

The Relevance of Mandatory Human Rights and Sustainability Due Diligence for the Greening of EU Antitrust Law

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1 Introduction

Life on Earth is in crisis. Our climate is changing faster than scientists predicted and the stakes are high. Biodiversity loss. Crop failure. Social and ecological collapse. Mass extinction. We are running out of time, and our governments have failed to act.¹

The planet is facing a climate crisis of a magnitude that is difficult to grasp, and we need all hands on (the policy) deck to address it. The international response to the climate crisis has been the Paris Climate Accord, and the EU has begun with implementing its very own response in the form of the European Green Deal. In particular, the EU aims at becoming a climate-neutral economy by 2050. The EU Green Deal follows a horizontal approach: all EU policies should contribute to achieving the European Green Deal objective, including EU competition law.

The push towards aiding the EU economy to become greener has triggered antitrust initiatives both at national and EU level. Mostly, the debate about implementing a sustainability agenda in competition law has focused on strategies for interpreting open-ended antitrust rules contained in Article 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) and national counterparts in a way that allows for more exceptions from antitrust enforcement to accommodate *voluntary* sustainability efforts by undertakings.

At the same time, the EU is developing a framework to make sustainability efforts *mandatory* for undertakings. In February 2022, the EU Commission published its Draft Directive on Corporate Sustainability Due Diligence (“CSDDD”).² After fragmented development of mandatory human rights due

1 Quote from the website of Extinction Rebellion, “This is an Emergency,” Extinction Rebellion, accessed May 20, 2024, <https://rebellion.global/>.

2 EU Commission 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, 2022/0051(COD) (“CSDDD”).

diligence (“HRDD”) legislation at national level, the recently adopted Directive might, for the first time, bring a harmonized, binding, supranational human rights and sustainability due diligence framework into being.

But what impact should EU legislation that makes sustainability efforts for companies and their supply chains mandatory have on the greening efforts under EU competition law? This is the question this chapter tries to critically assess. It can be considered as a first attempt in trying to reconcile two trends: the sustainability turn in antitrust law and the rise of mandatory human rights and sustainability due diligence. The main focus of this chapter is to assess the impact of mandatory human rights and sustainability due diligence on the availability of sustainability *defenses* under antitrust law. Conversely, human rights and sustainability obligations could also give room for crafting new *offenses* under antitrust law,³ thus using the enforcement toolbox of antitrust law to fight serious human rights and environmental violations by corporations. Given that current developments in EU antitrust practice only relate to sustainability defenses, and the verdict is still out on whether antitrust law could become a sword in fighting human rights and environmental violations by private actors, this chapter will only focus on the impact of HRDD legislation on the sustainability defense under antitrust law.

The chapter is structured in the following way: Section 2 starts by discussing the sustainability turn in EU competition law and similar developments at the national level. Section 3 then gives an overview over the structure and obligations imposed by the CSDDD and comparable national frameworks. Section 4 seeks to answer the question of how much room there is left for taking sustainability exceptions into account under EU competition law. Section 5 concludes.

2 The Sustainability Turn in Antitrust Law

The debate on if and how to introduce a sustainability agenda into EU competition law is not new. It started in the aftermath of the EU Commission’s decision in *CECED*.⁴ In *CECED*, the EU Commission assessed the compatibility of an agreement between washing machine manufacturers to no longer produce and import energy inefficient washing machines into the EU internal market.

3 See Julian Nowag, “Competition Law’s Sustainability Gap? Tools for an Examination and a Brief Overview,” *Nordic Journal of European Law* 5, no. 1 (2022): 149–65; Simon Holmes, “Climate change, sustainability, and competition law,” *Journal of Antitrust Enforcement* 8, no. 2 (July 2020): 354–405.

4 2000/475/EC: Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718. *CECED*), OJ L 187, January 24, 1999 (“*CECED*”).

Since energy-efficient washing machines were more expensive, this agreement could lead to higher prices for consumers and could thus be anti-competitive and contrary to Article 101 (1) TFEU, the main provision prohibiting anti-competitive agreements in EU law.

Ultimately, the Commission did find a violation of Article 101 (1) TFEU but granted an exemption under Article 101 (3) TFEU. Article 101 (3) exempts otherwise anti-competitive agreements from Article 101 (1) TFEU if four cumulative conditions are met. First, the agreement contributes to improving the production of goods and services or promotes technical or economic progress. According to the Commission, the push for green washing machines contributed to technical progress. Second, consumers receive a fair share of the benefits from the agreement. The Commission saw a benefit for consumers in the form of reduced energy and water bills due to more energy-efficient washing machines. Third, the Commission found that the anti-competitive elements in the agreement were strictly necessary to achieve the objectives of the agreement. Fourth and last, the agreement did not eliminate all competition on the market in washing machines.

The *CECED* decision clearly pointed to the fact that an agreement that fosters public policy objectives more than it harms competition could be exempted under Article 101 (3) TFEU. With the rise of the more economic approach in the mid-2000s, however, the validity of the *CECED* decision was cast into doubt.⁵ Could environmental concerns factor into a consumer welfare analysis? The Guidelines on the application of Article 101 (3) TFEU published in 2004 remained silent on how to deal with agreements that are environmentally efficient.⁶ Rather, the Guidelines made clear that only pure economic efficiencies from an agreement would be considered in the analysis of the four cumulative criteria under Article 101(3). This approach appeared to exclude any broader, non-economic considerations from its analysis, including environmental and sustainability considerations.

On the other hand, under the EU Commission's Horizontal Guidelines published in 2011,⁷ environmental concerns did have a place, albeit a modest one. According to the Commission, standardization agreements on environmental aspects could "facilitate consumer choice and lead to increased product

5 Giorgio Monti, "Implementing a Sustainability Agenda in EU Competition Law," presented at Vienna Competition Law Days – Vienna University of Economics, September 17–18, 2022.

