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Environmental defences as a shield from Article 102 TFEU

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ABSTRACT

Against the backdrop of the European Green Deal, the Commission, via DG COMP, is now well underway in its process of envisioning how competition law can do its part in response to the impending environmental threats. However, Article 102 TFEU as a whole, and more specifically objective justifications pertaining to this legal basis, have been left out of the discussions. This article contemplates how objective justifications could be shaped and construed to ensure Article 102 TFEU does not hamper the potential contributions of dominant undertakings to the Green Deal. As such, it summarises other authors' propositions and puts forward some food for thought on the conceptualisation of Article 102 TFEU environmental objective justifications. The below-mentioned findings suggest expanding the current efficiency gains framework of Article 102 TFEU to "economic and environmental benefits" or creating in the Guidance on the enforcement of Article 102 TFEU a third category of objective justifications dedicated essentially to environmental benefits.

Dans le contexte du pacte vert pour l'Europe, la Commission, par l'intermédiaire de la DG COMP, a d'ores et déjà bien avancé sur l'intégration de la question environnementale dans les règles de concurrence européenne pour faire face aux défis de demain. Néanmoins, l'article 102 TFUE dans son ensemble, et plus particulièrement les justifications objectives liées à cette base juridique, ont été omises de ces discussions. Cet article examine comment les justifications objectives pourraient être façonnées et interprétées pour s'assurer que l'application de l'article 102 TFUE n'entrave pas les efforts et progrès environnementaux entrepris par les entreprises dominantes à l'égard du pacte vert. Ainsi, cet article résume les contributions de divers experts sur le sujet et met en avant d'autres éléments de réflexion sur la conceptualisation des justifications environnementales de l'article 102 TFUE. Les observations mentionnées ci-dessous suggèrent d'étendre la structure actuelle des gains d'efficacité de l'article 102 TFUE aux "bénéfices économiques et environnementaux" ou de créer dans le document d'orientation de l'application de l'article 102 TFUE une troisième catégorie de justifications objectives dédiées essentiellement aux bénéfices environnementaux.

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I. Introduction

1. Since the Commission unveiled the European Green Deal in December 2019, DG COMP has been on track to take on the "verdancy" process that behoves each EU Directorate-General. Pursuant thereto, competition authorities have been mesmerised by Article 101 TFEU, which has received the most attention in the debates on the sustainable transformation of EU competition law. Recent examples include the revision of the guidelines on horizontal cooperation agreements[1] and the derogation jointly adopted by the European Parliament and the Council that would give the green light to cooperation agreements between undertakings in the agricultural sector if they are indispensable to the achievement of higher sustainability standards.[2] State aid has also been a focal point,[3] while the current EU Merger Regulation has been somewhat questioned.[4] In stark contrast, Article 102 TFEU[5] and the associated objective justifications have been missing from the discussions on the sustainability of EU competition law. The Commission omitted Article 102 TFEU from its call for contributions on how EU competition policy can serve the European Green Deal and in the ensuing results discussed during the 25th IBA Competition Conference and published in the 2021-01 *Competition policy brief*. Apart from the Greek Competition Authority,[6] Article 102 TFEU has also been largely neglected by national competition authorities (NCAs).[7] On the side

1 *See* Communication from the Commission, Approval of the content of a draft for a 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, COM(2022) 1159 final, 1 March 2022.

2 *See* Eur. Comm., press release IP/22/1352 of 28 February 2022, Antitrust: Commission consults stakeholders on sustainability agreements in agriculture, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1352 (accessed 14 April 2022).

3 *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A competition policy fit for new challenges, COM(2021) 713 final, 18 November 2021.

4 *See* N. Kar, E. Cochrane and B. Spring, Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to Support Green Investment, in *Competition Law, Climate Change & Environmental Sustainability*, S. Holmes, D. Middelschulte and M. Snoep (eds.), Concurrences, New York, 2021, pp. 117–138; A. Burnside, M. De Backer and D. Strohl, Can Environmental Interests Trump An EUMR Decision?, in Holmes, Middelschulte and Snoep (n. 4), 139–152; K. Uçar, G. Gürkaynak and H. Demirkan, Sustainability factors in merger control assessments: Do ambitious efforts fall short of expectations?, *Concurrences* No. 4-2021, art. No. 103263, www.concurrences.com.

5 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47, Art. 102.

6 *See* Hellenic Competition Commission, Staff Discussion Paper on Sustainability Issues and Competition Law, 16 September 2020, https://www.epant.gr/en/enimerosi/competition-law-sustainability.html (accessed 11 September 2021), paras. 86–90.

7 *See* Eur. Comm., Competition Policy in Support of Europe's Green Ambition, *Competition policy brief* 2021-01, September 2021; Netherlands Authority for Consumers and Markets, press release, Guidelines on sustainability agreements are ready for further European coordination, 26 January 2021, https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination (accessed 11 September 2021); UK Competition and Markets Authority, Guidance, Environmental sustainability agreements and competition law, 27 January 2021, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law (accessed 11 September 2021); V. H. S. E. Robertson, Sustainability: A World-First Green Exemption in Austrian Competition Law, *Journal of European Competition Law & Practice* (forthcoming in 2022).

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of academic debates, an extensive wealth of resources on the nexus between EU competition law and environmental considerations already exists, especially in French academia.[8] Nonetheless, the use of Article 102 TFEU as a shield from the findings of prima facie abuses of dominance has only been marginally covered,[9] or a while ago.[10]

2. The author of this article finds it incomprehensible that all the other legal bases of competition law were evoked in the discussions on environmental considerations at the EU level, whereas Article 102 TFEU remains uncharted territory despite the emergency and gravity of forthcoming environmental crises. Indeed, the provisions of objective justifications in the realm of Article 102 TFEU, including objective necessity and efficiency gains motives, are well established and acknowledged in EU official documents, which are laid down in the Guidance on the enforcement of Article 82 EC (presently Article 102 TFEU).[11] Consequently, the central claim throughout this article is to give more attention to Article 102 TFEU environmental objective justifications and to recognise them officially, most notably by enshrining them in the Commission's Guidance on the enforcement of Article 102 TFEU, for example, under the current framework of efficiency gains justifications.

3. In the subsequent sections, this article first gives a cursory summary of Article 102 TFEU objective justifications and explains why those could be useful for the pro-environmental conduct of dominant undertakings. It then goes over the case law connected to Article 102 TFEU environmental justifications before segueing into the examples of potential environmental motives that could be condoned via Article 102 TFEU. Finally, it describes the frameworks that competition authorities could rely on to assess environmental defences.

