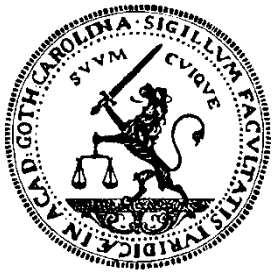

F A C U L T Y O F L A W

L U N D U N I V E R S I T Y

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Sustainability Dimension in the application of Article 102 TFEU: A Lack of Will or 'Wonderland'?

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Gunel, with a grateful memory

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Summary

The consideration of sustainability issues in different fields of law is increasing due to the urgent call for climate change after the year 2015, with the adoption of widely known sustainable development goals. As a consequence of the European Green Deal, EU competition law has started to play its role for the sustainable future. The possible application of Article 102 TFEU as a 'sword' to attack unsustainable business practices is one of the discussion topics in this field despite the underestimation at practical and academic levels. This thesis mainly aims to analyse the genuine possibilities of the application of Article 102 TFEU to tackle unsustainable conduct. According to the given hypothesis, the legal basis as well as the goals of competition law are considered to some extent for the assessment of the mentioned application of Article 102. To emphasize the significance related to the applicability of Article 102 towards unsustainable conduct, and subsequent required assessments, the relationship between dominance and unsustainable business practices are scrutinized by using the results of exercise conducted by researchers in this field. For the substantive assessment concerning unsustainable business practices, the concept of abuse and other major concepts such as competition on the merits, more economic approach and others that could be essential for the examination, are discussed and assessed in terms of their utilization for the evaluation of abuse. Consequently, two available directions are considered for the possible assessment of unsustainable conduct as abuses under Article 102 TFEU. Relevantly, the last chapter of the discussion part of the thesis contains information about the positions of different competition authorities towards the possible use of Article 102 for sustainability considerations by comparing various perspectives and initiatives between the application of Article 101 and Article 102. Additionally, that chapter defines the current challenge by evaluating the mentioned perspectives from competition authorities and gives some suggestions for the initial steps towards the consideration of Article 102 as a 'sword' for unsustainable business practices.

As a final result of the research, it turns out that there is a real possibility for applying Article 102 TFEU to attack unsustainable business practices. However, it is emphasized that this potential application requires a deep and broad understanding of competition law and policy, including the goals of competition law, as well as the improvements in the economic, and legal tests used for the assessment of abusive conduct are necessary. It seems that more comprehensive research and willingness towards this topic can be a solution to the many problems in future.

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List of Abbreviations

ACM	Netherlands Authority for Consumers & Markets
AEC	as efficient competitor
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DG Comp	Directorate - General for Competition
EAGCP	Economic Advisory Group on Competition Policy
EC or Commission	European Commission
ECJ	European Court of Justice
EGD	European Green Deal
EJAtlas	Environmental Justice Atlas
EUMR	European Union Merger Regulation
GHGs	greenhouse gas emissions
OECD	Organization for Economic Co-operation and Development
SDGs	sustainable development goals
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

1. Introduction

1.1. Background

"*We must globally warm our hearts,*
And change the climate of our souls."[1]

Precisely, these days, it is not even questionable what the biggest problem[2] is of mankind compared to the last few centuries. From a positive perspective (if any), at least, we 'defined' the problem that needed to be solved.

Notwithstanding the fact that climate change is a problem known clearly since last century[3], more comprehensive actions for the mitigation and adaptation of climate change have only begun after the 2030 Agenda for Sustainable Development[4] and the Paris Agreement[5]. Accordingly, the European Union adopted an ambitious 'European Green Deal'[6] package with full of measures serving the purpose of turning Europe into the world`s first climate-neutral continent. A revival in all fields of EU law, including EU Competition law towards integration of sustainability has commenced with the adoption of EGD and strengthened after the entry into force of the European Climate Law[7].

In the field of EU Competition law and policy, it was stated that although the competition law is not "in the lead" for the protection of the environment and there are other regulations to do it, it can be used to complement those regulations by helping "to keep the pressure on business to use scarce resources efficiently and to innovate".[8] This statement has probably strengthened the ongoing debate on sustainability considerations in competition law. The current debate comprises discussions about the role of competition rules in sustainability and the integration of sustainability considerations to competition law and policy. The most discussed part of the debate is related to the primary provisions of competition law reflected in the TFEU[9]. The problem is that the potential role of Article 102 for tackling sustainability issues is underestimated with a narrow view both in debates and practice. Connectedly, the statement mentioned above might be one of the reasons for the formation of the current protective view of DG Comp when it comes to the integration of sustainability into competition enforcement. The first step in the sustainability direction was the opening of a public Call for Contributions by DG Comp on the "Competition Policy supporting the Green Deal" in 2020. Although the Call asked for contributions related to sustainability for Article 101, State aid and merger

[1] A song by Prince EA, 'Dear Future Generations: Sorry', (2015)
All links in the footnotes were last accessed 25 May 2023.
[2] United Nations, Global Issues, < https://www.un.org/en/global-issues>
[3] NASA, 'How do we know climate change is real?', Global Climate Change, Vital Signs of the Planet, <https://climate.nasa.gov/evidence/>
[4] United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development', (2015), United Nations Sustainable Development Summit, <https://sdgs.un.org/2030agenda>
[5] United Nations, Paris Agreement, (2015), <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>
[6] European Commission, 'European Green Deal', (2019)
<https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en>
[7] The European Parliament and the Council of the European Union, 'European Climate Law', (2021)
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R1119>
[8] European Commission, Competition Policy
<https://competition-policy.ec.europa.eu/sectors/energy-environment/european-green-deal_en>
[9] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01

control, that was not the case for Article 102. Even though that Call was published three years ago, there is still no improvement considering that DG Comp remains in the same position related to the role of Article 102 TFEU.
However, some academics do not share the same view with the EU competition authority and argue that there is a genuine possibility to use Article 102 TFEU for sustainability concerns. In the academic sphere, a few options are suggested for the consideration of sustainability issues within the application of Article 102. It is assumed that two of those suggestions are of crucial importance. The first one contains the idea about the use of Article 102 as a 'sword'[10] or 'preventative integration'[11] to attack unsustainable business practices while the second one considers sustainability as a 'shield'[12] or 'supportive integration[13] in the meaning of 'objective justification and defence' against the application of Article 102. The observation in the literature shows that the suggested 'sword' function of Article 102 is less analysed compared to the 'shield' function, and therefore, this work will be organised around the discussions of the 'sword' function of Article 102.

Considering the utmost importance of finding all possible solutions addressing the integration of sustainability and the huge gap that existed in both academic and practical spheres related to the topic taken, the examination of possibilities for the application of Article 102 as a 'sword' to deal with unsustainable business practices has a particular significance.

1.2. Purpose and Research Question

The primary purpose of this thesis is to find out potential possibilities, from the legislative and practical side, for the application of Article 102 TFEU to catch unsustainable business practices. Consequently, the thesis further aims to identify potential gaps and obstacles in EU legislation and enforcement systems that could prevent the integration of sustainability considerations into the competition policy. In addition, the thesis aims to contribute to academic debates on the chosen topic on one hand while aiming at the increase of engagement in sustainability issues in relation to competition law and policy.

In order to achieve the purpose of this thesis, the main research question and sub-questions are formulated as follows:

- Are there any possibilities for addressing Article 102 TFEU as a 'sword' to capture unsustainable business practices?

  - What is the legal basis in general for the consideration of sustainability concerns in EU Competition law?

  - Is there any connection between unsustainable business practices and the dominant position of undertakings?

[10] Simon Holmes, "Climate Change, Sustainability and Competition Law" (2020) 8(2) Journal of Antitrust Enforcement 354-405 <https://doi.org/10.1093/jaenfo/jnaa006>
[11] Julian Nowag, Environmental Integration in Competition and Free Market Laws (OUP 2016)
[12] Ibid (10) p. 384
[13] Ibid (11) p

- Can unsustainable business practices be assessed as abuses of dominant position? Which instruments can be used for the assessment? Which directions can be used for the evaluation of unsustainable business practices as abuses?

- Is there any connection between the perspectives of competition authorities and non-application of Article 102 so far to unsustainable conduct? A lack of will or 'Wonderland'?

1.3. Methodology

For the analysis of research questions, different research methods are used in this thesis. One of the methods adopted for the research is the European legal method which is used for the examination of EU legislation in the second chapter that contains the EU legal framework. Another method used in the thesis is the descriptive legal research method which helps to describe the legal concepts thoroughly for the purpose of subsequent interpretation. Additionally, the interpretative legal research method is addressed to interpret the materials, including primary and secondary legislation as well as other resources. Finally, the comparative research method is mainly used for the last chapter of this thesis as well as for the third chapter to some extent.

1.4. Delimitations

As stated in the section on purpose and research question, the purpose of this thesis is directly related to the sustainability considerations within the application of Article 102 TFEU as a 'sword'. It means that this research does not contain any legal analysis towards other competition rules such as Article 101 and merger control. However, it should be noted that this thesis also excludes the examination of the so-called 'shield' function of Article 102 TFEU. Addressing those excluded rules from the scope of this thesis is only possible for purpose of the further analysis and comparison of the 'sword' function under Article 102.

1.5. Hypothesis

The hypothesis for this thesis is formulated as follows:

"*Unsustainable business practices can be caught under the 'sword' application of Article 102 TFEU on the basis of primary law through a deep and broad understanding of EU law and competition law concepts by improving methods and tests used for the assessment of abuse of dominant position.*"

1.6. Outline

The structure of this thesis is organized using different chapters, sections, and subsections. The first chapter as an introduction contains preliminary information for the subsequent chapters.

The second chapter is dedicated to the analysis of the legal framework with the purpose of finding relevant provisions which could allow the consideration of sustainability issues within the application of competition law. Additionally, the goals of EU competition law are briefly considered for the sake of general framework examination.

The third chapter aims to find out the relationship between dominance and unsustainable business practices. Before diving into the research part of this relationship, the concept of dominance and the meaning of unsustainable business practices are briefly discussed. Consequently, the possible connection between the dominant position of undertakings and unsustainable business practices is assessed.