6 Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty (text with EEA relevance), OJ C 101, 2004/C 101/08.

7 The Horizontal Guidelines set out the principles that the Commission applies when assessing horizontal cooperation agreements under Article 101 TFEU. Horizontal cooperation agreements refer to agreements between actual or potential competitors. See

quality,”⁸ thus yielding efficiency gains. The 2011 Horizontal Guidelines also included the *CECED* facts as an example of a standardization agreement which yields efficiencies.

Still, environmental concerns did not play a very prominent role in the EU’s competition agenda at the beginning of the 2010s, if at all. Industry initiatives allegedly supporting sustainability objectives proved to be anti-competitive greenwashing. In *Consumer Detergents*,⁹ participating companies in an industry initiative to reduce non-biodegradable ingredients in detergents ended up not reducing polluting elements in their detergents effectively. Instead, they used this arrangement purely to limit competition between them. The *AdBlue* decision of the Commission tells a similar story.¹⁰ German car manufactures agreed to jointly develop a system to reduce emissions. The system proved to be less emissions-reducing than if each of the companies had implemented such a system independently. As in the case of the *Consumer Detergents*, the car companies used the joint initiative to not to compete as vigorously against each other rather than striving to develop the most effective system for NOx-cleaning.

Despite its relative irrelevance in practice, the debate on sustainability in competition law did not abate in academic circles. It factored, and continues to factor, into an overall debate on the weight that should be given to non-economic public policy objectives in EU antitrust law. Kingston (2011), for example, argues that environmental concerns form part of the broader understanding of “consumer interest or consumer wellbeing” in EU antitrust law and could legitimately be considered in competition analysis.¹¹ According to her, there are valid legal, governance and economics arguments to attend to environmental concerns under EU antitrust rules. When it comes to the legal argument, EU competition law needs to be considered as an integral part of the EU legal system. Article 11 TFEU states that “Environmental protection

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 (Text with EEA relevance), OJ C 11, 2011/C 11/01 (“2011 Horizontal Guidelines”).

8 *Id.* at 308.

9 AT.39579 *Consumer detergents* (2011) (for more information, see “Competition Policy,” European Commission, April 13, 2011, <https://competition-cases.ec.europa.eu/cases/AT.39579>).

10 AT.40178 – *Car Emissions* (2021) (for more information, see “Competition Policy,” European Commission, July 8, 2021, <https://competition-cases.ec.europa.eu/cases/AT.40178>).

11 Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2011), 39.

requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". Along similar lines, Article 37 of the Charter of Fundamental Rights states that a "high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." An approach to EU antitrust law that considers it to be embedded in the overall architecture of EU law can thus not fundamentally question *if* sustainability concerns should factor into competition law and policy. Rather, the question is *how*.¹²

The real sustainability turn in EU competition law can be dated to 2019, when then new Commission President Ursula von der Leyen announced the Green Deal as one of the key policy pillars for her presidency.¹³ The next section briefly discusses the Green Deal and its competition policy-specific impact.

2.1 *The EU Green Deal Agenda for EU Competition Law*

2.1.1 The Path towards Greening EU Antitrust Law

In December 2019, under the lead of the then newly elected Commission President von der Leyen, the Commission Published its first Communication on the European Green Deal.¹⁴ The Green Deal sets as its main goal transforming the EU to a net zero economy, i.e., cutting greenhouse gas emission close to zero, or finding another way of compensating for emissions (e.g. by re-absorbing CO₂ from the atmosphere). It puts out a sweeping policy reform, including transitioning to renewable energies, establishing a circular economy in all industry sectors, fostering green finance, greening public budgets, increasing ecological preservation efforts, as well as providing education on sustainability. At the same time, the Commission also commits in the Green Deal to a just transition that should not disadvantage any part of the population disproportionately.

12 For some suggestions about the how, see Monti, "Implementing a Sustainability Agenda," *supra* note 5, at footnote 1.

13 Klaudia Majcher and Viktoria H.S.E. Robertson, "The Twin Transition to a Green and Digital Economy: The Role for EU Competition Law," in *Research Handbook on Sustainability and Competition Law*, ed. Julian Nowag (Edward Elgar Publishing, 2024), 192–210.

14 Communication from the Commission: The European Green Deal, COM(2019) 640 final, December 11, 2019 (text available online at Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, European Commission, December 11, 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN>).

In October 2020, the Directorate General for Competition of the EU Commission (“DG Comp”) announced that it was exploring how EU competition policy could support the EU Green Deal, and launched a public consultation to this effect.¹⁵ When it comes to antitrust law and policy on anti-competitive agreements, DG Comp sought input from stakeholders to understand which kind of desirable, sustainability-fostering agreements could not be implemented due to companies being worried about infringing competition rules. In addition, DG Comp looked for ideas as to what kind of changes to its practice would be necessary to accommodate these kinds of agreements. When it comes to merger control, DG Comp sought to understand which types of mergers would cause harm to consumers by reducing their choice of sustainable products or technologies, and how merger control could further contribute to the sustainability objectives of the Green Deal. Numerous responses to the public consultation were submitted and debated during a conference dedicated to EU antitrust policy and the Green Deal, showing that antitrust law is not an obstacle to companies trying to pursue sustainability objectives in a coordinated fashion.¹⁶

2.1.2 Horizontal Sustainability Agreements

One of the result of this public debate was a section on sustainability agreements in the new Horizontal Guidelines published by the EU Commission on June 1, 2023.¹⁷ The Guidelines recognize that negative externalities from business and consumer conduct that harm sustainability objectives are first and foremost mitigated by regulation, pricing mechanisms like the EU’s emission trading system, and taxation.¹⁸ Still, competition law could have a role to play for any residual negative externalities that are not remedied by these mechanisms and could be remedied by collaboration between competitors.

