Market and Competition Law Review / VOLUME IX / No. 1 / APRIL 2025

Embracing Sustainability: Harnessing a Fiction in Dealing with Dominant Firms?*

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ABSTRACT: This article explores the intersection of competition law and sustainability, particularly focusing on the role that Article 102 of the Treaty on the Functioning of the European Union may play in this context. It presents a novel approach, categorizing the relationship between Article 102 and sustainability into four scenarios, and examining the corresponding actions antitrust authorities should take. It identifies key challenges when competition protection conflicts with sustainability, analysing the pros and cons of two potential approaches: a bottom-up method, based on consumer willingness to pay for sustainability, and a top-down approach that integrates sustainability into antitrust goals. Finally, the paper delves into the arguments against penalizing dominant firms for actions that harm sustainability without infringing upon competition.

KEYWORDS: sustainability; abuse of dominance; willingness to pay; policy goals; rule of law

1. Introduction

In recent times, within the escalating spectres of climate change and burgeoning economic disparities, the global community of antitrust experts and scholars has pivoted its gaze towards the intersection of safeguarding competition and fostering sustainability. The question that many try to answer is whether competition law might support or, unfortunately,

* Date of reception: 09.10.2024; Date of acceptance: 20.12.2024.
DOI: https://doi.org/10.34632/mclawreview.2025.17737.
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happen to interfere with the goal of making human activities be sustainable, that is, meet the needs and aspirations of the present without compromising the ability to meet those of the future.[1]

This intellectual shift has found notable expression in the initiatives undertaken by the European Commission,[2] which has released two key-documents emblematic of this growing discourse. The first, dating back to September 2021, is a seminal Policy Brief entitled "Competition Policy in Support of Europe's Green Ambition", wherein the Commission expounds upon the symbiotic relationship between competition policy and legislative imperatives in tackling ecological transition challenges.[3] The Commission's second more recent endeavour, unveiled in June 2023, builds upon this foundation and is embodied in the revised guidelines on the application of Article 101(3) including a section devoted to sustainability agreements.[4]

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[1] The definition of sustainability is taken from the 1987 United Nations Brundtland Commission. See "Report of the World Commission on Environment and Development: Our Common Future", World Commission on Environment and Development, 1987, accessed September 30, 2024, http://www.un-documents.net/our-common-future.pdf. Furthermore, see "SDGS", UN, accessed September 30, 2024, https://sdgs.un.org/goals for the United Nation's sustainability priorities.

[2] This paper explores the intersection between sustainability and antitrust law, with a particular focus on the relationship between sustainability and Article 102 TFEU. Nonetheless, the Commission is actively working to support sustainability through a variety of complementary approaches. For instance, on the relationship between sustainability and state aid rules, see Johan W. van de Gronden, *State Aid, Sustainable Management of Natural Sites and Services of General Economic Interest*, in this journal, 2, 2024, p. 17. Similarly, on the relationship between corporate governance rules and sustainability, see Marc Veenbrink, *Synergies Between the CSDDD and EU Competition Law: A Toxic Relationship?*, in this journal, 2, 2024, p. 49.

[3] See DG for Competition (European Commission), *Competition Policy in Support of Europe's Green Ambition*, 2021, https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF, where the Commission affirms that the primary role in the challenge making the EU's economy more sustainable must be played by legislators and policymakers, supported by the presence of well-functioning and fair markets. In this context, competition policy can be regarded as a guardian and a facilitator. Antitrust enforcement contributes to the pursuit of sustainability objectives by promoting and protecting competitive markets. In particular, "by prohibiting anticompetitive practices, it ensures that prices remain cost-reflective and companies face incentives to come up with efficient and sustainable solutions".

[4] Communication from the Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01) (hereinafter, 'New Guidelines 101'). See Jean-François Bellis, "The undue reliance on Article 101(3) TFEU in the Assessment of Sustainability Agreements in the 2023 Horizontal Guidelines", *CPI Columns*, April, 2024, https://www.pymnts.com/wp-content/uploads/2024/04/EU-Column-April-2024-2-Full.pdf; Julian Nowag and Wolf Sauter, "The European Commission's new Horizontal Guidelines:

Meanwhile, the uncharted terrain where sustainability intersects with Article 102 remains ripe for exploration. The current scholarly perspectives on this matter *seem* to introduce a moral imperative[5] and a constitutional duty[6] to prioritize sustainability at any cost.[7]

Furthermore, they advocate for two complementary enforcement attitudes.[8] Firstly, they promote using the pursuit of sustainability as a 'shield'

A great reset for competition law and sustainability?", *Competition Law & Policy Debate* 8, no. 2 (2023): 57-62, https://doi.org/10.4337/clpd.2023.02.01. See also Jonas von Kalben, "Europe's green ambition: New guidelines of the European Commission on the application of Art. 101 TFEU to sustainability agreements – A critical account", *Zeitschrift für Wettbewerbsrecht* 4 (2022): 468-488, https://doi.org/10.15375/zwer-2022-0408.

[5] Specifically, some scholars – see, *e.g.*, Simon Holmes, "Climate change, sustainability, and competition law", *Journal of Antitrust Enforcement* 8, no. 2 (2020): 359-365, https://doi.org/10.1093/jaenfo/jnaa006 – argue that, in light of the emergency we are facing, we shall do "everything possible" to save our eco-system from the destruction caused by human exploitation – a renewed version of the famous Mario Draghi's expression "whatever it takes". See Mario Draghi, as President of the European Central Bank, who declared on July 26, 2012, during the European sovereign debt crisis, that the ECB would do "whatever it takes" to protect the euro from potential speculative attacks.

[6] Indeed, Article 3(3) of the Treaty on European Union (TEU) mandates the Union to pursue several goals beyond mere competition protection, including sustainable development, balanced economic growth, and social progress. Furthermore, Article 7 of the Treaty on the Functioning of the European Union (TFEU) can be interpreted as requiring the Union to be consistent in pursuing all these goals. Therefore – the argument runs – competition law can be enforced to promote and/or protect sustainability. On this matter, see also Julian Nowag, "The environmental integration obligation of Article 11 TFEU", in *Environmental integration in competition and free-movement laws*, ed. Julian Nowag (Oxford University Press, 2016), 15.

[7] It is not a case; indeed, such a position has prompted the response from other scholars that refute the use of Article 102 to protect sustainability irrespective from the impact of dominant firms' practices on competition. See Roman Inderst and Stefan Thomas, "Abuse of dominance and sustainability", *Journal of European Competition Law & Practice* 15, no. 1 (2024): 48, https://doi.org/10.1093/jeclap/lpad041; and Edith Loozen, "Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability", *Common Market Law Review* 56, no. 5 (2019): 1265, available at: https://ssrn.com/abstract=3157725.

[8] See Marios Iacovides and Christos Vrettos, "Radical for whom? Unsustainable business practices as abuses of dominance", in *Competition law, climate change & environmental sustainability*, ed. Simon Holmes, Dirk Middelschulte and Martijn Snoep (Concurrences, 2021), available at: https://ssrn.com/abstract=3815630; Marios Iacovides and Christos Vrettos, "Falling through the cracks no more? Article 102 TFEU and sustainability: The relation between dominance, environmental degradation, and social injustice", *Journal of Antitrust Enforcement* 10, no. 1 (2022): 32, https://doi.org/10.1093/jaenfo/jnab010; Marios Iacovides and Valentin Mauboussin, "Unilateral conduct and sustainability under EU competition law", in *Research handbook on sustainability and competition law*, ed. Julian Nowag (Edward Elgar Publishing, 2024), 352-374; Holmes, "Climate change, sustainability, and competition law", 354; Simon Holmes and Michelle Meagher, "A sustainable future: How can control of monopoly power play a part?", *European Competition Law Review* 44, no. 1 (2023): 16; Matthias Uffer, "Sustainability through competition and participation", in

to deem dominant firms' abusive conduct lawful, such as in cases where a dominant firm imposes high prices or exclusive agreements to fund environmental enterprises, promotes the consumption of environmentally friendly goods via predatory pricing or bundle discounts, or disadvantages unsustainable businesses through discriminatory pricing or selective refusals to deal.[9] Secondly, they ask for wielding Article 102 TFEU as a 'sword' to penalize dominant firms for unsustainable behaviour, such as when a dominant firm pays extremely low salaries or input prices, compels a supplier to produce goods in environmentally harmful ways, restricts third-party development of greener products or processes, neglects the demand for more sustainable products or services, or refuses to adopt environmentally friendly technologies.[10]

In the following pages, I offer a quite distinctive perspective. Disregarding the specific facts that may characterize each market situation, I commence by delineating the interface between Article 102 and sustainability into four scenarios. These scenarios pertain to when the conduct of a dominant firm: (I) neither harms competition nor sustainability; (II) harms competition but promotes sustainability; (III) harms both competition and sustainability; and (IV) harms sustainability without harming competition. Subsequently, I analyse the appropriate actions antitrust authorities should undertake in each scenario.

Clearly enough, the most problematic cases arise when the protection of competition does not align with the protection or promotion of sustainability. Therefore, I analyse two approaches that antitrust enforcers could

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Sustainability through participation? Perspectives from national, European and international law, ed. Birgit Peters and Eva Julia Lohse (Brill, 2023), 252; Helen Lindenberg, "Will sustainability and environmental considerations be the next big hit for shaping the application of Article 102 TFEU?", *Zeitschrift für Wettbewerbsrecht* 3 (2022): 320. https://doi.org/10.15375/zwer-2022-0307. See also Suzanne Kingston, *Greening EU competition law and policy* (Cambridge University Press, 2011), 294.

[9] More exactly, Iacovides, Mauboussin, and Kingston frame such a defence in terms of objective justifications or efficiency gains, while Holmes makes the more radical proposal of "taking account of sustainability factors in the initial assessment of a potential abuse", thus considering that a conduct which promotes sustainability is not an abuse of dominant position in the first place. See Iacovides and Mauboussin, "Unilateral conduct and sustainability under EU competition law", 361-372; Kingston, *Greening EU competition law and policy*, 321; and Holmes and Meagher, "A sustainable future", 29.

[10] See Iacovides and Mauboussin, "Unilateral conduct and sustainability under EU competition law", 356; Holmes and Meagher, "A sustainable future", 26-28; Holmes, "Climate change, sustainability, and competition law", 384, and Kingston, *Greening EU competition law and policy*, 325.

adopt to integrate sustainability considerations into the competitive assessment of dominant firms' practices. The first approach is bottom-up, based on consumers' willingness to pay for sustainability. The second approach is top-down, incorporating sustainability among the goals of antitrust law. I show the pros and cons of the two approaches, but I primarily contend that applying the second approach in markets where consumers are unwilling to pay for sustainability amounts to using a fiction to pursue sustainability.[11] In such markets, competition for sustainability does not exist. Consequently, asserting that a dominant firm harming sustainability has also undermined competition through its market power is a fiction, contrary to the principle of the rule of law. Additionally, I present further value-driven, legal, and policy arguments to contest the proposition that Article 102 could function as a "sword" against dominant firms that, while not posing competitive harm, nevertheless compromise sustainability through their actions. Essentially, I question the notion that sustainability should unconditionally supersede other considerations, such as the protection of competition, presenting reasons to rebut the moral imperative and constitutional duty so far articulated in the scholarly discourse.

