Falling through the cracks no more? Environmental degradation and social injustice as abuses of dominance under Article 102 TFEU

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1. Introduction

In its Resolution ahead of the 25th United Nations Climate Conference of the Parties (COP 25), the European Parliament (EP) declared, for the first time, a climate and environment emergency. In that Resolution, the EP called on the European Commission (Commission), _inter alia_, to ‘urgently take the concrete action needed in order to fight and contain the threat of climate and environmental catastrophe before it is too late’. Moreover, the current public health and economic crisis generated by the coronavirus pandemic has made it clearer than ever that social and ecological systems are intertwined through a complex web of intricate connections that demand holistic policy responses to the climate and environment emergency and the economic crisis we are facing.

The Commission’s response to the EP’s call for action is the European Green Deal (Green Deal) and its response to the economic crisis caused by the pandemic is the € 2,4 trillion ‘Recovery plan for Europe’ that is linked to the Green Deal. The Commission has recognised in the past – despite the onset of the ‘more economic approach’ – that its significant and rather unique powers of enforcement in competition policy can be used supportively of other tools to achieve broad goals such as sustainable development, unemployment, and addressing financial crises. Moreover, the idea that EU competition law can further goals such as sustainability and fairness has featured consistently in Commissioner for Competition Vestager’s speeches.

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2 European Parliament Resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)).
7 See e.g., M. Vestager speech at the GCLC Conference on Sustainability and Competition Policy, ‘Competition and Sustainability’ (Brussels, 24 October 2019); speech at the Danish Competition and Consumer Authority, ‘Fair markets in a digital world’ (Copenhagen, 9 March 2018); speech at the GCLC Annual Conference, ‘Fairness and Competition’ (Brussels, 25 January 2018); and speech ‘How Competition Can Build Trust in Our Societies’ (21 September 2017). Commissioner Vestager’s speeches are available at https://ec.europa.eu/competition/speeches/index_speeches_by_the_commissioner.html (last accessed 30 January 2020).
However, neither of the Commission’s responses to the climate and environment emergency or the public health and economic crisis contains any specific proposals for using European Union (EU) competition law and policy (beyond State aid law) as one of the tools to address the linked crises. That is problematic, since if our approach to solving the crises fails to be holistic, we risk entrenching our social, economic, and ecological systems into further perpetuating and mutually-reinforcing crises.

The acuteness of the climate and environmental emergency and the EU’s commitment to become climate neutral and sustainable through a fair and just process of transition, as well as the unique window of opportunity for change generated by the pandemic, bring the debate on EU competition law’s goals into sharp relief and mandate a fresh look at the interplay between EU competition policy and sustainability goals. In particular, they require looking at two almost unexplored aspects of the debate amongst competition lawyers. First, how market power can be the genesis but also the result of environmental degradation and social injustice. Second, whether environmental degradation and social injustice could be framed as ‘abuses’ of a dominant position within the meaning of Article 102 TFEU.

With that backdrop, in this paper we argue that EU competition law can act as a public policy tool to further sustainability goals through the application of Article 102 TFEU. First, we show that a case can be made for a moral and constitutional imperative to include sustainability goals in those that are pursued by EU competition law. This question relates to the existing debate about the goals of EU competition law, but we broaden the perspective through the combination of legal research with socio-ecological research. The latter ‘utilizes interdisciplinary and transdisciplinary methods to examine complex cause-effect relationships and feedback cycles occurring between natural and human ecosystems and, intentionally, treating them as an integrated coupled (socio-ecological) system’. Second, we demonstrate how unsustainable business practices that lead to environmental degradation and social injustice can be viewed as ‘abuses’ of dominant positions within the meaning of Article 102 TFEU. This question relates to the growing literature on sustainability and EU competition law, but focuses on Article 102 instead of Article 101 TFEU and on using sustainability as a sword rather than a shield.

The rest of the paper is structured as follows. In section 2 we briefly present the current climate and environment emergency, before describing what we consider to be unsustainable business practices in section 3. In section 4, we explain the nexus between market power and such practices. In section 5, we turn our focus to the law and make the case for a constitutional EU law requirement to integrate sustainability considerations in EU completion law and policy. In section 6, we combine our findings from sections 2 to 5 in order to identify the gap in current EU competition law enforcement. In section 7, we suggest a framework of analysis that allows for unsustainable business practices to be considered as abuses of a dominant position. In section 8, we collect our findings and conclusions, discuss briefly their policy implications, and set out an agenda for future research.

