COMPETITION LAW COMPLIANCE AND CSDDD – **A TICKING TIME BOMB?**

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For several decades, EU antitrust developed incrementally based on a widely accepted doctrinal orthodoxy, which arranged all participants by enabling global investment and trade. In recent years, doctrine has begun to deviate from the standard, mostly to take account of the world´s new complex multipolar geopolitics, with a touch of protectionism, industrial policy and politicization of enforcement. Regrettable or not it is the new reality. On the other hand, there are pressing challenges such as the one on climate, where a certain departure from orthodoxy might be more welcome but has not yet occurred. The future will tell.

"*Why be unpleasant … when you can be obnoxious?*"

Witold Gombrowicz

When CPI reached out for a contribution, we had just read the text of the new draft Corporate Sustainability Due Diligence Directive ("CSDDD") and, with expertise only in competition law, spontaneously suggested the above topic. After all, what can poor kids do except play in a rock 'n roll band? Now, as we strive to come up with something meaningful, we cannot promise anything – you will be our judge.

01
THE SUSTAINABILITY REVOLUTION

For several years, the world has been in the process of gradually awakening and increasing its awareness of all the important aspects of human life and dignity. This is a very important development as its proponents' aspiration is to make the world a better, friendlier, less cynical, and less hypocritical place. Good intentions are no guarantee for success, but it is worth trying to apply them in a rational, thought-through and balanced way. EU proposals usually meet that standard.

Those interested in the history of labor may have read Friedrich Engels' report on the working conditions of the English proletariat,[2] a text of such striking brutality that it is still cited in more recent Papal encyclicals.[3] Whilst the old world has since then managed to improve working conditions and social justice to a certain degree, helped by the well-being of the "*trentes glorieuses*," the same cannot be said of all those economies Europe works with. Note that some less privileged inhabitants of the Western world take the view that globalized trade undercuts social justice at home, and while the current public debt level incurred to sedate the electorate is not directly their fault, awakening to hard realities is not always easy, as the recent - and still on-going at the time of writing - protests against President Macron's reform of the French pension system reveal.[4] Combining the challenges of fostering a more just working life with the challenges of preserving the planet through combating climate change, two potentially conflicting goals, makes the task far more complex, not to mention the further complication brought by other currently relevant geopolitical developments.[5]

The EU has recently produced several studies and policy and legal instruments to advance its policy objectives in this field. With no claim to exhaustiveness, we mention a few of them in chronological order:

· the 2020 "Study on directors' duties and sustainable corporate governance" authored by the unbreakable E&Y,[6] the objective of which "is to assess the root causes of "short termism" in corporate governance, discussing their relationship with current market practices and/or regulatory frameworks, and to identify possible EU-level solutions, also with a view to contributing to the attainment of the UN Sustainable Development Goals and the goals of the Paris Agreement on Climate Change";
· the 2020 "Study on due diligence requirements through the supply chain" by BIICL, Civic and LSE - a school also known for some of its famous drop-outs - which focuses "on due diligence requirements to identify, prevent, mitigate and account for abuses of human rights, including the rights of the child and fundamental freedoms, serious bodily injury or health risks, environmental damage, including with respect to climate";[7] and
· the ensuing open consultation of the "Sustainable corporate governance initiative"; rooted in the European Green Deal[8] and the Commission's Communication on the (COVID-19) Recovery Plan,[9] aimed at embedding sustainability further in the corporate governance framework, with a view of focusing on long-term sustainable value creation rather than short-term financial value.

2 https://en.wikipedia.org/wiki/The_Condition_of_the_Working_Class_in_England.

3 https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.pdf.

4 https://www.ft.com/content/e92ce473-9e0d-4f2b-a6c2-93c3e9b4fd25.

5 https://www.youtube.com/watch?v=Tms0yk9kqVM.

6 https://data.europa.eu/doi/10.2838/472901.