15 Elisabetta Righini, Javier Ruiz-Calzado, David Little, and Pierre Bichet, “The European Green Deal & Competition Policy – Call for Contributions on how EU Competition Rules and Sustainability Policies Can Work Together”, Kluwer Competition Law Blog, October 19, 2020, <https://competitionlawblog.kluwercompetitionlaw.com/2020/10/19/the-european-green-deal-competition-policy-call-for-contributions-on-how-eu-competition-rules-and-sustainability-policies-can-work-together/>.

16 Prim Jansen, Sarah J. Beeston, and Liesbet Van Acker, “The sustainability guidelines of the Netherlands Authority for Consumers and Markets: an impetus for a modern EU approach to sustainability and competition policy reflecting the principle that the polluter pays?,” *European Competition Journal* 18, no. 2 (October 2021): 287–327, 290.

17 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, OJ C 259, 2023/C, July 21, 2023 (“2023 Horizontal Guidelines”).

18 *Id.* at para. 520.

In the Guidelines, the Commission clarifies that an agreement that would generally be considered a by-object restriction of competition because it fixes prices, allocates markets, or limits outputs or innovation, will be considered under the milder standard of an effects-based restriction of competition if it pursues a genuine sustainability objective.¹⁹ In relation to sustainability standardization agreements (e.g. in the form of labels given to goods produced in a particularly sustainable way), the Commission lays out a range of factors that it will consider when judging whether there is an infringement under Article 101(1) TFEU. The Commission's competition concerns in relation to sustainability standards are the risk of price coordination, foreclosure of competing standards, or discrimination against certain competitors.²⁰ These concerns can be averted if six conditions for a "soft safe harbour" are met: (i) the procedure for developing the standard is made transparent and open for competitors to participate; (ii) the adoption of the standard is voluntary; (iii) parties remain free to adopt a higher standard; (iv) there is no exchange of sensitive commercial information; (v) if effective and non-discriminatory access to the agreement for new participants is made possible after its conclusion; and (vi) if it does not lead to a significant increase in price or reduction in quality and/or if the combined market share of participating undertakings does not exceed 20% on any relevant market affected by the standard.²¹

The most interesting part of the Guidelines on sustainability agreements can be found in the analysis of how the efficiency defense under Article 101(3) TFEU may apply to sustainability agreements. The Commission finds that, in principle, sustainability agreements have the potential of yielding significant efficiencies, e.g. due to improved technologies, innovation, consumer choice, and more resilient infrastructure or supply chains.²² They will thus regularly fulfill the first criterion under Article 101(3) TFEU. When it comes to the indispensability or necessity prong, it is interesting to note that a sustainability agreement will not be considered indispensable if EU or national laws require the same companies to comply with specific sustainability goals.²³ This is a relevant point when it comes to analyzing the impact of mandatory HRDD obligations on EU antitrust law.²⁴

19 *Id.* at para. 534.

20 *Id.* at para. 546.

21 *Id.* at para. 549.

22 *Id.* at para. 558.

23 *Id.* at para. 564.

24 For an extended discussion, see *infra* Section 4.

The Commission offers a particularly detailed reflection on the consumer pass-on criterion under Article 101 (3) TFEU. One of the most heated debates surrounding the use of sustainability considerations to justify agreements that would otherwise violate Article 101 (1) TFEU revolves around the question of which consumer group should receive a fair share of the efficiencies generated by the agreement. Several authors argue that the group of consumers who should receive a fair share of the benefits should not be strictly limited to the market to which the agreement relates to.²⁵ It should encompass a broader group of consumers, including future generations of consumers. Yet, the Commission adopts a relatively conservative approach in its new Guidelines.²⁶ It identifies three relevant consumer benefits that it would consider under its Article 101 (3) analysis of sustainability agreements: individual use value benefits, individual non-use value benefits, and collective benefits.

Individual use value benefits include the direct benefits for consumers on the market to which the agreement applies to.²⁷ Consuming eggs from free range chicken that have not received antibiotics as a result of an agreement between competing egg producers to stop using antibiotics in chicken, for example, gives health benefits to the consumers of those eggs.

Individual non-use value benefits are indirect benefits that accrue to consumers in the relevant market because of how others benefit from their consumption choices.²⁸ The Commission gives the example of consumers that prefer to buy detergents that are less water-contaminating. While this detergent might not have a better cleaning action, the consumer in question might still prefer it for its positive impact on the environment. In this sense, consumers in the relevant market value the product for its beneficial effect on others. The Commission considers these benefits as equal to individual use value benefits.

Lastly, collective benefits are those that accrue irrespective of an individual consumers appreciation of the product in question.²⁹ The Commission will only take collective benefits into account if the group of consumers in the relevant market overlaps with the group of beneficiaries. As an example, the Commission gives a situation where drivers (consumer in the relevant market) that purchase less polluting fuel also benefit as citizens (broader group of beneficiaries) from cleaner air.³⁰ As these drivers are also citizens, there is an

25 Jansen, Beeston, and Van Acker, "The sustainability guidelines," *supra* note 16.

26 2023 Horizontal Guidelines, *supra* note 17, at para. 569.

27 *Id.* at para. 571–74.

28 *Id.* at para. 575–81.

29 *Id.* at para. 582–89.

30 *Id.* at para. 585.

overlap. As an example where these groups do not overlap, the Commission gives a situation of consumers of textiles that have been produced sustainably.³¹ While the benefits accrue to communities where cotton is grown and processed, benefits will not accrue to the consumers in the relevant market for clothing. In this case, the Commission would likely not take these benefits into account. The Commission will assess whether the benefits to the consumers in the relevant market occurring outside that market are significant enough to compensate consumers in the relevant market for the harm suffered (e.g. in the form of higher prices).