The fourth chapter provides an analysis of the possibility of unsustainable business practices being qualified as abuses under Article 102. The concept of abuse and its major elements are reflected in earlier sections. By considering the concept analysis and major elements, including methods and tests, the examination for the possible application of Article 102 as a 'sword' towards unsustainable business practices is conducted.

The fifth chapter is about the current challenge for the consideration of Article 102 to attack unsustainable conduct. The examination of the perspectives of different competition authorities related to the chosen topic and conducting a comparison between positions and intentions for the application of main competition rules are described with examples. Consequently, after answering the question of "A lack of Will or 'Wonderland'?", some suggestions regarding the examined topic are reflected in this chapter.

The last chapter reflects a conclusion to all previous chapters and contains the result of the whole research.

2. Legal basis for sustainability considerations

2.1. Relevant rules of EU primary law

As in all matters, the analysis of the legal framework is necessary for the consideration of sustainability in EU Competition law as well. There is a large-scale ongoing discussion about this topic, in which almost every one of them logically begins with Article 11 TFEU and Article 37 Charter and continues with the complex evaluation of them together with Articles 7, 9, and 191 TFEU. Under Article 11 TFEU and Article 37 Charter, in order to promote sustainable development, the integration of environmental protection requirements into the EU policies and activities is a must, not a choice.[14] In the simplest route, although these articles should be enough even for those who are seeking exact wording in the legislation rather than relevant interpretation to consider sustainability concerns, there are still sceptic approaches to whether those articles can be used as a basis for the integration of environmental aspects to the EU Competition law or EU Competition law has the ability to capture sustainability considerations.[15] This paper does not aim to go deep down into the legal framework and theoretical possibilities since the apparent and comprehensive analysis regarding the possibility of environmental integration into EU Competition policy has been conducted by several scholars, including Julian Nowag[16], Simon Holmes[17] and others. However, it would be worth pointing out just a few matters which may be needed for the next chapters of this work.

The emergence of this paper is mainly based on the above-mentioned rules which are recognized enough as a legal basis. It may seem irrelevant for some to base Article 11 TFEU on the purpose of this work as the article only puts pressure on the integration of environmental protection requirements, but this paper aims to involve sustainability considerations as a whole[18], not only from environmental aspects. However, it is important to consider the true purpose of the article which is reflected as "promoting sustainable development". Additionally, this purpose confirms itself in research conducted by Julian Nowag about the intentions of Member States regarding the formulation of Article 11 TFEU.[19]

2.2. Sustainability as a goal of EU Competition law?

The goals of the EU Competition law, a highly contentious subject, are seen by some scholars as the alternative way for the integration of sustainability into the EU Competition law to soften the constraints like competence considering that the environment is an area of shared competence.

Honestly, it is not clear why competence is a problem unless the notion emerges that the environment is an exclusive competence area for the Member States. Contrarily, Article 191(2)

[14] Ibid (9) Article 11; Charter of Fundamental Rights of the European Union, Article 37, 2012/C 326/02
[15] Oles Andriychuk, 'The Concept of Sustainability in EU Competition Law: A Legal Realist Perspective' (2021) 23 YARS 11, Edith Loozen, Maarten Schinkel and Leonard Treuren, Giorgio Monti.
[16] Ibid (n 11)
[17] Ibid (n10)
[18] Depending on the different interpretations on the definition of sustainability, the view may change, but for the purposes of this work sustainability encapsulates economic, environmental, and social aspects.
[19] Julian Nowag, 'The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and its Intended Reach' (December 8, 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535273>

stipulates that the EU 'shall aim a high level of protection' regarding the environment. In this case, is it not possible for the EU to use its competence and integrate these matters into the EU Competition law as well to achieve 'a high level of protection'? It seems possible unless the EU Commission puts competition law requirements away and focuses only on cutting trees in the competition law cases (it is assumed that the second part is not going to happen).

Regarding the goals of EU Competition law, there is an idea that the integration requirement of Article 11 TFEU and Article 37 Charter does not mean that environmental protection should be a goal of competition law rather it should be respected in the same way as the "right of defence and other fundamental rights".[20] Those parts of primary EU Law just reflect the prohibition of exclusion of sustainability concerns for the sake of "purity of competition law", not the integration as the form of a 'goal'[21]. Regarding this, in *Austria v Commission* the CJEU held that anything that is examined and found to be in violation of EU environmental regulations cannot be deemed as compatible with the internal market considering that no EU Law has the capability to exclude EU rules on environmental protection.[22] Analogically, the conduct of undertakings could not be considered "compatible with the internal market" under the same reasoning with mentioned case law as applied to Articles 101 and 102, if it violated EU environmental law requirements and was determined to violate competition law.[23]

As a consequence of the analysis of EU primary law and the survey conducted by Iacovides and Stylianou about the goals of EU competition law reflected in the case law and decisional practice of nearly 60 years, Iacovides and Stylianou consider that environmental protection and other sustainability considerations should be pursued and integrated as the goals of EU competition law in comparison with Julian Nowag's idea about the same way of respect for the environmental protection with the "right of defence and other fundamental rights".[24] Does it really matter to form sustainability concerns as a goal of competition law or to respect them in other ways? It just depends on the way of thinking of relevant authorities on how to apply and integrate sustainability into competition policy. If it is assumed that there is no possibility to consider it as a part of competition analysis without being a goal, then the fastest way to solve the problem would be to see sustainability as a new goal of competition law. However, considering that this problem is not exceptional for only competition law and policy and Article 11 TFEU captures all union policies, it would be meaningful to respect sustainability at a union level for the sake of ending similar discussions in other areas and integrate it to the substantive stage of analysis in all areas. In any case, it seems just a matter of choice and priority at a simple glance of this author.

[20] Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview', (2022) 1 Nordic Journal of European Law, 149-165 <http://dx.doi.org/10.2139/ssrn.3484964>
[21] Ibid.
[22] Case C-594/18 P, *Austria v Commission,* EU:C:2020:742, para 45.
[23] 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) Journal of Antitrust Enforcement, 10(1), 32-62. <https://doi.org/10.1093/jaenfo/jnab010>
[24] Ibid.

3. Dominance and unsustainable conduct

3.1. Introduction

"Greed over need, the rule of gold above the golden rule"[25]

Considering that Article 102 TFEU can only be applicable if there is a dominant undertaking abusing its power, do we really need to discuss Article 102 TFEU and sustainability concerns on the same page? This question has crucial significance as someone may think it should take less attention since there are no hundreds of decisions based on Article 102 by competent authorities and judiciary.[26] However, it would be better to look into the essence rather than the quantity in these matters. This chapter aims to find whether there is any relationship between the dominant position of undertakings and their unsustainable conduct. With that purpose in mind, the concept of dominance and the meaning and scope of unsustainable business practices will be analysed as an initial step before digging into the analysis of the mentioned relationship. We will examine the bond (if any) between dominance and unsustainable conduct to see if there is a point to push the ongoing small-scale debate forward on the use of Article 102 to catch unsustainable practices.

3.2. The concept of dominance

Although dominance is one of the main elements of Article 102 TFEU, there is no definition of dominant position in the Treaty just like the other elements. As usual, the Court has played its part via case law by giving definition and clarification on the concept of dominance. In *United Brands*, the CJEU defined dominance as "a position of economic strength" which enables the undertaking to conduct independently from its competitors, customers, and consumers.[27] The CJEU has added the expression "an appreciable influence on the conditions under which that competition will develop"[28] to the definition of dominance in *Hoffmann-La Roche.* This appreciable influence may be evaluated as an indicator of substantial market power which is mainly equated to the dominant position.

At first sight, the definition seems as clear as seen like the word of "dominant" itself. However, the choice of words like customer, and consumer used for the definition in both mentioned cases gives the impression that the buyer side of the market has not been considered.[29] Fortunately, the General Court in *British Airways*[30] clearly expressed that to be in a dominant position is possible for purchasers just like the sellers and it does not matter which side of the market has the dominant position for the application of Article 102. This matter is worth

[25] Ibid (1)
[26] See 2023 Commission Policy Brief: there have been 27 Commission decisions and 32 court judgments based on Article 102 TFEU (exclusionary conduct) since 2008, <https://competition-policy.ec.europa.eu/system/files/202303/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf>
[27] Case 27/76, *United Brands v Commission*, Judgment of the Court of 14 February 1978, ECLI:EU:C:1978:22, para 65.
[28] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, Judgment of the Court of 13 February 1979, ECLI:EU:C:1979:36, para 39.
[29] R. Whish and D. Bailey, Competition Law (10th edition), (2021) Oxford University Press.
[30] Case T-219/99, *British Airways plc v Commission*, Judgment of the Court of First Instance (First Chamber) of 17 December 2003, EU:T:2003:343, para 101.

mentioning because we will see in the next chapter that one of the recent emerging examples that has the potential to be considered unsustainable conduct is related to the purchaser's power in the market. Furthermore, it seems weird that in most cases, a major part of academia and the EU Commission does not refer to the 'unified' definition of dominant position which also includes the 'buyer side'. Perhaps, this negligence can be one of the reasons for today`s more attention to exclusionary abuse rather than exploitative one. It can be seen as unimportant but the author of this work believes that everything begins in mind.

It is apparently known from the established case law and Guidance on the Commission's enforcement priorities[31] that the test for the finding of dominant position starts with the definition of market and defining the position of undertaking in that relevant market. It is not intended for this paper to go deep down about the definition of the market. However, since we are going to examine the relationship between dominance and unsustainable business practices, it would be interesting to know whether the sustainability factors can have any impact on the definition of the market and finally on the position of the undertaking in the market. S. Kingston has conducted a well-detailed analysis of this matter considering the integration of environmental factors into the market definition but not the whole sustainability factors. According to her analysis, it is suggested that environmental factors should be considered at the substantive stage since they do not provide more favour for environmental protection than existing methods.[32] Personally, the precise meaning of "more favour" is not clear to the author despite the example provided about non-interchangeability.[33] In the author`s opinion, the consideration of sustainability factors can change the result from the perspective of the finding of dominance which is the beginning of the potential application of Article 102 and without it, there will be no substantive stage to take into account the mentioned factors. In addition, it has been stated that environmental protection does not have an impact on substitutability which is the main element for market analysis.[34] From this aspect, it would be better to keep in view the fast-changing world and preferences considering that we have more environmentally sensitive people today than 10 years ago. To conclude, it would be beneficial to measure and consider possible sustainability factors using relevant expert knowledge to step into strongly for these matters.