7 https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

8 https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

9 https://commission.europa.eu/strategy-and-policy/recovery-plan-europe_en#:~:text=NextGenerationEU%20is%20a%20more%20than,the%20current%20and%20forthcoming%20challenges.

Eventually, on 23 February 2023, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence, which "aims to foster sustainable and responsible corporate behavior throughout global value chains." Companies will be required to identify, prevent, end or mitigate activities impacting on human rights, including child labor and exploitation of workers, and on the environment, including pollution and biodiversity loss. For businesses, these new rules promise to bring legal certainty and a level playing field, while consumers and investors will benefit from more transparency.

The new due diligence rules, once definitively adopted, will apply to EU companies of a certain size and to smaller EU companies in sensitive sectors. They will also apply to non-EU companies, provided their EU activities meet the relevant turnover thresholds. Small and medium size enterprises ("SMEs") are not directly in the scope of this proposal, but they may be caught in the value chain of those larger ones which are. In order to comply with the corporate due diligence duty, companies will have to:

· integrate due diligence into policies;
· identify actual or potential adverse human rights and environmental impacts;
· prevent or mitigate potential impacts;
· bring to an end or minimize actual impacts;
· establish and maintain a complaints procedure;
· monitor the effectiveness of the due diligence policy and measures; and
· publicly communicate on due diligence.

New national administrative authorities will be responsible for supervising these new rules and may impose fines in case of non-compliance. Claimants will be entitled to follow-on damages. In addition, the larger companies need to have a plan to ensure that their business strategy is compatible with limiting global warming to 1.5° C in line with the Paris Agreement, and directors will be liable in case of non-compliance, i.e. they can no longer use the company's best interests as their sole benchmark for decision-making. The proposal also includes accompanying measures to support all directly or indirectly affected companies, including SMEs. These measures include State aid for SMEs and the development of individually or jointly dedicated websites, platforms or portals.

To complete the picture, on the same day, the Commission presented its "Communication on decent work worldwide," which is part of its "Just and sustainable economy package," built on ILO[10] and UN[11] standards, and has child labor and forced labor at the heart of its endeavor. In fact, this communication announces a new legislative instrument to effectively ban products made using forced labor from entering the EU market,[12] which will cover goods produced anywhere in the world and will be combined with a "robust enforcement framework."

En passant, we simply note that this package, rooted in the Green Deal and Covid recovery framework, encompasses the whole body of digital, health and global competitiveness policies – what we are talking about here is a package about "nearly everything."[13]

So where is the place for competition law in all this?

02
THE COMPETITION LAW REVOLUTION

Before we can answer the above question, we need to briefly remind ourselves of some very important evolutions in our own field, which have profoundly modified competition law as it has been known for several decades. We shall be brief:

· The "New Competition Tool," based on a blockbuster study by Crémer, de Montjoie & Schweitzer,[14] which threatened fundamental concepts of competition law such as the distinction between unilateral and non-unilateral conduct and the established allocation of the burden of proof, was temporarily shelved by the European Commission, but may be resurrected. At one of the recent large-scale competition community events in Brussels, most likely at Christina Cafarra's Annual Antitrust Conference[15]

10 Decent work (ilo.org).

11 https://sdgs.un.org/goals/goal8.

12 State of the Union Address by President von der Leyen (europa.eu).

13 To complete your understanding of everything, we recommend Bill Bryson's "A Short History About Nearly Everything, re-issued in 2016 and available at competitive prices with record-breaking short delivery times on all EU-investigated digital consumer product platforms.

14 https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

15 https://www.brusselsconference.com/.

in the Steigenberger Hotel,[16] one's ear could catch a senior DG COMP official referring to a possible come-back.