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8 The Green Deal, above n 3, pp. 9 and 18.
9 See further, infra section 2 and references in n 11.
2. The climate and environment emergency

The Earth is currently facing an acute climate and environment emergency that poses an existential threat to humanity through the collapse of multiple interconnected aspects of the Earth system.\(^\text{11}\) This is captured through the planetary boundaries framework\(^\text{12}\), i.e. a set of boundaries that if transgressed would mean humanity would no longer be within a safe operating space. The boundaries relate to climate change, freshwater use, biochemical cycles, land system change, ocean acidification, aerosol loading, ozone depletion, biosphere integrity (biodiversity) and novel entities that are increasingly prevalent in ecosystems, such as microplastics and antibiotics. Four of the planetary boundaries have already been pushed beyond what is considered a safe limit, namely climate change, biodiversity loss, biochemical flows of nitrogen and phosphorus, and land system change.\(^\text{13}\) The accumulating pressures resulting from transgressing these planetary boundaries often reinforce each other in positive feedbacks, leading to accelerating non-linear, irreversible and often catastrophic change.\(^\text{14}\)

Current emission trends, often characterised as the ‘business as usual scenario’, risk activating multiple tipping points, triggering a ‘domino-like cascade’\(^\text{15}\) leading to ‘serious disruptions to ecosystems, society, and economies’.\(^\text{16}\)

Since the emergency is anthropogenic and global, coordinated efforts are being made to address it internationally, most prominently through the 2015 Paris Agreement.\(^\text{17}\) The parties to the Agreement, which include the EU and its Member States, have undertaken to hold the increase in global average temperature to well below 2 °C above pre-industrial levels and recognised that pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels would significantly reduce the risks and impacts of climate change.\(^\text{18}\)

\(^{11}\) See \textit{inter alia} the United Nations Environment Programme’s ‘2019 Emissions Gap Report’ (Nairobi, November 2019), showing that there is a need to dramatically cut emissions to meet the Paris Agreement target of maximum temperature rise, available at \url{https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf}; the United Nations Intergovernmental Panel on Climate Change (IPCC), ‘Special Report on the Ocean and the Cryosphere in a Changing Climate’ (September 2019), showing that major cities in the world will be flooded by 2050, available at \url{https://www.ipcc.ch/srocc/}; the IPCC ‘Special Report on Climate Change and Land’ (August 2019), available at \url{https://www.ipcc.ch/srccl/}; D. Eckstein \textit{et al.}, Briefing Paper of the German Watch, ‘Global Climate Risk Index 2020’, showing that in 2018 developed countries such as Germany, Japan and Canada were in the most affected from climate change related meteorological phenomena, available at \url{www.germanwatch.org/en/cri}; and W. Steffen \textit{et al.}, ‘Trajectories of the Earth System in the Anthropocene’ (2018) 115(33) \textit{Proceedings of the National Academy of Sciences of the United States} 8252, showing that if certain tipping points of the Earth system are surpassed a cascading effect will be caused that puts the planet on self-accelerating warming (all links last accessed 31 January 2020).


\(^{14}\) Case examples include the Arctic, which risks being ice free as early as 2030 and the Amazon rainforest, which risks tipping into a savannah state and transforming from a carbon sink into a carbon source. For the Arctic, see J. A. Screen and C. Deser, ‘Pacific Ocean Variability Influences the Time of Emergence of a Seasonally Ice-Free Arctic Ocean’ (2019) 46(4) \textit{Geophysical Research Letters} 2222 and for the Amazon, see T. E. Lovejoy and C. Nobre, ‘Amazon Tipping Point’ (2018) 4(2) \textit{Science Advances} eaat 2340.


\(^{16}\) Ibid, p. 8252.


\(^{18}\) Ibid, Article 2(1)(a).
In order to achieve those goals urgent action is needed, as highlighted by the Intergovernmental Panel on Climate Change (IPCC), the United Nations (UN) body tasked with assessing the science related to climate change.\(^{19}\) The IPCC has identified different emission pathways that are consistent with the Paris Agreement’s targets, by staying within a so-called ‘carbon budget’\(^{20}\). With current emission levels, the carbon budget could be depleted as early as 2030, pushing global temperature rise well above 1.5 °C.\(^{21}\) Such rapid climatic change would impact every component of the Earth system, frequently interacting with other anthropogenic pressures and exacerbating their effects on ecosystems and biodiversity.