3.3. Unsustainable business practices

3.3.1. The meaning of unsustainable conduct in the context of sustainability

To understand the essence of unsustainable business practices, it is necessary to take a closer look at the definition of sustainability since it is the exact opposite of unsustainability. The initial idea towards sustainability had been expressed in an article written by Garret Hardin, although there was no reflection of sustainability as a word in that text.[35] Although after this article was published, few large-scale conferences were organized at an international level,

[31] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02

[32] Suzanne Kingston, 'Greening EU Competition Law and Policy', (2011) Cambridge University Press, p. 207, <https://doi-org.ludwig.lub.lu.se/10.1017/CBO9780511758522>

[33] Ibid.

[34] Ibid (n 11) p.67.

[35] Garrett Hardin, 'The Tragedy of the Commons', Science 162, no. 3859 (1968): 1243-1248 <https://doi.org/10.2307/1724745>

there was no comprehensive definition of sustainability till 1987. In Brundtland Report, sustainability was described as a development which 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[36] This definition combined two main concepts "the concept of needs" and "the idea of limitations" which could be enough to consider in all directions such as environmental, social, and economic development[37] to achieve more sustainability decades ago. However, considering that we have already crossed that line to guarantee the needs of future generations, even for us, it seems that we need to add a 'concept' (if any in this world) to reverse things to their sustainable way. Since it does not seem possible in near future, we can move forward with the existing concept which surrounds three aspects of development in itself: economic, environmental, and social.[38]

Sustainable development depends on these abovementioned aspects since all three areas are connected and have the ability to impact each other. Although the foundation of this idea is related to the Brundtland report, today`s increasing research on this sphere serves to establish a more comprehensive definition and adjust it to the relevant areas. For the existing generation of the 21st century which is mostly not aware of the Brundtland Report, sustainable development is associated with the UN Sustainable Development Goals.[39] From this perspective, the utilization of the "Doughnut Framework"[40], which unifies 'planetary boundaries'[41] with UN SDGs, by M. Iacovides and C. Vrettos has been useful in order to define "unsustainable practices".[42] Under that definition and contrary to the definition of sustainability, unsustainability is linked to any conduct that leads to the violation of planetary boundaries and/or fails to comply with the SDGs by moving the world closer to becoming life-threatening and unfair.[43]

3.3.2. Examples concerning unsustainable business practices

Depending on the different adjusted definitions of "unsustainability", the existing lists of practices at issue can be different at some point but they are mainly the same in essence in light of the sustainability concerns. There are unsustainable business models which have been categorized per sector such as energy supply, transportation, construction, technology, etc and involve main unsustainable practices, even possible sustainable business responses within those sectors.[44] It would be useful to understand the very essence of unsustainable practices,

[36] G Brundtland, 'Report of the World Commission on Environment and Development: Our Common Future', Annex to UN document A/42/427 - Development and International Co-operation: Environment (4 August 1987), p. 24 and 54–57, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>
[37] Ibid.
[38] OECD, Background Note by Julian Nowag, 'Sustainability & Competition law and Policy', DAF/COMP(2020)3 <https://one.oecd.org/document/DAF/COMP(2020)3/En/pdf>
[39] UN General Assembly Resolution, "Transforming our world: the 2030 Agenda for Sustainable Development" UN document A/RES/70/1 (21 October 2015)
[40] Kate Raworth, Doughnut Economics, <https://doughnuteconomics.org/about-doughnut-economics>
[41] Will Steffen and others, "Planetary boundaries: Guiding changing planet" (2015) 347 Science 6223
[42] Marios Iacovides and Christos Vrettos, 'Radical for whom? Unsustainable Business Practices as abuses of dominance' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), (2021) Competition Law, Climate Change & Environmental Sustainability, Concurrences, Institute of Competition Law, <https://ssrn.com/abstract=3815630>
[43] Ibid. p.94
[44] Nancy M.P. Bocken and Samuel W. Short, 'Unsustainable business models – Recognising and resolving institutionalised social and environmental harm', (2021) Journal of Cleaner Production, Volume 312, 127828, <https://doi.org/10.1016/j.jclepro.2021.127828>

their impact and potential responses in order to use them for future research in this sphere like M.Iacovides and C.Vrettos did through the Environmental Justice Atlas. They found unsustainable practices such as human rights violations, labour law violations, discrimination, corruption, and environmental law violations which the dominant undertakings have been documented as engaging in. Although the impacts of those unsustainable practices might not be immediately apparent as having anything to do with competition law, it would be crucial to assess those impacts within the model of 'toxic competition' which must be the target for competition law.[45]

3.4. Relationship between dominance and unsustainable conduct

Keeping the concept of dominance and the essence of unsustainable conduct in mind, it is significant to analyse the relationship and mutual interaction between unsustainable business practices and the dominant position of undertakings. Undoubtedly, unsustainable conduct is not only connected with the dominant position, but it is today`s common feature for almost a major part of all enterprises existing in the world. It is not a new discovery that the main disaster for humanity, namely global warming, is the work of companies rather than individuals to a huge extent. Even with this perception in mind, it is mindblowing that only 100 fossil fuel companies in the world are liable for the 71% of GHG emissions emitted since 1988.[46] The author does not have any information on whether those companies have dominance in the relevant market or not, but it would be logical to think with the way that they may have a certain market power since the bigger the business volume, the bigger the impact. It is not by chance that the 2030 Agenda for Sustainable Development by establishing a separate goal (SDG 12) related to responsible production, emphasizes the necessity for companies to embrace more sustainable business practices.[47]

In any case, it is important to take into consideration the dominance element for the possible application of Article 102. In this matter, there is unique research conducted by M. Iacovides and C. Vrettos, which involved the undertakings that have already been identified as dominant by DG Comp with regard to the implementation of Article 102 TFEU. They found 86 distinct dominant undertakings through the practice of DG Comp and classified them per specific business sector. The most important point was to determine whether these identified undertakings have also featured somewhere regarding unsustainable business conduct. The EJAtlas which is the platform reflecting major data on socio-ecological disputes from all over the world, including the parties involved in each dispute, was used to continue the test to find the mentioned connection. The result was not surprising since a significant percentage of the companies (31%) was found to engage in unsustainable business practices and featured in a total of 176 cases. The researchers emphasized a few key outcomes from the exercise. Under their understanding of the outcome of the exercise, there was a significant overlap between environmental damage, corruption, and human and labour rights violations which supports the view that social and environmental sustainability are unbreakably linked. Furthermore, in the researcher`s opinion, the finding of 51 corruption cases and its overlap with 45 cases regarding

[45] Ibid (n 42), p.100
[46] Paul Griffin, 'The Carbon Majors Database – CDP Carbon Majors Report 2017' (*CDP*, July 2017) <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of emissions>
[47] Ibid (n 38).

human rights violations and overlap with 41 cases in violation of environmental principles depicted that competition law may still have the ability to play an important role not depending on the certain sector-specific regulations.[48] This is definitely a kind of research that proves the significance of competition law, especially the underestimated role of Article 102 in tackling unsustainable practices.

It is undeniable that the wide prevalence of unsustainable practices is also linked to the policy choices and gaps that exist in the regulation at the legislative and executive levels. In the time when most policymakers are not ambitious to get rid of unsustainable business practices via strong policies, substantial market power is used to penetrate the political processes through different methods like lobbying. It seems that many large undertakings also have a significant role in determining domestic and global climate policy.[49] Research in 2019 revealed that five of the abovementioned 100 companies which were responsible for 71% of GHG emissions, have spent at least 251 million euros lobbying the EU regarding the decision-making process in the energy sector.[50] There are several examples regarding the political influence of undertakings by using their market position.[51] As a result, it is crystal clear that market power in the hands of undertakings can have the effect of a "gun" for the policies we hope to be adopted. In fact, it is a matter of question in itself who is holding the "gun": undertakings or policymakers?

3.5. Conclusion

The facts and results from the relevant research on the respective parts listed above illustrate that there is a robust connection between unsustainable business practices and dominance which in turn shows that this discussion is not a waste of time considering that dominant undertakings have negatively an undeniable role in terms of unsustainability. It is worth noting that the analysis of the concept of dominance shows that there may be room for the consideration of sustainability concerns even in the finding process of the dominant position, not only at the substantive stage. The definition of sustainability and the meaning of unsustainable business practices help to analyse and comprehend the link with the dominance element. Consequently, considering the concept of dominance and the essence of unsustainable business practices together with the results obtained from M. Iacovides and C. Vrettos's research gives a strong basis for the claims and subsequent research on the relationship between unsustainable conduct and the dominant position of undertakings.

[48] Ibid (n 42)
[49] Ibid (n 23)
[50] Corporate Europe Observatory, 'Big Oil and Gas spent over 250 Million Euros Lobbying the EU' (23 October 2019), <https://corporateeurope.org/en/2019/10/big-oil-and-gas-spent-over-250-million-euros-lobbying-eu>
[51] Jennifer Clapp, 'Mega-Mergers on the Menu: Corporate Concentration and the Politics of Sustainability in the Global Food System' (2018) 18(6) Global Environmental Politics 12; Pat Mooney, Too big to feed: Exploring the impacts of mega-mergers, consolidation and concentration of power in the agri-food sector Report of the International Panel of Experts on Sustainable Food Systems (IPES-Food 2017)

4. Abuse of dominant position: Article 102 TFEU as a 'sword'

4.1. Introduction

The application of Article 102 TFEU requires the abuse of dominant position by the undertaking irrespective of whether it is used to attack unsustainable business practices or 'traditional' types of abusive unilateral conduct. It is known that holding a dominant position in the market is not prohibited itself[52], what is considered illegal is the abusive conduct of the undertaking that has the dominance in the relevant market. This chapter aims to examine whether unsustainable business practices can be deemed abusive conduct under Article 102 TFEU. Since just a few people have answered this question thus far, it would be worthwhile to compile all the previous findings and arguments regarding this crucial issue and consider the potential application of Article 102 in this direction. In more detail, this chapter will commence the analysis regarding the concept of abuse. Accordingly, after the concept of abuse, the possibility of unsustainable practices to be considered abusive conduct will be examined. Finally, in case that possibility is affirmative, we will look into the different ways such as the integration of unsustainable conduct to the 'traditional' types of abuse or the establishment of new kinds of abuses based on unsustainable behaviour for the potential application of Article 102.