The article is structured as follows: Paragraph 2 introduces the four scenarios that describe the interface between Article 102 and sustainability. Paragraph 3 examines the issues arising in Scenarios I and III, where promoting or protecting sustainability aligns with safeguarding competition. In contrast, Paragraph 4 discusses Scenarios II and IV, where protecting competition comes into conflict with promoting or protecting sustainability. It then highlights two approaches to integrating sustainability factors into competitive assessments: a bottom-up approach and a top-down approach. Paragraph 5 explains the bottom-up approach, which is empirically based and involves a detailed, case-by-case examination of consumer willingness to pay for sustainability, along with its challenges and drawbacks. Paragraph 6 explores the top-down approach, which is value-driven, prioritizing sustainability as a paramount consideration within competition law, potentially overriding concerns about competition protection. Since this second approach diverges from traditional antitrust law, Paragraph 7 examines how to limit its application in Scenario II cases. Paragraph 8 outlines several reasons – ranging from adherence to

[11] I argue that this is a fiction, as those who endorse this approach do so intentionally. If they were not purposeful, describing a scenario where consumers are willing to pay for sustainability, when they are not, would be a factual mistake rather than a fiction.

the rule of law to concerns about paternalism – why this approach should not be applied in Scenario IV cases, where dominant firms impair sustainability without harming competition. Finally, Paragraph 9 concludes the discussion.

2. The four scenarios of the interface between Article 102 and sustainability

Competition law is all about facts:[12] even the slightest factual nuance can transform a scenario from procompetitive to anticompetitive, and vice versa. Therefore, attempting to navigate the intersection of Article 102 and sustainability by listing and discussing potentially lawful and/or prohibited practices of dominant firms can prove to be a frustrating exercise. It risks shifting the focus away from the interface between Article 102 and sustainability towards the broader considerations of when dominant firm's practices are deemed impermissible under conventional competition law.

Consider, for example, the case of a dominant firm entering into an exclusive agreement with a courier that exclusively uses electric vehicles for shipping. While one might argue that such an agreement inherently promotes sustainability, its classification as procompetitive or anticompetitive ultimately hinges on the market share held by the distributor and the duration of the contract. With a market share of 5% and a 1-year contract, the exclusive agreement would not pose a threat to competition, but with a market share of 45% and a 10-year contract, it likely would.[13] Therefore, using Article 102 as a "shield" would be necessary only in the latter and not in the former scenario.[14]

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[12] "Just the facts ma'am: competition cases are all about facts" – Ian Forrester, "A bush in need of pruning: The luxuriant growth of *light judicial review*", in *European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases*, ed. Claus-Dieter Ehlermann and Mel Marquis (Hart Publishing, 2011), 410.

[13] Judgment of 23 October 2003, *Van den Bergh Foods v. Commission*, T-65/98, EU:T:2003:281, paragraph 160.

[14] Likewise, consider the case of a dominant firm imposing very high prices to finance investments in sustainable products and processes. If we hastily compare these prices with the lower prices charged for unsustainable goods, they may seem unfair within the meaning of Article 102(a). However, if we consider that under the current case law "the economic value of the goods must be determined with regard to the particular circumstances of the case" – Commission decision of 23 July 2004, *Scandlines Sverige AB v. Port of Helsinborg*, Case Comp/A.36.568/d3, paragraph 232, and Commission decision of 23 July 2004, *Sundbusserne AB v. Port of Helsinborg*, Case Comp/A.36.568/d3, paragraph 207 – we realize that the necessity of passing on the costs of sustainability investments can be duly considered to deem these prices fair under standard antitrust

Similarly, consider the case in which a dominant firm refuses to adopt environmentally friendly technologies. Granted that such behaviour impairs sustainability, the conditions under which it should also be found abusive under conventional antitrust law are not straightforward; rather, the contractual freedom enjoyed by dominant firms should prompt us to deem the behaviour lawful. As a consequence – and to be as neat as possible – this would be a case in which scholars ask to apply Article 102 as a "sword" against a dominant firm that harms sustainability *without* affecting competition. Differently, if we had a dominant firm refusing to share an essential green patent that rivals need in order to develop follow-on innovations, ordinary EU competition law would intervene[15] and qualify the conduct abusive, independently from any sustainability-driven consideration.

Therefore, in this article I chose to disengage from these antitrust technicalities as much as I can.[16] I explore the intersection of Article 102 and sustainability through posing two inquiries: whether the actions of dominant firms impair sustainability and whether they undermine competition. As a matter of logic, based on the answers to these questions, any practice undertaken by a dominant firm will inevitably fall into one of the four scenarios outlined in the subsequent table:

	Does the dominant firm's conduct harm sustainability?			
Does the dominant firm' conduct harm competition?	I	*No* No	II	*No* Yes
	II	*Yes* No	IV	*Yes* Yes

This framework clearly elucidates that the hype surrounding the interface between Article 102 and sustainability does not pertain to cases where ordinary competition law already functions to protect and promote sustainability, namely in Scenarios I and III.

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law. Again, hence, in this second hypothesis there would be no need to use sustainability as a shield against the enforcement of Article 102.

[15] On the conditions of the essential facility doctrine, see judgment of 17 September 2007, *Microsoft Corp. v. Commission of the European Communities*, T-201/04, ECLI:EU:T:2007:289.

[16] For the reasons stated in paragraph 4.1, I found it impossible in relation to cases driven under Scenario IV.

3. Scenarios I and III: When Safeguarding Competition and Advancing Sustainability Serendipitously Converge

In Italian politics, the term *convergenze parallele* (*i.e.* parallel convergences) refers to situations where parties with fundamentally different histories and ideals – considered parallel because they would typically never intersect – actually converge in deciding which actions to take in specific concrete cases.

I believe that this term could also be used to address the scenarios I and III outlined in the previous table, which exemplify practical situations where the application of Article 102 *happens to* align with the protection/promotion of sustainability irrespective of any further (value-driven?) consideration.

Consider scenario I. In this instance, the behaviour of the dominant firm neither compromises sustainability nor competition, despite the potential divergence between the objectives of antitrust law and sustainability. Numerous examples illustrate such behaviour: a dominant company introducing an innovative product, service, or technology that reduces pollution, or a dominant company adopting market practices that require wholesalers to obtain green certification as a condition for entering distribution contracts. Both practices enhance living conditions for future generations. Moreover, the former boosts consumer welfare through innovation, despite its potential exclusionary effects,[17] while the latter cannot

[17] See judgment of 6 September 2017, *Intel Corp. v. Commission*, C413/14 P, EU:C:2017:632, paragraphs 133-134, stating that "[i]t is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market. Thus, not every exclusionary effect is necessarily detrimental to competition. 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". Furthermore, see judgment of 27 March 2012, *Post Danmark I*, C-209/10, EU:C:2012:172, paragraphs 40-41, stating that "[i]t is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article [102]. In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary …, or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers". To the same effect, see also judgment of 30 January 2020, *Generics (UK) and Others*, C307/18, EU:C:2020:52, paragraph 165, and judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C377/20, EU:C:2022:379, paragraphs 45-46, 48 and 73.

be deemed unfair under Article 102(a) as long as it does not stem from any coercive power exerted by the dominant firm.[18]

However, as previously stated, the focus of this analysis is not on providing specific examples, but on recognizing that: (i) certain practices fall under Scenario I; (ii) these practices do not pose concerns for antitrust authorities; and that (iii) this outcome remains true regardless of revisions to competition law, the incorporation of sustainability considerations into antitrust discussions, or efforts to prioritize sustainability at all costs.

Certainly, one might ponder the prevalence of such practices and question whether certain policy tools or legal norms could encourage dominant firms to engage in actions that prioritize both competition *and* sustainability. However, it is crucial to understand that due to the text of Article 102, competition law operates exclusively through prohibitions rather than incentives. While it may deter firms from certain actions, it does not actively encourage or reward them for other practices. Hence, whether the behaviours of dominant firms falling under scenario I already constitute or would ever constitute a majority of their actions is not a matter of competition law enforcement; rather, it falls within the purview of policymakers and legislators interested in designing *ad hoc* regulations to promote sustainability and competition.

Consider now scenario III. It captures the case of an autonomous infringement of competition law that also undermines sustainability. Ponder, for example, a dominant company that might impose excessively high prices for renewable energy heating services, thereby preventing consumers from accessing cleaner heating alternatives.[19] Similarly, ponder a firm dominating the market for bicycle electrification systems that, while competing in the e-bike Anti-lock Braking System (ABS) market, might

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[18] See Commission decision of 3 March 2024, *Apple – App Store Practices (music streaming)*, Case Comp/AT.40437, paragraph 538. Furthermore, on Article 102(a): Renato Nazzini, "The objective of Article 102", in *The foundations of European Union competition law: The objective and principles of Article 102*, ed. Renato Nazzini (Oxford University Press, 2011), 144; and Renja Vänskä, "Privacy policy clauses: Exploitation by unfair trading conditions under Article 102(a) TFEU?" (Master's thesis, University of Uppsala, 2021), 25-46, available at: FULLTEXT01.pdf (diva-portal.org).

[19] The Italian Competition Authority (ICA) has launched a series of simultaneous investigations targeting dominant companies providing heating services using renewable energy. The ICA suspects that the prices for these services are unreasonably high, as they unduly mirror the international price surges observed in natural gas and, thus, in heating services reliant on gas – see ICA, order no. 30646 of 23 May 2023, A563 – *IREN/ Prezzo del teleriscaldamento*, available at https://service.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/40C01FE7E05950A3C12589DA00539557/$File/p30646.pdf.

withhold interoperability codes from rival ABS providers to safeguard its dominance and enforce monopolistic pricing in the primary market.[20] In both cases, the practices autonomously infringe Article 102: the former constitutes a classic exploitative abuse under standard competition law, while the latter represents a paradigmatic exclusionary and anticompetitive abuse consistent with prevailing case law. Moreover, in both instances, these practices impair sustainability by hindering the sale of environmentally friendly products. Therefore, proponents of incorporating sustainability into competition law need not fret, because in these cases the sanctioning of practices that decrease sustainability is a *byproduct* of ensuring the proper functioning of the market. More generally, indeed, also in scenario III safeguarding competition aligns with promoting sustainability, even when sustainability considerations do not directly influence the evaluation of dominant firms' practices.

