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SUSTAINABLE TECHNOLOGY AND THE ENVIRONMENT: REGULATORY INITIATIVES

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LETTER FROM THE EDITOR

Dear Readers,

"Environmental, Social and Governance" ("ESG") is a broad term used for policies to promote social and environmental goals. While initially dismissed as a buzzword, such policies are increasingly being adopted or promoted by legislation, NGOs, and in binding commitments by private entities themselves. Due to their broad-ranging goals, such policies inevitably overlap with other regulatory priorities, including notably the application of antitrust rules. Private companies have long had to navigate the tension between their own economic incentives, legal requirements imposed by governments, and the expectations of their own consumers. Once seen as corporate window-dressing, ESG is now a potent addition to this mix.

As **Bertold Bär-Bouyssiere & Paulina Brzezinska** describe, over several decades, EU antitrust rules have developed incrementally based on a widely accepted doctrinal orthodoxy. This has involved 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. This 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.

The scope for tension between ESG and antitrust rules is an obvious risk, particularly where cooperation between firms to achieve goals such as "net zero" carbon emissions may involve the sharing of sensitive information, coordination on targets, or more. In addition to these new risks, firms are increasingly subject to ESG reporting requirements under EU and U.S. SEC rules, among others. The contributions to this Chronicle address these and various other issues raised by ESG.

Focusing on the much vaunted goal to reach "Net Zero" climate goals, **Justin Stewart-Teitelbaum, Martin McElwee, Sarah Jensen, Justin Chen & Donna Faye Imadi** open with a discussion of different approaches to spur innovative technologies to achieve that goal. Despite some level of public consensus about the need to act on climate change and other environmental and social issues, there is ongoing debate on how antitrust rules should deal with competitor collaborations to promote ESG initiatives. The authors observe divergent approaches from antitrust authorities across the globe in the face of divided public opinion and political polarization. The presents a brief overview of the current treatment of ESG collaborations under antitrust rules in the EU, UK, and the U.S. and suggests possible approaches for policymakers and regulators.

Turning to the EU specifically, **Michael Mencher & Emma Bichet** discuss the Corporate Sustainability Reporting Directive ("CSRD"), passed this year. The CSRD will require thousands of companies, both inside and outside the EU, to report on their sustainability credentials. As the authors note, the CSRD attracted far less controversy than its U.S. counterpart, the proposed SEC. climate rules. This is surprising given that the CSRD is far more expansive in scope. The authors explain who will need to comply with the CSRD, what it requires, and contrast it with the upcoming U.S. climate reporting initiatives. The authors conclude that the EU rules are likely to have a significantly greater impact on market practice than their SEC equivalents.

In a similar vein, **Angela Lucas & Maria Folque** discuss other aspects of the EU legal framework relevant to ESG. In particular, they discuss the EU's Corporate Sustainability Reporting Directive ("CSRD"), which is a central piece in the growing set of regulations to operationalise the "European Green Deal." They also discuss the fundamental role of finance as a driver for sustainability, which is why the EU enacted the Sustainable Finance Disclosure Regulation ("SFDR"). In short, the authors underline that companies should take a holistic approach to this novel legal framework to effectively tackle and manage their ESG risks while making the best of its opportunities.

Christian Ritz, Benedikt Weiß & Tim Büttner zero in on the interplay between ESG and competition law. This interaction poses significant legal, economic, and public policy questions that make both enforcement and compliance a true challenge. Therefore, companies, enforcers and legislators alike are turning their attention towards these issues. But what exactly are these challenges and how can the somewhat conflicting interests of ESG and competition law be aligned? This article sheds some light on these issues and points out what to look out for in times where compliance with ESG and competition law has become particularly challenging.