II. Article 102 TFEU objective justifications

4. In the Guidance on the enforcement of Article 102 TFEU, objective justifications have been grouped into two distinct headings. Firstly, "objective necessity" justifications, which includes any behaviour of dominant undertakings whose spillovers contribute to the protection of legitimate public interest objectives. For these defences to be condoned, the conduct of dominant undertakings must be proportionate and necessary to reach objectives of public interest,[12] with no less restrictive means to do so.[13] Secondly, "efficiency gains justifications," whereby dominant undertakings affirm their behaviour leads to a net gain in consumer welfare. These justifications must comply with different provisions, as follows:

- The efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods or a reduction in the cost of production or distribution.
- The conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies.
- The likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets.
- The conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.[14]

5. Although the founders of Article 102 TFEU did not initially foresee the creation of objective justifications and logically nor did they state which party—or parties—must adduce evidence to support their existence,[15] it is generally accepted that the evidentiary burden of raising an objective justification is incumbent upon dominant undertakings.[16] This assumption was corroborated by the General Court's judgment against Microsoft as follows: "[A]*lthough the burden of proof of the existence of the*

8 *See* C. London, Concurrence et environnement : une entente écologiquement rationnelle ?, *RTD eur.*, Vol. 39, No. 2, 2003, pp. 267–286; L. Idot, Droit de la concurrence et protection de l'environnement, *Concurrences* No. 3-2012, art. No. 48128, www.concurrences.com; P. Thieffry, Protection de l'environnement et droit antitrust européen, *JurisClasseur Europe Traité*, fasc. 1915, 2014; W. Chaiehloudj, Le droit de la concurrence est-il un frein à la protection de l'environnement ?, *Contrats, conc., consom.* 2022, No. 4, pp. 13–24.

9 *See* Thieffry (n. 8), paras. 34–38; S. Holmes, Climate Change, Sustainability, and Competition Law, *Journal of Antitrust Enforcement*, Vol. 8, Issue 2, 2020, pp. 388–389; C. Thomas, Exploring the Sustainability of Article 102, in Holmes, Middelschulte and Snoep (n. 4), 105–113; M. Dolmans and H. Mostyn, Editor's Preface, in *The Dominance and Monopolies Review*, M. Dolmans and H. Mostyn (eds.), 9th edition, The LawReviews, London, 2021.

10 *See* S. Kingston, *Greening EU Competition Law and Policy*, Cambridge University Press, Cambridge, 2011, pp. 294–327; J. Nowag, *Environmental Integration in Competition and Free-Movement Laws*, Oxford University Press, Oxford, 2017, pp. 239–247.

11 *See* Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7, paras. 28–31.

12 M. de la Mano, R. Nazzini and H. Zenger, Article 102, in *Faull and Nikpay: The EU Law of Competition*, J. Faull and A. Nikpay (eds.), 3rd edition, Oxford University Press, Oxford, 2014, p. 395.

13 R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*, Oxford University Press, Oxford, 2011, p. 320.

14 Commission (n. 11), para. 30.

15 D. Waelbroeck, The Assessment of Efficiencies under Article 102 TFEU and the Commission's Guidance Paper, in *Competition Law and the Enforcement of Article 102*, F. Etro and I. Kokkoris (eds.), Oxford University Press, Oxford, 2010, p. 126.

16 T. Van de Vijver, Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuses?, *Journal of European Competition Law & Practice*, Vol. 4, Issue 2, 2013, p. 125; A. Jones, B. Sufrin and N. Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 387.

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circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence (...)."[17] Invoking an objective justification to counter the initial findings of authorities does not suggest that an abuse of dominance would be justified. It simply signifies that the enforcement of Article 102 TFEU and the finding of a prohibition do not apply, meaning that there is no abuse of dominance in the first place.[18]

6. Admittedly, in the ambit of Article 102 TFEU, objective justifications are notoriously known as being theoretical rather than real,[19] which is a perception bolstered by the absence of an Article 102(3) TFEU derogation on the basis of Article 101(3) TFEU.[20] According to Laguna de Paz and Thieffry, it underlies that Article 102 TFEU should have a minimal role in the sustainability process of EU competition law.[21] These facts could endorse the decision of competition authorities to ignore Article 102 TFEU and its related objective justifications as part of the discussions on the sustainability of EU competition law. However, EU officials, such as Massimiliano Kadar, argue that the number of cases wherein the behaviour of dominant undertakings has not been condemned by the Commission due to efficiency gains is not negligible.[22] They claim those are simply not published because of the priority setting powers conferred on the Commission by Regulation 1/2003.[23] In fact, various Article 102 TFEU objective justifications have been accepted in national jurisdictions and disclosed to the public.[24] In France, at least four Article 102 TFEU objective justifications have been condoned, two of them under the motive of pursuing efficiency gains motives in *Coca-Cola*[25] and *Canal+*,[26] and the other two due to objective necessity motives in *Congrégation cistercienne de l'Immaculée Conception*[27] and *SNCF*.[28] Moreover, despite the fact that objective justifications might sometimes be rejected by competition authorities, they might still mitigate the associated fines imposed on undertakings if companies can prove they did not intend to harm competition and consumers.[29] Regardless of legal proceedings, dominant undertakings also adapt their conducts based on the existence of these objective justifications before the investigations of competition authorities, but the absence of guidelines and legal certainty about Article 102 TFEU environmental objective justifications might induce a chilling effect on the attitude of undertakings. These arguments demonstrate objective justifications are not downright theoretical in the realm of Article 102 TFEU and underscore that Article 102 TFEU objective justifications should be part of the discussions of the "verdancy" process of EU competition law.

III. The necessity of environmental objective justifications in the field of Article 102 TFEU

7. The decision of DG COMP to ignore the potential influence of Article 102 TFEU in the debates on sustainability considerations is also questionable in view of the considerable greenhouse gas emissions produced during the last decades by the largest undertakings, which are usually dominant in their markets.[30] Based on the CDP Carbon Majors Report, between 1988 and 2015, 25 corporate and state producing entities accounted for 51% of global industrial greenhouse gas emissions, while 100 producers emitted 71% of global industrial greenhouse gas emissions.[31] It denotes that the leading causes of climate change and environmental degradation lie in the actions of these companies, which are also the main entities having the economic clout to make a real difference.[32] Some perceive these companies are ruthless,

17 CFIEC, 17 September 2007, *Microsoft v. Commission*, case T-201/04, ECR II-03601.

18 Nazzini (n. 13), 292.

19 R. O'Donoghue and J. Padilla, *The Law and Economics of Article 102 TFEU*, 2nd edition, Hart Publishing, London, 2013, p. 287; V. Brisimi, *The Interface between Competition and the Internal Market Separation under Article 102 TFEU*, Hart Publishing, London, 2016, pp. 129–136; Jones, Sufrin and Dunne (n. 16), 382.

20 M. Lorenz, *An Introduction to EU Competition Law*, Cambridge University Press, Cambridge, 2013, p. 219.

21 *See* J. C. Laguna de Paz, Protecting the Environment Without Distorting Competition, *Journal of European Competition Law & Practice*, Vol. 3, Issue 3, 2012, p. 255; Thieffry (n. 8), para. 34.

22 M. Kadar, Article 102 TFEU and Efficiency Pleas: A "Fact-Check," in *Richard Whish QC (Hon) Liber Amicorum: Taking Competition Law Outside the Box*, N. Charbit and S. Ahmad (eds.), Concurrences, New York, 2020, p. 94.

