preferred. Although it is associated with many practical hurdles, it is in the interest of all to try and figure these problems out rather than shy away from them and potentially not prevent the end of humanity.

Chapter 5 - Conclusion

While the climate catastrophe is still fast approaching, the EU must step up and play its part in preventing it from happening. As discussed, one avenue relatively unexplored up until now is article 102 TFEU. This thesis aimed to set out if article 102 TFEU can and should be used as a sword to attack unsustainable conduct and if so, how. To do so, a normative framework was set out, illustrating that the climate catastrophe itself provides a significant moral imperative to do everything possible to prevent the climate catastrophe from happening, including using article 102 TFEU as a sword against unsustainable conduct. However, this moral imperative is limited by the goals of competition law. The normative framework thus reviewed the consumer welfare standard, an empirical study into the goals of competition law in practice, and if there are legal grounds for arguing that sustainability should be a goal of competition law. After finding that there is a legal ground for arguing that sustainability should be a goal of competition law, an alternative standard, the citizen welfare standard, was suggested, interpreting it considering the finding of Ioannis Lianos.

After taking the stance that article 102 TFEU should be used as a sword against unsustainable conduct itself, chapter three analyzed if this is currently possible under the consumer welfare standard. This descriptive chapter first sets out the general legal framework of article 102 TFEU, including both the sword and the shield functions based on the abuse requirement and the objective justification. Furthermore, the potential role of the Meta/Bundeskartellamt case was explored, as this may provide an avenue for including sustainability considerations into the sword function. Then, the integration of sustainability into these two functions was examined. First, this analysis showed that integration into the shield function is theoretically possible and done in practice by using sustainability arguments as an objective justification for *prima facie* abusive conduct. Second, this analysis showed that the integration of

sustainability into the sword function is largely impossible. Two theories of harm are explored which provide limited scope for the integration of sustainability. The first theory is an infringement of environmental legislation based on the Meta/Bundeskartellamt if consumers care about such infringement. The second theory is an inverse excessive pricing theory of harm based on interpreting sustainability as a marker of quality. This chapter concludes that there is limited scope for integrating sustainability into the sword function of article 102 TFEU.

The last chapter, chapter four, reflects on the outcome of the descriptive analysis in chapter three considering the normative framework set out in chapter two. It concludes that the outcome of the descriptive analysis does not suffice considering the normative framework. The outcome being that there is limited scope under the consumer welfare standard to integrate sustainability into the sword function of article 102 TFEU is not in line with the point of view that this should be the case based on the normative framework. After having established this normative reflection on the descriptive chapter, an alternative framework is established. This new framework, the staircase framework, sets out categories in the form of steps, which have various levels of integrating sustainability into the sword function of article 102 TFEU. Four steps have been established. Each of these steps are explored based on their differing standards, theories of harm, (primary and secondary) effects that they are attacking, the extent of attacking unsustainable conduct itself, alignment with the normative framework and their associated hurdles. This framework allows for further exploration of which step of the staircase would be most fitting to adopt in practice allowing for a baseline for further discussion and research into the topic of using the sword function of article 102 TFEU to attack unsustainable conduct. Furthermore, it is argued that the fourth step, using

the citizen welfare standard without a link to competition, should be preferred based on the urgency of the climate crisis.

To summarize, this thesis has shown that there is a moral imperative to use the sword function of article 102 TFEU to attack unsustainable conduct. However, contrary to this conviction, this thesis has shown that under the consumer welfare standard this is not currently possible. After having established that this is not in line with the moral conviction, this thesis explores multiple alternative scenarios and their characteristics, allowing for further discussion and research into the usage of the sword function of article 102 TFEU to combat unsustainable conduct.

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