### 3. Unsustainable business practices

To a significant extent, the climate and environment emergency, as well as the ensuing social inequality, has been created and exacerbated by undertakings.\(^{22}\) The business practices that directly or indirectly contribute to the emergency are the focus of this paper. For our purposes, we understand ‘unsustainable’ practices as being antithetic to ‘sustainable’ ones, allowing us to use well-established frameworks and definitions of sustainability to determine the practices that we refer to as ‘unsustainable’ business practices collectively for ease of reference.

The most commonly used definition of sustainability comes from the 1987 Brundtland Report for the UN. In that Report, ‘sustainable’ was defined as that which ‘meets the needs of the present without compromising the ability of future generations to meet their own needs.’\(^{23}\) The idea of sustainability has since been further elaborated and given specificity. For our current research, we understand ‘sustainability’ as a state of affairs that is in line with Raworth’s Doughnut framework, a comprehensive framework that combines the planetary boundaries we referred to in the previous subsection with the UN Sustainable Development goals\(^{24}\), thereby delineating a safe and just operating space where every person’s minimum societal needs are met, within the planet’s carrying capacity.\(^{25}\) A social-ecological research lens, which is also enshrined in the conceptual Doughnut framework, elucidates that society and environment are inextricably intertwined across space and time.\(^{26}\) Thus, environmentally

\(^{19}\) V. Masson-Delmotte et al (eds.), ‘Summary for Policymakers’ in Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty (IPCC, 2018).

\(^{20}\) Ibid, p. 12.

\(^{21}\) Ibid, p. 4.


\(^{25}\) K. Raworth, ‘A Safe and Just Space for Humanity’ Oxfam Discussion Paper (February 2012).

unsustainable practices are directly interconnected with socially unjust practices. In simple terms, in this complex web of life anything that harms society ends up also being harmful to the environment and vice versa. Understanding this interconnectedness is crucial to fully appreciate the theories of harm we discuss in section 6 of this paper.

In order to operationalise the Doughnut conceptual framework to business practises and obtain a range of practices that we consider to be ‘unsustainable’, we draw from the planetary boundaries framework and the ten principles of the UN Global Compact for corporate sustainability, which relate to human rights, labour, the environment and anti-corruption.27 First, in relation to human and labour rights, unsustainable business practices include violating or being complicit in violations of internationally proclaimed human rights (Principles 1 and 2), not upholding freedom of association, or not recognising the right to collective bargaining, (Principle 3), using forced, compulsory, or child labour (Principles 4 and 5), and engaging in discrimination in respect of employment and occupation, or producing under hazardous working conditions that endanger workers’ health and life (Principle 6). Second, in relation to the environment, unsustainable business practices are those that have a significant and proven impact on any of the planetary boundaries. Such practices include not supporting a precautionary approach to environmental challenges by not having, or not following, a business plan that aligns business operations and practises with the target of 1.5 °C global temperature increase by 2050 (Principle 7)28, discouraging greater environmental responsibility (Principle 8), and discouraging or inhibiting the development and diffusion of environmentally friendly technologies (Principle 9). Third, in relation to anti-corruption (Principle 10) we include as ‘unsustainable’ the business practises of rent-seeking lobbying, extortion, bribery, corporate fraud and lack of transparency. Specifically for transparency we draw from the Carbon Disclosure Project, a database where corporations can voluntarily disclose the environmental impact of their operations.

Seen through our chosen lens of the Doughnut framework, such ‘unsustainable’ practices entail pushing the world towards both a more ‘unsafe’ and ‘unjust’ state. An example that clearly illustrates this is pollution and lobbying. Just 100 companies are responsible for over 70 per cent of global emissions.29 Many of these companies have a strong influence in shaping domestic and international climate policy. Since 2010, five of these same companies have together spent more than € 250 million in the EU, lobbying for policies that are favourable to Big Oil and Gas.30 Thus, these corporations have moved the world towards a more ‘unsafe’ state, in this case in regards to catastrophic climate change, and an ‘unjust’ state because the
practices that they employ foment clientelist political relationships that demean the democratic principles of equality and accountability.