23 Ibid.; *See* Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1, Art. 2.

24 *See* Luxembourg Competition Council, 3 August 2009, *Tanklux*, dec. No. 2009-FO-02, paras. 55–56; Austrian Supreme Court, 12 January 2015, *Flüssiggas V*, dec. 16 Ok 4/15x, para. 6.11; UK High Court of Justice, 12 February 2016, *Streetmap.EU Ltd v. Google Inc. & Ors*, EWHC 253 (Ch), para. 161.

25 Fr. NCA, dec. No. 03-D-20 of 18 April 2003 on practices attributable to Coca-Cola Beverages, the Société des Boissons and the Société des Boissons gazeuses de la Côte d'Azur, paras. 54, 55, 61.

26 Fr. NCA, dec. No. 05-D-13 of 18 March 2005 on practices implemented by the Canal Plus Group in the pay television market, paras. 66–67.

27 Fr. NCA, dec. No. 05-D-60 of 8 November 2005 on practices implemented by the Immaculée Conception Cistercian Order, the Planaria company and the municipality of Cannes, para. 67.

28 CA Paris, ch. 5-7, 6 November 2014, *La Société Nationale des Chemins de Fer Français (SNCF)*, No. 2013/01128, p. 53; against Fr. NCA, dec. No. 12-D-25 of 18 December 2012 on practices implemented in the railway freight sector, para. 771.

29 Kadar (n. 22), 96.

30 M. Iacovides and C. Vrettos, Radical for Whom? Unsustainable Business Practices as Abuses of Dominance, in Holmes, Middelschulte and Snoep (n. 4), 92.

31 P. Griffin, Report, The Carbon Majors Database, CDP Carbon Majors Report 2017, June 2017 https://climateaccountability.org/pdf/CarbonMajorsRpt2017%20Jul17.pdf (accessed 8 May 2022).

32 Holmes (n. 9), 389.

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inclined to hurt their competitors, and exclusively keen on reaping profits.[33] However, they are also increasingly coerced by public scrutiny and their shareholders to change their paradigm because the latter are progressively incorporating climate change considerations in their engagement activity and investment policies.[34] In general, firms do not think primarily about short-term profit maximisation but instead focus on getting returns and long-term sustainable income.[35] It is in the financial self-interest of dominant undertakings to make their business operations more environmentally sustainable to ensure their profits can be achieved on a long-term basis, given that climate change will doubtlessly have a devastating effect on their portfolios.[36] Additionally, Roe argues that corporate environmental purposes reduce political animosity towards corporations, help shape a positive public image, and boost employees' morale and consumers' satisfaction, increasing companies' profits.[37] Several studies have demonstrated that companies with a higher market share are more committed and engaged with the funding and organisation of environmental projects within the frameworks of environmental sustainable governance (ESG) and corporate social responsibility (CSR).[38] The Commission itself has acknowledged the findings of Roe: "*Mostly large companies have been increasingly deploying due diligence processes as it can provide them with a competitive advantage. This also responds to the increasing market pressure on companies to act sustainably as it helps them avoid unwanted reputational risks vis-à-vis consumers and investors that are becoming increasingly aware of sustainability aspects*."[39] To help them in their endeavours, the Commission has recently put forward a directive proposal on "Corporate Sustainability Due Diligence," which aims at improving corporate governance practices and strategies to better integrate and mitigate ecological risks and impacts stemming from the value chains of corporations. In the footsteps of the Commission, Member States have also established their own legal frameworks to guide corporations in their pursuit of making their value chains and business conducts more sustainable.[40] Therefore, environmental objective justifications in the area of Article 102 TFEU could also be a valuable tool to assist undertakings in putting their good intentions into practice, whose benefits could also trickle down to other stakeholders, for example, via the creation of energy-saving products.

IV. The body of case law and decisions on Article 102 TFEU and environmental objective justifications

8. Paragraph 29 of the Guidance on the enforcement of Article 102 TFEU, which concerns objective necessity justifications, refers only to the protection of the health and safety of consumers. These motives are listed as examples, and other goals linked to environmental protection, albeit regrettably not mentioned, can also be pursued. Indeed, the Commission has stated as early as 2006 that pro-environmental motivations could justify the conduct of dominant undertakings, be they to protect the seabed in *Port of Genoa*[41] or prevent air congestion in *Spanish Airports*.[42] However, due to the scarce number of provisions endorsing the existence of sustainable objective justifications in the realm of Article 102 TFEU, reinforced by the omission of environmental objective justifications from the Guidance on the enforcement of Article 102 TFEU, dominant undertakings may rely on other types of defences that are more commonplace in EU competition law proceedings. As a consequence, dominant undertakings may refrain from relying on environmental motives to defend themselves, and therefore, their importance for the business operations of dominant undertakings is surely undervalued. Nonetheless, several cases are very interesting for the study of environmental defences in the area of Article 102 TFEU and adhere to the definition of environmental objective justifications.

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33 *See* M. Meagher, *Competition is Killing Us*, Penguin Business, London, 2020, pp. 33–45.

34 SquareWell Partners, Insights, The Changing Climate on Investor Behavior, 22 April 2021, https://squarewell-partners.com/insights (accessed 31 January 2022); *see also* Climate Action 100+, an investor-led initiative gathering 615 significant investors, which engages the world's largest corporate greenhouse gas emitters to take necessary action on climate change, https://www.climateaction100.org/about (accessed 8 March 2022); Netherlands Authority for Consumers and Markets (n. 7).

35 K. Stylianou, Can Common Business Practices Ever Be Anticompetitive? Redefining Monopolization, *American Business Law Journal*, Vol. 57, Issue 1, 2020, pp. 185–186.

36 M. Condon, Externalities and the Common Owner, *Washington Law Review*, Vol. 95, Issue 1, 2020, p. 6.

37 M. J. Roe, Corporate Purpose and Corporate Competition, *Washington University Law Review*, Vol. 99, Issue 1, 2021; S. Holmes and M. Meagher, A Sustainable Future: how can control of monopoly power play a part?, Working Paper (3 May 2022), available at SSRN: https://ssrn.com/abstract=4099796, p. 16.

38 M. J. Roe (n. 37), 244–248. *See also* E. Dimson, O. Karakaş and X. Li, Active Ownership, *The Review of Financial Studies*, Vol. 28, Issue 12, 2015, pp. 3225–3268; O. Hawn and H. Kang, The Effect of Market and Nonmarket Competition on Firm and Industry Corporate Social Responsibility, in *Sustainability, Stakeholder Governance, and Corporate Social Responsibility*, S. Dorobantu, R. V. Aguilera, J. Luo and F. J. Milliken (eds.), Emerald Publishing Limited, Bingley, 2018, pp. 313–337; T. Barko, M. Cremers and L. Renneboog, Shareholder Engagement on Environmental, Social, and Governance Performance, *Journal of Business Ethics* (forthcoming).

39 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 23 February 2022.