To be sure, within this context, four distinct policy and legal issues of potential interest to law enforcers may arise.

Firstly, if one desires competition authorities to take a leading role in safeguarding and promoting sustainability, they may urge them to utilize their agenda-setting power to prioritize investigations in industries and markets susceptible to sustainability challenges.[21] Indeed, such a proactive approach could avert situations where instances of dominance abuse (as well as cartels) detrimentally impact sustainable products, services, or technologies.

Secondly, if a specific regulatory body were tasked with enforcing a particular sustainability regulation, competition authorities should be

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[20] . ICA, order no. 30765 of 5 September 2023, A567 – *Mercato degli ABS nelle e-bike*, available at https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/74A7E3EED2707F40C1258A2E003E74A2/$File/p30765.pdf. In the same vein, see also ICA, order no. 30576 of 4 April 2023, A557 – *Enel X Way ed Ewiva/ condotte abusive nel mercato dei servizi di ricarica elettrica*, available at https://www.agcm.it/dotcmsdoc/allegati-news/A557%20avvio%20istruttoria.pdf. In this case, the ICA has launched an inquiry into a company that holds a dominant position in the Italian market for installing and managing electric charging stations. This company is also involved in the connected market of supplying electric charging services directly to end-users. Allegedly, this dominant player has squeezed the margins of its competitors in the downstream market, aiming to exclude them and thwart the potential entry of other non-integrated operators who might be eyeing this emerging downstream market. According to the ICA, this move could also stifle the introduction of innovative electric mobility support services.

[21] See Alessandra Catenazzo, "Competition and the Green Deal: A study of consumers' WTP for CO2 emissions reduction in the Italian car market", *Journal of European Competition Law & Practice* 15, no. 3 (2024): 209, https://doi.org/10.1093/jeclap/lpae028.

required to coordinate their intervention with that of this other regulatory body. This is indeed what emerges from the recent judgment of the Court of Justice in the *Bundeskartellamt v. Facebook* case,[22] addressing the intersection between antitrust law and the protection of personal data. The ruling clarifies that the guiding principle governing the relationship between an antitrust authority and a data protection authority is one of loyal cooperation. Based on this principle, when dealing with data protection issues, a competition authority is obligated to "consult and cooperate sincerely" with the relevant national data protection authority. It must determine whether the conduct in question has already been addressed by the data protection authority. If such a decision exists, the competition authority must adhere to it and cannot diverge from its conclusions, even during competition law investigations. In cases where no prior decisions have been made, the competition authority is required to consult and collaborate with the data protection authority. The data protection authority may then provide the necessary information, authorize the continuation of the investigation if there are no objections, notify the competition authority of its intention to launch its own investigation, or offer other forms of support. If the data protection authority does not respond within a reasonable timeframe, the competition authority is permitted to proceed with its investigation.[23] Therefore, granted that there is no reason to limit such principle to the interface between competition law and data protection rules, we could argue that when an antitrust authority needs to assess whether certain conduct complies with another regulation, first it must determine whether the authority responsible for enforcing that regulation has already decided on the matter and adhered to it. Alternatively, if there is uncertainty regarding the existence of such a prior decision (or if proceedings have already commenced), the two authorities must engage in consultation to avoid any misinterpretation of the other regulation for the sake of consistency.[24]

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[22] Judgment of 4 July 2023, *Meta Platforms and Others*, C-252/21, EU:C:2023:537. See, in this regard, Valeria Caforio, "Molto rumore per nulla: la sentenza della Corte di giustizia sul rapporto tra diritto della concorrenza e tutela dei dati personali nell'Unione europea", *Il Diritto Industriale* 5 (2023): 404; Vincenzo Iaia, "The strengthening liaison between data protection, antitrust and consumer law in the German and Italian big data-driven economies", *Białostockie Studia Prawnicze* 26, no. 5 (2021): 63-74, available at https://ssrn.com/abstract=4533788.

[23] Ibid., paras. 52-59.

[24] The *Bundeskartellamt v. Facebook* further clarified that the antitrust authority can ascertain a violation of the GDPR regulation only incidentally, for the sole purpose of applying the rules that

Thirdly, in the event of scenario III, where a specific practice is prohibited not only by Article 102 but also by a regulation promoting sustainability, the *ne bis in idem* principle may come into effect, with the result of nullifying the efforts made and wasting the resources put by the antitrust authority at hand.[25]

As a way of illustration, consider the recent case involving the intersection of consumer protection law and Regulation (EC) No. 715/2007 on emissions, which implicated the Volkswagen Group.[26] The latter had installed systems in its vehicles to manipulate pollutant emissions measurements for approval under that Regulation. On 4 August 2016, the Italian Competition Authority deemed such conduct an unfair commercial practice involving the marketing and dissemination of misleading advertisements for vehicles equipped with illegal defeat devices. Consequently, it imposed a fine of EUR 5 million. The Volkswagen group contested this decision before the Italian Regional Administrative Court and the Italian Supreme Administrative Court. Meanwhile, on 13 June 2018, the German Public Prosecutor's Office of Brunswick levied a fine of EUR 1 billion on the Volkswagen Group for circumventing emissions requirements. The group opted not to challenge this decision, rendering it final, *while both Italian administrative proceedings were still pending*. Therefore, in relation to these proceedings the Volkswagen Group was able to invoke Article 50 of the Charter of Fundamental Rights of the European Union, arguing that the Italian decision and fine had become unlawful as they violated the *ne bis in idem* principle – the right not to be tried or punished twice for the same offence in one or multiple EU Member States. In a preliminary ruling requested by the Italian Supreme Administrative Court, the Court

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protect the proper functioning of the market. On this point, it can be interpreted in two ways. According to a broader interpretation, the Court of Justice has clarified the relationship between all administrative authorities in the European Union. This implies that also the authority responsible for enforcing the GDPR could incidentally identify violations of rules aimed at protecting competition, in coordination and consultation with the competent antitrust authority. Under a more restrictive interpretation, one could conclude that the aforementioned ruling pertains only to the scenario where a violation of the GDPR is incidentally detected by an antitrust authority, and not vice versa. Although contacts between different administrative authorities may occur, they should be considered merely occasional.

[25] Marco Cappai and Giuseppe Colangelo, "Applying *ne bis in idem* in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets", *Common Market Law Review* 60, no. 2 (2023): 431-456, https://doi.org/10.54648/cola2023026.

[26] Judgment of 14 September 2023, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, C-27/22, ECLI:EU:C:2023:663.

of Justice has recently held that Volkswagen had room to make this claim. Indeed, drawing on precedents such as the *bpost* and *Nordzucker* cases,[27] the *ne bis in idem* principle applies if: (i) the same person (unity of the offender condition) is prosecuted, tried, or penalized for (ii) the same relevant conduct (*idem* condition) in multiple trials or proceedings, resulting in (iii) multiple punitive measures against that person (the *bis* condition); and if it is demonstrated, as in the *Volkswagen* case, that at least (iv) one of the decisions from those trials or proceedings has become final from a procedural standpoint (the *res judicata* condition), and none of the given exceptions can find application.[28]

Thus, in analogous scenarios where a practice violates both antitrust law and sustainability-friendly regulation, one of the parallel proceedings might yield no outcome if the other reaches a final resolution more swiftly. This situation may legitimately prompt the question of whether it is efficient and in the taxpayers' interest to conduct parallel proceedings against the same firm for the same behaviour, especially when, under the principle of *ne bis in idem*, one of these proceedings will conclude without imposing any penalties.

Fourthly, if the antitrust proceeding results in a prohibition decision imposing fines, the fact that the dominant firm's practice violates a legal interest beyond competition could likely work, according to current fine calculation guidelines, to increase the amount of the fine.[29]

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[27] See judgment of 22 March 2022, *Bundeswettbewerbsbehörde v. Nordzucker AG and others*, C-151/20, EU:C:2022:203.

[28] Before the jurisprudential shift seen in *bpost*, the *ne bis in idem* prohibition applied under three conditions: the *bis* condition, the *res judicata* condition, and the *idem* condition (judgment of 22 March 2022, *bpost SA v. Autorité belge de la concurrence*, C-117/20, EU:C:2022:202). The *idem* condition was determined by a threefold test outlined in *Aalborg Portland*, which required the presence of the same offender (unity of the offender condition), the same facts (*idem factum*), and the same protected legal interest (*idem crimen* condition) (judgment of 7 January 2004, *Aalborg Portland A/S and Others v. European Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 338). Thus, before *bpost*, the *idem crimen* condition would have prevented the application of the *ne bis in idem* prohibition in cases where both antitrust law and other regulatory frameworks aimed at enhancing sustainability or addressing unsustainable practices (such as environmental and employment law) were involved, given their differing objectives. However, as mentioned in the text, this condition is no longer required following the developments in *bpost*.

[29] See *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (Text with EEA relevance)*, OJ C 210/2, September 1, 2006, pages 2-5, paragraph 20, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:en:PDF. In other words, the violation of the other interests that the Treaty protects would be one of the cir-

However, once again, these policy and legal considerations do not negate one clear point: safeguarding competition through the enforcement of standard laws against abuses of dominance can indeed advance the cause of sustainability. This holds true regardless of any debate concerning the objectives of competition law or the necessity of prioritizing sustainability at all costs.

4. Scenarios II and IV: when preserving competition and advancing sustainability do not coincide

The intense debate concerning the intersection between the ordinary enforcement of Article 102 and the promotion of sustainability does not centre on the above scenarios but focuses on scenarios II and IV of the table above. These indeed involve situations where a behaviour may either harm competition while enhancing sustainability or reduce sustainability (potentially violating associated laws) without impeding competition.

In such cases, the following questions emerge: should actions that infringe antitrust laws remain unpunished if they contribute to safeguard or even increase sustainability? Conversely, should actions not infringing Article 102 still face penalties from antitrust authorities if they undermine the guaranteed level of sustainability?

Consider, for example, a scenario II case in which a dominant firm, signing an exclusive contract lasting over 10 years with a distributor that covers more than 45% of the market, excludes its horizontal competitors who exploit undocumented immigrants. For sure, it would be hard to dispute the sense of outrage provoked by businesses exploiting vulnerable people, even if they are excluded from the market in an anticompetitive way. Yet, is it legally sound to suggest that antitrust laws should refrain from penalizing such abusive behaviour simply because the excluded companies resort to forms of slavery?

Alternatively, consider a scenario IV in which a dominant company neglects its environmental responsibilities in waste disposal, without distorting competition. Once again, no one would ever defend a firm intentionally polluting. However, would it be justified to apply Article 102 against a practice that does not harm competition law whatsoever?