4.2. The concept of abuse

Since the abuse is one of the main elements for the application of Article 102 and as a stage is considered more proper to integrate sustainability considerations is essential to assess the concept briefly. This section serves to highlight key points which can be crucial for the assessment of abuse considering unsustainable business practices. As a fact, there is no definition of abusive conduct established in the TFEU. Although there are a lot of attempts in case law to define abuse thus far, considering the specialities in each case, there is no commonly accepted, single definition of abuse.[53] From this perspective, it is not surprising that although EU courts have had cases on the abuse of dominance since the 1970s, it is still asked from the courts in the referred questions for the preliminary ruling what is the abuse of dominance or what is the purpose in the concept of the abuse or how it should be assessed.[54]

Despite all the uncertainties, EU case law has a general concept and definition regarding the abuse. Pursuant to the judgment in *Hoffman-La Roche* which is one of the most visited cases for the definition of abuse, abuse is an 'objective concept' which is related to the unilateral "behaviour of an undertaking in a dominant position" that has the potential to change the market`s structure by using methods other than those which condition 'normal' competition and has the effect of restricting the degree of competition in the market. [55] It is interesting that although the Court had also analysed the abuse from the aspect of 'detriment to consumers` in

[52] Case 322/81**,** *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities***,** Judgment of the Court of 9 November 1983, ECLI:EU:C:1983:313
[53] Ibid (n 29) chapter 5
[54] Case C-377/20, *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato and Others*, Judgment of the Court (Fifth Chamber) of 12 May 2022**,** ECLI:EU:C:2022:379
[55] Ibid (n28) para 91

its foundational judgment Continental Can[56] on Article 102, had not considered it as a part of the definition in Hoffman La Roche. However, it has been added as a requirement to the definition in Post Denmark I[57] that the effect of hindering the maintenance of the competition should be detrimental to the consumers. As stated before, it seems that the unified definition will not be established in near future.

There are some key outcomes as well as questionable parts of the definition identified in the case law. The clear outcome is the objective concept which means that the abusive conduct is not related to the intention of undertaking in a dominant position, nevertheless, the intention can be considered in the process. Thus, the finding of an abuse does not require to prove the intent towards the results of conduct.[58] The questionable and the most important part is about the methods that are different from those used in 'normal' competition. What is the normal for whom? This expression, namely 'normal' competition, has been associated by the Court with the new concept of "competition on the merits" after the Deutsche Telecom case[59]. Considering that the competition on merits itself was not clear in essence, the Court, in *Post Denmark* and *AstraZeneca* judgements, has tried to clarify that "a dominant firm must not eliminate a competitor other than by methods that come within the scope of competition on the merits"[60], but "competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation"[61]. This part will be discussed further in the next sections.

It should be pointed out that the list of abusive behaviours is not exhaustive, and the list stipulated in Article 102 just contains different examples of abuse.[62]

4.3. Unsustainable business practices as abuses

4.3.1. Is it possible to assess unsustainable conduct as abuses or is it a 'rocket science'?

Answering this question requires a thorough analysis of the major points described in the concept of abuse as well as other issues, such as various approaches, instruments and tests used to determine if a behaviour qualifies as abuse.

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[56] C-6/72, *Europemballage Corporation and Continental Can Company v Commission***,** Judgment of the Court of 21 February 1973, ECLI:EU:C:1973:22

[57] Case C-209/10, *Post Danmark*, Judgment of the Court (Grand Chamber), 27 March 2012 EU:C:2012:172

[58] Case 549/10 P, *Tomra and Others v Commission*, Judgment of the Court (Third Chamber), 19 April 2012, ECLI:EU:C:2012:221, para 21

[59] Case C-280/08 P, *Deutsche Telekom v Commission*, Judgment of the Court (Second Chamber) of 14 October 2010, EU:C:2010:603.

[60] Case C-457/10 P, *AstraZeneca v Commission*, Judgment of the Court (First Chamber), 6 December 2012 EU:C:2012:770.

[61] Ibid (n 57)

[62] Ibid (n 60) para 26; Case C–333/94 P, *Tetra Pak v Commission*, Judgment of the Court (Fifth Chamber) of 14, ECLI:EU:C:1996:436, para 37; Case C–95/04 P *British Airways v Commission*, Judgment of the Court (Third Chamber) of 15 March 2007, ECLI:EU:C:2007:166, paras 57-58; Case T–201/04 *Microsoft v Commission*, Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, ECLI:EU:T:2007:289; Case T-814/17, *Lietuvos geležinkeliai AB v Commission*, EU:T:2020:545, para 85

To begin with, it is obviously seen from the case law and decisional practice that there is no limitation about what can be considered abuse. It is assessed with the consideration of special features of each case, and taking into account that time and business environment, even minds are fast changing, it is not surprising that new types of abuses are added to the targets of Article 102. [63] The conclusion on the CJEU`s interpretation of abuse, namely the non-exhaustive list and emerging new types of abuses, demonstrates that nothing prevents unsustainable business practices from being considered abuses of dominance under Article 102.[64] The intriguing fact is that although the case law is evolving to address new forms of abuse in light of shifting economic realities, it maintains consistency when it comes to how abuse of behaviour is assessed and uses largely the same standards and techniques. In other words, the form-based approach, uncertain and limited effect-based approach with the concept of competition on the merits (normal competition) which does not have precise clarification and the AEC test are still used in the same form without any improvement.

4.3.1.1.Form-based approach or effect-based approach?

If someone could take into consideration the definition of abuse established in the case law, the answer to this question would be simple. According to the definition, the conduct of a dominant undertaking is prohibited when its conduct potentially can change the market`s structure through methods that are considered unacceptable in 'normal' competition and have the effect of hindering the level of competition in the market.[65] Although this definition was formed in the last century and the significance of effect in the market had been clearly underlined, some parts of the case law show that the conflict based on form and effect has not yet ended. Even though the categorization of types of abuse as exclusionary and exploitative abuses are directly connected to the consequences of unilateral conduct, the questions about the choice of approaches are still on the table. It could be considered normal for the last century that the concept was new and there was a need for categorization which became a foundation for today`s abuses like predatory pricing, exclusivity rebates, etc. However, considering the 'effect' emphasised in the definition, it is clear that even that categorization has been formed based on the effects.

The question is whether there is any need to remain loyal to those specific types of abuse. Regardless there is a need or not, the judicial approach over the years was formed towards a form-based approach and for that reason, judicial authorities have been trying to put each disputed conduct in the boxes they have formed, namely accepted types of abuses. In comparison with the judicial authorities, the transition to the effect-based analysis on the EU Commission's approach has been seen earlier and more precisely.[66] The Commission has been evaluating the potential effects of abusive conduct in each case since reviewing its approach to Article 102.[67] However, the situation is different for the Court and its approach changes case

[63] Ibid (n 60); T-612/17, *Google and Alphabet v Commission (Google Shopping),* Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, ECLI:EU:T:2021:763

[64] Ibid (n 42) p. 97

[65] Ibid (n 28)

[66] M. Monti, "A Reformed Competition Policy: Achievements and Challenges for the Future" (Speech, Centre for European Reform, Brussels, 28 October 2004); cf. also M. Monti, "EU Competition Policy after May 2004" (Speech, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003).

[67] A.C. Witt, 'The More Economic Approach to EU Antitrust Law', (Oxford: Hart Publishing, 2016), p.288

by case depending on the type of undertaking`s conduct. For example, regarding the Court's approach to predatory pricing, it would be wrong to say that the Court merely decides on the anti-competitive nature of undertaking`s behaviour based on the form of conduct, but it is also apparent that the Court does not compel the enforcement agency to evaluate the actual consequences on the competition.[68] However, there are other types of conduct and accordingly, established case law in which the Court requires the assessment of likely effects on the competition to determine whether the conduct has a 'capacity' or 'liability' to influence the competition negatively.[69] The meaning of those effects in the understanding of the Court is associated with the exclusion of the competitors from the market, namely the foreclosure effect in case of exclusionary conduct.[70]

Although, in some cases such as Post Danmark II[71] and TeliaSonera[72], the Court has repeatedly declined to consider economic effects, in others like *Post Danmark I*[73] as well as *Intel*[74], considered the importance of effects analysis.[75] This is the point where we reached to talk about economic effects. But weren't they general effects on competition and consumers?

4.3.1.2. Does the effect-based approach mean a 'more economic approach'?

As seen from the case law and decisional practice, the effect-based approach is used to amount to a 'more economic approach'. After the publication of the Commission`s Guidance on the enforcement priorities in applying Article 102, the effect-based approach in light of economic effects began to be mainly considered in the application of Article 102 by the Commission.[76] Considering that the formalization of each approach is mainly connected with the goals of Competition law which remain as a topic of debate thus far, it is difficult to assess what is really meant by the effect-based approach. In fact, this uncertainty is not specific to the application of Article 102.