The dividing line between individual non-use value benefits and collective benefits is, blurry. It seems to all boil down to the evidence that can be brought as to consumer preferences and willingness to pay for certain products and technologies, and whether it can be shown that users value a certain benefit to others or not. This evidence is to be gathered via consumer surveys according to the Commission.³²

2.1.3 Vertical Agreements, Abuse of Dominance, and Merger Control

So far, the EU Commission has only started to position itself towards sustainability competition considerations in the case of horizontal agreements, i.e. agreements between competitors. Antitrust law, however, is also concerned with vertical agreements, abuses of dominance, and merger control.

In terms of vertical agreements, i.e. agreements along the supply chain, the Commission has not found it necessary to provide lengthy elaborations of how to treat vertical restraints that pursue a sustainability objective. In its Vertical Guidelines,³³ the Commission limits itself to highlighting that vertical restraints from sustainability-enhancing agreements will be judged according to the general approach to vertical agreements, which is more lenient compared to its approach towards horizontal agreements. The 2022 Vertical Block Exemption Regulation does not mention sustainability explicitly.³⁴

31 *Id.*

32 *Id.* at para. 597.

33 Communication from the Commission: Commission notice – Guidelines on Vertical Restraints, OJ C 248, 2022/C 248/01, 8.

34 Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Text with EEA relevance), OJ L 134, C/2022/3015.

When it comes to Article 102 TFEU and abuses of dominance, sustainability considerations could act both as a shield and a sword.³⁵ As a shield, a dominant undertaking could, for example, invoke sustainability concerns to justify an otherwise abusive exclusionary or exploitative behavior. As a sword, the concept of exploitative abuse under Article 102 TFEU could be extended to unilateral conduct by a dominant undertaking that harms the environment or human rights.³⁶ None of these considerations have been taken up so far in the EU Commission's recently launched revision of its Guidance on its enforcement priorities under Article 102 TFEU.³⁷

Lastly, the Commission also does not see much reason to implement any changes to its merger control regime to better account for sustainability effects from mergers. In a Policy Brief from September 2021,³⁸ the Commission stated that its merger analysis framework was sufficiently developed to consider consumer preferences, innovation concerns, and environmental harm, which were also of relevance when factoring sustainability concerns into the merger analysis. Therefore, no fundamental reform was necessary in order to go green for merger control.

2.2 *National Initiatives*

While the sustainability agenda gathered momentum in EU competition law, developments also took place at the national level. The Dutch Competition Authority ("ACM") was a forerunner by publishing Draft Sustainability Guidelines in 2021.³⁹ To date, the ACM has followed its Guidelines by issuing several statements as to agreements fostering sustainability objectives that

35 Albeit focusing more on the shield function in this chapter, sustainability concerns could act like a sword under Article 101 TFEU, too. See Nowag, "Competition Law's Sustainability Gap?," *supra* note 3; Holmes, "Climate change," *supra* note 3.

36 To some extent, the CJEU has endorsed such an approach in the Facebook Case. See the Judgment of the Court (Grand Chamber) of 4 July 2023, *Meta Platforms Inc and Others v Bundeskartellamt*, C-252/21 *Facebook v Bundeskartellamt*, ECLI:EU:C:2023:537.

37 See Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance), OJ C 116, 2023/C 116/01, March 31, 2023, Annex.

38 Alexandra Badea et al., "Competition Policy in Support of Europe's Green Ambition," Competition Policy Brief, September 2021, <https://op.europa.eu/o/opportal-service/download-handler?identifier=63c4944f-1698-11ec-b4fe-01aa75ed71a1&format=pdf&language=en&productionSystem=cellar&part=>.

39 "Guidelines regarding Sustainability claims," Authority for Consumers & Markets, June 13, 2023, <https://www.acm.nl/en/publications/guidelines-regarding-sustainability-claims>. See also Jansen, Beeston, and Van Acker, "The sustainability guidelines," *supra* note 16.

were found to be unproblematic. These included, for example, an agreement of Shell and Total Energies to cooperate in the storage of CO₂ in natural gas fields in the North Sea,⁴⁰ and an agreement between garden centers to reduce pesticides, which included a boycott of growers that do not comply with the agreement.⁴¹ The Hellenic Competition Commission also published a Draft Discussion Paper on Sustainability and Competition Law in 2020.⁴²

In Austria, the legislator decided to introduce an amendment to the equivalent national provision to Article 101 (3) in 2021.⁴³ The Austrian legislator thus updated the criteria for the efficiency defense available to otherwise anti-competitive agreements. Article 2 (1) of the Federal Cartel Act 2005 now states that:

consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy.⁴⁴

In principle, national and EU antitrust law provisions should be fully harmonized when it comes to the assessment of anti-competitive agreements.⁴⁵ From the wording of the Austrian provision, it appears, however, that collective benefits would be fully considered when companies claim an exemption for a sustainability agreement.⁴⁶ It thus appears to point towards a broader

40 “ACM: Shell and TotalEnergies can collaborate in the storage of CO₂ in empty North Sea gas fields,” Authority for Consumers & Markets, June 27, 2022, <https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields>.

41 “ACM agrees to arrangements of garden centers to curtail use of illegal pesticides,” Authority for Consumers & Markets, September 2, 2022, <https://www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides>.

42 “Competition & Sustainability Law,” Hellenic Competition Commission, March 2023, https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf.

43 Viktoria H.S.E. Robertson, “Sustainability: A World-First Green Exemption in Austrian Competition Law,” *Journal of European Competition Law & Practice* 13, no. 6 (September 2022): 426–34.

44 “Die Verbraucher sind auch dann angemessen beteiligt, wenn der Gewinn, der aus der Verbesserung der Warenerzeugung oder -verteilung oder der Förderung des technischen oder wirtschaftlichen Fortschritts entsteht, zu einer ökologisch nachhaltigen oder klimaneutralen Wirtschaft wesentlich beiträgt.”