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cumstances of the case that the Commission would take into consideration in assessing the gravity of the antitrust infringement.

The following paragraphs outline two distinct approaches to addressing these questions. The first is market-based – a bottom-up method, if you will – relying on a case-by-case analysis of consumers' willingness to pay for sustainability, that is, for sustainable products, services, or technologies. Essentially, it ties the competitive relevance of sustainability to consumers' preferences. The second approach is value-driven – a top-down strategy, if you prefer – centred on the premise that, given the urgent risks posed by climate change and the social challenges sparked by wealth inequality, sustainability must be prioritized over competitive concerns at any cost, regardless of consumers' choices.

However, before delving into these issues, I must take some time to address a few antitrust technicalities to better describe the boundaries of Scenario IV and pre-empt some potential criticisms.

4.1. Sustainability, unfair cost advantages, and exclusion

As I mentioned in Paragraph 2, competition law hinges on specific facts, where even minor nuances can shift a situation from procompetitive to anticompetitive. Consequently, attempting to navigate the intersection of Article 102 and sustainability by listing potential practices risks diverting attention from the core issue to broader debates about the permissibility of dominant firms' actions under conventional competition law. Notwithstanding this effort, we now have reached a point where, due to the example I used to illustrate behaviours falling within Scenario IV, we must address an issue that is not specific to the interface between sustainability and Article 102 but rather pertains to ordinary antitrust law!

I presented the case of a dominant firm that harms sustainability by neglecting its environmental responsibilities in waste disposal, yet does not distort competition. However, is such a case really possible? Isn't it true that compliance with waste disposal regulations is costly? Therefore, doesn't a dominant firm that neglects its environmental duties gain an unfair cost advantage over rivals that bear these compliance costs? And, does a dominant firm that gains such an unfair cost advantage over its rivals violate Article 102?

Currently, antitrust law does not penalize such unfair cost advantages[30] and likely cannot prosecute even those leading to exclusionary pricing, as

[30] This is the case unless one wishes to conclude otherwise based on the ruling of the Court of Justice in the *Bundeskartellamt v. Facebook* case. In that decision, the Court stated that "a competition authority must assess, based on all the specific circumstances of the case, whether the con-

predatory pricing laws and other rules governing dominant firms' pricing conduct use the dominant firm's costs as the benchmark.[31] Therefore, under ordinary antitrust law, dominant firms that gain an unfair cost advantage over their competitors do not violate Article 102. Accordingly, one could have illustrated Scenario IV via the simple case of a dominant firm that neglects its sustainability duties, without making any further specification about the impact of such conduct on competition. Nevertheless, I chose to exemplify Scenario IV referring to a dominant company that neglects its environmental responsibilities in waste disposal *without distorting competition*.

Indeed – and to be frank – there is no competitive merit in gaining an edge by violating the law or skirting compliance costs. Therefore, in light of the spirit that seems to inspire the new guidelines on abusive exclusionary conduct, firstly, one could argue that Article 102 should penalize dominant firms engaging in such conduct, as it strays from competition on the merits.[32] Secondly, one should establish whether antitrust authorities should go after any behaviour that gives a dominant company an *unfair* cost advantage, or only prosecute those actions that allow the company to use that advantage to *exclude* competitors.

I believe that the first option should be rejected because claiming that every unfair cost advantage constitutes an abuse of a dominant position would effectively turn antitrust law into the 'quintessential guardian' of any law that is being violated. Consider indeed that in a market economy, unfair cost advantages may arise from various infringements or decisions

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duct of the dominant undertaking, by employing methods different from those governing normal competition in products or services, has the effect of hindering the preservation of the existing level of market competition or its growth. [...] In this regard, the compliance or non-compliance of such conduct with the provisions of the GDPR may, depending on the circumstances, serve as an important indicator among the relevant factors of the case for determining whether the conduct involves resorting to methods outside normal competition and for evaluating the impact of a particular practice on the market or consumers". – see CJEU, Case C-252/21, *Meta Platforms and Others*, EU:C:2023:537, para. 47.

[31] To put it more plainly, a price is considered predatory when it is lower than a certain benchmark of the dominant firm's costs, meaning an efficient firm like the dominant one could not match it. In the scenario we are considering, the dominant firm's costs would already be skewed by illegal behaviour, like unlawfully dumping pollutants. Therefore, the unfairly low price and its exclusionary effect would not be recognized and cached.

[32] Communication from the Commission, *Draft guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings*, 2024, paragraphs 40-58, available at https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

not to comply with specific laws. Dominant companies that evade taxes, create slush funds, ignore workplace safety regulations, or neglect building maintenance – all gain an unfair cost edge. Furthermore, as I will discuss in Paragraph 9, any non-dominant company may violate the law or skirt compliance costs; these practices do not require significant market power to occur or to produce anticompetitive effects. Therefore, using Article 102 to punish these practices would distort the overarching goal of antitrust law, which is to control how firms use their market power.

As for the second option, I consider it reasonable and this is why I illustrated Scenario IV with a dominant company that neglects its environmental responsibilities in waste disposal *without distorting competition*, meaning without harming market functionality with the result of excluding competitors. In other words, I believe that Article 102 could be used to address unfair cost advantages resulting from unsustainable (or unlawful) conduct, if – and only if – these advantages enable dominant firms to exclude rivals[33] and this is the reason why I illustrated the Scenario in which competition law is not infringed by addressing the case where the unstainable conduct does not undermine the working of the market.[34]

Made this clarification, which is not so much about the specifics of Article 102 and sustainability but rather about the ongoing debate over what Article 102 should actually prohibit, we can go back to the analysis of the interface.

5. The bottom-up path to sustainability and consumers' willingness to pay

Willingness to pay refers to the maximum price consumers are ready to spend on a product or service. It is crucial in competitive dynamics for two main reasons. Firstly, if consumers show a willingness to pay for a certain feature, companies will compete to provide it. In other words, consumers' satisfaction will result from the competition among firms. Conversely, if consumers are not willing to pay for a feature, companies lack incentive to produce it and, *a fortiori*, the interplay between demand and supply will

[33] To be sure, to achieve this, we should reshape the cost benchmark used to evaluate the prices set by dominant firms. Specifically, we should adopt a test that considers not just an equally efficient competitor, but one that is both equally efficient and equally compliant with the law.

[34] Sure, one could counter-argue that in AstraZeneca the Commission punished the act of misleading regulators. However, AstraZeneca's conduct was capable of both excluding rivals and reducing consumer welfare.

not result in any sustainable product or service. Secondly, once it is confirmed that consumers are willing to pay for a certain item, the amount they are willing to spend serves as a gauge of their preferences for that item as opposed to others, such as low prices or high innovation.

Therefore, to answer the previous questions in relation to dominant firms' practices, one could choose to assess whether consumers are inclined to pay for sustainability.

If they were, it could be argued that businesses are competing to become more sustainable. This would imply that the levels of sustainability achieved in a given market are a consequence of competition and market dynamics. Consequently, we could align ordinary pro- or anti-competitive effects – such as variations in prices, output, quality, variety, and innovation – with sustainability enhancements or decreases. We could view these enhancements as pro-competitive effects and decreases as anti-competitive effects, respectively, and compare them with other effects that a given practice has on the standard variables influencing consumer welfare.[35]

In contrast, if consumers showed no willingness to invest in sustainability, they would remain indifferent to its variations. Consequently, firms would lack motivation to compete in offering sustainable products and services, and changes in competition would not affect the overall sustainability landscape within the market, rendering any consideration of how a particular action might impact sustainability irrelevant.

With this background in mind, we could reassess the aforementioned cases categorized under scenarios II and IV.

In the first case, regarding the 10-year exclusive agreement excluding rivals exploiting undocumented immigrants, we would still face a situation where a dominant company benefits from maintaining monopolistic prices through that agreement with a distributor covering more than

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[35] See Roman Inderst and Stefan Thomas, "Prospective welfare analysis – Extending willingness-to-pay assessment to embrace sustainability", *Journal of Competition Law & Economics* 18, no. 3 (2022): 551-583, https://doi.org/10.1093/joclec/nhab021. By embracing this approach, there would be no need to distinguish, as the Commission does in its revised guidelines on Article 101, between "individual use benefits" and "individual non-use value benefits". The former refers to the direct benefits consumers derive from sustainable products, such as lower prices or higher quality, while the latter pertains to the indirect benefits consumers enjoy because sustainable product consumption enhances overall sustainability. See 'New Guidelines 101', paragraphs 571-574 and 575-581, respectively. However, if consumers are willing to pay for sustainability, it becomes irrelevant whether the benefits are direct or indirect, or whether they arise from changes in prices and quality, or from improvements in the market's overall level of sustainability.

45% of the market. However, considering consumers' willingness to pay for sustainability, one could argue that (or test whether) consumers were willing to accept the higher prices imposed by the dominant firm *in order to* eliminate competitors who exploit undocumented immigrants. In the affirmative, this behaviour could thus be justified based on its procompetitive effects resulting from sustainability enhancements. Conversely, if consumers were not willing to pay for sustainability, the very same competitive mechanism would disregard undocumented immigrants. Neither the dominant firm nor its rivals would concern themselves with treating undocumented immigrants fairly, as this would not be something consumers would care about. Therefore, the exclusive agreement would be judged solely based on the parameters of standard antitrust law. It would be prohibited under Article 102 as exclusionary and anticompetitive, with no further consideration for sustainability-related issues.[36]

In relation to the second example, *i.e.* that of a dominant firm failing to meet its environmental obligations in waste disposal, a premise must be done. Since ordinary antitrust law focuses on firms' performances as judged by consumers, and thus on what consumers can perceive and appreciate (namely, prices, quantity, quality, variety and innovation), in this example we must find a way to connect the unfair cost advantage to a price variation. Thus, suppose that, thanks to its unlawful behaviour in relation to waste disposal, the dominant firm is able to offer low prices that benefit consumer welfare. Still, it could be argued that, or tested if, despite such price reduction, consumers inclined towards sustainability would experience a significant decline in their welfare due to the pollution caused by the dominant firm. If so, the dominant firm's practice and the like would be prohibited. Conversely, if consumers were not inclined towards sustainability, the dominant firm would not feel compelled to compete by portraying itself as environmentally compliant to consumers, also because its rivals would not do so either. Consequently, the actions of the dominant firm would not be prohibited under standard antitrust law because they could not impede a form of competition – *i.e.* that on compliance with environmental obligations – that does not even exist.

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[36] For the very same approach in relation to Article 101 see Cristina Volpin, "Sustainability as a quality dimension of competition: Protecting our future (selves)", *Competition Policy International*, July 2020, https://www.competitionpolicyinternational.com/wp-content/uploads/2020/07/02-Sustainability-as-a-Quality-Dimension-Cristina-A.-Volpin.pdf.