GlaxoSmithKline case is one of the examples of this situation where the General Court, for the first time, acknowledged that the protection of consumer welfare is the goal of EU competition policy.[77] The subsequent ECJ ruling on this case, however, made it obvious that protecting undistorted competition as a goal prevails to consumer welfare objective.[78] Finally, in *Intel*, as a recent approach regarding the application of Article 102, the ECJ gave priority to consumer welfare rather than less efficient competitors as a goal of competition policy.[79] This judgement

[68] Ibid.
[69] Joined cases C-468/06 to C-478/06, *GlaxoSmithKline*, Judgment of the Court (Grand Chamber) of 16 September 2008, ECLI:EU:C:2008:504 para 34; *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, Judgment of the Court of 6 March 1974, ECLI:EU:C:1974:18, para 25; ibid (n 27) para 183
[70] Ibid (n 67)
[71] Case C-23/14, *Post Danmark II A/S v Konkurrenceradet*, Judgment of the Court (Second Chamber) of 6 October 2015, EU:C:2015:651
[72]C-52/09, *Konkurrensverket v TeliaSonera Sverige*, Judgment of the Court (First Chamber) of 17 February 2011, EU:C:2011:83.
[73] Ibid (n 57).
[74] Case C-413/14 P, *Intel v Commission,* Judgment of the Court (Grand Chamber) of 6 September 2017, EU:C:2017:632.
[75] Carsen Koenig, 'Form, effects, or both? - The more economic approach and the European Commission's decision in Google Search', European Law Review 2019, 44(5), 680-693
[76] Ibid (n 31)
[77] Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission* (2006) ECLI:EU: T: 2006: 265, para 118
[78] Case C-501/06, *GlaxoSmithKline Services Unlimited v Commission* (2009) ECLI:EU: C: 2009: 610, para 63
[79] Ibid (n 74)

is seen as a shift in the goals of EU competition law and policy. [80] The mentioned case law and decisional practice show that the effect-based approach is considered as a 'more economic approach' within the understanding of judiciary as well as competition authorities.

Even well before the respective case law and Commission`s Guidance, this issue has been raised in the report by EAGCP that the examination of each case should not be based on how a specific business activity appears (for example, tying, etc.), it should instead evaluate the anti-competitive effects produced by unilateral conduct.[81] This report also emphasizes that an economic approach to the application of Article 102 aims the improvement of consumer welfare.[82] It appears that the meaning of the 'effect-based' approach has been directly associated with the 'more economic approach' even when the fight with the form-based approach started, and now the situation is still the same. Pursuant to the outcome obtained from this analysis, it is apparent that the main reason for this economic understanding of the 'effect-based' method is the goals of EU Competition law, especially consumer welfare. In that case, since the economic approach is characterized by consumer welfare as a goal and protection of the competition rather than a less efficient competitor, there is a need for a brief discussion on this.

As far as comprehended, from the perspective of a more economic approach, consumer welfare as a goal of EU competition law is considered crucial to be achieved through the application of Article 102. Therefore, if the issue arises about applying Article 102, it should meet the condition to serve consumer welfare. Apparently, the consideration of unsustainable business practices requires the examination of consumer welfare at least briefly. After being named the commissioner in charge of competition policy, Vice-President Almunia said in a speech that "Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions. Our objective is to ensure that consumers enjoy the benefits of competition, a wider choice of goods, of better quality and at lower prices."[83] After twelve years of this speech, Vice-President Vestager also pointed out in her speech that "competition policy remains a tool that serves the needs of European citizens – as consumers who benefit from lower prices, wider choice and higher quality; as workers who benefit from a vibrant labour market; and as business owners who benefit from innovative, diverse and reliable inputs, and a level playing field".[84] Beyond the speeches, the Commission`s Guidance emphasizes that 'in applying Article 102 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers".[85] Regarding the ECJ`s position in this matter, it would be worthwhile to emphasize that the Court was not willing to highlight the consumer welfare perspective thoroughly in its previous judgements. The ECJ has considered 'consumers` in its recent judgements such as *Google Shopping*[86] and *Servizio Elettrico Nazionale*[87] by highlighting "direct harm to consumers" and "benefits" to

[80] Pier Luigi Parco, Giorgio Monti, and Marco Botta, 'Economic Analysis in EU Competition Policy', (2021), <https://doi.org/10.4337/9781800370197.00009>
[81] Report by Economic Advisory Group on Competition Policy, 'An economic approach to Article 82, (2005).
[82] Ibid.
[83] Joaquín Almunia, 'Competition and consumers: the future of EU competition policy', Speech at European Competition Day, Madrid, 12 May 2010
[84] Executive VP Vestager, 'Check against delivery', European Innovation Council Summit, Speech (2021) <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_6290>
[85] Ibid (n 31)
[86] Ibid (n 63)
[87] Ibid (n 54)

consumers. The Court has not used "the consumer welfare", but 'price, choice, quality and innovation` as benefits to consumers have been underlined in both cases.

Since this paper does not aim to go deep down for the theoretical understanding of the meaning of consumer welfare, the description and examples of views provided above will be assessed to understand consumer welfare as a goal. The views from the competitive authorities as well as courts indicate that their understanding and assessment of consumer welfare are completely related to the economic aspects. It is not surprising when taking into account that consumer surplus is often used as a synonym for consumer welfare[88], which in itself 'surplus' is mainly an economic term. It also comes as no surprise that 'a more economic approach' is based on a more economic, that is to say, "narrowly construed"[89] understanding of consumer welfare.

Apparently, the possibility of using Article 102 to attack unsustainable practices with this economic approach and existing mindset does not seem proper. However, as stated on numerous occasions, even regarding consumer welfare, the competition policy should be an instrument to achieve the goals of EU Competition law in the first place. With this purpose, the exercise conducted by Iacovides and Stylianou demonstrates the seven principal goals of EU Competition law which include "welfare, efficiency, market structure, fairness, single market, freedom to compete, and competition process".[90] Pursuant to the mentioned research, all seven goals are reflected mainly everywhere related to competition, including literature, case law, and decisional practice, and none of them prevails above others[91], which means that all of them as a complex should be considered for the assessment of abuse. Furthermore, before underestimating that sustainability is not a goal of EU Competition law, it is important to take a look at whether the listed goals of EU Competition law would exist without sustainability considerations. Perhaps, it will be a rough example but today`s understanding and utilization of the notion of consumer welfare can be compared with a situation where the "dimethylmercury (a slow killer poison)" is injected into a 'consumer' but together with it, a lot of money, the choice of opportunities and quality products are given to use for the short period of her/his life left. The question would be in this situation what extent the assessment of abuse simply based on the economic methods is proper and ethical to the existing legal framework and "moral imperatives"[92]? As Simon Holmes said, "It would be awful enough if the law demanded it, however, it is morally reprehensible to use this approach when the law "does not" compel it".[93]

4.3.1.3. Competition on the merits

From the section about the concept of abuse, it is obvious that the initial concept of competition on the merits as 'normal competition' has emerged in *Hoffman La Roche*[94] where ECJ has defined abuse. Briefly, the definition of abuse requires that the dominant undertaking cannot

[88] Swend Alboek, 'Consumer Welfare in EU Competition Policy', p. 70
[89] Ibid (n 42) p.97
[90] Konstantinos Stylianou and Marios C Iacovides, 'Goals of EU Competition Law – A Comprehensive Empirical Investigation' (2020), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735795>
[91] Ibid (n 42)
[92] Ibid (n 10)
[93] Ibid (n 10), See also Sandeep Vaheesan, 'The Profound Nonsense of Consumer Welfare Antitrust' (2019) 64 The Antitrust Bulletin 479–94
[94] Ibid (n 28)

use methods which are not proper to the normal competition. Although 'normal competition' as a vague term[95] has not been clarified over the years, the Court has used 'normal competition' and 'competition on the merits' as synonymous in *Deutsche Telecom* without giving any clarification. Perhaps, the utilization of this concept regularly in case law, including the Deutsche Telecom case, was related to the general criticism about whether competition law protects the structure of competition or any competitors. It is not by chance that in the same case, the Court held that pricing practices which have an exclusionary effect on equally efficient actual or potential competitors are prohibited under Article 102.[96] This view is also reflected in the Commission`s Guidance and other case law examples. The outcome of this is that the dominant undertaking can use methods other than those used in competition on the merits unless the conduct causes the exclusion of as efficient as the competitor. The phrase "competition on the merits" indicates that a dominant firm can lawfully engage in activity that fits within the scope of that expression, even if the result of that conduct is to force competitors out of the market or to discourage their entry or expansion.[97] In paragraph 5 of its Guidance on Article 102 Enforcement Priorities, the Commission provided examples of what it regards as 'competition on the merits', including providing lower costs, higher quality, and a greater selection of novel and enhanced goods and services.[98] As far as understood from the case law and decisional practice, competition on the merits is the exact opposite of abuse, but the meaning is still not clear since it is not known what the 'methods' used in that definition comprise. The analysis of competition on the merits is necessary from the perspective of determining whether there is a place to consider unsustainable business practices as methods other than those that fall under the scope of competition on the merits.

4.3.1.3.1. AEC test and competitive advantage

Since the concept of competition on the merits is associated with the exception of the exclusion of as efficient as competitors from the process of competition, we will further discuss whether the as efficient as competitors test can be used for the application of Article 102 to tackle unsustainable practices. EU Commission in its Guidance Paper refers 'as efficient as competitor' test in relation to the price-based exclusionary conduct. In general, this test is based on the economic data relating to cost and sale prices.[99] However, is it possible to evaluate the efficiency of the competitor in terms of sustainability considerations? Can a competitor be considered as efficient if it engages in more sustainable practices and promotes sustainability? Although this question remains open under the current AEC assessment, it is almost definite that the current price-based test is unlikely to be useful for such kind of assessment.