40 Ibid.

41 Comm. EC, dec. 97/745/EC of 21 October 1997, *Port of Genoa*, OJ L 301, 5.11.1997, p. 27, para. 21.

42 Comm. EC, dec. 2000/521/EC of 26 July 2000, *Spanish Airports*, OJ L 208, 18.8.2000, p. 36, para. 52.

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1. European Union level

9. In the EU, a significant part of the cases involving Article 102 TFEU and an environmental rationale have been related to the waste management industry and recycling practices.[43] Among the decisions and case laws rendered by the European Commission and the European Court of Justice (ECJ), *DSD*[44] is often perceived as the leading precedent in the area of Article 102 TFEU environmental objective justifications.[45] In this case, German legislation required manufacturers and distributors to take back and recover consumers' used sales packaging outside the public waste disposal system unless they participated in a system that guaranteed their regular collection with the likes of the one organised by DSD.[46] The companies using this system were obligated to pay a licensing fee to DSD for all the sales packaging bearing the green dot trademark and distributed within Germany even if manufacturers decided to dispose of their sales packaging themselves or use a competing exemption system.[47] Nonetheless, it is somewhat incorrect to assume that DSD relied on an environmental justification to defend itself in this judgment. Although the fundamental purpose of DSD's business operations had ecological virtues, it did not put forward genuine environmental justifications to legitimise its conduct. It primarily argued that its system operated as a service of general economic interest (SGEI) and would be economically non-viable if it did not receive a guaranteed licence fee to treat all products having a green dot mark.[48] As a result, given that no objective justifications have ever satisfactorily passed the objective justifications frameworks among the cases and decisions published by EU authorities, neither have there been any environmental objective justifications condoned by EU institutions when Article 102 TFEU was enforced alone.

10. However, in some cases, competition authorities and courts have adjudicated the conduct of dominant undertakings as the operation of SGEI, concurrently reviewed under the frameworks of Articles 102 and 106 TFEU.[49] The latter legal basis also provides objective justifications via Article 106(2) TFEU, for example, if restrictions on competition are necessary when the economic conditions in which the dominant undertaking evolves do not allow it to bear the cost of environmental protection and comply with environmental legislation.[50] Such an environmental defence was granted in *Sydhavnens Sten & Grus.*[51] The municipality of Copenhagen had entrusted three undertakings with the task of processing environmentally non-hazardous building waste by means of exclusive contracts that excluded Sydhavnens from participating in the process.[52] The ecological problem at hand was caused by the antecedent practice of burying most building waste due to a lack of infrastructure, which could have been recycled instead. Consequently, the exclusivity contracts were approved by the ECJ because they were necessary to set up a high-capacity centre and to recycle to a high standard by filling it with a significant flow of waste, which also secured the profitability of the three undertakings.[53]

2. Member States level

11. We find more cases dealing with environmental objective justifications in the national jurisdiction of Member States. As of now, two environmental objective justifications have been evoked in France with some success. In the first one, the French Competition Authority's decision No. 05-D-60, the proceedings opposed Trans Côte d'Azur, a company specialising in the organisation of touristic boat trips around Cannes, and the Cistercian Congregation of the Immaculate Conception, which owned the island of Saint-Honorat and operated touristic shuttles to the island via its subsidiary Planaria.[54] Trans Côte d'Azur complained that the congregation had abused its dominant position and foreclosed competition by granting its subsidiary the exclusive rights to transport tourists to the island of Saint-Honorat. The French NCA found that this practice met motives of objective necessity to preserve the peculiar environment of the island, such as safeguarding the tranquillity of the monastery area and the integrity of the listed site.[55] Opening the access to the island to other competitors would have resulted in excessive numbers of tourists to the detriment of the island's environment and the aforementioned intrinsic objectives, while the introduction of quotas of visitors for each company would have been too difficult to enforce.[56]

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43 Besides the cases and decisions already mentioned in this article, *see also* CJEC, 25 June 1998, *Chemische Afvalstoffen Dusseldorp BV and Others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, case C-203/96, ECR I-04075; CJEU, 19 April 2012, *Tomra Systems ASA and Others v. European Commission*, case C-549/10 P, ECLI:EU:C:2012:221; High Court of Ireland, 12 December 2017, *Nurendale Ltd T/A Panda Waste v. The Labour court*, IEHC 806.

44 Comm. EC, dec. 2001/463/EC of 20 April 2001, *DSD*, case COMP D3/34493, OJ L 166, 21.6.2001, p. 1; The Commission's decision was upheld in CJEC, 16 July 2009, *Der Grüne Punkt – Duales System Deutschland v. Commission*, case C-385/07 P, ECR I-06155; *See also* Eur. Comm., dec. C(2016) 5586 of 20 September 2016, *ARA*, case COMP/AT.39759.

45 *See* H. Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?*, Europa Law Publishing, Groningen, 2003, pp. 215–223; Kingston (n. 10), 312–318; Thomas (n. 9), 105–113.

46 Thomas (n. 9), 105–106.

47 Kingston (n. 10), 312–316.

48 CFIEC, 24 May 2007, *Der Grüne Punkt – Duales System Deutschland v. Commission*, case T-151/01, ECR II-01607, para. 205; Kingston (n. 10), 312, 316.

49 Consolidated version of the Treaty on the Functioning of the European Union, Art. 106.

50 CJEC, 27 April 1994, *Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij*, case C-393-92, ECR I-01477.

51 CJEC, 23 May 2000, *Sydhavnens Sten & Grus*, case C-209/98, ECR I-3777; OECD, Discussion paper, Environmental considerations in competition enforcement, 1 December 2021, https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement-2021.pdf (accessed 1 February 2022), pp. 32–33; *See also* the informal proceedings that took place in *Cobalt*, in which the Italian state tasked Cobalt to collect and recycle lead waste in particular batteries. However, the dominant undertaking did not submit an environmental justification to defend itself.

52 *Sydhavnens* (n. 51), para. 83.

53 Ibid., para. 78.

54 *Congrégation cistercienne de l'Immaculée Conception* (n. 27).

55 Ibid., para. 67.

56 Ibid., paras. 62–63.

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12. The second case is related to decision No. 12-D-25,[57] which culminated in judgment No. 2013/01128 at the Paris Court of Appeal,[58] and which opposed SNCF to Euro Cargo Rail in the market for mass train transport services in the rail freight sector. Among various counts of abuse, SNCF had been found to implement a low price strategy upon which the reasoning between the French NCA and the Paris Court of Appeal slightly differed. While the French NCA presumed that the conduct of SNCF, albeit not predatory, tended to evict competitors from the market, the Paris Court of Appeal viewed it as a strategy to align its prices with those of its competitors. However, both institutions subscribed to the contextual factors that underpinned the behaviour of SNCF. Among several objectives of public interest, the conduct helped safeguard the freight transport market as an alternative to road transport, which served the cause of environmental protection.[59] In view of the environmental benefits ascribed to the conduct of SNCF, the French NCA concluded that it should find another remedy than a sanction to correct the behaviour of SNCF via an injunction prescribing that SNCF changes its economic model within three years to make it profitable.[60] Instead, the court of appeal relied on the qualitative data, inter alia the environmental defences, to justify and excuse the conduct of SNCF.[61] While this motive was not mentioned by the court of appeal as a chief reason to reduce the penalty of SNCF from €60,966,000 to €48,195,000,[62] the exoneration of SNCF for its low pricing practices might have exerted a minor role in this decision.