In conclusion, under the bottom-up approach herein described the integration of sustainability concerns into antitrust discussions would not result from any act of public powers: it would hinge on the idea that, if in some markets sustainability has become one of the factors that drives consumers' choices, firms do harm competition when they prevent those markets from delivering sustainable solutions.

To be sure, even this approach triggers some practical challenges.

5.1. Technical challenges in measuring consumer willingness to pay for sustainability

In order to work with consumers' willingness to pay, antitrust authorities should understand *which* consumers' willingness to pay for sustainability should be assessed and tested; and *how* the variations in sustainability that a practice may imply should be *compared* with the positive and negative impacts that the practice may have on prices, output, quality, variety, and innovation.

To address the first issue, one could begin with considering that the practices of firms in a dominant position can impact either a single market, as is the case of exploitative conduct or predatory pricing, or multiple markets, as observed with exclusive agreements, tying, fidelity or bundle rebates, among others. Consequently, it seems reasonable that among the consumers whose willingness to pay needs to be assessed – let's call them "the relevant consumers" – we should include both the *current consumers* operating within the monopolized market and, in the case of multi-market practices, the current consumers operating within the secondary market. These consumers are indeed those who directly bear the benefits and costs of the practices at hand.[37]

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[37] On this point, the Commission, with regard to "collective benefits" (*i.e.* benefits that "occur irrespective of the consumers' individual appreciation of the product and accrue to a wider section of society than just consumers in the relevant market"), provides that "[a]lthough the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same". See "New Guidelines 101", paragraphs 583-584. On this point see Margherita Colangelo, "Sustainability agreements and competition law: A comparative perspective", paper presented at the seminar "Sustainability agreements, green transition and Article 101 TFEU", held at Roma Tre University, November 21, 2023, and whose contributions are going to be collected in the *Roma Tre Law Review*, and at the conference "Il diritto antitrust in crisi? La tutela della concorrenza tra nuovi obiettivi, modalità di enforcement, regole procedurali" (Centro Guido Rossi, Pavia, March 15, 2024), 11-17.

In addition, considering the intertemporal dimension inherent in the concept of sustainability, *future consumers* could also warrant consideration among the relevant ones. After all, preferences evolve over time due to various factors, ranging from greater awareness and information regarding both sustainability issues and the negative externalities that current products and services may entail, to demographic shifts and changes in societal and cultural attitudes towards sustainability that may lead to its increased significance in consumer decision-making. Therefore, as some scholars have recently suggested, considering the willingness to pay of future consumers could be a prudent choice.[38] True, for practical reasons aimed at narrowing the scope of the effects-analysis, the Commission states that harm and benefit usually must relate to the same consumers to be identifiable. However, at a closer look,[39] this principle does not imply that enforcers must consider the same individuals. Rather, it underscores the importance of identifying a given relevant market and its consumers. By focusing on future consumers, the relevant market would remain the same (!), while antitrust authorities would be allowed to capture the potential shifts in consumers' preferences and their hierarchical organization.[40]

Finally, following the guidelines on Article 101(3) addressing the collective benefits of sustainability agreements,[41] one could wonder if also the so-called "non-consumers" should be included in the group of the relevant consumers whose willingness to pay must be assessed to integrate sustainability issues in the analysis of Article 102 cases. However, the Commission's choice to give credit to the preferences of "non-consumers"

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[38] Roman Inderst and Stefan Thomas, "Prospective welfare analysis", 561-566 (discussing about the categories of current and future consumers as well as non-consumers in relation to sustainability agreements).

[39] Roman Inderst and Stefan Thomas, "Prospective welfare analysis", 570 (discussing in details how introducing future projections on the consumer welfare analysis).

[40] To date, even antitrust authorities that have scrutinized sustainability, and specifically sustainability agreements, have yet to address the notion of "future consumers' preferences". When their attention has been directed towards the intertemporal aspects of the sustainability discourse, they have not focused on future consumers. They have emphasized the prospective *benefits* of sustainable agreements. See 'New Guidelines 101', paragraphs 573 and 591; CMA, *Green Agreements Guidance*, CMA 185, October 12, 2023, https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf, points 5.7, 5.17, 5.25 and 5.28. Furthermore, see Margherita Colangelo, "Sustainability agreements and competition law", 14-17, who notices that the Commission's guidelines are more conservative than the CMA and the ACM ones.

[41] See 'New Guidelines 101', paragraphs 582-589.

clearly takes distance from the bottom-up approach hinging on consumers' willingness to pay that we are discussing here.[42]

Regarding the second issue – how to juxtapose consumer willingness to pay for sustainability with their valuation of other product attributes – the analysis conducted by the Dutch competition authority ("ACM") in the *Chicken of Tomorrow* case offers an enlightening illustration. This case revolved around an agreement among producers, traders, and retailers concerning minimum welfare standards for chickens. However, this agreement also constituted price fixing, failing to meet the criteria outlined in Section 6, paragraph 3 of the Dutch Competition Act, which mirrors the criteria stipulated in Article 101(3) TFEU for anticompetitive agreements to be deemed lawful.[43] Notably, the agreement was deemed incapable of delivering benefits to consumers. To reach this determination, the ACM assessed consumers' willingness to pay for improved living conditions for chickens, employing a technique known as "conjoint analysis". This method evaluates consumer preferences for product attributes by presenting hypothetical product choices: if a consumer opts to purchase a sustainably raised chicken at a particular price over a conventionally raised one, the price discrepancy reflects their willingness to pay for sustainability. Through this approach, the ACM discovered that consumers were willing to pay not only an additional 68-euro cents per kilo of chicken fillet for enhanced chicken welfare, but also an extra 14-euro cents per kilo for the heightened environmental impact resulting from the proposed new chicken raising standards. This increased willingness to pay of 82-euro cents was then weighed against the increased price of chicken due to the agreement, totalling EUR 1.46 per kilo of chicken fillet. Building on this analysis, the ACM reached the conclusion that the agreement imposed a price hike on consumers which they were not entirely willing to shoulder, as sustainability, while significant, did not hold such paramount value for them. Consequently, one prospective method for comparing consumer willingness to pay for sustainability with that for other product attributes could involve quantifying this willingness in pecuniary terms – monetizing it – and then applying the "conjoint analysis" technique described earlier.

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[42] In light of that said in the text, the approach pivoting around consumers' willingness to pay for sustainability would be more conservative than the one endorsed by the Commission in its revised guidelines on Article 101.

[43] On this case see Margherita Colangelo, "Sustainability agreements and competition law", 7-11.

Moreover, it is worth noting that antitrust law routinely addresses cases where a practice has mixed effects on traditional variables. For instance, a practice might raise prices while also driving innovation. Typically, antitrust law handles these cases without delving into the details of monetizing these effects. Instead, it simply determines that the impact on one factor outweighs the impact on another. For example, it consistently prioritizes increases in innovation over price reductions. To be sure, this preference for innovation (and dynamic efficiency) over prices (and static efficiency) typically reflects the economic principle that boosting innovation is generally more beneficial than lowering prices.[44] To be sure, so far, there are not equivalent economic theories showing that enhancing sustainability is generally more beneficial than reducing prices. However, once it has been established that both current and future consumers in markets affected by dominant firms' anticompetitive practices are willing to pay for sustainability, antitrust authorities could assume that any enhancement in sustainability is much more valuable to consumers than any potential reduction in prices. This would be a *compromise* that might sometimes bend reality to reduce the costs of monetizing consumers' willingness to pay and, hence, administering antitrust law. However, it would still only be available in situations where consumers were willing to pay for sustainability.

Indeed, the very essence of the argument presented thus far is that there may still exist consumers uninterested in paying for sustainability. Consequently, in markets where these consumers constitute the majority, both presently and in the future, firms' practices should be evaluated solely on the basis of ordinary antitrust law parameters, devoid of any sustainability-related considerations.

Undoubtedly, such outcome may not fully satisfy proponents of sustainability-driven antitrust rules. Hence, they might pursue an alternative solution untethered from consumers' willingness to pay, as the Commission has already decided to do in the guidelines on article 101(3).

6. The top-down path to sustainability and the goals of competition law

As discussed in paragraph two, there are scholars who argue for the utilization of antitrust law to safeguard and advance sustainability. Essentially,

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[44] See, *e.g.*, Thomas M. Jorde and David J. Teece, "Introduction", in *Antitrust, innovation, and competitiveness*, ed. Thomas M. Jorde and David J. Teece (Oxford University Press, 1992), 3-4, arguing that "competition driven by innovation generally stimulates rivalry and promotes economic welfare far more effectively than does competition that focuses on price reductions".

they propose that antitrust authorities evaluate the impact of business practices on sustainability under Article 102 of TFEU. More, recognizing the paramount importance of sustainability, they advocate prioritizing its protection and promotion over market preservation concerns.[45] Hence, these scholars propose resolving the aforementioned scenarios II and IV as follows. First, they would regard as permissible any business conduct that may harm competition but fosters sustainability. In our example, they would deem lawful the 10-year exclusive contract with a significant distributor whereby the dominant firm enforces monopolistic pricing, as long as this practice excludes the dominant firm's horizontal competitors who exploit undocumented immigrants. Second, they would classify as abusive the practices damaging sustainability without affecting competition, such as when a dominant company neglects its environmental responsibilities in waste disposal, resulting in lower prices that do not surpass its competitors. In their framework, sustainability would act as a "shield" in the former scenario, deflecting the enforcement of Article 102, and as a "sword" in the latter, wielding Article 102 to safeguard sustainability against harmful practices.[46]

Now, in light of what has been discussed in paragraph 5, it is evident that this solution is independent of any analysis of consumers' willingness to pay. One could also argue that this solution has been developed precisely to separate the enforcement of Article 102 from the consideration of consumers' willingness to pay. However, this implies that if antitrust authorities defend and promote sustainability when consumers are unwilling to pay for it, they are presuming that firms compete to be sustainable even when they do not. In other words, they are assuming that, if allowed to develop competitively, the markets they are analysing will deliver sustainable products and processes, although this is not true. Therefore, incorporating sustainability as one of the goals of antitrust law means accepting that in certain situations – though not always – antitrust authorities will apply Article 102 based on a fiction: presuming that there is competition for sustainability, even when such competition does not exist, as consumers are not willing to pay for sustainability.

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[45] See, *e.g.*, Simon Holmes, "Climate change, sustainability, and competition law"; Suzanne Kingston, "Competition law in an environmental crisis", *Journal of European Competition Law & Practice* 10, no. 9 (2019): 517-518.

[46] See, e.g., Beata Mäihäniemi, *Manipulation into Unsustainable Consumer Choices as Exploitative Abuse of Dominance*, in this journal, 1, 2024, p. 101 (analyzing cases in which Article 102 could be applied to prosecute dominant firms for practices that steer consumers toward unsustainable products and services).