· For more than thirty years, spanning more than 10,000 EU notifications, we believed that the Commission's merger control regime aimed to review transactions based on clearly defined jurisdictional turnover thresholds. This is no longer the case. Not only has the Commission given new life and meaning to the defunct Article 22 ECMR,[17] which is questionable enough for the Bundeskartellamt to disregard it[18] - though this was upheld by the EU General Court[19] and is now pending on appeal - but the Court of Justice,[20] supported by Advocate General Kokott,[21] recently reminded us that Article 102 TFEU can be applied to transactions that have escaped merger review. Admittedly, not all jurisdictions have consistently applied clear turnover-based jurisdictional thresholds, but the new concept of the transaction-value threshold, together with the attempt to factor future developments into jurisdictional assessment - anticipating the future is the essence of merger control, but historically only in substantive assessment once jurisdiction is established[22] – creates new and unprecedented levels of legal uncertainty.

· Another ancient creed of antitrust outside merger control was that it is based on *ex post* investigation of potentially unlawful conduct. The recent digital legislation package[23] has introduced what is *de facto* the first *ex ante* antitrust tool to manage digital gatekeepers, a one-size-fits-it-all instrument to deal with the competitive, political and societal challenges brought about by some of the most successful digital companies – which all happen to be U.S.-based.

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· A few years ago, the EU encouraged the implantation of foreign direct investment control at a national level –for jurisdictional reasons[24] – and more recently it adopted a regulation to deal with foreign subsidies.[25] While the resulting regulation – the FDI – "only" affects the merger control process by adding an additional layer of work, introducing the widest political margin of discretion not compensated by reasoned decisions, it not only brings new possibilities to the merger review and the public tender processes, both linked to events and thus plannable, but also allows authorities to scrutinize general market conduct that is not linked to any particular event – a sword of Damocles which hangs over domestic as well as third country companies.

· The somewhat novel concept of "relative market power" lowers the standard of the intervention for abuse doctrine and blurs the distinction between unilateral

16 https://hrewards.com/de/steigenberger-icon-wiltchers-bruessel – for industry meetings we recommend its 1 Star restaurant "Canne en Ville" https://lacanneenville.be/.

17 https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

18 As BKartA President Andreas Mundt explained it at Evelina Kurgonaite's recent fully packed 5th Women@Competition Conference (https://www.womenat.com/5th-w-at-competition-conference) in The Hotel in Brussels https://www.thehotel-brussels.be/?utm_source=-google&utm_medium=cpc&utm_campaign=Brussels&utm_content=the%20hotel%20brussels&&utm_term=%7bad%7d&gclid=Cj0KCQ-jwlumhBhClARIsABO6p-yeZaUHrBYVD3HHDmrrRuzShrxWnAQQggE-htQzM7tCOMlAhJR4fecaAt7wEALw_wcB&gclsrc=aw.ds.

19 https://curia.europa.eu/juris/liste.jsf?num=T-227/21&language=en.

20 https://curia.europa.eu/juris/document/document.jsf?text=&docid=271327&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=9800388.

21 https://curia.europa.eu/juris/document/document.jsf?text=&docid=267143&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=9800388.

22 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionswertschwelle.pdf;jsessionid=1433F-45701451B72476960E6C983D26F.2_cid362?__blob=publicationFile&v=2.

23 https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

24 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN.

25 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2560&from=EN.

and non-unilateral conduct. It significantly reduces the "safe harbor" delta offered by the Adalat-case law.[26]

· At the doctrinal level, the years between 1980-2022 were characterized by a broad consensus to keep antitrust and merger policy "clean," with a focus on financial parameters (consumer welfare and competitive market structure ultimately befitting consumer welfare). Initially driven by Robert Bork's Chicago School of Economics, based on the admittedly extreme because irrebuttable presumption of efficiencies (economies of scale)[27] – which was nevertheless a necessary correction of the then prevailing Industrial Organization ("big is bad") doctrine – and attenuated since the Clinton years by game theory *inter alia* , all agreed that competition law should only cater to competition policy and was not be tainted by other, albeit equally worthy, policies (labor, environment, global competitiveness, etc.). Under this approach, "industrial policy" was a dirty word – it no longer is. What makes it worse is that the new antitrust school[28] does not aim at replacing the Chicago doctrine with any other doctrine so as to increase the foreseeability of intervention. As a high-ranking representative of the Biden administration explained at the aforementioned Cristina Caffarra Conference, there is no need for a doctrine, which would only limit the potential field of antirust interference with business conduct. Instead, the new mantra is "I know it when I see it."[29]

These recent developments, the consequences of which are not yet determinable, impact our answer about the place of competition law in the context of sustainability and sustainability reporting.