45 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, January 4, 2003, Article 3(2).

46 Robertson, “Sustainability,” *supra* note 43.

approach than the approach adopted by the EU Commission in its Horizontal Guidelines discussed above.

In Germany, there have been no legislative amendments or guidelines introduced so far, but policy changes might likely occur in the future. In March 2023, the German Ministry for the Economy and Climate Protection published a *Report on Competition and Sustainability* commissioned from a group of law and economics scholars.⁴⁷ The Report deals with all areas of antitrust law and merger control. Interestingly, the Report also engages with the issue of overlaps between antitrust law and mandatory HRDD legislation, but rather from a state action doctrine perspective: agreements that are formed to comply with the German Supply Chain Law should be immune from competition enforcement.⁴⁸ Before engaging further with the impact of mandatory HRDD legislation on the greening efforts under EU antitrust law, the next section gives an overview of national HRDD legislation and the EU mandatory HRDD framework in the CSDDD.

3 Obligations on Undertakings under Mandatory HRDD Legislation

3.1 *The UNGPs as the Origin of Mandatory HRDD Legislation*

The origins of HRDD legislation can be traced back to the publication of UN Guiding Principles on Business and Human Rights published in 2011.⁴⁹ The operational principles under the UNGP's "respect pillar"⁵⁰ entail that multinational corporations should publish and implement policy commitments to meet their responsibility to respect human rights in their operations.

47 "Wettbewerb und Nachhaltigkeit in Deutschland und der EU," Heinrich Heine Universität Düsseldorf, March 2023, https://www.bmwk.de/Redaktion/DE/Publikationen/Studien/studie-wettbewerb-und-nachhaltigkeit.pdf?__blob=publicationFile&v=4.

48 *Id.* at 88. See also Roman Inderst and Stefan Tomas, "Legal Design in Sustainable Antitrust," *Journal of Competition Law & Economics* 19, no. 4 (December 2023): 556–79.

49 "Guiding Principles on Business and Human Rights," United Nations Human Rights Office of the High Commissioner ("OHCHR"), accessed 6 February 2023, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf ("UNGPs").

50 The UNGP framework is built on three pillars. The first pillar, entitled "protect," deals with the obligations of states to create legal frameworks that hold corporations accountable for their human rights obligations, and thus protect their victims. The second pillar, "respect," imposes an obligation on multinational corporations to respect human rights. The third pillar, "remedy," stipulates that both states and multinational corporations should implement mechanisms to remedy human rights violations and to give victims access to redress.

Furthermore, they should introduce human rights due diligence processes to identify, prevent, mitigate, and account for how they address their adverse impacts on human rights. Lastly, multinational enterprises should have processes in place to remedy any adverse human rights impacts. The UNGPs also extend these processes to the business relationships of multinational corporations. In other words, multinational corporations should carry out risk assessments as to their human rights risks along their supply chains and make sure that their business partners, too, respect human rights in their operations.⁵¹

The focus under the UNGPs is on protecting human rights, and sustainability considerations are not separately mentioned. Nonetheless human rights risks emanating from the activities of multinational businesses often overlap with environmental and sustainability concerns. This has been the case in the past when businesses failed to live up to their obligations to respect human rights. When Shell, for example, started drilling for oil in Ogoniland (Nigeria), civil unrest ensued, which eventually led to the extrajudicial killing of several tribal leaders that had opposed the drilling.⁵² This was a grave violation of a variety of human rights. At the same time, the drilling operations also brought about vast environmental degradation to Ogoniland.⁵³ In the mining sector, too, human rights violations and environmental damage have regularly gone hand in hand.⁵⁴

4 National Initiatives: Mandatory Human Rights Due Diligence

After the UN Human Rights Council endorsed the UNGPs in 2011, several legislators followed up with making human rights due diligence compulsory through regulation.⁵⁵ This section briefly focuses on three initiatives by three EU Member States: the 2017 French Vigilance Law,⁵⁶ the 2019 Dutch Child

⁵¹ UNGPs, *supra* note 49, at Principle 18.

⁵² John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: ww Norton & Company, 2013), 10.

⁵³ *Id.*

⁵⁴ For several examples of such socio-environmental conflicts caused by mining companies, see Rajiv Maher, “De-contextualized Corporate Human Rights Benchmarks: Whose Perspective Counts? See Disclaimer,” *Business and Human Rights Journal* 5, no. 1 (January 2020): 156–63.

⁵⁵ Gabriela Quijano and Carlos Lopez, “Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?,” *Business and Human Rights Journal* 6, no. 2 (June 2021): 241–54.

⁵⁶ LOI n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (1) (“French Vigilance Law”).

Labor Act,⁵⁷ and the 2021 German Supply Chain Law,⁵⁸ to highlight similarities and differences between existing mandatory HRDD legislation in the EU.

All three legal acts impose human rights due diligence obligations on companies incorporated or with an important business presence (in the form of a branch or subsidiary) in their jurisdiction. The German and French laws have set certain thresholds for the size of companies that are subject to mandatory HRDD,⁵⁹ whereas Dutch law applies to companies irrespective of their size.⁶⁰ All laws impose HRDD obligations in the form of conducting risk analyses, as well as reporting, transparency, and disclosure duties. Furthermore, all three acts impose these due diligence obligations beyond the companies' own activities. The duties imposed under the Dutch law apply in respect of the entire supply chain of a company subject to the Dutch Child Labor Act. The obligations under the German Supply Chain law extend to direct and indirect suppliers.⁶¹ The French Vigilance law covers companies directly and indirectly controlled by the company subject to the vigilance obligations, as well as sub-contractors and supplies with which the entity has an established commercial relationship.⁶²

The types of human rights and sustainability considerations in respect to which companies must conduct due diligence vary in the different laws. As the title of the Dutch act indicates, it is exclusively concerned with violations of children's rights in the form of child labor, as defined by international law.⁶³ The French Vigilance law has a broad formulation and applies to serious harms to fundamental rights and liberties, and health and safety of persons and the environment.⁶⁴ The German Supply Chain Law, in contrast, has a closed list

57 Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid) ("Dutch Child Labor Act").