Finally, from an investment perspective, **Cary Krosinsky & Sahil Mulji** discuss the potential impact of ESG policies and laws for investors seeking to maximize returns. In the authors' view, despite uncertainties on the market, opportunities nonetheless exist for investors to target both financial gains and sustainability and impact improvement. Investors ought to fully consider sustainability issues across all of their asset classes, so that these become embedded into their financial decision making. Based on their review of available data, the outperformance of investments in sustainable businesses suggests that this strategy is sustainable.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

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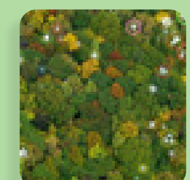
Governments across the globe have adopted different approaches to spur innovative technologies to transition economies towards Net Zero. "Environmental, Social and Governance" ("ESG") is the umbrella term for policies that are adopted by organizations to promote such social and environmental goals. Despite some level of public consensus (admittedly higher in some countries than others) about the need to act on climate change and other environmental and social issues, there is ongoing debate on how antitrust rules should deal with competitor collaborations to promote ESG initiatives. Whilst it is still early days, we can already observe divergent approaches from antitrust authorities across the globe in the face of divided public opinion and political polarization. This article will present a brief overview of the current treatment of ESG collaborations under antitrust rules in the EU, UK, and the U.S. then offer a range of possible approaches open to policymakers and regulators. We reflect below on the need to achieve legitimacy for any steps taken to adopt a more ESG-friendly stance, and on how different approaches may achieve this legitimacy.



THE STATE OF ESG IN ANTITRUST IN EUROPE

By Christian Ritz, Benedikt Weiß & Tim Büttner

The interplay between ESG and competition law has gained increasing attention not only in academia but also in competition law enforcement practice. The complexities of this interplay in an ever-increasing regulatory environment pose significant challenges for companies. They raise complex legal, economic and public policy questions that make both enforcement and compliance a true challenge. That is also why companies, enforcers and legislators alike are turning their attention towards these issues. But what exactly are these challenges and how can the somewhat conflicting interests of ESG and competition law be aligned? In this article, we shed some light on these issues and point out what to look out for in times where compliance with ESG and competition law has become particularly challenging.

EUROPEAN COMMISSION SETS THE AGENDA: ESG REPORTING REQUIREMENTS IN THE EU AND THE U.S.

By Michael Mencher & Emma Bichet

As part of a general policy of improving transparency on environmental, social and corporate governance ("ESG") matters, the EU has adopted a new law known as the Corporate Sustainability Reporting Directive ("CSRD"). The CSRD will require thousands of companies, both inside and outside the EU, to report on their sustainability credentials. During the process of its adoption, the CSRD attracted far less controversy than its U.S. counterpart, the proposed SEC climate rules. This is surprising given that the CSRD is far more expansive both in terms of the companies it applies to, as well as what they will be required to report on. In this article we explain who will need to comply with the CSRD and what it requires, and we explore the upcoming US climate reporting initiatives. We conclude that the EU rules are largely defining global ESG regulation due to their value chain requirements and application to non-EU companies. In our view, these are likely to have a significantly greater impact on market practice than the much-anticipated SEC climate rules.

CORPORATE SUSTAINABILITY REPORTING: A REAL GREEN DEAL

By Angela Lucas & Maria Folque

The European Union's Corporate Sustainability Reporting Directive ("CSRD") is a central piece in the cascade of regulation put in place to operationalise the European Green Deal, articulating with the EU Taxonomy Regulation and setting a new paradigm as regards to reporting obligations applicable to corporations operating in Europe, including foreign companies. The fundamental role of finance as a driver for sustainability is why the EU triggered this procedure by enacting the Sustainable Finance Disclosure Regulation ("SFDR") setting the scene for the legal frameworks that followed and some that are yet to come. The role of technology has also not been forgotten as an important enabler for transparency and comparability of the data provided. The double materiality approach followed by the CSRD, works as a major enabler for companies to comprehensively assess, understand and use ESG factors in setting their corporate strategies. Finally, the importance of incorporating human rights in the strategy, policies and relevant internal decision-making processes of the company is also of paramount relevance to the success of the business, in particular in the selection and performance assessment of suppliers, the acquisition of companies or sale/closure of industrial units or investment projects in infrastructure in developing countries. Companies should take a holistic approach to this novel legal framework to effectively tackle and manage their ESG risks while making the best of its opportunities.