4. How market power facilitates unsustainable business practices

The reason for which undertakings engage in the practices we identified as ‘unsustainable’ in the previous section is self-evident. Most undertakings strive to increase their net profit, to the direct benefit of their owners or shareholders and the indirect benefit of their management. One way of increasing net profit is to reduce costs. Unsustainable practices result in lower production costs to undertakings engaging in them through lower standards, for instance paying low wages, not compensating for environmental externalities, not providing safe working conditions to workers, etc. Although the practices may also entail certain costs (inter alia reputational costs, litigation, fines), those are often too low to offset the increased profit made by engaging in them. Moreover, as a consequence of reduced costs, an undertaking engaging in unsustainable business practices also gains a competitive advantage over any competitor that does not engage in the practices and even more so over competitors that sacrifice profit in order to actively pursue sustainable practices.31

Thus, ‘unsustainable business practices’ are available to all undertakings, irrespective of whether they hold market power on the relevant market or not and all undertakings may have incentives to pursue them. Why, then, is this a competition law issue? First, when it comes to the application of Article 102 TFEU, it is simply a feature of EU competition law that the prohibition only applies to undertakings holding a dominant position on the relevant market. Consequently, conduct which is perfectly acceptable under Article 102 for non-dominant undertakings, may still fall foul of that Article when individually or collectively dominant undertakings engage in it, in recognition of the fact that a dominant firm’s conduct will always have a greater impact on the market than if the same conduct were pursued by a non-dominant firm.32 Moreover, case law has also made it clear that a position of market power imposes on dominant undertakings a special responsibility – not shared by non-dominant undertakings – not to allow their conduct to distort competition.33

That said, our argument for expanding competition law’s understanding of abuse to include unsustainable business practices would certainly carry more weight if we could identify a nexus between market power and such practices. Identifying a nexus would also facilitate an appreciation of the unique ways in which dominant undertakings can harm competition and consumers and lend support to the theories of harm we expound in section 6. For these reasons, in this subsection, we test the hypothesis that such a nexus exists.

Two observations are in order before we proceed. First, we do not purport to establish any type of causation between market power and unsustainable business practices. Indeed establishing causation is impossible within the confines of a paper like this. Rather, we make an effort to show that market power facilitates undertakings’ engaging in unsustainable

33 Case 322/82 Nederlandsche Banden Industrie Michelin v Commission EU:C:1983:313, para. 57 and reiterated numerous times, most recently in Case C-307/18 Generics (UK) and Others EU:C:2020:52, para. 153.
business practices, in the same way that one would theorise that dominance is conducive to other abusive behaviour. Second, EU competition law does not require for there to be a causal relationship between the dominant position and the abuse, meaning there is no need to show that ‘but for’ the dominance, the conduct characterised as abusive is impossible.

To test our hypothesis, we utilise two methods, one hermeneutic and one empirical. Starting with the hermeneutic one, we turn our attention to the definition of ‘dominant position’ within the meaning of Article 102 TFEU. According to the Court of Justice, a dominant position is a position of economic strength which enables an undertaking ‘to prevent effective competition from being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers’ and to ‘act largely in disregard of’ any competition that may exist on the market. Furthermore, the case law from the CJEU endorses the Commission’s argument that abusive conduct can itself be an indicium of dominance, since certain abusive conduct will not be appealing to non-dominant companies that expect ‘effective competition to normally ensure that the adverse consequences of such behaviour would outweigh any benefits’. Given the current ubiquity of issues relating to corporate social responsibility in Europe, mandatory non-financial reporting for large corporations, and the increasing relevance of the issue for investors, one would expect that only undertakings enjoying some degree of market power would be able to rip gains from engaging in unsustainable business conduct and bear any associated costs, acting in disregard of competitors, customers, and consumers. Hence, we can deduce that ‘dominance’, as understood in EU competition law, is a feature that facilitates unsustainable business practices.