On the other hand, since the Court emphasized that this test is not the only tool to assess the exclusionary abuse, is there any possibility of using the competitive advantage stemming from unsustainable practices against the dominant undertaking as an abuse of dominance? Considering that unsustainable business practices usually, at least for now, cost less than 'normal' or sustainable practices, can it be deemed as a competitive advantage for the dominant

[95] OECD, Policy Roundtables, Competition on the merits, 2005 <https://www.oecd.org/daf/competition/35911017.pdf>
[96] Ibid (n 59), para 171
[97] OECD, Policy Brief, 'What is competition on the merits?' 2006 <https://www.oecd.org/competition/mergers/37082099.pdf>
[98] Ibid (n 31)
[99] Ibid (n 31)

undertaking? An undertaking using unsustainable business practices gains a competitive edge, as a result of the lower expenses, over any rivals that do not use them, and even more so against rivals who actively pursue sustainable methods at the expense of profit.[100] As Iacovides and Vrettos demonstrated, "This is unfair competition, as the competitive advantage cannot truly be attributed to normal competition on the merits and there can be nothing" normal" and "meritorious" in toxic competition through bribery, extortion, human rights violations, destruction of habitats and livelihoods, offering exploitative salaries and working conditions".[101]

4.3.1.4. Theories of harm

Theories of harm are considered significant in today`s EU Competition policy, although there were not too many references to the concept of harm in the earlier case law. The Court, in its *Continental Can* judgment, had emphasized the expression of "detriment to consumers" a few times without giving any comprehensive explanation of the harm.[102] In general, 'consumer harm' as a concept has not been reflected in the case law until a few years ago, although beginning with the Deutsche Telecom case, the Court has given more attention to the 'detriment to the consumers'.[103] The most cited paragraph related to consumer harm in the case law since Continental Can judgement is about Article 102 of the TFEU encompasses both actions that directly affect consumers and those that indirectly harm consumers by having an adverse effect on competition. Negative effects, which stem from anti-competitive practices of dominant undertakings, on the 'normal' competition are assumed to have harm to consumers. However, it is highlighted that competition is not necessarily harmed by every exclusionary conduct[104], and the purpose of using the 'as efficient as competitor' test explains further that it is not illicit to exclude inefficient competitors from the market under Article 102. Consequently, for the finding of abusive conduct under Article 102, it is essential to assess the harm in general, which indeed is connected with effects on the competition and consumers.

Theories of harm are mainly in relation to the concept of an effect-based approach since the harm is the embodiment of the effects established as a result of abusive conduct. Although there is no exhaustive list of harm just like abuse, it is mainly evaluated in terms of economic perspective such as raising prices which are detrimental to the consumers and the competition. It means that applying Article 102 TFEU to unsustainable business practices also requires the consideration of theories of harm from a broader perspective rather than purely economic. The existing limits of conceptions of harm could potentially be stretched in different directions.[105] For particular cases, specific conceptions of harm will need to be constructed.[106] Last year, Commissioner Vestager made the following extremely clear recognition related to the theories of harm: "I would encourage all colleagues in the enforcement community to be willing to

[100] Ibid (n 23), See also T Lundgren, L Dam, and B Scholtens, 'Sustainable Business Practices – An Environmental Economics Perspective' in Arvidsson (n 77) 217–18
[101] Ibid (n 42) p.101
[102] Ibid (n 56)
[103] Ibid (n 59)
[104] Ibid (n 72) para 43
[105] Ibid (n 38)
[106] EU Commission, 'Intervention triggers and theories of harm, Expert Advice for the Impact Assessment of a New Competition Tool' (2020)

explore the boundaries, and not shy away from novel theories of harm".[107] From the analysis of settled case law which remains open to the new types of abuse[108], it also seems that there is nothing to prevent the consideration of new theories of harm in case law. Consequently, it is feasible to consider the theories of harm in terms of sustainability concerns with the proper analysis.Whatever damages society ends up harming the environment as well in this intricate web of life, and vice versa.[109] There must be some consideration of long-term sustainability implications in the underlying hypotheses of theories of harm to competition.[110]

The important decision on the German Facebook case (2019) analogically showed that it is possible to consider some breaches, which are connected to other fields of law such as data protection law, under the competition law. This case as a model has crucial significance for sustainability considerations. From this point of view, the existing criticism of the German Facebook case concerning the lack of detailed analysis on the part of theories of harm makes it essential to enhance the theories of harm in competition law as a whole, not only for sustainability considerations.

4.3.2. Potential directions for the assessment of unsustainable business conducts as abuses under Article 102

In the previous section, we discussed the possibility of the evaluation of unsustainable business conduct as abuses using the most prominent concepts known within the whole concept of abuse. One of the crucial steps towards this possibility, or more correctly its realization, is the choice of the way that should be taken to determine how unsustainable business conduct can be assessed as an abuse. Unsustainable practices and their effect can be demonstrated in two different ways to make them more pertinent to competition law and to be qualified as abuses under Article 102 TFEU.[111] It is apparent that while one of these potential ways is to integrate disputed conduct into the 'traditional' types of abuse, the other one is to establish new types of abuse based on unsustainable business practices since the list of abuse is not exhaustive. It would be meaningful to examine both directions to some extent.

4.3.2.1. Integration of unsustainable business conduct to existing types of abuse

It is not a secret that both case law and decisional practice of the EU Commission was sceptical about establishing new kind of abuses in its earlier times. Therefore, each disputed conduct was assessed in the box of traditional types of abuse over the years. Perhaps, it was relevant in most cases and will also be for unsustainable business practices. This direction of integration seems indeed faster than establishing new kinds of abuses since it has already been experienced thoroughly via established tests and other tools.[112] From this perspective, we will analyse one

[107] Speech by Executive Vice-President Vestager, European Competition day 2022, Prague, 10 October 2022
[108] Ibid (n 63), Case T-336/07, *Telefónica, SA and Telefónica de España, SA v European Commission*, ECLI:EU:T:2012:172
[109] Ibid (n 23)
[110]OECD (2020), Sustainability and Competition - Note by Greece, <https://one.oecd.org/document/DAF/COMP/WD(2020)64/en/pdf>
[111] Ibid (n 42)
[112] Ibid (n 42)

of the traditional types of abuses to see as an example if it is possible to address unsustainable conduct to the scope of that traditional type of abuse.

Predatory pricing which is one of the well-established types of abuse and comprises low selling prices, can be used to subsume unsustainable business practices to a certain extent by using new legal and economic tests. Traditionally, three-step rules have been acknowledged to determine whether the disputed conduct is abusive or not as a predation.[113] These rules assess the conduct from three aspects which are based on price-cost comparison. However, this test has been criticised at both an academic level and the EU Commission.[114] Although the Court did not refer to non-price predation in its *Akzo* judgement, the Commission Discuss paper emphasized it as a type of predation, which shows that even non-price conduct can be abusive as predation.[115] Analogically, this underline supports the idea stated by Simon Holmes that "often selling prices are unsustainably low because they do not reflect the "*true* costs of production", considering "negative externalities" which means offloading some production expenses towards society.[116] It is obvious that these unsustainable practices can be the reason for low prices, but if prices are not considered based on "true costs of production"[117] by taking into account the effects of unsustainable conduct, it is less likely to determine the conduct as abusive since the price may not be above average total costs that used for the traditional test. Consequently, it is also necessary to improve the methods and tests within the assessment of well-established types of abuse and to adapt them or to add new mechanisms for the consideration of sustainability concerns.

4.3.2.2. Establishing new types of abuses in relation to unsustainable business conduct

The analysis of predation as a well-established type of abuse gives reason to assume that the integration into 'old generation' abuses can be possible via relevant mechanisms. However, it is obvious that this will not be possible for each disputed conduct related to unsustainability. Therefore, we should not feel compelled to attempt to fit an unsustainable practice into a predefined category even though it does not fit easily.[118] From this perspective, it would be valuable to look into Article 102 itself to define whether it is suitable to address unsustainable business practices. Although the following types of abuses are reflected in the Treaty, they are not often experienced in case law and decisional practice. Therefore, they are examined under the new types of abuses from the sustainability perspective.

Article 102(a), which reflects all 'unfair purchase or selling prices or other unfair trading conditions' of a dominant undertaking as one of the examples of abuse, can be the first of the

[113] Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, Judgment of the Court (Fifth Chamber) of 3 July 1991ECLI:EU:C:1991:286
[114] 'A Three-Step Structured Rule of Reason to Assess Predation under Article 82', Discussion Paper, 12 dekabr 2005 <https://ec.europa.eu/dgs/competition/economist/pred_art82.pdf>
[115] Ibid
[116] 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 business practices as abuses of monopoly power', [2023] 44(2) E.C.L.R. 61-69
<https://uk-westlaw com.ludwig.lub.lu.se/Document/I219ECC3093A711ED96E8B3EEAAB079FF/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default)>
[117] True Price Foundation, "A Roadmap for True Pricing. Vision Paper—Consultation draft" (2019)
[118] Ibid (n 116)

most proper tools to combat unsustainable activities under Article 102.[119] Although the category established in this clause has been used for 'unfair selling prices' such as predatory/low pricing and excessive pricing, it has not been estimated in terms of 'unfair purchase prices'. The assessment analysis for this category might be expanded to take social or environmental sustainability goals into account.[120] Unfair purchase prices within the meaning of the existing clause mean the low purchase price paid by the dominant undertaking. Although in literature, the example is given as a low purchase price paid to the farmers[121], probably due to their more sensitiveness, other producers/suppliers who have less strength in the market than the dominant undertaking may also be considered from this perspective. The sustainability aspect in this simple example is that low purchase price can be a reason for an 'extreme use of insufficient resources' because the price is not relevant to the "true costs of production"[122], even 'sustainable land use' methods can be demoralized owing to low prices.[123] On the other hand, considering that low purchase prices mean reduced costs for the dominant undertaking, it can probably create a competitive advantage in comparison with other competitors, which in itself can be considered abuse in light of exclusionary abuses. However, the problem with this type of abuse can be the assessment of prices as 'unfair' which does not have a clear and accepted definition.[124] Nevertheless, it is known less or more what is unfair, in turn, which can facilitate the formation of definition with the consideration of the competition law perspective. Additionally, it may not be necessary to have a concrete definition, it can be assessed case by case, but mindfully. Article 102(a) also has 'other unfair trading conditions' which is a broad category just as seen in the choice of words. It would not be wrong to say that this category has a real capacity to catch unsustainable business practices with relevant tests and assessments. The establishment of new types of abuses does not mean that the judiciary and competition authorities should entirely step aside from the existing practice, on the contrary, the main purpose is to achieve a comprehensive consideration of the potential already reflected in the relevant laws.