58 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 16. Juli 2021, BGBl, 2021 I Nr. 46, Seite 2959 ("German Supply Chain Law").

59 The French Vigilance Law, *supra* note 56, applies to companies with more than 5,000 employees in direct or indirect subsidiaries based in France, and with more than 10,000 employees when including direct and indirect subsidiaries globally. The German Supply Chain Act applies from 1 January 2024 to companies with more than 1,000 employees (from 1 January 2023 to 1 January 2024 it applies to companies with more than 3000 employees).

60 According to Article 4 of the Dutch Child Labor Act, *supra* note 57, the due diligence obligations apply to companies incorporated in the Netherlands and foreign companies that sell goods or services to Dutch consumers.

61 German Supply Chain Law, *supra* note 58, at para. 1.

62 Article L225-102-4 of the French Code de Commerce.

63 Dutch Child Labor Act, *supra* note 57, at Article 2.

64 French Code de Commerce, *supra* note 62.

of human rights violations and environmental damages covered. In terms of human rights risks, it covers child labor, slavery and forced labor, violations of labor protections (in particular safety measures, collective rights, discrimination, and pay), environmental pollution (soil, water, air, and noise pollution), illegal expropriation of land, and violations of human rights resulting from the deployment of untrained private security personnel.⁶⁵ In terms of environmental risks, it covers prohibitions in relation to the production of goods and disposal of waste containing mercury under the Minamata Convention, violations of the provisions of the Stockholm Convention of Persistent Organic Pollutants, and violations of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

Lastly, the enforcement of the various mandatory HRDD laws varies. The French Vigilance law establishes civil liability for companies that act in contravention of their obligations under the Vigilance law.⁶⁶ It also gives standing to victims of human rights violations before French courts to claim damages suffered from human rights violations that could have been prevented if the company in question had fulfilled its due diligence obligations.⁶⁷ The Dutch Child Labor Act, on the other hand, does not envisage civil liability as an enforcement tool. It only contains administrative⁶⁸ and, in grave cases, criminal sanctions for non-compliance with its due diligence obligations.⁶⁹ The German Supply Chain law combines public and private enforcement. It allows victims to task German labor unions or NGOs to bring their claims before German civil courts.⁷⁰ Furthermore, it allows competent authorities to investigate companies as to their compliance with their due diligence obligations⁷¹ and to impose fines in cases of non-compliance.⁷² As Quijano and Lopez (2021) stress, mandatory HRDD will only be effective and able to provide the opportunity to victims to obtain redress if it has both a legal basis for civil liability and a rigorous public enforcement in place.⁷³ As the following section discusses, the EU Directive on Corporate Sustainability Due Diligence tries to follow such an approach.

65 See German Supply Chain Law, *supra* note 58, at para. 2(2).

66 French Code de Commerce, *supra* note 62.

67 *Id.*

68 Dutch Child Labor Act, *supra* note 57, at Articles 7 and 8.

69 *Id.* at Article 9.

70 German Supply Chain Law, *supra* note 58, at para. 11.

71 *Id.* at paras 16–18.

72 *Id.* at paras. 23 and 24.

73 Quijano and Lopez, “Rise of Mandatory Human Rights Due Diligence,” *supra* note 55, at 244.

5 Envisaged Sustainability Obligations under the EU Directive (CSDDD)

In February 2022, the EU Commission published its Draft Directive on Corporate Sustainability Due Diligence,⁷⁴ which was adopted by the European Parliament and Council by April 2024 and was published in the Official Journal on 5 July 2024 as Directive (EU) 2024/1760 on corporate sustainability due diligence (CSDDD). According to the Directive, EU companies with more than 1000 employees on average and a worldwide turnover exceeding EUR 450 million will have to comply with the due diligence requirements of the Directive. The same applies to companies that do not reach those thresholds but are the ultimate parent company of a group that reached those thresholds. Furthermore, a company or the ultimate parent of a group that entered into franchise or license agreements in return for royalties in the EU with independent third parties can be subject to the obligations in the Directive if certain royalty and turnover thresholds are met.⁷⁵ Companies incorporated outside the EU will be subject to the Directive's obligations if their EU operations meet any of the thresholds just mentioned. Compared to French law, the EU-wide thresholds will be considerably lower, thus covering more companies than those covered under the thresholds of the French due diligence law.

Due diligence obligations will mainly cover the operation of the affected EU companies themselves, their subsidiaries, and “and the operations carried out by their business partners in the chains of activities of those companies.”⁷⁶ The definition contained in the original proposal of “an established business relationship” has thus been removed. Human rights advocates had feared that it could be too narrow of a concept to catch all relevant actors in the supply chain that contribute to human rights violations.⁷⁷ Prior experience with the French Vigilance law confirms these concerns, where the term “established commercial relationship” has led to legal uncertainty.⁷⁸

The due diligence obligations under the Directive include:

74 *supra* note 2.

75 Directive 2024/1760, Article 2(1).

76 *Id.* at Article 1(1)(a).

77 C Patz (2022). The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment. *Business and Human Rights Journal* 7, 291–297, 292.

78 Elsa Savourey and Stéphane Brabant, “The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption,” *Business and Human Rights Journal* 6, no. 1 (February 2021): 141–52.