IMPLICATIONS OF THE OUTPERFORMANCE OF ACTIVE SUSTAINABLE INVESTING

By Cary Krosinsky & Sahil Mulji

Although some U.S. states such as Florida and Texas have been passing or considering legislation preventing their pension systems from considering environmental, social, and corporate governance ("ESG") factors, active sustainable investors have been financially outperforming over the long term, earning higher returns for their clients, while attracting tens of billions more dollars to manage on the back of this financial success. Opportunities clearly exist to target both financial outperformance with a focus on sustainability and impact improvement. The outperformance of active sustainable investing, at a time when most active investors underperform, is an encouraging sign that the future of active investment in general, and across asset class will need to consider sustainability issues more seriously.

COMPETITION LAW COMPLIANCE AND CSDDD – A TICKING TIME BOMB?

By Bertold Bär-Bouyssiere & Paulina Brzezinska

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.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POLICY AND POLITICS: TWO SIDES OF THE ESG COIN?

BY JUSTIN STEWART-TEITELBAUM

& MARTIN MCELWEE

& SARAH JENSEN

& JUSTIN CHEN

& DONNA FAYE IMADI

Justin Stewart-Teitelbaum, Partner, Freshfields Bruckhaus Deringer, advises on premerger notification requirements in the United States and abroad, joint ventures, agency conduct investigations, agency Order compliance, and civil antitrust litigation, standard setting, and the intersection of antitrust and ESG. Prior to joining Freshfields, Justin oversaw antitrust merger investigations as a lead attorney in the FTC's Bureau of Competition. Martin McElwee, Partner, Freshfields Bruckhaus Deringer, manages clients strategy in relation to competition law issues and covers all aspects of EU and UK competition law, including merger control, antitrust, market reviews and State aid. Sarah Jensen, Counsel, at Freshfields Bruckhaus Deringer, in the global antitrust and foreign investment group. She has extensive experience and technical expertise across a wide range of antitrust and foreign investment issues that arise on complex mergers and investigations Justin Chen, Associate, Freshfields Bruckhaus Deringer based in London where he works primarily on mergers and advises clients on cross-border matters. Donna Faye Imadi, Associate in antitrust, competition, and CFIUS/trade practice, based in Washington, DC. Donna Faye assists clients with mergers, civil litigation, and ESG/antitrust related initiatives.

01

IT TAKES A VILLAGE, BUT WHAT ABOUT A VILLAGE OF COMPETITORS?

Governments across the globe have adopted different approaches to spur innovative technologies to transition economies towards Net Zero. "Environmental, Social and Governance" ("ESG") is the umbrella term for policies that are adopted by organizations to promote such social and environmental goals. Despite some level of public consensus (admittedly higher in some countries than others) about the need to act on climate change and other environmental and social issues,

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there is ongoing debate on how antitrust rules should deal with competitor collaborations to promote ESG initiatives. In the United States for example, on the one hand, pro-ESG Democrats advocate for free enterprise and ingenuity of companies to pursue their Net Zero goals within the bounds of antitrust law, whereas Anti-ESG Republicans characterize the current private-enterprise driven *standard-setting* collaboration as a *tax on democracy* from the *global elites*. Since President Trump's election, various alliances have been formed, dedicated to implementing ESG plans – which those who are skeptical of or opposed to the ESG agenda allege will raise prices, risk retirement funds, and undermine the democratic system of governance.