13. As to the other national jurisdictions, two dominant undertakings also attempted to rely on an environmental objective justification in the Swedish jurisdiction. In the first case, Svenska Förpacknings- och Tidningsinsamlingen (FTI) and TMResponsibility (TMR) both competed in the market for household packaging collection.[63] To carry out its activities, TMR relied on the recycling centre owned by FTI, which was indispensable to its business operations. However, FTI decided to terminate the access of TMR to its recycling system in order to comply with higher environmental and recycling standards. The Swedish Patent and Market Court concluded that this behaviour was not objectively justifiable.[64] There were less restrictive measures to achieve the same goals, for instance, via the renegotiation of the contract, and the task of determining which recycling standards ought to apply did not fall upon FTI.[65] In the second case, *Luftfartsverket*,[66] the Swedish Civil Aviation Administration (Luftfartsverket[67]), which operated Swedish public airports, had planned to implement a new queuing system for taxis at Stockholm Arlanda Airport. Several small taxi companies complained to the Swedish Competition Authority (SCA) about the policy taken by Luftfartsverket in view of its discriminatory nature, which supposedly advantaged the larger taxi companies. Luftfartsverket defended the new queuing system at Terminal 5 by relying on efficiency gains and environmental motives. The number of lines allocated to each taxi company would have been dependent upon the number of environmentally friendly vehicles owned by each taxi company in order to promote the use of environmentally friendly taxis. The SCA found this practice disproportionate to reach the intended environmental aim of the measure, given the severe financial loss smaller taxi companies would have faced if the measure had been implemented.[68]

14. In a related fashion to the *Luftfartsverket* case, Heathrow Airport Limited (HAL) was confronted by Purple Parking Limited (Purple) and Meteor Parking Limited (Meteor) in regard to its new policy on meet-and-greet parking services.[69] The service offered customers the possibility of leaving their car at the forecourt of the departure terminals, which would then be placed at the off-site parking of the companies before being restored to them upon their return. At the expense of the other competitors providing this service, HAL modified its policy by relocating the slots of Purple and Meteor from the terminal forecourts to nearby terminal car parks, while HAL continued operating its meet-and-greet parking services at the forecourts. The English High Court judged that each terminal forecourt represented an essential facility for Purple and Meteor on top of the fact that HAL had unfairly favoured its own meet-and-greet parking services.[70] HAL claimed that this policy change for Terminal 1 was due to environmental commitments, which the previous system was unable to achieve. It purported this measure emanated from its desire to reduce the emissions induced by vehicles waiting at the forecourts with their engines running and from

57 Fr. NCA, *SNCF* (n. 28).

58 CA Paris, *SNCF* (n. 28).

59 Fr. NCA, *SNCF* (n. 28), para. 771; CA Paris, *SNCF* (n. 28), 53.

60 Fr. NCA, *SNCF* (n. 28), para. 779.

61 CA Paris, *SNCF* (n. 28), 67.

62 Ibid., 66.

63 Swedish Patent and Market Court, 21 January 2019, *Svenska Förpacknings- och Tidningsinsamlingen AB (FTI)*, case PMÄ 2741-18.

64 Ibid., 39; Swedish Competition Authority, Written Contribution: Competition Policy and the Green Deal, 20 November 2020 (accessed 4 February 2022), p. 12; OECD (n. 51), 32.

65 *FTI* (n. 63), 39. In any case, the decision was later reversed by the Swedish Patent and Market Court of Appeal, which judged FTI had not abused its position of dominance in the first place; *see* Swedish Patent and Market Court of Appeal, 28 February 2020, *Svenska Förpacknings- och Tidningsinsamlingen AB (FTI)*, case PMÖÄ 1519-19, para. 21.

66 Swedish Market Court, 5 February 2010, *Luftfartsverket v. Konkurrensverket*, 2010:5, Dnr A 3/09.

67 "Swedavia"in English.

68 C. Wetter, H. Höök and E. Fahlén Godö, The Swedish Market Court upholds the Competition Authority's interim order to prohibit a state-owned airport operator to implement a planned reallocation of the queuing system for taxis at Arlanda airport as the planned system would have amounted to an abuse of a dominant position (*Luftfartsverket*), *e-Competitions* February 2010, art. No. 32043.

69 UK High Court of Justice, 15 April 2011, *Purple Parking Limited and Meteor Parking Limited v. Heathrow Airport Limited*, EWHC 987 (Ch).

70 I. Sherr, The English High Court finds London airport abused its dominant position in refusing competing for car concierge services access to the arrivals forecourt (*Heathrow Airport / Purple Parking / Meteor Parking*), 15 April 2011, *e-Competitions Transport*, art. No. 36695.

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those recirculating around the airport's terminal because their owners have not arrived at the terminal yet to pick them up.[71] The Court judged that the relatively marginal number of off-airport meet-and-greet movements was insignificant either for the sake of environmental protection or as part of the decision-making of HAL.[72]

15. An environmental objective justification has also arisen in Finland in *Pirkanmaan Jätehuolto*.[73] Pirkanmaan Jätehuolto Oy (PJH) is a cooperative waste management company owned by its stakeholder municipalities, which collected household and corporate waste that it later sorted and processed at its treatment centres. Following a request from SITA Finland Oy AB (SITA), the Finnish Competition and Consumer Authority (FCCA) unveiled the different pricing strategies applied by PJH, on the one hand, to its municipal and corporate customers and, on the other, to businesses having a contract with SITA or another private waste management company.[74] The former category of customers was subject to the cheaper Y150P waste class fee, while it automatically charged the more expensive Y120P waste class tariff for the latter category,[75] regardless of the content of the waste.[76] PJH defended its pricing system, arguing that the content of the waste deliveries from other businesses is not known in advance and therefore requires additional inspections to prevent any environmental damages. The FCCA considered that the approach of PJH to avert any environmental risk was excessive, leading up to price discrimination between undertakings and breaching the principle of competitive neutrality.[77] It suggested instead that PJH could have demanded from its business customers a declaration of the waste imported to its treatment centres.[78]

16. Another case in Luxembourg is also quite interesting, which concerned the transport of petroleum products from oil companies to the storage facilities owned by Tanklux and located at the port of Mertert, which were essentially transported by ships across the Moselle.[79] The claimant's dissatisfaction came from the obligation imposed on the tenants of the storage facilities provided by Tanklux to rely on the services of specific fluvial transportation companies designated by Tanklux.[80] Among the various justifications outlined during the proceedings, the Luxembourg Competition Council approved the environmental motive articulated by Tanklux, which was framed as an objective necessity defence.[81] Accordingly, it was preferable that Tanklux enact certain safety standards and rely exclusively on a small number of intermediaries to safely transport petroleum products from the ships to the storage facilities. This practice was necessary to prevent accidents, such as the spilling of dangerous and polluting products into the river.[82]