03
COMPETITION LAW AND CSDDD

Thanks to the EU State action doctrine, compliance with mandatory rules cannot create antitrust liability,[30] but compliance is not a free ticket for anticompetitive collusion either.

In a recent discussion, a peer active in the field of competition legal tech expressed enthusiasm for expanding compliance from antitrust to wider sustainability – a company has only a few competitors but many suppliers and customers, they said. Indeed, for the legal, compliance and auditing professions, the EU's sustainability campaign, which as stated englobes "nearly everything," promises to compensate for feared income loss through novel AI. For companies, it increases the burden with consequences on both the vertical and horizontal vectors. Many companies will not want to or feel capable of stemming the challenges alone, and they will want to ensure that they are not alone in sticking out their neck to do good. Hence, there will be more rather than less collaboration, both vertically and horizontally. Vertically, companies will need to ensure that they strictly manage the exchange of "commercially sensitive information," which is easier said than done. In the old days, anything not related to prices was not commercially sensitive (in simplified terms),[31] but in the new world many formerly "soft" factors may become "competitive factors" in vertical, dual distribution or clearly horizontal relationships. Combine this with the recent focus on non-competes in employment contracts,[32] whereby every company becomes the other's competitor on the hiring market and it is fair to say we now live in an era of "competitive relationship explosion."

The current draft Horizontal Guidelines, to be finalized by summer 2023, show the way forward. In the chapter about "sustainability agreements," the Commission outlines the state of its current thinking, acknowledging *inter alia* that it

26 https://curia.europa.eu/juris/document/document.jsf?text=&docid=48819&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=4222167.

27 https://www.d-kart.de/en/blog/2021/08/25/revisiting-bork-the-antitrust-warrior/.

28 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

29 https://www.ftc.gov/about-ftc/biographies/lina-m-khan/speeches-articles-testimonies.

30 https://curia.europa.eu/juris/document/document.jsf?docid=48015&doclang=EN.

31 https://www.dentons.com/en/insights/articles/2022/july/18/information-exchanges-in-distribution-agreements.

32 https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets.

is not at all averse to taking out of market efficiencies into account, but that it has limited experience with them. Other competition regulators have published their own guidelines on sustainability collaboration, some more and some less daring. Again, the consensus is that competition law must not be an obstacle to sustainability, and divergences relate to the degree to which competition law should step back to make room for sustainability. The EU draft Horizontal Guidelines also provide "soft safe harbor" guidance on how to structure collaborations so as not to run afoul of Article 101 (1) TFEU.

In the current discussion, the term sustainability is commonly understood and used in an environmental sense. It seems clear that identical standards would apply to sustainability agreements relating to child labor and human rights.

Today, the discussion is mostly structured to follow the method of EU antitrust law, with its two-step-assessment process. The first question is always whether an agreement or concerted practice restricts competition and is caught by Article 101 (1) TFEU. If the answer is yes, the second question is whether the agreement or concentration produces sustainability efficiencies of such a magnitude that they outweigh the restriction of competition (Article 101 (3) TFEU).