- Identifying actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations by setting up due diligence processes;⁷⁹
- Preventing and mitigating adverse human rights and environmental impacts;⁸⁰
- Bringing adverse impacts to an end;⁸¹ and
- Implementing a complaints procedure for unions, civil society organizations and victims.⁸²

The EU Directive is similarly broad in its human rights focus as the French and German mandatory HRDD laws. It has a list⁸³ as to the specific human rights violations it applies to, which is more extensive than the list contained in the German Supply Chain Law. The EU list includes, for example, the right to privacy and family life, the people's right to dispose of a land's natural resources and to not be deprived of means of subsistence, and the freedom of thought, conscience, and religion, which are not covered by the German list. When it comes to the list of environmental risks, the CSDDD contains more references to international instruments and areas than the German Supply Chain law.⁸⁴

The CSDDD has arguably the farthest-reaching sustainability obligations compared to other HRDD legislation. Article 22 of the CSDDD requires that Member States oblige the companies subject to the CSDD to adopt a plan for a business model and strategy, which “aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5°C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities.”⁸⁵ Any company that identifies a climate change risk from its operations needs to include an emission reduction objective in its plan. Furthermore, companies should make executive bonuses dependent on a director's contribution to achieving the sustainability objectives.

79 Article 8 Directive 2024/1760.

80 *Id.* at Article 8 to 10.

81 *Id.* at Article 11.

82 *Id.* at Article 14.

83 See *id.* at Annex Part I.

84 See *id.* at Annex Part II.

85 *Id.* at Article 22.

The Directive also includes a range of sanctions for the affected companies that do not comply with their due diligence obligations. As with the German Supply Chain law, it adopts a mix of private and public enforcement. First, the Directive stipulates that national supervisory authorities shall have investigation and sanctioning powers.⁸⁶ Second, in principle, companies subject to the CSDDD who cause human rights or environmental harm due to non-compliance with their due diligence obligations should be liable for damages.⁸⁷ In contrast to the national provisions, however, the Directive remains very vague as to whom shall have standing to bring a damages action, and it also considerably shields companies from civil liability for harm done only by business partners in the companies' chain of activities.⁸⁸

6 Delineating the Interface between the CSDDD and EU Competition Law

So, what impact should mandatory HRDD legislation such as the CSDDD have on efforts under EU antitrust law to incorporate sustainability considerations? This contribution will answer this question by starting from a very simple hypothesis, to then highlight the actual complexity due to the different scopes of antitrust law and mandatory HRDD legislation.

The hypothesis is the following: if mandatory HRDD legislation already imposes obligations on companies to implement codes of conduct with their business partners and to monitor their supply chains to ensure they operate in a socially and environmentally sustainable way, any sustainability efforts resulting from these obligations should not be a valid justification for otherwise anti-competitive behavior under antitrust law.⁸⁹

If this hypothesis is correct, then a clear delineation of the area of overlap is necessary to define the circumstances under which companies should have

86 *Id.* at Articles 25-27.

87 *Id.* at Article 29.

88 *Id.* at Article 22(1).

89 This hypothesis is different from the current text of the CSDDD, which in several articles suggests that companies should act in a competition law-compliant manner when collaborating with other entities in order to increase the company's ability to prevent or mitigate the adverse human rights or environmental impact (Article 10(2)(f)) and when coordinating to bring adverse human rights impacts to an end (Article 11(3)(g)). (See *id.* at Articles 10(2)(f) and 11(3)(g)). This contribution is interested in assessing the impact of the CSDDD on the scope of a sustainability defense under EU competition law with the stated hypothesis.

no sustainability defense available to them under EU antitrust law because of their obligations under HRDD legislation. The problem is that the boundaries of this overlap are very fuzzy and will be difficult to discern in practice. For now, three parameters are suggested to start delineating this area of overlap:

- The characteristics of the companies in question;
- The nature of the agreement (horizontal or vertical); and
- The nature of the sustainability objective.

For the sake of simplicity, the following sections refer to the CSDDD. Parallel considerations would apply to the national HRDD legislations discussed, but adjusted to their specific provisions.

6.1 *The Characteristics of the Companies in Question*

Whether a company can invoke a sustainability defense under antitrust law will first depend on its turnover and number of employees, as the obligations of the CSDDD apply to:

- companies that are incorporated in one of the EU Member States, have more than 1000 employees, and a minimum world-wide turnover of 450 million Euro in the last financial year;
- companies that do not meet those thresholds but are the ultimate parent company of a group that reached those thresholds;
- companies or ultimate parent companies of a group that entered into franchise or license agreements in return for royalties in the EU with independent third parties if certain thresholds are met;
- companies incorporated outside the EU whose operations inside the EU meet one of the thresholds listed above.

From this consideration, a de-minimis doctrine could be applied to the invocation of a sustainability defense under EU antitrust law, which would only allow smaller companies that do not meet the thresholds for mandatory HRDD to invoke a sustainability defense under EU law. Yet, this filter is not accurate enough yet to delineate the area of overlap. Furthermore, the nature of the agreement or behavior in question is of relevance.

7 The Nature of the Agreement or Behavior in Question

The nature of the agreement or behavior is also relevant to determine the area of overlap. The due diligence obligations under the CSDDD apply to “actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies”.⁹⁰

Translating this into antitrust parlance, the obligations regarding social and environmental sustainability under the CSDDD concern both the companies’ own operations and those of its subsidiaries, i.e. what would be referred to as unilateral conduct, which is scrutinized under Article 102 TFEU.⁹¹ The entire sustainability debate has not progressed far under Article 102 TFEU. Yet, the obligations under the CSDDD would, strongly limit a sustainability defense under Article 102 TFEU, given that a dominant undertaking in the internal market will likely also have the number of employees and turnover to fall into the scope of the CSDDD.