For the empirical method, we turn to the rich literature of socio-ecological studies discussing the connection between market concentration and unsustainable business practices. Folke et al (2019) provide a solid basis of understanding how market consolidation over the years had led to transnational corporations growing so large that they are now effectively controlling critical functions of the biosphere. The authors explicitly list market consolidation levels at the global scale for the agriculture, forestry, seafood, cement, minerals and fossil energy sectors, and highlight the main environmental impacts associated with these sectors. From the use of lobbying to exert political influence, to blatant disregard for even rudimentary

35 Case C-85/76 Hoffmann-La Roche v Commission EU:C:1979:36, para. 9. In exceptional situations where the abuse and the dominance occur on different markets, the case law requires proof of a ‘link’ between the two: see, e.g. Case C-333/94 P Tetra Pak International SA v Commission EU:C:1996:436, para. 27.
36 Hoffmann-La Roche (n. 35) paras. 38-39.
38 According to S. Arvidsson and J. Johansson, ‘Sense-Making and Sense-Giving: Reaching Through the Smokescreen of Sustainability Disclosure in the Stock Market’ in S. Arvidsson (ed), Challenges in Managing Sustainable Business Reporting, Taxation, Ethics and Governance (Palgrave Macmillan, 2019), p. 81, reporting can be criticised for its lack of value relevance and credibility. The Commission’s recently commissioned ‘Study on Due Diligence Requirements through the Supply Chain Final Report’ also accepts that reporting has had limited real impact on business conduct, see pp. 245-250.
environmental regulations, studies have consistently shown how excessive market consolidation is not compatible with a just and sustainable world. To test the veracity of the nexus identified in the literature we reviewed, we decided to check whether undertakings that have already featured in DG Competition’s enforcement of Article 102 TFEU, in specific sectors with high concentration and global and complex value chains have in the past also engaged in unsustainable business practices. We first compiled a list of all Article 102 TFEU decisions ever to have resulted in either a prohibition decision, or a commitments decision, since both types entail a finding, or a preliminary finding, of dominance. We then categorised the cases according to NACE codes and created our own broader categories of economic sectors. We decided to focus on six of them, namely (i) web, computer services, software, online retail, (ii) electronics manufacture, (iii) food, tobacco, and food packaging, (iv) transport and car production, (v) energy production and distribution, and mineral and metal extraction, and (vi) pharmaceuticals. Finally, we checked whether any of the undertakings that featured in our catalogue had engaged in unsustainable business practices according to our definition in section 4. Ideally, for methodological ease and consistency, we would have liked to check one centralised database documenting all such practices, but in lieu of such a database, we […]

5. The constitutional imperative
In the sections above, we showed that there is a strong moral imperative to do everything possible to address the climate and environment emergency we face and that there is a connection between market power and business behaviour that has created and exacerbated the emergency. This would suggest that EU competition law ought to be addressing the matter. However, strong as that moral imperative may be, EU action, including the enforcement of Article 102 TFEU, is constrained by the competences conferred on the EU and the EU’s goals. Therefore, in this section we try to discern whether EU competition law does or should have sustainability as a goal, as a matter of positive law, case law and decisional practice.

To begin with, competition lawyers have a tendency to think of EU competition law as a self-contained area of law, failing to appreciate that EU competition policy is but one policy among a plethora of policies that the EU engages in. Instead, the purpose of Articles 101 and 102 TFEU can only be properly understood by setting those provisions in the broader context of the EU Treaties, setting them in relation to other provisions in the Treaties and seeing how they fit in the whole system of EU law.

For our purposes, the most relevant provisions of primary EU law are those found in Articles 11 and 191 TFEU as well as Article 37 of the Charter of Fundamental Rights (the

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40 In order for the conduct of the undertakings to have been subject to Article 102 TFEU scrutiny, they would have to be dominant. I.e. the cross-referencing allows us to focus on undertakings that have already been shown to hold market power.

41 Arts 2-6 TFEU contain the EU’s broad catalogue of competences, which translate into policies in Part III of the TFEU.

42 See Case C-621/18 Wightman EU:C:2018:999, paras. 45-47 for a recent example of this interpretative method.
Article 11 TFEU stipulates that environmental protection requirements must be integrated into the definition and implementation of the EU’s policies and activities, in particular with a view to promoting sustainable development. Importantly, Article 11 TFEU is a ‘provision having general application’, that is to say it is a horizontal provision of the TFEU and, thus, permeates all other TFEU provisions, including, of course, the ones on competition. Moreover, it is framed as an imperative, using the verb ‘must’, in contrast to other horizontal provisions. Article 191 TFEU sets out the EU’s environmental policy goals, which include inter alia preserving, protecting and improving the quality of the environment, protecting human health, and using national resources prudently and rationally. While exercising its competence in environmental policy, the EU must aim at a high level of protection. The same follows from Article 37 of the Charter which adds, like Article 11 TFEU, a positive requirement to integrate the improvement of the quality of the environment into EU policies and to ensure this is achieved in accordance with the principle of sustainable development.