In general terms, enforcing a piece of law based on a fiction is neither a trivial nor a routine decision, as it involves accepting as true something that is not established or may even be deliberately false, all in pursuit of a specific goal.[47] In legal systems founded upon the principle of legality, this poses a particular problem, especially when the fiction is a judicial one – applied by judges – because this could allow them to circumvent the application of the law.[48] Furthermore, considering that such fiction – like the existence of competition for sustainability where it does not exist – would initially be invoked by competition authorities, the spectre of arbitrary exercise of power arises, lacking clear, pre-established, and exceptional criteria delineating the circumstances justifying the invocation of such a legal construct.

The following paragraph deals with the exceptional circumstances that could find application in scenario II, that is, when a dominant firm has distorted competition, while improving sustainability.

7. Exceptional circumstances limiting the pursuit of sustainability as an autonomous goal of competition law in Scenario II cases

Even legal systems founded upon the principle of legality may permit exceptions. In pursuit of the paramount goal of sustainability, they may allow some dominant firms that abuse their power within the meaning of Article 102 to go unpunished. However, to avoid any misuse of this exemption, it should be limited by some conditions.

Firstly, it should be imperative that dominant firms are not afforded the opportunity to falsely assert the enhancement of sustainability through their practices. Put differently, antitrust authorities must exercise prudence in discerning instances of *greenwashing*.[49] Given that they will

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[47] "Legal fiction", Encyclopedia Britannica, last accessed June 1, 2024, https://www.britannica.com/topic/legal-fiction. See also Liron Shmilovits, *Legal fictions in private law* (Cambridge University Press, 2022), 1, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/527591E0622FD5F995C9AC65783A79F5/9781316519479int_1-4.pdf/general_introduction.pdf; and Giovanni Tuzet, "Una teoria coerentista delle finzioni", *Ragion Pratica* 37, no. 2 (2011): 530, https://doi.org/10.1415/35683.

[48] See Giovanni Tuzet, "Finzioni", in *Filosofia del diritto: norme, concetti, argomenti*, ed. M. Ricciardi, A. Rossetti and V. Velluzzi (Carocci, 2015), 269-284.

[49] In general terms, greenwashing is the practice of giving a false impression of the environmental impact or benefits of a product, which can mislead consumers. On the approach that EU institutions follow against false green claims see Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information, OJ L/1, March 6, 2024.

neglect to enforce a prohibition – that is Article 102 – that constitutes a fundamental aspect of antitrust legislation, it is incumbent upon them to diligently ascertain the legitimacy and substantiation of purported sustainability benefits.

In addition, one might seek to apply conventional antitrust law principles to sustainability-driven justifications, thereby asserting that a dominant firm could potentially justify its unlawful practices by demonstrating either their production of procompetitive effects outweighing anticompetitive ones or their objective justification, due to technical or commercial necessities.[50] Specifically, in the former scenario, as the Court of Justice has established,[51] dominant firms should satisfy the four conditions outlined in Article 101(3) for anticompetitive agreements. They should demonstrate that the abusive conduct: (i) generates efficiency gains, contributing to the enhancement of goods' production or distribution, or to the advancement of technical or economic progress; (ii) is indispensable to achieve said efficiency gains; (iii) offers consumers a fair share of resulting benefits; and (iv) does not eliminate competition concerning significant aspects of the products in question. However, in markets where consumers are unwilling to pay for sustainability, verifying the conditions of Article 101(3) would be nonsensical. Specifically, dominant firms will endeavour to demonstrate that the pursuit of sustainability results in genuine, quantifiable efficiency gains, as recently mandated by the Court of Justice when dealing with sports associations attempting to use their legitimate goals as procompetitive effects of their abusive practices.[52] After all, the decision to incorporate sustainability among the objectives of antitrust law proves beneficial precisely because it allows for bypassing the economics-driven analysis of Article 101(3).

Finally, dominant firms might defend their abusive practices by claiming they were essential for achieving their sustainability goals. They could argue that their anticompetitive behaviour was objectively necessary to

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[50] Judgments of 27 March 2012, *Post Danmark I*, C-209/10, EU:C:2012:172, paragraph 41, and of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 46 and 86.

[51] Judgment of 23 December 2023, *European Superleague Company, S.L. v. Unión de Federaciones Europeas de Fútbol (UEFA) and Fédération internationale de football association (FIFA)*, C-33/21, ECLI:EU:C:2023:1011, paragraph 201 and judgments of 27 March 2012, *Post Danmark I*, C-209/10, EU:C:2012:172, paragraph 40, and of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 46.

[52] *Superleague*, *ibidem*, paragraph 196.

produce the sustainable products and processes they offer. However, under current case law, to this end, they would need to demonstrate that their actions were both essential (say also indispensable) and reasonable (say also proportionate) in relation to their sustainability objectives.[53] Not by chance, there have been 102 cases in which national antitrust authorities have insisted that dominant firms prove their abusive practices were the least anticompetitive means necessary to achieve the sustainability benefits they claimed to generate.[54] For example, the Paris Court of Appeal overturned the French Competition Authority's decision[55] to sanction SNCF for various anticompetitive practices, including below-cost pricing. The Court determined that SNCF's justification for the below-cost pricing – specifically, its aim to promote a greener alternative to road transport – was proportionate and aligned with the public interest.[56] Analogously, in the most recent *Tanklux* case, the Luxembourg Competition Council saved the conduct of Tanklux S.A., which compelled petroleum companies

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[53] See Miguel de la Mano, Renato Nazzini and Hans Zenger, "Article 102 TFEU", in *Faull & Nikpay: The EU law of competition*, 3rd ed., ed. Jonathan Faull, Ali Nikpay and Deirdre Taylor (Oxford University Press, 2014), 395; Ekaterina Rousseva, "Objective justification and Article 82 EC in the era of modernisation", in *EC competition law: A critical assessment*, ed. Giovanni Amato and Claus-Dieter Ehlermann (Hart Publishing, 2007); Paul Craig and Gráinne De Búrca, "Competition law: Article 102", in *EU Law: text, cases and materials*, 7th ed., ed. Paul Craig and Gráinne De Búrca (Oxford University Press, 2020), 1118.

[54] There have been also 101 cases focused on the criteria of proportionality and necessity. For example, in the *Kølebranchens Miljøordnings* case, the Danish competition authority did not sanction a concerted refusal to deal that some producers and importers within the refrigerants industry opposed to firms that do not agree to take specific measures to enhance the recycling of refrigerants and so mitigate ozone layer depletion. The Danish authority deemed the justification provided – specifically, the necessity of certain resources and expertise for effective recycling – as proportionate and necessary – see Danish Competition Council, Decision in Case 2:8032-49/TH, *Kølebranchens Miljøordnings* (1998). Similarly, in the 2005 *Transport to Saint Honorat* case, the French National Competition Authority did not fine an agreement granting exclusive rights to use the landing stage to be anticompetitive. The Authority determined that the agreement was essential for preserving the unique geography of the site, maintaining the island's private character, and regulating visitor flow – see 05-D-60 *Transport to Saint Honorat* (2005), paragraphs 62-68. In particular, the French Authority used Article 102 TFEU exception (objective necessity) as a basis for granting an Article 101(1) exemption.

[55] French Competition Authority, Decision in Case 12-D-25, *Société Nationale des Chemins de Fer Français (SNCF)* (2012), paragraph 771.

[56] See Paris Court of Appeal, judgment in Case No 2013/01128, *Société Nationale des Chemins de Fer Français v. Autorité de la Concurrence* (2014), 53. However, that decision started a judicial saga. It was annulled by the *Cour de Cassation* in 2016. Following this decision, in 2018 the Paris Court of Appeal concluded that the SNCF had indeed engaged in predatory pricing and in 2021 the *Cour de Cassation* finally confirmed the decision.

to use certain firms to provide brokerage services for the transportation of petroleum products by waterway, since such exclusive dealing offered certain guarantees and improvements to the process of delivering petroleum products to the port of Mertert, to the advantage of the security of Luxembourg's energy supply.[57] On the opposite, there have been cases in which the justifications provided by the investigated undertakings were judged not necessary and proportionate. Consider, for example, that in the case involving Heathrow Airport Limited (HAL), the England and Wales High Court of Justice determined that HAL had abused its dominant market position by imposing unfair and discriminatory requirements to all third-party valet parking operators (*i.e.*, those operators who park passengers' cars at departure and return them upon arrival).[58] Notably, indeed, these new requirements did not apply to HAL's own valet parking service, HVP, which continued to operate from designated areas on or adjacent to each terminal forecourt. Whereas HAL contended that such a measure aimed to reduce emissions from idling and circulating vehicles, the England and Wales High Court of Justice concluded that there had not been a CO2 congestion problem at Terminal 1 for 18 months and that, even if such issues existed at Terminal 3, the measure would not have sufficiently mitigated the problem to justify the anticompetitive conduct. In other words, the measure was disproportionate because it harmed competition more than it reduced pollution.

In conclusion, the acceptance of dominant firms' anticompetitive actions in the pursuit of sustainability should be contingent solely upon the veracity, necessity and proportionality of the sustainability-driven justifications underlying those actions. Under these criteria, hence, one could decide to take distance from the consumers' willingness to pay approach, as the Commission has already done in the New Guidelines on Article 101(3).

8. Arguments against pursuing sustainability as an autonomous goal of competition law in Scenario IV cases

As articulated in paragraph 5, in markets where consumers are unwilling to pay for sustainability, firms do not engage in competitive offerings

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[57] See Luxembourg Competition Council, Decision in Case 2009-FO-02, *Tanklux* (2009), paragraphs 50-54.

[58] See England and Wales High Court, *Purple Parking Ltd and Meteor Parking Ltd v. Heathrow Airport Ltd*, [2011] EWHC 987 (Ch), available at https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2011/987.html&query=purple+and+Parking&method=boolean.

of sustainable solutions. Therefore, as clarified in paragraph 7, if antitrust authorities invoke Article 102 to defend and promote sustainability as an independent goal of competition law when, in reality, consumers are unwilling to pay for sustainability, they are effectively operating on a fictitious premise. While paragraph 8 outlines the conditions under which such use of fiction may be deemed acceptable to exempt a dominant firm that enhances sustainability from an antitrust penalty, this section presents several arguments why Article 102 should not be applied in Scenario IV cases – specifically, to penalize a dominant firm that has harmed sustainability without affecting competition.