4.4. Conclusion

The analysis and thorough discussion reflected in this chapter allowed to understand the current situation in case law and decisional practice as well as in legislation with a clear view in terms of the assessment of unsustainable business practices as abuses of dominant position. With the purpose of the aforementioned assessment, the concept of abuse was analysed at first by emphasizing the definition of abusive conduct and the meaning of its major elements such as 'objective concept' and 'competition on the merits'. The analysis of case law and existing literature helped to complete the concept of abuse with two more points, namely the approach towards the non-exclusive list of abuse and existing categories (exclusionary and exploitative) of abuse. With the concept of abuse in mind, we examined the possibility of the assessment process by using the comparison between the form-based approach and the effect-based approach. After the analysing effect-based approach, it turned out that this approach carries the same meaning as the 'more economic approach' within the understanding of judiciary and

[119] Ibid (n 10)
[120] Ibid (n 110)
[121] Ibid (n 10)
[122] Ibid (n 110)
[123] Ibid (n 10)
[124] Ibid (n 60)

competition authorities. Since the ‘more economic approach’ has been used more intensively in recent years, the necessary analysis of the concept as well as its relationship with the goals of competition law, especially consumer welfare, and negative aspects demonstrated that the mere utilization of this approach is not in harmony with the goals of competition policy as a complex and sustainability concerns. Consequently, there is a need for reconsideration of the narrow understanding of EU competition law goals and the methods used for the assessment of abusive conduct by giving special attention to sustainability considerations. Furthermore, elements like competition on the merits, as efficient as competitor tests, theories of harm as well and competitive advantage were considered one by one to understand their meanings and roles within the evaluation of abuse. The finding from the consideration of these elements is that there is a lack of clarification in case law towards competition on the merits, but the likely result is that it is indeed the exact opposite of abuse and other ‘elements’ serve as tools to catch the abuse which is contrary to competition on merits. As a most important and common problem, the more economic approach was emphasized related to the so-called ‘elements’ which can be or probably, will be an obstacle to addressing Article 102 to unsustainable business practices. As a result, we found out that the possibility for unsustainable business practices to be qualified as abuses is mainly affirmative in the case of adaptation of a broad effect-based approach to sustainability considerations. For the next and last step, it was necessary to use this possibility in the relevant directions for achieving unsustainable business practices to be qualified as abuses. Integration of unsustainable business practices into the well-established types of abuses and establishment of new types of abuses towards unsustainable practices were taken into account as two main directions for the assessment. It was revealed that both ways can be utilized for the assessment depending on the special features of unsustainable conduct by improving existing methods and techniques as well as establishing new relevant mechanisms.

5. A Lack of Will or 'Wonderland'?

5.1. Introduction

"*Sustainability is a political choice, not a technical one. It's not a question of whether we can be sustainable, but whether we choose to be."*[125]

So far, in the previous chapters, we discussed the legal basis for sustainability considerations as well as real possibilities in terms of practice and legislation by analysing the relationship between dominance and unsustainable business practices and the potential assessment of those practices to be qualified as abuses under Article 102. As a result, this analysis showed that indeed there can be a 'space' for sustainability considerations, namely the so-called 'sword' function under Article 102 TFEU. There is an ongoing discussion about why this possible 'space' under Article 102 TFEU is not used by ignoring all suggestions. According to Holmes and Meagher, unsustainable business practices should be assessed as abuses of dominance and the enforcement of Article 102 against them is not anymore, a question of possibility, it is a question of will to do it.[126] From this perspective, as an evaluation chapter of the current situation, it is necessary to analyse the existing practise and underlying intention for that practise towards sustainability considerations by using comparisons between the application of Articles 102 and Article 101 TFEU, in this chapter. Furthermore, we are going to look into the perspectives and initiatives revealed by different competition authorities and suggestions to eliminate current challenges which are the main obstacles to the consideration of unsustainable business practices under Article 102 TFEU.

5.2. Current challenges: Perspectives on the 'sword' function of Article 102 TFEU

5.2.1. Commission`s perspective: Comparison of the positions regarding the application of Article 101 and Article 102

As previously mentioned, the ideas about the consideration of sustainability concerns within the EU competition law and policy have begun to increase after the adoption of EGD. This revival towards sustainability has not been involving only academics, but also judiciary and competition authorities. For that reason, it is not surprising that after the adoption of EGD, some sustainability movement has emerged at the EU Commission level. This 'movement' can be an initial point to compare the approaches regarding Article 102 and Article 101. It is widely known that the public consultation scheme conducted by DG Comp for the research towards sustainability considerations in EU competition policy is one of the main indicators of the EU Commission`s approach to the mentioned topic. Accordingly, the first public consultation, namely 'Green Deal and Competition Policy', comprising the relationship between sustainability and competition after the adoption of EGD was mainly about gathering suggestions indicating how sustainability can be integrated into the competition rules. The content of this consultation paper showed that although DG Comp was willing to collect

[125] Gary Lawrence
[126] Ibid (n 10)

suggestions for Article 101, it was not the case when it came to Article 102. The debate opened by DG Comp is careful regarding the extension of discussions on the reform to the rules on Article 102 and EUMR.[127] Since the content of the consultation paper was narrow regarding Article 102, it is assumed that the contributions were also limited considering the general concept reflected in the Competition Policy Brief (2021) which includes the general view of the EU Commission and the short information about contributions.[128] It seems that the EU Commission does not believe in the utilization of Article 102 as a tool to attack unsustainable business practices, it is mainly about sustainability agreements and innovation as seen from the following expression:

"Environmentally ambitious policies will only be effective if markets respond to the new regulatory signals and incentives without creating distortions to competition, and if firms are pushed to innovate by competing intensely and fairly with each other."[129]

In fact, the claim about the EU Commission`s negligent approach regarding Article 102 is seen from the documents adopted during the last few years. Although the public consultation was conducted about the draft horizontal guidelines which the inclusion of a new chapter involving sustainability agreements into the guidelines was also reflected, there was no initiative in terms of Article 102. Undoubtedly, the sustainability considerations within the scope of Article 101 are the real improvement. The problem is that while Article 102 has an actual potential, it is mainly ignored. Considering that the dimension of sustainability agreements via sustainable practices is definitely less than unsustainable business practices, even it can be assumed that Article 102 is a more powerful tool in terms of sustainability. Furthermore, while there is a need to pay much more attention to the Article 101 cases due to "greenwashing" attempts, that is not a possibility in applying Article 102 as a 'sword' regarding unsustainable business practices. In this situation, the position of the EU Commission towards the 'sword' function of Article 102 is not understandable, even the problem is that as far as seen there is no position on this topic stated by the Commission.

Additionally, even there is a different approach to the abuses within Article 102 itself, which in turn can be problematic as an obstacle to the assessment of unsustainable business practices. It is apparent from the adoption of Guidance on enforcement priorities regarding exclusionary abuses while ignoring exploitative abuses. This year, in March, the Commission launched a call for evidence with the purpose of adopting Guidelines on exclusionary abuses of dominance which is expected to enter into force in 2025. While it is confessed on its own website that "Article 102 TFEU is one of the few areas of European competition law where no Guidelines clarify its application"[130], the Commission still continues to disregard the significance of consideration of Article 102 as a whole, including exploitative abuses. It could be claimed that the Commission does not want to become a price regulator considering that mainly pricing abuses have been caught as exploitative abuses. However, it is not a reason considering that

[127] Lexis PSL, produced in partnership with David Little, Pierre Bichet and Clément Pradille from Latham Watkins, Sustainability and EU Competition Law, www.lexisnexis.com,<Sustainability and EU Competition law>

[128] EU Commission, 'Competition Policy in Support of Europe`s Green Ambition', 2021, Competition Policy Brief, <Commission Policy Brief>

[129] Ibid

[130] Call for Evidence, Guidelines on exclusionary abuses of dominance <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1911>

predatory pricing[131] which is one of the types of exclusionary abuses as an example is also based on price-cost tests and assessed by the Commission. Furthermore, exploitative abuses are not only about unfair prices but also 'other unfair trading conditions' which can involve non-pricing activities.

5.2.2. NCA`s perspectives on the relevant sustainability considerations

Since the enforcement of EU competition law in the areas of Member States is provided by each Member State, they have an important role to play. As seen from the contributions to the public consultation papers published by the EC, Member States, although not all of them, are willing to support sustainability considerations through the competition law. Even some Member States are more ambitious to engage in this issue rather than EU competition authorities. There are some different, even opposite views from different countries on the sustainability considerations in competition law. In this particular section, we will discuss briefly the perspectives of a few member states for the purpose of understanding the current situation related to sustainability concerns, especially in terms of Article 102 TFEU and/or its national equivalents.

There are some countries such as the Netherlands and Greece which are leading the integration debate of sustainable development to the competition law.[132] By way of 'guidelines and their joint Technical Report on Sustainability and Competition', the competition authorities of these two states have taken the initiative and begun taking significant steps to rectify any gaps in this area.[133]

Hellenic Competition Commission is the first national competition authority acknowledging the potential 'sword' function of Article 102 for unsustainable business practices by referring to Simon Holmes in its Staff Discussion Paper.[134] This step of HCC is remarkable taking into account the comprehensive analysis of competition rules regarding sustainability without neglecting any article reflected in TFEU, as well as the encouraging content of it as a form of an open call for the EU and national authorities to act together.

The Dutch ACM was the first national competition authority participated in the sustainability debates. Dutch ACM could be considered more conservative in the past regarding the sustainability considerations in competition law considering some cases such as 'Chicken of Tomorrow' which contained an agreement between chicken producers and sellers to only sell chickens produced in compliance with certain standards, was not successful for the undertakings.[135] However, today it is one of the leading authorities acting towards sustainability concerns. It is apparent from the adoption of the Sustainability Guidelines

[131] Ibid (n 113); (n 80)
[132] Malinauskaite, Jurgita, and Fatih B. Erdem. 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' *JCMS: Journal of Common Market Studies*, <https://doi.org/10.1111/jcms.13458>
[133] Roman Inderst, Eftichios Sartzetakis, Anastasios Xepapadeas, 'Technical Report on Sustainability and Competition' (2021)
[134] Staff Discussion Paper, Hellenic Competition Commission, <https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf>
[135] Ibid (n 10)

Draft[136], even though it has a narrow focus on sustainability agreements. The ACM provided clarification about sustainability initiatives by suggesting different assessment techniques. Furthermore, this Guidelines Draft has a particular significance not only because of the consideration of sustainability at the state level and the assessment tests provided there but also with this document, the Dutch competition authority acknowledged that instead of focusing solely on the advantages for the consumers of the products, it is crucial to take into account sustainability for the benefit of the larger society as a whole.