The obligations under the CSDDD also apply to “the operations carried out by their business partners in the chains of activities of those companies.” Again, translating to antitrust parlance, the CSDDD is predominantly concerned with vertical agreements. If companies subject to the CSDDD are obliged to implement sustainability considerations into their vertical agreements, would there still be room to justify any horizontal agreements between competitors subject to mandatory HRDD? *Prima facie*, the answer would be probably not. After all, each individual competitor would already be obliged to do so individually under the CSDD.

The German Federal Cartel Office has to some extent addressed this question in a decision from November 2021.⁹² In it, it analyzed an agreement between

⁹⁰ *Id.* at Article 1(1)(a).

⁹¹ Subsidiaries are defined as “a legal person through which the activity of a ‘controlled undertaking’ as defined in Article 2(1), point (f), of Directive 2004/109/EC of the European Parliament and of the Council is exercised” (*id.* at Article 3(d)), which would thus be considered a single economic entity with the parent under EU antitrust law.

⁹² German Federal Cartel Office, Decision from 25 November 2021, B2-90/21 Arbeitsgruppe des deutschen Einzelhandels – Nachhaltigkeitsinitiative zur Förderung existenzsichernder Löhne im Bananensektor (text in English available at “German Retailers Working Group – Sustainability initiative to promote living wages in the banana sector,” Bundeskartellamt, March 8, 2022, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-90-21.pdf?__blob=publicationFile&v=2).

the German development agency GIZ and the German industry association for retail (whose members include the largest supermarket chains in Germany) to promote fair wages in the banana sector as not violating the prohibition of anti-competitive agreements. The agreement stipulated that 50% of bananas sold under the home brand of the companies involved should be sold applying living-wage-criteria. One could expect an increase in banana prices on the German market by this agreement. Still, the German Federal Cartel Office held that there was no violation of Article 101 or § 1 of the German Act against Restraints of Competition. This was due to how the agreement was implemented: there was no agreement as to minimum prices for bananas sold under the agreement or the minimum wages to be paid to workers in the banana sector. Furthermore, the agreement was voluntary, and the Cartel Office did not expect that any sensitive business information would be exchanged between competitors.⁹³ This being said, however, the agreement was concluded *before* the German Supply Chain law entered into force. One may wonder whether it would still be justified after the entry into force of the Supply Chain law on 1 January 2023. In any case, the agreement was carefully crafted to avoid competition red flags in the first place. Note, also, how the fact that it was a sustainability agreement was not a salient factor in its evaluation.

The situation for sustainability standardization agreements might be different. However, for companies that are subject to mandatory HRDD obligations, these agreements would, if at all, be justified on the same grounds as any other standardization agreements: for the pure economic efficiencies that they bring, and not their sustainability dimension.

The delineation of the area of overlap is not complete yet, however. It still depends on the specific sustainability objective of an agreement or conduct whether there is a true overlap which disqualifies a specific sustainability defense under antitrust law.

8 The Nature of the Sustainability Objective

Last, but not least, the overlap between HRDD obligations and a sustainability safe harbor under antitrust will depend on the specific sustainability objective of an agreement or conduct. In principle, all pieces of national HRDD

93 At this point, one might question the effectiveness of the agreement to actually deliver better working conditions for banana workers in Ecuador, but this is not the main focus of this chapter.

legislation and the CSDDD limit companies' obligations in relation to certain human rights and environmental risks. This would mean that any sustainability efforts in agreements or unilateral conduct going beyond this base line established in mandatory HRDD legislation might qualify as a sustainability defense under antitrust law. This is where the entire delineation exercise will become a microscopic inquiry into which obligations are within versus beyond the obligations of mandatory HRDD legislation. The problem is that HRDD obligations are in themselves vague and will only crystallize through the practice of companies, supervisory authorities, and courts. Article 22 CSDDD will potentially make this even more difficult because it would cover any initiative that has as its objective the limiting of global warming to 1.5 °C in line with the Paris Agreement. This might make it difficult to assess for a competition enforcer whether a sustainability defense invoked by a company is part of already existing HRDD obligations or not. One solution to this problem might be to establish a collaboration between the supervisory authorities in HRDD regimes and competition enforcers. Similar collaborations have been proposed before between data protection authorities and competition enforcers.⁹⁴

9 Conclusion

The planet is facing a climate crisis of unknown magnitude, and all policy makers should indeed be committed to doing their part to mitigate the climate crisis and all its negative repercussions on biodiversity, animal health, and human health and safety of current and future generations. When it comes to EU antitrust law and policy, however, this chapter tries to caution the enthusiasm with which sustainability has been embraced in antitrust law circles as a justification for otherwise anti-competitive conduct. Existing and future mandatory HRDD instruments at national and EU level will already go far in imposing obligations on companies to factor sustainability considerations into their operations and supply chains. Sustainability objectives should only be accepted as a valid justification for conduct violating antitrust rules if they go beyond the obligations of mandatory HRDD regimes. Otherwise, competition might be restricted to an extent that is not justified by any gains in

94 See, e.g., the collaboration between the UK Competition and Markets Authority and the UK Information Commissioner's Office at "Competition and data protection in digital markets: a joint statement between the CMA and the ICO," Information Commissioner's Office ("ICO"), May 19, 2021, <https://ico.org.uk/media/about-the-ico/documents/2619797/cma-ico-public-statement-20210518.pdf>.

sustainability efficiencies. If this proposition is accepted, the challenge lies in clearly delineating the group of addressees and the scope of HRDD obligations to determine which market players could legitimately have recourse to a sustainability defense under antitrust law. For this delineation, three factors are important: the characteristics of the company or companies in question, the nature of the agreement or conduct, and the sustainability objective pursued. Some of these factors are more difficult to determine than others, and it might be wise for competition enforcers to consult with supervisory authorities for HRDD regimes when deciding whether to allow a sustainability defense in a concrete case. Overall, however, there is no reason to suspect that competition law in Europe will stand in the way of genuine collaborations between companies to foster human rights and sustainability goals.