The *first* argument is straightforward. Legal systems grounded in the principle of legality cannot justify employing a fiction to impose prohibitions that also entail substantial fines. This principle should delineate a boundary against the moral imperative or constitutional duty to duly consider sustainability. Stated differently, while sustainability can be prioritized, it should not extend to the use of antitrust law to penalize a dominant firm that has not disrupted market functioning. Such an approach would inherently be unjust: broadly speaking, false negatives, which result in an innocent verdict for a guilty individual, are indeed more socially acceptable than false positives, which convict an innocent person, it is unacceptable to penalize an innocent party *for an act they did not commit*! Therefore, in markets where consumers are hesitant to pay for sustainability, Article 102 should not be invoked to punish a dominant firm that, while undermining sustainability, has not distorted competition.

Secondly, it is evident that everyone is free to believe or not in the idea that a market economy yields more benefits than a planned economy. Nevertheless, if one views market economy as advantageous, they should also believe that competition among firms is a natural, bottom-up mechanism[59] that effectively delivers what consumers demand.[60] Therefore, they

[59] See Friedrich von Hayek, "Cosmos and Taxis", in Friedrich von Hayek, *Law, legislation and liberty*, *Volume I*: *Rules and order* (The University of Chicago Press, 1978) 35-52, where he makes the famous distinction between unplanned orders (Cosmos) and planned order (Taxis). The market is ascribable to the first type of order (Cosmos) and therefore its natural working must be preserved against those trying to undermine it, pretending that it is a "Taxis", since any intervention could upset the overall equilibrium.

[60] See Ludwig von Mises, *Human action: A treatise on economics* (Foundation for Economic Education, 1996), 269, where the A. clearly states "[t]he direction of all economic affairs is in the market society a task of the entrepreneurs. Theirs is the control of production. They are at the helm and steer the ship. A superficial observer would believe that they are supreme".

should not take distance from consumers' willingness to pay and from the idea that consumers' choices, which in turn are an expression of their freedom, drive market dynamics.[61] Doing otherwise means being embracing paternalism, which tarnishes the essence of competition and, more importantly, disregards what consumers want.

However, suppose someone argues that current circumstances, especially climate change, necessitate disregarding consumers who do not prioritize values like sustainability, partly because of the urgency of the situation and also because, as behavioural economics shows, consumers can be biased and short-sighted. Still, this should involve making a deliberate political decision resulting in one or more tailored regulations. In other words, this course of action could be easily recognized *without attributing* it to a system or rules, such as competition law, which fundamentally exists to safeguard consumers' choices and prevent companies from unduly manipulating them through their (significant) market power. Put another way, those who believe in the market mechanism also believe that antitrust law addresses market failures caused by firms exploiting their market power to maintain consumer favour, even when offering overpriced, inferior, or unoriginal products. They do not believe that competition law is a tool designed to create the market, make it function, or steer it toward various economic or political goals. More importantly, they cannot believe that competition law is a piece of legislation to be repurposed for any objective based on current needs.

Therefore, scholars who start treating antitrust rules as malleable tools for achieving whatever socio-political goals are necessary at the moment betray the very essence of a free market economy and, in so doing, they undermine a system that inherently benefits consumers by fostering genuine competition. If the market fails to produce certain outcomes, such as sustainability-focused solutions, because consumers are short-sighted, proponents of the market economy might concede that legislators should implement alternative regulations to address such deficiencies. However, they cannot accept that a law designed to protect the outcomes of competitive markets – what consumers want – is expected to compel firms to produce *outcomes that those markets are inherently unable to deliver because consumers do not want them*!

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[61] Peter Behrens, "The 'consumer choice' paradigm in German ordoliberalism and its impact upon EU competition law", Europa-Kolleg Hamburg, Discussion Paper No. 1/14 (2014), http://dx.doi.org/10.2139/ssrn.2568304.

Thirdly, applying Article 102 to behaviour that harms sustainability but does not restrict competition goes against the diligence standard set by the Court of Justice for firms holding a dominant position. Unlike other businesses, those firms have the special responsibility *not to stifle competition in the markets they dominate*.[62] And this is because, competition in monopolized markets is already limited.[63] Thus, enforcing Article 102 in cases where sustainability is harmed but competition is not restricted contradicts the Court's directive.

It is true, there are some scholars – and Holmes is one among them – that seem to argue that this special responsibility mirrors the Roman law principle of *neminem ledere* under which physical and legal persons should never harm anybody. However, under current case law, this is not entirely accurate. The Court of Justice has never prescribed the special responsibility of Article 102 in such absolute terms. Instead, it has always applied this responsibility specifically to competition, compelling dominant firms not to harm it further. Thus, the idea that dominant firms have the special responsibility not to harm other legal interests, ranging from sustainability to privacy, is not grounded in the current understanding of the special responsibility regime.

Fourthly, as a matter of fact, antitrust law targets agreements, practices of dominant firms, and mergers, on the grounds that these behaviours tend to aggregate and wield market power. This is because firms lacking market power cannot harm competition. A practice that damages sustainability without affecting competition does not necessitate market power either to

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[62] The Court of Justice has repeatedly affirmed that "a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market". See, *e.g.*, judgments of 27 March 2012, *Post Danmark I*, C-209/10, EU:C:2012:172, paragraph 23, and of 6 December 2012, *AstraZeneca v. Commission*, C-457/10 P, EU:C:2012:770, paragraph 188; judgment of 2 April 2009, *France Telecom v. Commission*, Case C-202/07 P, ECR I-2369, paragraph 105; judgment of 9 November 1983, *NV Nederlandsche Banden-Industrie-Michelin v. Commission*, C-322/81, EU:C:1983:313, paragraph 57. Furthermore, on the evolution of the concept of special responsibility, see Giorgio Monti and Ekaterina Rousseva, "The special responsibility of dominant undertakings", in *Research handbook on abuse of dominance and monopolization*, ed. Pınar Akman, Or Brook and Konstantinos Stylianou (Edward Elgar Publishing, 2023), 239-258.

[63] Judgment of 13 February 1979, *Hoffmann-La Roche v. Commission*, C-85/76, EU:C:1979:36, paragraphs 91 and 120, where the Court established that "[t]he concept of abuse is (…) relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which (…) has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".

occur or to produce its effects; any firm – whether dominant or not – can potentially harm sustainability even in a significant way. Therefore, prosecuting practices that harm sustainability but not competition is not aligned with the overarching rationale of competition law, *which is that of controlling the use that firms may do of their single or aggregated market power they hold*.

Indeed, it is frequently observed that practices which are lawful for non-dominant firms can become unlawful when undertaken by dominant firms. Yet, this distinction is not motivated by a desire to be punitive towards dominant firms (!), but by the fact that their market power is what changes the nature of their conduct. Consequently, practices that do not inherently require market power to be problematic – such as unsustainable practices – should not fall within the purview of competition law.

In response, one might argue that this perspective implies a need to establish a direct link between the dominant position and the abusive practice. However, as affirmed under *Continental Can* and *Hoffmann-La Roche*, such a causal link is not necessary to apply Article 102.[64] However, as scholars have clarified,[65] there is room to take distance from those two precedents, as the very same Court of Justice has started to do in recent times, by introducing the concept of super-dominance and by stating that the greater a firm's market power, the larger its anticompetitive impact.[66]

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[64] Judgment of 21 February 1973, *Continental Can*, C-6/72, ECLI:EU:C:1973:22, paragraph 27: "such being the meaning and the scope of article 86 of the EEC treaty, the question of the link of causality raised by the applicants which in their opinion has to question exist between the dominant position and its abuse, is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under article 86 of the treaty, regardless of the means and procedure by which it is achieved, if it has the effects mentioned above"; and *Hoffmann-La Roche*, *ibidem*, paragraph 91.

[65] Pierre Vogelenzang, "Abuse of dominant position in Article 86; The problem of causality and some applications", *Common Market Law Review* 13, no. 1 (1976): 61, 66, https://doi.org/10.54648/cola1976004. In particular, the A. went through the exemplary types of abuses listed in Article 102 to conclude that in all of them there is a link between dominance and the conduct or between dominance and its effects. See also Ekaterina Rousseva, *Rethinking exclusionary abuses in EU competition law* (Hart Publishing, 2010), 75-79, stating: "however, to draw the conclusion from these two statements (*cf. Continental Can* and *Hoffmann-La Roche*) that no causal link between dominance and abuse is needed, is too far-reaching and, in my view, such a conclusion is contrary to the very essence of Article [102]". See, furthermore, Robert O'Donoghue and Jorge Padilla, *The law and economics of Article 102 TFEU*, 3rd ed. (Hart Publishing, 2020), 215-217, stating that "it would be absurd to blame a dominant firm for adverse effects on a rival firm or competition that are not caused by anything done by the dominant firm".

[66] Judgment of 17 February 2011, *Konkurrensverket v. TeliaSonera Sverige AB*, C-52/09, ECLI:EU:C:2011:83, paragraphs 80-81. Here the Court held that, as a general rule, the degree of dominance is not relevant for finding an abuse because Article 102 TFEU does not envisage

Briefly, as a matter of logic, the relationship between dominance and abusive practices – which consist of two main components, the dominant firms' actions and their anticompetitive effects – can result in two distinct scenarios. First, an abusive act may inherently require dominance because it cannot be performed by firms in perfect competition. For example, consider unfair market prices: price takers cannot impose them because consumers can easily turn to other companies. [67,68] Second, the anticompetitive effects of certain actions may either not occur or be exacerbated without dominance. For instance, any company – dominant or not – can sell below cost. However, a non-dominant company would not have the capacity to sell below cost long enough to drive competitors out of the market; and, even if it succeeds to do so, it would be unable to recoup the losses incurred when it raises its prices. Similarly, while any firm can refuse to deal with a rival, only dominant firms can harm competition through such refusals. The cases of *Continental Can* and *Hoffmann-La Roche* fall into this second category: while even non-dominant firms can merge (*Continental Can*) or conclude exclusive agreements (*Hoffmann-La Roche*), dominance

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any variation in form or degree in the concept of a dominant position, but also clarified that this does not mean that the undertaking's strength in the market is irrelevant. Indeed, in *Intel* the Court expressly pointed out the market share covered by the conduct as an important element of finding an abuse in the context of rebates when the Commission is required to examine their effects – see judgment of 6 September 2017, *Intel Corp. Inc. v. European Commission*, C-413/14 P, ECLI:EU:C:2017:632, paragraph 139.

[67] See, *e.g.*, Miguel de la Mano, Renato Nazzini and Hans Zenger, "Article 102 TFEU", 371.