The nexus between environmental protection, sustainability, and reducing inequality on the one hand and competition policy on the other is further buttressed when Articles 7 and 8 TFEU are considered. Article 7 TFEU requires consistency between the EU’s policies and activities, taking all of its objectives into account, in accordance with the principle of conferral of powers. Article 8 TFEU mandates the EU to aim to eliminate inequalities in all its activities. Just like Article 11 TFEU, both provisions are drafted as mandatory provisions, using the verb ‘shall’ and they are horizontal provisions permeating all other TFEU provisions. By referring to the EU’s ‘objectives’, Article 7 TFEU also creates a link to Article 3 TEU. Article 3(3) stipulates that those objectives include, inter alia, working for ‘the sustainable development of Europe based on balanced economic growth … aiming at … a high level of protection and improvement of the quality of the environment’ and promoting social justice and protection.

Consistently with this, EU competition law’s porous nature is also reflected in the CJEU’s case law and the Commission’s decisional practice. Far from being focused on a Chicago school inspired narrow ‘consumer welfare’ standard, as some commentators have argued

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43 Charter of Fundamental Rights of the European Union (2012) OJ C 326/2. The Charter has the status of primary EU law, according to Article 6(1) TEU.
44 For instance, Article 12 TFEU regarding consumer protection, which uses the formulation ‘shall be taken into account’ and Article 13 TFEU regarding animal welfare, which asks the EU and its Member States to ‘pay full regard to the welfare requirements of animals’.
45 Art 191(1) TFEU.
46 Art 191(2) TFEU.
and contrary to what the Commission’s conscious move towards a ‘more economic approach’ might suggest, an exhaustive, detailed, and systematic survey into EU competition law case law and decisional practice from the 1960’s to 2020 conducted by Iacovides and Stylianou reveals that EU competition law is polysylleptic when it comes to goals being pursued and that those goals find expression in a plethora of ways in the case law. This is consistent with other positive or normative research in competition law.

What is more, Iacovides and Stylianou show that EU competition law’s mosaic of diverse goals includes some that do not fit the Procrustean framework of welfare and efficiency, such as protecting fairness, consumers, equality of opportunity, freedom to compete, a level playing field, the structure of the market, the internal market goal, the public interest and well-being of the EU as a whole, and avoiding wealth transfers from consumers to colluding companies. Our own search, replicating the method used by Iacovides and Stylianou, shows that in a handful of cases and Commission decisions sustainability and environmental protection are explicitly taken into account in the application of the rules.


52 Iacovides and Stylianou, ‘Goals’, n 50 supra, pp. xx.

53 Reference

54 Reference.
Taken together, several provisions of primary EU law show emphatically that EU competition policy cannot be separated from the EU environmental policy. To the contrary, EU primary law sets forth a constitutional imperative on the EU to integrate environmental protection and sustainability in all its policies. The consequence of that is that not only can EU competition policy enforcement not pursue goals that are inconsistent with environmental goals, but must also, as a matter of EU constitutional law, positively pursue them and integrate them in its goals. EU competition law’s goals, as shown in case law and decisional practice, are and always have been broader than narrow consumer welfare. This constitutional imperative means that they should include environmental protection and sustainability, meaning that the enforcement of the rules ought to promote conduct that furthers sustainability and at the same time prevent conduct that leads to environmental degradation and social injustice.

6. Unsustainable business practices as ‘abuses’: identifying the gap

Regarding specifically different methods of using competition law as a public policy tool to further environmental goals beyond purely consumer welfare, the research of Townley, Kingston, and Nowag stands out and there is currently research being conducted on climate change and competition law by Holmes. When it comes to fairness and social injustice, the work of Lianos and Ezrachi are of particular interest for us.