Whilst it is still early days, we can already observe divergent approaches from antitrust authorities across the globe in the face of divided public opinion and political polarization. Authorities in the EU, UK and Asia (such as the Japan Fair Trade Commission)[2] have started tackling the issue head-on, with some already issuing potentially valuable (draft) guidance on how businesses can lawfully engage in ESG collaborations and circumstances where collaborations generating anti-competitive effects may nevertheless be permissible on efficiency or public benefit grounds. In the U.S., we have not seen much (if any) regulatory or legislative action on a federal scale, whilst a complex patchwork of various state-driven approaches exists.

This article will present a brief overview of the current treatment of ESG collaborations under antitrust rules in the EU, UK, and the U.S. then offer a range of possible approaches open to policymakers and regulators. We reflect below on the need to achieve legitimacy for any steps taken to adopt a more ESG-friendly stance, and on how different approaches may achieve this legitimacy.

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DIVERGENT REGULATORY APPROACHES ACROSS JURISDICTIONS

A. UK and the Netherlands

The UK's Competition and Markets Authority ("UK CMA") and the Netherlands Authority for Consumers and Markets ("Dutch ACM") have positioned themselves as two of the leading antitrust authorities seeking to drive the global debate on how antitrust laws should facilitate legitimate collaborations between businesses to achieve environmental sustainability objectives.

The Dutch ACM was the first authority in Europe to issue detailed draft guidance on the application of antitrust laws to ESG initiatives, releasing its first draft Guidelines on Sustainability Agreements in 2020[3] with a revised draft published in 2021.[4] The UK CMA followed suit by publishing an information sheet for businesses and trade associations in January 2021[5] and, in early 2023, releasing draft guidance on the application of the prohibition on anticompetitive agreements to environmental sustainability agreements.[6]

Both authorities' draft guidance provide much needed clarity on the types of collaborations that would not typically raise antitrust concerns (e.g. joint lobbying efforts or collaborations that do not affect parameters of competition between firms) and those that do but can nevertheless benefit from existing legal exemptions on the basis that they generate sufficient public benefits that outweigh any anti-competitive effects. However, it is in the latter sphere that the Dutch ACM and the UK CMA have put their heads above the regulatory parapet.

2 On March 31, 2023, the Japan Fair Trade Commission (the "JFTC") enacted new guidelines to provide a guidance as to how and whether the concept of "sustainability" would impact their regulatory enforcement. See Kaori Yamada et. al., *Japan's new antitrust guidelines on environmental sustainability, including business cooperation*, FRESHFIELDS BRUCKAUS DERINGER OUR THINKING (April 10, 2023), https://www.freshfields.com/en-gb/our-thinking/knowledge/briefing/2023/04/japans-new-antitrust-guidelines-on-environmental-sustainability-including-business-cooperation/.

3 *Sustainability Agreements – Opportunities Within Competition Law* (Autoriteit Consument & Markt, Draft Government Guidelines, 2020), https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

4 *Sustainability Agreements – Opportunities Within Competition Law* (Autoriteit Consument & Markt, Draft Government Guidelines, 2021) https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf.

5 *Environmental Sustainability Agreements and Competition Law*, Competition & Markets Authority (Jan. 27, 2021), https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law.

6 *Draft Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Environmental Sustainability Agreements* (Competitions & Markets Authority, Draft Government Guidelines CMA177, 2023), [hereinafter *CMA Draft Guidance*] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document__.pdf.

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The conventional competition law wisdom (at least in the EU and the UK) is that anticompetitive agreements should only be exempt if the consumers who bear the costs (e.g. increase in price or reduction in product quality, choice or innovation) receive a "fair share" of the benefits resulting from it. Under this approach, ESG benefits could only be taken into account if the value that the relevant consumers place on them (e.g. as demonstrated by their willingness to pay higher prices for sustainable products) fully compensates those same consumers for competitive harms suffered. This may present a challenge for some ESG agreements where ESG benefits are typically enjoyed by a much broader group of consumers than those affected by the conduct, and the cost-benefit analysis may fail to stack up if the benefits assessment is limited to the narrower class of affected consumers – at least partly because negative externalities, including costs for future generations, are not generally reflected in pricing decisions. Here, the UK CMA has given clear signals that it is prepared to take into account benefits to the totality of UK consumers, albeit only in relation to agreements that contribute to the UK's binding climate change targets.[7] The Dutch ACM is prepared to go even further and apply this more permissive treatment to a broad range of agreements which reduce "environmental damage," not just those that relate to climate change but also including, for example, agreements to stem biodiversity loss. This puts both the UK and the Netherlands currently in a different position from some other regulators in Europe, most notably the European Commission, as well as the U.S. Agencies.