[68] When discussing unfair bargaining conditions, whether related to prices or not, the situation differs slightly. In a perfectly competitive market, no firm can impose unfair bargaining conditions. However, even non-dominant firms can impose such conditions if they have significant bargaining power relative to their counterparties or if they enjoy economic duress. See, in this regard, Benjamin Klein, "Why hold ups occur: The self-enforcing range of contractual relationships", *Economic Inquiry* 34, no. 3 (1996): 444-463, https://doi.org/10.1111/j.1465-7295.1996.tb01388.x; Oliver D. Hart, "Incomplete contracts and the theory of the firm", *Journal of Law, Economics, & Organization* 4, no. 1 (1988): 119-139; Benjamin Klein, "Market power in aftermarkets", *Managerial and Decision Economics* 17, no. 2 (1996): 143-164; Benjamin Klein, Robert G. Crawford and Armen A. Alchian, "Vertical integration, appropriable rents, and the competitive contracting process", *Journal of Law & Economics* 21, no. 2 (1978): 297-326; and Andrew B. Whitford, "Oliver E. Williamson, markets and hierarchies: Analysis and antitrust implications", in *The oxford handbook of classics in public policy and administration*, ed. Martin Lodge, Edward C. Page and Steven J. Balla (Oxford University Press, 2015); Oliver E. Williamson, "Transaction-cost economics: The governance of contractual relations", *Journal of Law & Economics* 22, no. 2 (1979): 233-261. Therefore, there is a connection between these kinds of clauses and the power of the firm in question. The key point is that this power is bargaining power rather than market power, although firms with significant market power often also possess substantial bargaining power.

is necessary to make these practices harmful to competition.[69] Thus, in these specific cases, the Court correctly held that no causal link needed to be established, because the two dominant firms did not need their market power to engage in these practices. However, generalizing this ruling to all cases of abuse would be too far-reaching, because even in *Continental Can* and *Hoffmann-La Roche* there was a link between the market positions of the dominant firms involved and the fact that their practices worsened competition – a link that the Court acknowledged, indeed.[70]

Fifthly – and turning to policy arguments – if we employ Article 102 to safeguard and advance sustainability, we do it under the more general framework of the so-called multi-purpose approach.[71] However, in this context it becomes unclear how antitrust authorities should proceed when confronted with a case where the promotion of sustainability conflicts with the promotion of other legal interests unrelated to competition protection, such as privacy or workers' rights. In other words, the risk of broadening the scope of antitrust law is that it becomes impossible to establish a clear hierarchy of interests.[72] If we accept that sustainability is a legal interest that antitrust authorities must preserve, we have to affirm the same in relation to privacy law, labour law and so forth. Hence, the risk is again that of transforming antitrust authorities in economy-wide regulators.[73] Suppose, for example, that a dominant fashion company decides to use organic and recycled materials to reduce its environmental impact: these materials are often more expensive than conventional ones. To keep overall production costs competitive, the firm could reduce salaries, increase work rhythms, relocate to countries where workers' rights are not respected or reduce the personnel. How should an antitrust authority intervene? Stated differently,

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[69] Indeed, any firm can enter into exclusive dealings, but the negative impact of such contracts increases with the firm's market power. Notably, exclusive dealings involving firms with market shares below 30% are exempt from the application of Article 101.

[70] *Continental Can*, *cit.*, paragraph 26, and *Hoffmann-La Roche*, *cit.*, paragraph 91.

[71] See Ioannis Lianos, "Polycentric competition law", *Current Legal Problems* 71, no. 1 (2018): 161-213, https://doi.org/10.1093/clp/cuy008.

[72] On the drawbacks of a multi-purpose approach see Giuseppe Colangelo, "The privacy/antitrust curse: Insights from GDPR application in competition law proceedings", *The Antitrust Bulletin* (2024): 3-13, https://doi.org/10.1177/0003603X241283975, where the Author contends that once a certain interest is included among the ones ostensibly protected in antitrust proceedings, firms may have incentive to adjust their strategies to invoke such interest (in our case, sustainability) as a business justification for allegedly anticompetitive conduct.

[73] *Ibidem*, 6.

if not competition protection, which legal interest should antitrust authorities prioritize among the myriad they should be tasked to uphold?

In this regard, one could note that the balancing of conflicting interests pertains solely to the legislator (or, at most, to constitutional or supreme courts in judging the reasonableness of such decisions), unless the law itself delegates such activity to antitrust authorities. Others could argue that striking a fair balance among the many interests at hand in a given case is precisely the task of administrative authorities and judges.

However, this latter viewpoint presents a significant issue: it introduces uncertainty regarding the boundaries of permissible behaviour for companies in dominant positions. Until now, these firms understood that their actions would be deemed lawful under Article 102 as long as they promoted efficiency and innovation to the consumer's advantage. If the multipurpose approach were adopted, this criterion would no longer suffice. They would now need to ensure that their actions do not adversely affect various other interests – interests that are not always clearly defined by specific rules. For instance, it could occur that a dominant company's behaviour that promotes innovation and supports environmental and social sustainability might be penalized as an abuse of dominance if it enables the company to avoid paying a specific tax. After all, such conduct cannot be considered respectful of the general interest that all taxpayers fairly contribute to state expenditures; and under the multi-purpose approach there is no reason why antitrust law should not protect also this interest (!). Nevertheless, in such context essential interests like efficiency, quality, and innovation could be overshadowed by competing concerns, posing a significant challenge in contemporary times. The question that would then arise is: if antitrust authorities are occupied with safeguarding these diverse interests, who will dedicate the necessary time and resources to ensure competition remains protected?[74]

Finally – and in connection to both what just said and what was said in paragraph 4.1 – if antitrust authorities are expected to invoke Article 102 whenever a dominant firm compromises sustainability, irrespective of any impact on competition, they would be perceived as the primary guardians of sustainability, especially if no other authorities were in charge with this task. This implies a scenario where they might to intervene frequently.

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[74] Timothy J. Brennan, "Should antitrust go beyond 'antitrust'?", *The Antitrust Bulletin* 63, no. 1 (2018): 49-64, https://doi.org/10.1177/0003603X18756143.

However, if one wants to design a rational and efficient legal system, this ongoing overlap between antitrust law and any other possible piece of law would significantly increase the level of complexity that market agents should bear. Furthermore, this would imply a scenario where authorities might need to intervene very frequently, *in lieu* of judges and other authorities. Furthermore, from a practical perspective, this would never be viable, especially in the long run. Antitrust authorities do not have enough financial and human resources to use competition law as a parachute for infringements that other enforcers fail to prosecute.[75] Should they start to intervene in fields different from the traditional ones, the result would be a "significant investment of political energy and time that has a very uncertain and unclear return".[76]

9. Closing perspectives

It is quite possible that, as they peruse these pages, proponents of the so-called multi-purpose approach to antitrust law[77] may have surmised that I hold little regard for the safeguarding and advancement of sustainability, or worse yet, that my aim is to merely preserve the "purity" of the economic approach to antitrust law.

Such assumptions could not be further from reality. I firmly advocate for businesses to invest in sustainability and for legislation that not only encourages such investments but also penalizes unsustainable practices.[78] Moreover, terms like "purity" carry inherently exclusionary and discriminatory undertones, which I find disconcerting.

Nevertheless, I do not believe that antitrust law should prioritize sustainability, nor – as I have previously expressed – should it make the protection

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[75] See Giuseppe Colangelo and Mariateresa Maggiolino, "Antitrust über Alles. Whither competition law after *Facebook*?", *World Competition* 42, no. 3 (2019): 355-376.

[76] Eugene Kimmelman, Harold Feld and Augustín Rossi, "The limits of antitrust in privacy protection", *International Data Privacy Law* 8, no. 3 (2018): 271, https://doi.org/10.1093/idpl/ipy015, with regard to the antitrust-privacy interface. However, a similar line of reasoning can be applied to sustainability.

[77] On that see Ioannis Lianos, "Polycentric competition law".

[78] See Directive 2022/2464/EU amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, known as Corporate Sustainability Reporting Directive (CSRD). See also the proposed Corporate Sustainability Due Diligence Directive (CSDD) and the Directive on substantiation and communication of explicit environmental claims (Green Claims Directive). See also the proposed Regulation on the prohibition of products made with forced labour on the Union market.

of privacy[79] or worker rights[80] its direct objectives. Other pieces of law can do it, even reducing the scope of competition law. The particular rationales underpinning my stance have been delineated in the above paragraphs.

Ordinary antitrust law can already do a lot to support sustainability. As highlighted in this paper, antitrust authorities have the capacity to judiciously wield their agenda-setting authority, directing investigative efforts towards industries and markets where anti-competitive behaviour might undermine sustainability. Moreover, in markets where consumers are willing to pay for sustainability, antitrust authorities can follow what I called here the bottom-up approach and consider the impact of dominant firms' practices on sustainability in the same way they analyse effects on prices, output, quality, variety, and innovation. Even in markets where consumers are unwilling to pay for sustainability, antitrust authorities could undertake the top-down approach and promote sustainability by being lenient – allowing certain abusive practices to go unpunished if they are necessary and proportionate to achieving genuine sustainable goals.

What is not admissible, for the reasons stated above, is using this top-down approach to ask competition law to punish dominant firms that harm sustainability without harming competition. So far, the Court of Justice seems to have understood this. In the *Superlega* case, it could have embraced the multipurpose approach, but it did not. In response to UEFA and FIFA's request to consider the non-economic values protected by their statutes as justification for their restrictive effect on competition, the Court replied that "the existence of such objectives, however laudable they may be, do not release the associations that have adopted those rules from their obligation to establish, before the national court, that the pursuit of those objectives translates into genuine, quantifiable efficiency gains, on the one hand, and that they compensate for the disadvantages caused in

[79] See Giuseppe Colangelo and Mariateresa Maggiolino, "Antitrust über Alles", and Giuseppe Colangelo and Mariateresa Maggiolino, "Data accumulation and the privacy-antitrust interface: Insights from the Facebook case", *International Data Privacy Law* 8, no. 3 (2018): 224-239, https://doi.org/10.1093/idpl/ipy018.

[80] See Mariateresa Maggiolino, "The application of competition law to labour markets: Some unresolved issues", *Journal of Antitrust Enforcement* 11, no. 1 supp. (2023): i127-i149, https://doi.org/10.1093/jaenfo/jnac021, and Mariateresa Maggiolino, "Even employees are undertakings in the labour market, but granting social rights is not antitrust's job", *Journal of Antitrust Enforcement* 10, no. 2 (2022): 365-402, https://doi.org/10.1093/jaenfo/jnab023.

competition terms by the rules at issue in the main proceedings, on the other".[81] Hopefully, hence, the anxiety over presenting certain interests as essential will not make the Court change its mind.

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[81] Case C-333/21, *European Superleague Company SL v. Fédération internationale de football association and Union des associations européennes de football*, ECLI:EU:C:2023:1011, para. 196. See, in this regard, also Giorgio Monti, "EU competition law after the Grand Chamber's December 2023 sports trilogy: European Super League, International Skating Union and Royal Antwerp FC", *Revista de Derecho Comunitario Europeo* (2024): 18-19.

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