17. The last relevant case for this research took place in Denmark.[83] It focused on a recycling arrangement scheme within the refrigeration industry between importers and distributors. Its aim was to agree on the disposal of refrigerant wastes in an environmentally-sound manner. If the refrigerants were not appropriately discharged, the components of refrigerants had a high depletion effect on the ozone layer when released into the atmosphere. The main anti-competitive concern was the concerted practice between competitors through the lens of the Danish national equivalent of Article 101 TFEU. However, an assessment of abuse of dominance had also been requested by the plaintiffs in view of the collective dominance held by the participants, which amounted to 90% of the market altogether, and the refusal to supply refrigerants to certain customers. Indeed, the members of the scheme could sell the concerned refrigerants only to customers approved by the Refrigeration Industry Environmental Scheme, who had to undergo a three-day training course and purchase the required draining equipment to receive approval. This measure was deemed necessary, objective, reasonable and proportionate to ensure refrigerants were adequately handled by customers in order to achieve the environmental objectives of the scheme. Furthermore, the Danish Competition Council estimated that the scheme yielded environmental benefits for consumers that were higher than the anti-competitive effects they had to tolerate. Eventually, the Danish Competition Council concluded that the scheme of the refrigeration industry did not constitute an abuse of dominance and could keep operating.[84]

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71 *Heathrow Airport Limited* (n. 69), para. 211.

72 Ibid.

73 Finnish Competition and Consumer Authority, 15 December 2014, *Pirkanmaan Jätehuolto*, No. 588/KKV14.00.40/2013.

74 Ibid., paras. 2, 9, 10.

75 Ibid.

76 K. Havu, The Finnish Competition Authority intervenes to stop competition-jeopardising pricing practices of a municipal waste management company and decides not to investigate the matter further after pricing changes (*Pirkanmaan Jätehuolto Oy*), *e-Competitions* December 2014, art. No. 70981.

77 Ibid.

78 *Pirkanmaan Jätehuolto* (n. 73), para. 30.

79 W. Simpson and P.-E. Partsch, The Luxembourg Competition Council applies for the first time the 2009 communication on Art. 82 EC in a case concerning domestic fuel capacities (*Tanklux*), *e-Competitions* August 2009, art. No. 30195.

80 Ibid.

81 Ibid.; Nowag (n. 10), 240.

82 *Tanklux* (n. 24), paras. 50–54.

83 Danish Competition Council, 26 August 1998, *Kølebranchens Miljøordnings ansøgning om ikke-indgrebserklæring/fritagelse*, Jnr.: 2:8032-49/TH.

84 Danish Competition Council, press release, Kølebranchens Miljøordnings ansøgning om ikke-indgrebserklæring/fritagelse samt § 11, stk. 4-erklæring, 26 August 1998, https://www.kfst.dk/media/13982/19980826-afgrelse-klebranchens-miljordnings-ansgning-om-ikkeindgrebserklringfritagelse-samt.pdf (accessed 19 May 2022).

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V. Potential environmental defences to justify unilateral conducts

1. Literature review

18. The case law and decisions disclosed in the previous section have revealed that environmental justifications are no stranger to European competition authorities in the purview of Article 102 TFEU. Holmes has listed several examples that dominant undertakings could rely on to underpin their behaviours, which could be condoned and subsumed under Article 102 TFEU objective justifications because of their redeeming ecological features,[85] as follows:

"– Charging a higher price in order to cover environmental costs or reinvest in environmental protection: as a defence against allegations of "excessive pricing";

– Charging different customers different prices according to the use to which the product is put—e.g. how environmentally friendly it is (e.g. the energy efficiency of the downstream production process): as a defence against allegations of "discriminatory pricing";

– Making the purchase of one product from the dominant company conditional on the purchase of another environmentally friendly product (e.g. sale of a printer conditional on the purchase of recyclable toner cartridges): as a defence against allegations of "tying";

– Offering exceptionally low prices to generate trial of a new environmentally friendly product: i.e. as a defence against allegations of "predatory pricing";

– Refusing to grant access to an essential facility to a user who intends to use the facility for environmentally unfriendly purposes (e.g. denying access to diesel vehicles—provided this was done on a non-discriminatory basis): as a defence against allegations of "refusal to supply.""[86]

19. Holmes' brainstorming contains relevant precursory elements to further elaborate on the implementation of environmental justifications in the ambit of Article 102 TFEU. Nonetheless, concerning Holmes' first and second proposals, it could be added that dominant undertakings should not be allowed to charge a higher price on essential goods if there are no cheaper alternatives. Otherwise, it could aggravate the difficulties of the least well-off consumers in purchasing the products they need to stay afloat. Regarding the third proposal on tying, sustainability also means not encouraging futile purchases that rely on critical stocks of resources. For this type of defence to be valid, the tied-in product should also be indispensable for the functioning of the tying product. Kingston's conception of an environmental tying defence, which would allow manufacturers to prevent unsustainable tied-in products from being used with the tying device, seems more appropriate.[87] With regard to the fourth proposal, it should be added that predatory pricing may also be permissible for obsolete products and perishable goods reaching their expiry date to avoid generating additional waste. This kind of objective justification is already applicable in France in line with paragraph 5 of Article L. 442-5 of the French Commercial Code.[88]

20. Kingston has also explained some of these potential suggestions in more detail and provided some creative insights. For example, she proposed that dominant undertakings could enter into a long-term exclusive contract with other companies to recoup substantial environmental investments.[89] She also added that dominant undertakings might grant loyalty-inducing discounts to environmentally friendly undertakings.[90] On their side, Maurits Dolmans and Henry Mostyn have come up with the idea of authorising e-commerce platforms to prioritise green products, including their own, and demote polluting products in their search rankings, for instance those of competitors, as a justification for allegations of self-preferencing.[91]

2. New proposals

21. Besides all these suggestions, here are other instances where potential environmental defences should not be overlooked:

– Making use of environmental prowess, production and resources in one market into another segment that is lagging behind on the green deal objectives: as a defence against allegations of "leveraging market power."

As undertakings have already achieved ecological progress in one market, their will and capabilities to accomplish environmental advances are more trustworthy. Therefore, in sectors where public authorities and market players have failed to develop green innovations, it could be welcome that undertakings, dominant in other markets, leverage their dominance into these non-sustainable markets to generate similar environmental benefits. For this justification to apply, competition authorities should receive evidence that there is room for sustainable innovation in these polluting markets.

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85 Holmes (n. 9), 388–389.

86 Ibid.

87 Kingston (n. 10), 321.

88 French Commercial Code, Ordonnance No. 2019-359, 24 April 2019, Art. L. 442-5, para. 5.

89 Kingston (n. 10), 312.

90 Ibid., 318.

91 Dolmans and Mostyn (n. 9), OECD (n. 51), 32.

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– Offering discounts to consumers who buy a significant number of eco-friendly products from one producer to increase the proportion of green goods purchased by consumers: as a defence against allegations of fidelity rebates, quantity rebates, or even bundling.