As a matter of typology, most authors seem to group together the operationalising methods according to whether they act in order to encourage conduct that is sustainable or in order to prevent, punish, or strike down conduct that is unsustainable. In the relevant literature this is also framed about the goal operating as a shield (i.e. invoked to avoid liability for what could otherwise be anticompetitive) or as a sword (i.e. invoked to strike down conduct and measures that contravene it), or as a matter of operating supportively or preventatively.

In our view, the operationalising methods can be grouped together in three categories: (i) exclusion (ii) inclusion and (iii) exemption. They can be further subdivided according to whether they operate as shield or sword. In the rest of this section, we set out the typical examples of these categories, to demonstrate the gap that our research is trying to fill. The typology is also presented schematically below, in Table 1. The categories where we identify a gap are coloured red.

In the ‘exclusion’ category, the undertakings’ agreement or conduct falls a priori outside the scope of application of EU competition law or is seen as not being ‘economic activity’, thus

57 Nowag, Environmental Integration, n 51 supra.
60 E.g. Ezrachi, ‘EU Competition Law Goals’, n 51 supra.
61 Holmes, ‘Climate Change’ n. 58 supra, pp. 18-21.
62 Nowag, Environmental Integration, n 51 supra.
rendering the entity engaging in the conduct not an ‘undertaking’ for the purposes of EU competition law. The reasoning could be either that it is considered that there is an exogenous sustainability goal that is more important than the goal of competition law and, therefore, would always trump the latter goal, or because it is considered that the sustainability goal is endogenous to competition law’s plethora of goals, while the agreement or conduct predominantly pursues that goal, has it at its centre of gravity, and would have only possibly a minimal impact on the other goals. The Albany and Wouters cases (and ensuing cases such as FNV Kunsten Informatie en Media and Meca-Medina), are examples of the ‘exclusion’ category within Article 101 TFEU. In Article 102 TFEU, a similar logic leads to the exclusion of competition law as the protection of the environment is seen as an activity which is not of an economic nature. A similar logic also permeates the way ancillary restraints are treated in Article 101 TFEU and merger control respectively. In this category, the methods can only ever operate as a shield, i.e. to avoid liability for what might have been a violation of EU competition law.

In the ‘inclusion’ category, whether the undertakings’ agreement, conduct, or proposed merger is found to be anticompetitive or lead to a significant impediment to effective competition (SIEC) or not, would hinge specifically on its effects on sustainability and social fairness. In this category, the sustainability goal is endogenous to EU competition law’s goals, resulting in the need to carry out a balancing act between positive effects of the agreement, conduct, or proposed merger (e.g. increased sustainability), and negative ones (e.g. short-term price increase). Examples of this category are objective justifications and efficiency defences in Article 101 TFEU and countervailing factors and efficiencies in merger control. Although these examples appear to be defences or exceptions, the analysis by the competition authority or court in reality happens in an integrated way, since neither Article 102 TFEU nor the EUMR contain any explicit exceptions as Article 101 TFEU does. Thus, although the undertakings will have to adduce evidence of alleged procompetitive effects, the burden of proof does not really shift and breaches of Article 102 TFEU or a SIEC are not established. In essence, this is a variant of the rule of reason approach, something that explains why the category is less suitable for Article 101(1) TFEU, where the CJEU has consistently held that the procompetitive effects have to be assessed under Article 101(3) instead of Article 101(1) TFEU. That said, there is no reason why an integrated, rule of reason approach could not be taken by the Commission as a matter of prioritisation policy instead. Arguably, this is already

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63 Case C-67/96 Albany EU:C:1999:430, paras. 60-64.
64 Case C-309/99 Wouters and Others EU:C:2002:98, para. 97.
65 Case C-413/13 FNV Kunsten Informatie en Media v Netherlands EU:C:2014:2411, para. 41.
69 Commission Notice on restrictions directly related and necessary to concentrations [2005] OJ C 56/03.
71 See Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, paras. 11(b) and 77.
the case. In essence, during the administrative procedure, the Commission weighs the positive effects of the agreement against the negative ones in order to decide whether to pursue the case further.