B. Austria

Unlike the UK and the Netherlands, where antitrust authorities have found footholds within the existing antitrust law framework to take broader sustainability (or climate change, in the UK) benefits into account, the Austrian legislature has formally addressed this issue by introducing a "sustainability exemption" to its cartel laws in September 2021. The new exemption does away with the need to prove the "fair share to consumers" criterion for collaborations that "significantly contributes to an ecologically sustainable and climate neutral economy." The exemption only applies to agreements focused on Austria and excludes those that affect trade between EU member states (which are governed by EU antitrust laws).

This puts both the UK and the Netherlands currently in a different position from some other regulators in Europe, most notably the European Commission, as well as the U.S. Agencies

C. EU

The European Commission is also seeking to play a leading role in the ESG and antitrust debate. In 2022, it released detailed draft guidelines for sustainability agreements, which (much like the UK CMA and Dutch ACM guidelines) provides helpful guidance on how to keep competitor ESG collaborations on the right side of the line. The draft guidelines do envisage that sustainability-related agreements can provide cognizable benefits. However, unlike the UK CMA and the Dutch ACM, the European Commission is currently not ready to take the step of permitting in-market consumer harms to be offset by "out-of-market" sustainability benefits.[8] Instead, under its draft guidelines, the European Commission envisages considering "collective benefits" enjoyed by a larger group of beneficiaries (for example, environmental benefits enjoyed by the general public) if there is a *substantial overlap* between those beneficiaries and consumers in the affected market – a requirement that will at least sometimes be more difficult to meet in practice for ESG agreements. This approach reflects the traditional philosophy that consumers should be fully compensated for competitive harms suffered in the relevant markets, and so does not take account of benefits generated for any wider class of consumers. That said, the fact that the European Commission has issued draft guidelines and has indicated its willingness to engage constructively with parties on a case-by-case basis, is nevertheless a positive contribution to the pro-ESG movement. Final guidelines from the European Commission are expected to be published in June 2023.

D. U.S.

U.S. Federal Antitrust Authorities: In the United States, ESG and antitrust guidance has not explicitly developed at the same pace as in the EU or the UK, either as a matter of policy or rhetoric. U.S. antitrust laws do not yet provide a clear-cut framework to account for potential welfare-enhancing ESG benefits on a broader scale. The federal antitrust agencies, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") have insisted that ESG-

7 *Id*. at 25-26.

8 Charley Connor, *Vestager Unwilling to Consider Out-of-Market Sustainability Benefits*, GCR (February 3, 2022), https://globalcompetitionreview.com/article/vestager-unwilling-consider-out-of-market-sustainability-benefits.

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related conduct must be assessed within the traditional antitrust framework[9]– pegged squarely to the consumer welfare standard— measuring competitive effects by price, output, innovation, quality, among other factors.[10] The consumer welfare standard evaluates business conduct and mergers by whether they harm consumers in any relevant market without necessarily considering wider – out of market – benefits. In the United States the prevailing view of both the FTC and the DOJ is that the *public interest* is best served by maintaining rigorous and effective competition, and ESG benefits cannot save an agreement that negatively affects competition.[11]

However, that is not to say that antitrust laws cannot facilitate pro-competitive collaborations. Antitrust laws can play a role in promoting industry collaborations in some instances – such as by offering guidance on joint ventures or standard-developing institutions. For example, the National Cooperative Research and Production Act of 1993 ("NCRPA")[12] is designed to promote innovation, facilitate trade, and strengthen competitiveness by allowing private entities to submit notifications to the DOJ, and receive guidance on the applicability of the antitrust laws toward joint efforts. Though it is possible to obtain informal guidance through DOJ and FTC *guidance letters*, those routes – as well as the NCPRA – have arguably been underutilized in relation to ESG-related efforts.