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Surprisingly the reverse question has not yet been widely discussed. Note that, leaving the "soft safe harbor" aside, sustainability seems to be absent from Article 101 (1). This brings us back to the question of what exactly this provision is designed to protect. The most obvious answer is "competition." However, even in the old world there was debate around what competition actually is (consumer welfare, the competitive process?) and whom it protects (the consumer, the competing supplier, the competitive process, the workers?). In the new world, the beneficiaries of this question will likely need to be expanded. Where U.S. antitrust now emphasizes protection of the worker,[33] it may in future also preserve the environment that is necessary to compete. In fact, "competition" may be about more than money or Jeffersonian democracy based on virtue and freedom. It may also be concerned with the level playing field on which competition takes place, and this level playing field may literally require green grass, fresh air and clear water. In fact, in a recent master thesis from Leiden University (2022), Tuncer Özgür Kiliç,[34] argues convincingly that one of the goals of EU competition law beyond consumer welfare is the "well-being of the EU peoples" as defined in Article 3 TEU (not TFEU).[35]

If accepted as a premise, the question is how and to what extent a competition authority would be allowed, to block an agreement under article 101 TFEU or to consider a practice under article 102 TFEU as being abusive that, while reducing the price for goods or services, would harm the environment or other sustainability goals. The core issue – in the future, and already today – will be to strike a balance between what is the consumer welfare from an economical point of view and consumer welfare from a sustainability point of view. In fact, we could say that that the first is the consumer welfare in the short term and the later the consumer welfare in the long term.

In fact, today, the premise in competition law, is that all innovation and progress is good as long as it leads to a better and cheaper product. Many realize, however, that if we want to be consistent about our sustainability goals, we should rethink our understanding of "*consumer welfare*" and if not, rethink its importance in the decision-making process. We can imagine a situation where a big company would completely revolutionize an object – let's say a smartphone – but, at the same time, the later would require a colossal number of resources, that would completely disrupt the climate in a region. Some will not hesitate to say that, in such as case, we should definitely lean in favor of sustainability. However, the issue might be more complicated if a balance had to be struck between a practice that would be harmful for the environment but at the same time, would innovate in terms of security for the consumers for example.

The question at a deeper level is, of course, if the constant progress just for the sake of it, is even compatible with our sustainability goals. If progress and innovation are not harmful as such, one must ask itself which progress and innovation is worth pursuing and at what costs?

Some jurisdictions empower the competition regulators to take public interest into account. Most do not. In the EU, DG COMP does not *prima facie* appear to have the power to protect the environment, and there is a distinction to be made between "taking another EU policy into account" and "enforcing another EU policy without a jurisdictional basis." We must not lose sight of the fact that the EU is based on the principle of conferral. On the other hand, DG COMP has always liked to stretch the competition policy stick to

33 https://www.justice.gov/archives/opa/blog/protecting-our-nations-workforce-through-antitrust.

34 https://www.linkedin.com/in/tozgurkilic/?originalSubdomain=tr.

35 "Article 3 (ex Article 2 TEU) 1. The Union's aim is to promote peace, its values and the well-being of its peoples."

overcome the absence of harmonization, for example in the field of taxation.[36] In a recent case, the General Court held that DG COMP must take account of other EU policies when adopting a decision. However, it also made it clear that the Commission is not obliged to specifically explain how it did so.[37] This being said, the "Querschnittsklauseln" such as Article 11 TFEU[38]- create a certain ambiguity and, given the evolutionary and dynamic nature of competition law enforcement, we may safely presume that the last word is not yet spoken.[39]

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04
CONCLUSION

Thus, the combination of competition law and CSDDD may lead to an exponential explosion of antitrust sensitive occurrences in D2D-company life that will call for legal tech and algorithm-based solutions to be manageable. At the same time, on the conceptual level we may expect further developments in the next five years.

To conclude, let us stay tuned.

36 https://curia.europa.eu/juris/document/document.jsf?text=&docid=233179&pageIndex=0&doclang=EN&mode=req&dir=&occ=-first&part=1&cid=4229542.

37 https://curia.europa.eu/juris/document/document.jsf?text=&docid=256346&pageIndex=0&doclang=EN&mode=req&dir=&occ=-first&part=1&cid=4229973.

38 Pursuant to Article 11 TFEU, environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities with a view to promoting sustainable development.

39 https://files.tourismlaw.pt/Sustainability-considerations-and-Article-101-TFEU/2/.

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