In the ‘exemption’ category, the undertakings’ agreement, conduct, or proposed merger is found to be anticompetitive or to lead to a SIEC, but is then exempted. In this category, the sustainability goal is again endogenous to EU competition law goals and a balancing act has to take place between the furtherance of that goal and the demotion of the other goal. The difference is that an anticompetitive effect has already been established and the burden of proof has shifted. The typical example in this category is Article 101(3) TFEU.\(^73\) Other examples that could be included in this category since they operate with a similar logic to Article 101(3) TFEU are remedies in merger control, Block Exemptions for various types of vertical agreements pursuant to Article 101(3) TFEU,\(^74\) as well as the treatment of certain horizontal cooperation agreements.\(^75\) As with ‘exclusion, the methods that exist in the ‘exemption’ category can only ever operate as a shield, i.e. to avoid liability for what might have been a violation of EU competition law.

The existing literature on the usage of EU competition law as a public policy tool is predominantly focused on the ‘exemption’ category.\(^76\) As noted by Nowag, examples given in the context of using sustainability goals as a sword ‘do not show any specific environmental integration […]’, they seem to reflect classical principles of competition law applied to environmental products.\(^77\) Since ‘it is not the environmental effect of the product or behaviour but the effect on competition that is decisive’\(^78\), the concept of ‘abuse’ cannot contain environmental degradation and social injustice as independent forms of abuse. Additionally, the existing literature is much more focused on the relation between Article 101 TFEU and sustainability goals, than on the one between Article 102 TFEU and sustainability goals.\(^79\)

The few existing proposals of using Article 102 TFEU as a sword, based on a broader understanding of consumer welfare or anticompetitive harm, although laudable and highly relevant for our paper, are still rather underdeveloped and vague.\(^80\) Based on our findings from above, we argue that this is a gap that can and ought to be addressed.

\(^{73}\) E.g., Commission Decision 2000/475/EC of 24 January 1999 in Case IV/F1/36718 CECED.
\(^{76}\) For an example in Article 102 TFEU, see Kingston, Greening EU competition law, n 56 supra, ch. 9.
\(^{78}\) Nowag, Environmental Integration, n 51 supra, p. 140.
\(^{80}\) E.g., T. Fernando and C. Lombardi, ‘EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links’, Fair Trade Advocacy Office (Brussels, February 2019), sections 4.2 and 5.2; Holmes, ‘Climate Change’ n. 58 supra, pp. 18-20.
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<td>Rule of reason (excluded by CJEU but could be used in prioritisation)</td>
<td>Art. 101.3 Block exemptions Horizontal cooperation agreements</td>
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<td>Art. 102</td>
<td>No economic activity <em>Diego Cali</em></td>
<td>Objective justification Efficiency “defence”</td>
<td>Not applicable, not available explicitly in the relevant legal text</td>
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Table 1: Typology

7. **A proposed framework: filling the gap**

In this section, we argue that causing environmental degradation and, as a result, social injustice should be seen as an independent ‘abuse’ when practiced by undertakings in a dominant position on a relevant market and we suggest – on the basis of the analysis from section 3 – relevant factors to take into account in order to investigate whether and how such practices lead to distortions of competition and reductions in consumer welfare (properly construed). In other words, we set out a framework of analysis for such abuses, including relevant factors and theories of harm that allow us to focus not on the effect such practices have on narrow consumer welfare as manifested in short-term price effects but on the impact they have on the environment and our shared notions of justice and fairness.

8. **Conclusions**

The climate and environment emergency has only recently been appreciated to its fullest extent and sustainability as a central goal of politics and a positive public policy goal affecting all other facets of policy, rather than something simply talked about, is a relatively new phenomenon, as pointed out by Commissioner Vestager. EU competition law has a lot of catching up to do in order to be reoriented from its current focus on narrow consumer welfare considerations. In our view, a significant gap exists in particular in relation to the enforcement of Article 102 TFEU and sustainability. We believe that research that cuts across law and socio-ecological studies offers an original and unique perspective on the pertinent question of filling EU competition law’s sustainability gap.

In this final section, we summarise our findings from previous sections, discuss briefly their policy implications, and set out an agenda for future research.

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81 An exception exists for services of general economic interest pursuant to Article 106(2) TFEU. We do not deal with this issue in this paper, as we are interested in business practices, not state measures falling under Article 106 TFEU.


83 M. Vestager, ‘Competition and Sustainability’, n. 7 supra.