As green products are generally more expensive, offering rebates on the purchase of sustainable products could help the least well-off shift their consumption habits. This practice would reduce the consumption of products that degrade the environment and would also cushion the negative externalities that are not reflected in the price of dirty products. Whereas quantity rebates are generally compatible with Article 102 TFEU,[92] rebates having a loyalty-building effect that constrain the buyers' freedom to choose their sources of supply are generally repelled by EU competition law.[93] Therefore, I suggest that fidelity rebates could be condoned if they apply exclusively to the purchase of green products.

3. A real-life example of a potential contribution to environmental protection: Unilever

22. Apart from the *SNCF* case, in which the defendant was a public undertaking,[94] all the approved environmental measures outlined in Section IV intended to avoid environmental damage via the proper recycling of dangerous pollutants or exclusive dealing arrangements. These cases were restricted to the ideas of "preventing" environmental catastrophes and "stabilising" the current ecosystem. They did not opt for the objective of "doing more" to improve the surrounding environment, nor did they consider the issue of climate change. Contrarily, *Unilever* has provided a real-life scenario wherein an environmental objective justification would innovatively go beyond the traditional method of improving recycling practices by reducing the quantity of waste produced in the first place.[95]

23. Unilever had produced a more efficient compression technology for aerosol deodorants in the UK personal care business that enabled the production of smaller cans with the same amount of product to reduce packaging waste and production. Sadly, Unilever's competitors did not use the available innovation for the production of their own goods, which looked bigger on shelves. In consequence, consumers perceived Unilever's product as being of lower worth, sales were poor, and the compressed cans were eventually delisted.[96]

24. Critics may argue that Unilever could have simply improved its marketing strategies and labelling to increase its sales. However, consumers are subject to behavioural biases in their shopping decisions. They are often time-constrained, tend to procrastinate and are not aware of external costs, which favour ingrained status quo behaviours.[97] As a consequence, readily visible prices may overly impact consumers' decisions compared to the rational importance they give to pecuniary characteristics. Moreover, the reachable audience of Unilever's marketing strategies is limited. It does not decide on the place of its goods on markets' shelves, and the smaller size of its cans makes it more difficult to share informative messages about the laudable nature of Unilever's products. The Commission is of the same opinion in reference to its decision in *CECED*, wherein manufacturers had agreed to cease manufacturing and importing washing machines that did not comply with certain energy efficiency criteria.[98] It stated that neither information campaigns nor ecolabels would have been as efficient as the intended agreement to promote energy savings.[99]

25. Via the environmental justifications of Article 102 TFEU, Unilever, had it been dominant and held substantial market power in the UK aerosol deodorant market, could have availed itself of a short-term predatory pricing strategy. As prices are a strong determinant in consumers' decision-making, consumers would have bought Unilever's cans to a greater extent thanks to their low price. By using the product, they would have then taken notice of the efficiency of Unilever's product and shared the beneficial information with other consumers via online reviews or word of mouth. Competition authorities could have decided that the predatory strategy behaviour in question should have been applicable only for a brief time span to change consumer behaviour sufficiently, say three months, thereby causing a minimal impact on the state of competition in the UK personal care market. Meanwhile, as a result of consumers shifting their consumption habits to Unilever's packaging-saving deodorants, competitors would have been pressured to adopt the same technology to retain their customers, spreading the environmental innovation to the whole market. Simultaneously, consumer welfare would have been enhanced economically speaking with more content for a lower price, while packaging waste would have been reduced for the benefit of environmental protection.

92 GCEU, 12 June 2014, *Intel v. Commission*, case T-286/09, ECLI:EU:T:2014:547, para. 75; Jones, Sufrin and Dunne (n. 16), 452.

93 CJEC, 13 February 1979, *Hoffmann-La Roche v. Commission*, case 85/76, ECR 461, paras. 89–90; Jones, Sufrin and Dunne (n. 16), 451.

94 Indeed, the activities of SNCF in the freight market were necessary and approved because they helped reduce gas emissions, and hence climate change. However, SNCF is a public undertaking whose objective is also to serve the general interest. The assessment of the French authorities might have given a different outcome if the company had been a private undertaking.

95 *See* FoodDrinkEurope, FoodDrinkEurope's contribution on "Competition Policy supporting the Green Deal," 20 November 2020, https://www.fooddrinkeurope.eu/wp-content/uploads/2021/02/FoodDrinkEurope_contribution_Green_deal_and_competition_policy.pdf (accessed 15 February 2022).

96 Ibid.

97 R. Inderst and S. Thomas, Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis, *Journal of Competition Law & Economics*, Vol. 17, Issue 4, 2021, p. 854

98 Comm. EC, dec. 2000/475/EC of 24 January 1999, *CECED*, case IV.F.1/36.718, OJ L 187, 26.7.2000, p. 47.

99 Ibid., para. 62; T. Kuhn and L. Arnolds, Sustainability defense for competitor collaborations, *Competition Law & Policy Debate*, Vol. 6, Issue 2, 2020, p. 13.

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VI. Which framework to assess Article 102 TFEU environmental objective justifications?

1. The choice of framework

26. It is primordial to determine the framework that competition authorities should rely on to evaluate the environmental-based arguments of dominant companies. Indeed, the rigour and strictness of each assessment framework diverge. Therefore, more precision on the assessment tools is needed in the Guidance on the enforcement of Article 102 TFEU to bring more legal certainty and ensure that the claims of dominant undertakings are treated with equivalent stringency across jurisdictions. The current legal instruments guide dominant undertakings towards two kinds of justifications: objective necessity and efficiency gains. At first sight, the goals and nature of the objective necessity framework are more concordant with the purpose of protecting the environment. Indeed, the objectives of pursuing social values and serving the public interest are in line with the concept of environmental protection, unlike the efficiency gains framework, which is of a purely economic nature.

27. Holmes advocates in favour of using a proportionality test similar to the objective necessity framework to review the environmental defences of dominant undertakings.[100] Accordingly, to condone an environmental justification, there should be no less restrictive way to achieve the environmental objective in question, and the environmental aim should be genuine.[101] As mentioned earlier in some of the cases outlined in Section IV, competition authorities have already relied on the framework of objective necessity justifications to condone the conducts of dominant undertakings having redeeming virtues on the environment. This framework is suitable to review the claims of dominant undertakings in cases of environmental safety, where there is a loophole in the legislation, or where public authorities have pulled out of their responsibilities and delegated their competencies to economic actors.

28. However, this framework is generally unsuitable to review the voluntary engagements of undertakings similar to those mentioned in the previous section, which yield environmental benefits on top of the current legislation. The proportionality test applied to objective necessity justifications is not shaped in such a way to review complex environmental arguments, which are better analysed via an effect-based approach instead of a form-based approach. Indeed, the approach to objective necessity justifications has solely focused on health and safety protection as proxies, and whether those could be worthy and proportionate defences to curtail competition. It cannot balance the positive environmental effects of a conduct with its negative effects on the competitive structure of markets, nor does it require evaluating mathematically the level of environmental protection that arises thereof. Nevertheless, it makes a difference to know whether the environmental benefits for consumers or the whole society arising from a certain conduct may offset its detrimental impact upon competition, which can be statistically measured via a plethora of methodologies.[102] Restrictions to competition that could prevent a 0.01-degree rise in temperature in twenty years should be evaluated more leniently than similar restrictions that would only prevent a 0.000001-degree rise in temperature in twenty years. In these circumstances, environmental-based defences would be better assessed by using the framework of efficiency gains justifications.