This Guideline (second draft) in addition is a guidance and encouraging sample for other national authorities, even for EC. In the Netherlands, not only competitive authorities but also the judiciary has played its role. The Dutch court`s judgement in the Shell case[137] where Shell, as a larger oil corporation was required to cut emissions by net 45%, compared to 2019, in 2030 by applying Dutch tort law, is considered the first of its kind which also seems to have triggered another 'first of its kind' Shell case[138] in the UK against Shell's board of directors. Undoubtedly, it was not about competition law and accordingly competition rules were not applied, but it was important in terms of the private liability of the larger companies which in turn reminds us of 'special responsibility' with regard to abusive conduct. The interesting point is that the Sustainability Guidelines Draft was also applied to Shell to give an exemption for cooperation with another energy company on sustainability. The mentioned Shell's private liability case just happened one year before this exemption. It seems that case has an impact on the exemption to support the company for cutting its emissions. Probably, this would not be surprising while knowing that last month the Dutch government also expressed its support to help the company reduce its emissions. It is assumed that the mentioned case and Guideline demonstrate the willingness of Dutch authorities about sustainability which in turn can also serve the actions soon regarding to consideration of sustainability concerns under Article 102. Considering that this topic is not even widely discussed at the EC level, it is not surprising that there is no movement at national levels (except Greece). This fact in turn makes it important to consider the Dutch example – the Shell case as an encouraging reason for bringing revival to the actions on the most important issue to promote sustainability considerations in competition law.

The observation on the perspectives from different competition authorities confirms that in comparison with Article 101, the Commission and many member states are not willing to deal with unsustainable business practices through the 'sword' application of Article 102, even though they are not willing just to discuss possibilities.

5.3. A lack of Will or 'Wonderland'?

"Even if I knew that tomorrow the world would go to pieces, I would still plant my apple tree."[139]

[136] The Netherlands Authority for Consumers & Markets (ACM), 'Draft Guidelines on Sustainability Agreements' (Dutch Draft Guidelines)
[137] Milieudefensie et al. v. Royal Dutch Shell plc.
<http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ >
[138] Shell Board of Directors are being sued. <https://www.theguardian.com/environment/2023/feb/09/shell-directors-personally-sued-over-flawed-climate-strategy>
[139] Martin Luther King

In this section, the question is that if we take all the possibilities of applying Article 102 as 'a sword' on one hand, and the perspectives (read: silence) by EC and national competition authorities related to this issue on the other hand, can current situation be characterized as a challenge in the form of 'lack of will'?

In the author`s view, the answer is affirmative, at least for the current stage. The realization of all possibilities listed above depends on the practice, although there is a legal basis for it. It is clearly known that there are a lot of symbolic, dead letter laws due to the lack of enforcement. Perhaps, there might be some occasions that the enforcement is not possible owing to aspects and some due to the lack of will. There is definitely a lack of will in this current stage for our case considering 'silence', the position of apathy shown by competition authorities, associated people, judiciary and many academics. A lack of will to show any position, to open any discussion, to put the possibilities to the test, and to put them into practice is the primary reason for the current situation. Undoubtedly, the examined possibilities for application of Article 102 TFEU might be a 'Wonderland' if it is not in compliance with today`s opportunities to utilize it in the working field. However, this is the next step to consider. The very first step is, to begin with introduced proposals and ideas which need less or more attention and can be a basis for comprehensive research. Although this research topic we discussed is not widespread compared to Article 101 which has many proposals of action, there are some suggestions about what to do towards the consideration of Article 102 TFEU as a 'sword' against unsustainable business practices. The following suggestions will include some similar recommendations taken from the proposal of actions for Article 101 which can also be useful for Article 102 and other general proposals, including some suggested by the author.

Suggestions:

1. We, namely 'lawyers, economists, academics, policymakers, and competition officials', need to stop and think for some time whether today`s competition for 'consumer welfare' is the thing as a society we need?[140] "Is this really the best we can do?"[141] Perhaps, it is the best, but surely not for society.

2. To begin to communicate. There is a need for widespread discussion of this topic in order to find effective tools to apply it. The example list can stretch from academics to competition authorities (articles, publication of legal opinions[142], public consultation papers, expert advice, round tables, etc.).

3. Encouraging public and private parties to bring a case in relation to the application of Article 102 to attack unsustainable business conduct: a test case.[143]

[140] Ibid (n 42)
[141] Ibid (n 66)
[142] Ibid (n 42)
[143] 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' (January 7, 2023). J. Nowag (ed.), Research Handbook on Competition Law and Sustainability; Edward Elgar, Forthcoming, <http://dx.doi.org/10.2139/ssrn.4319866>

4. Increase the awareness of this topic to reach more ideas and research projects. There is a particular need for more people who are ambitious to work on the ‘sword’ function.

5. Instead of concentrating on the straightforward price consequences of market dominance, competition authorities should invest in reframing their position and goal function in a wider framework that takes into consideration various types of externalities and their inter-generational implications.[144] At the international, EU, and national levels, programmatic goals pertaining to sustainability should be more closely aligned with the larger constitutional values and principles of consistency and policy coherence for competition law to shed its insularity.[145]

6. To consider the longer-term implications of unsustainable business practices as unilateral conduct in each and every aspect of society, economy and environment.

7. After the changing minds to change guidelines and notices, to prioritize the relevant cases that can have an impact on sustainability.[146]

5.4. Conclusion

In this chapter, it was aimed at analysing the current situation related to the possible application of Article 102 with considering sustainability concerns. For that purpose, the Commission`s perspectives related to the application of Article 102 and Article 101 were examined through the comparison between the actions carried out by the Commission towards the application of each article. From the analysis, it seems that there is clearly a lack of will regarding the consideration of the potential application of Article 102 as a ‘sword’. In order to examine whether this situation is only applicable to the Commission or other competition authorities that show the same reluctant position, we looked into briefly the perspectives of national competition authorities. It came out that some national competition authorities are more willing to consider the potential ‘sword’ application for the sake of sustainable development. After the brief analysis of perspectives towards the topic in question, we reasoned why it is the lack of will considering the results from the section for the analysis of perspectives. At the end, the suggestions, including proposals gathered from different resources and introduced by the author of this work, was listed as the possible initial solutions to the lack of will, in other words, current challenge and other potential upcoming obstacles towards the ‘sword’ application of Article 102.

[144] Ibid (n 110)
[145] Ibid (n 110)
[146] Ibid (n 42)

6. Conclusion

The particular significance of Article 102 regarding sustainability concerns and its underestimation by many are the main reasons for the analysis reflected in this thesis. Different important issues and their analysis were covered throughout the work. It would be useful in terms of accuracy to note the concluding remarks regarding the result coming from the analysis of each essential aspect. For the purpose of answering the main research question, all chapters of this thesis were dedicated to each specific sub-question where the answers formulated the whole picture as follows:

At the first stage, to examine whether there is any possibility of capturing unsustainable business practices through the application of Article 102 as a 'sword' required finding a legal basis for it before everything else. Undoubtedly, the legal basis for sustainability consideration is not specific to Article 102, it was more considered in general. Since there is nothing in the content of Article 102 to prevent the mentioned application, a general legal basis would be enough. According to the findings, there is a solid legal basis in the primary law for the consideration of sustainability issues within the EU competition law. Furthermore, the brief analysis of the goals of competition law with taking a broader understanding of them demonstrated that there is nothing contradictory to the 'sword' application.

As a next step, defining the relationship between dominance and unsustainable business practices is important regarding the understanding of this particular discussion in general. The examination by using information stemming from exercises conducted so far provided that there is an undeniable connection between unsustainable practices and the dominant position of undertakings. In addition, the possibility of using sustainability aspects in the stage of defining dominance was briefly considered. It seems that sustainability considerations can also be taken into account from that perspective with the support of further research.

The subsequent and one of the most important parts was the analysis of sustainability considerations at the substantive stage regarding the application of Article 102. A thorough examination of this stage considering the concept of abuse and other essential elements for the assessment of abuse demonstrated that indeed there is a possibility for the evaluation of unsustainable business practices as abuses. The analysis concerning the approaches, especially the 'more economic approach', as well as the concepts such as 'competition on the merits', 'objective concept`, AEC test, competitive advantage and theories of harm which have crucial roles for the assessment of abuse, proved that although there is a possibility to catch unsustainable business practices as abuse under the Article 102, it is needed to improve existing tests and techniques as well as to estimate all kind of effects of the abusive conduct rather than purely economic aspects. It was also shown that two directions can be used for abuse assessment of unsustainable conduct: integration into well-established abuses and establishing new types of abuse which depends on the special features of disputed conduct and the choice of methods for the assessment.

The last part of the thesis was about the 'current challenges' regarding the application of Article 102 as a 'sword'. It turned out that the perspectives of the Commission and many Member States on this particular topic are today`s current challenges against the further consideration

of possibilities related to the ‘sword’ application. The comparative assessment of positions between the potential utilization of Article 101 and Article 102 TFEU towards sustainability considerations revealed that the Commission as well as many Member States are not willing to consider, even to discuss the mentioned possibility. At the end, some suggestions were given to eliminate current challenges to some extent.

To conclude, it is evident from the research conducted in this thesis that there is a genuine ‘sword’ potential of Article 102 to be addressed to unsustainable business practices. Since it is not a ‘Wonderland’, and we are not Alice, we must be willing to take care of our ‘Wonderland’.

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