29. Based on the provisional guidelines of the Netherlands Authority for Consumers and Markets (ACM), which are perceived as a model in the sphere of sustainable competition law, the ACM will presumably take into account these same characteristics when it analyses environmental justifications in connection to Article 101 TFEU. It will evaluate whether the benefits that the proposed collaboration aims to achieve, such as lower carbon emissions, outweigh the negative impact of this collaboration, which includes, inter alia, a price rise for consumers.[103] Additionally, the ACM plans to carry out a simplified test when undertakings would have a combined market share of no more than 30% and whose harm to competition would evidently be smaller than the environmental benefits that ensue from their conduct.[104] In the same vein, instead of obliging dominant undertakings to use numerical analyses to substantiate their arguments, it could be acceptable that authorities apply the proportionality test of objective necessity justifications if dominant undertakings are not overly dominant and the environmental benefits of their behaviour clearly outweigh its disadvantages upon the competitive structure of markets beyond a reasonable doubt.

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100 Holmes (n. 9), 388–389.

101 Kingston (n. 10), 308–309; Holmes (n. 9), 388–389.

102 A. Claici and J. Lutz, Beyond the Policy Debate: How to Quantify Sustainability Benefits in Competition Cases: Lessons Learned From Environmental Economics, *European Competition and Regulatory Law Review*, Vol. 5, Issue 3, 2021, pp. 200–209.

103 *See* Netherlands Authority for Consumers and Markets, Guidelines, second draft version, Guidelines on Sustainability Agreements – Opportunities within competition law, 26 January 2021, https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf, (accessed 21 March 2021), p. 30.

104 Ibid., 54–56.

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2. Proposed suggestions

30. Although the current objective necessities framework has already been used to evaluate the environmental defences of dominant undertakings, only health and safety reasons are mentioned in paragraph 29 as legitimate public purposes that would justify the conduct of dominant undertakings. Therefore, environmental protection should also be added as a potential motive to prevent the enforcement of Article 102 TFEU and should preferably be listed before health and safety reasons due to the seriousness of the potential forthcoming ecological crises.

31. In order to review defences that are incompatible with the framework of objective necessity justifications, I suggest that the Commission modifies the current efficiency gains framework to make it apt to evaluate environmental defences. Accordingly, it could rephrase the current wording of "efficiency gains" to "economic and environmental benefits" as economic and environmental benefits are often interdependent, and in the same way, rephrase the various criteria pertaining to the framework to reflect those changes.[105] Otherwise, in the same vein as the Austrian competition authority's decision to create a sustainability exemption into the national Cartel Act,[106] a new, distinct, third type of justification could be introduced for quantifiable environmental justifications. The former solution would be more practical for cases combining both environmental benefits and economic efficiency gains, which arose, for instance, in *Sydhavnens* and the circumstances faced by Unilever. However, the current efficiency gains framework has also been criticised, mostly for being too strict to satisfy the thresholds required by competition authorities,[107] which in turn casts some doubts on whether it would be the best candidate to assess environmental justifications. Anyhow, such a leap forward towards the inclusion of environmental considerations in EU competition law, by enshrining them into an official document and giving them as much importance as economic market-efficiency gains, would demonstrate that the Commission is genuinely committed to its 2050 climate neutrality objectives.

VII. Conclusion

32. The implications of Article 102 TFEU justifications are not the panacea for saving our planet. But neither is EU competition law perceived as a bedfellow of environmental protection, yet DG COMP has embraced the goals of the European Green Deal. Competition authorities have underrated the environmental contributions that dominant undertakings can bring via Article 102 TFEU objective justifications. The existence of Article 102 TFEU objective justifications are recognised in EU law and thus should not be dismissed from the ongoing debates on environmental considerations in competition law. The "verdancy" process of EU competition law should be holistic and encapsulate all the legal bases where it can act, including Article 102 TFEU. Critics might purport this would jeopardise the good functioning of EU competition law, hamper legal certainty, promote greenwashing, and unravel the current consumer welfare-centric approach, all sacrificed for the sake of the almighty concept of environmental protection. Contrarily, the goal of this article is not to reject conventional economic theories nor to pamper dominant undertakings or to naively give them a free pass when they submit an environmental justification. Its objective is to encompass the universally accepted environmental economics methods into the enforcement of Article 102 TFEU. The propositions listed in this article have elaborated comprehensive guidelines to ensure no harm would be done to the enforcement of Article 102 TFEU and that all stakeholders would reap benefits from environmental defences, including consumers and society alike. Indeed, this article has favoured the use of the efficiency gains framework in most cases to guarantee that the environmental benefits of a behaviour surpass its anti-competitive effects and that no false negatives would escape. Setting robust and clearly detailed criteria to maintain highly competitive markets while condoning conducts bringing in significant environmental benefits and with a lesser impact on competition is doubtlessly the best modus operandi.

105 The concept of "sustainability benefits" has been used repetitively by the Commission in its *Competition policy brief* 2021-01, hence the terminology of "economic and environmental benefits."

106 *See* Robertson (n. 7).

107 *See* Waelbroeck (n. 15), 121–126; O'Donoghue and Padilla (n. 19), 287–289; H. W. Friederiszick and L. Gratz, Hidden Efficiencies: The Relevance of Business Justifications in Abuse of Dominance Cases, *Journal of Competition Law & Economics*, Vol. 11, Issue 3, 2015, pp. 671–700; Jones, Sufrin and Dunne (n. 16), 387–388.

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33. In fact, European competition authorities and courts have already appraised several environmental objective justifications that were outlined in Section IV of this article. This reason reinforces the need for more clarity because the possibility of relying on environmental motives to excuse the behaviour of dominant undertakings is not explicitly acknowledged in the Guidance on the enforcement of Article 102 TFEU. Notwithstanding its apparent disdain for ecological goals, the current framework of objective necessity justifications is well structured to capture straightforward and basic claims of pro-environmental justifications. In contrast, for the environmental defences that are more complex to resolve for NCAs and which would involve the use of environmental economics methods, the current efficiency gains framework should undergo a greening process to be apt to adjudicate the legality of environmental defences. Nevertheless, amid criticism and the prevalent scepticism that objective justifications never live up to the thresholds required by NCAs in the realm of Article 102 TFEU, it could also be an opportunity for competition authorities to reconsider their whole approach to efficiency gains justifications and its implications on environmental justifications.

34. Additionally, the concept of sustainability also encompasses social dimensions beyond environmental protection. The findings of this article could therefore be extended to the pursuit of other public interest goals, such as human rights, media pluralism, or the reduction of poverty and economic inequalities. To complement the findings of this article, further research should also be conducted on the topic to clarify the motives of competition authorities not to include the enforcement of Article 102 TFEU, either as a sword or a shield, in their sustainable transformation. ■

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