However, that is not to say that antitrust laws cannot facilitate pro-competitive collaborations

The policy polarization on both ends of the spectrum has allowed what some are calling the "weaponization of antitrust laws" to emerge to fill the vacuum of clear consensus on policy or societal objectives. This is not, of course, the first time commentators have pointed to potential political motivations behind the use of antitrust laws to prevent certain economic activity – for example, some have alleged similar uses of antitrust law for political ends in the cannabis industry,[13] certain merger control enforcement actions during the Trump era, via the California emissions standard investigations, and via the current *techlash*'[14] In at least some cases, it may be said that the alleged weaponization of antitrust is arguably a means to an end of signaling and enacting certain social and economic messages and objectives– rather than being strictly related to driving antitrust-related outcomes.[15]

9 See Lina Khan, *ESG Won't Stop the FTC*, WALL STREET JOURNAL (Dec. 21, 2022), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135 noting, "The antitrust laws don't permit us to turn a blind eye to an illegal *deal just because the parties commit to some unrelated social benefit* [emphasis added]**.** The laws we enforce are explicit: They prohibit mergers that "may substantially lessen competition or tend to create a monopoly." They don't ask us to pick between good and bad monopolies. Our statutory mandate is to halt a lessening of competition "in any line of commerce." So we can't act as deal makers, allowing reduced competition in one market in exchange for some unrelated commitment or benefit in another." Note, although a merger-specific reference, this approach broadly reflects the philosophical approach to vigorous antitrust enforcement generally.

10 See Christine S. Wilson, Commissioner, U.S. Fed. Trade Com'n, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get*, keynote address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019): "the Agencies do not consider non-competition factors in their antitrust analysis." The Agencies have learned that, while such considerations "may be appropriate policy objectives and worthy goals overall … integrating their consideration into a competition analysis … can lead to poor outcomes to the detriment of both businesses and consumers." Instead, the Agencies focus on ensuring competition that benefits consumers, and they leave other policies to other parts of government that may be specifically charged with or better placed to consider such objectives. *Id*. at p.3

11 See *Public Interest Considerations in Merger Control* 5 (OECD, Working Paper No. 3 on Co-operation and Enforcement, 2016), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/1606public_interest_merger-us.pdf.

12 15 U.S.C. §§ 4301-06.

13 "In 2020, former Acting Chief of Staff to the U.S. Assistant Attorney General for the Antitrust Division, testified in front of Congress that the Division investigated ten cannabis mergers and the California/automakers emissions agreements, based on political pressure from Attorney General Bill Barr- rather than concerns about harm to competition. See Bill Baer *Opinion | Think the DOJ's Antitrust Division is Immune From Political Meddling? Think Again.*, WALL STREET JOURNAL (June 24, 2020), https://www.washingtonpost.com/opinions/2020/06/24/think-dojs-antitrust-division-is-immune-political-meddling-think-again/.

14 "The AT&T/Time Warner merger is one of three antitrust decisions made during the Trump administration that could be characterized as "pro-Fox," alongside Disney/21st Century Fox and Sinclair Broadcasting Group/Tribune Media Company." See Becky Chao, *Preventing the Politization of Antitrust Enforcement*, NEW AMERICA (May 9, 2019), https://www.newamerica.org/weekly/preventing-politicization-antitrust-enforcement/.

15 According to AAG Delrahim, the Antitrust Division was confronted with the question of whether the policy aims of effective antitrust enforcement (i.e. preservation of market conditions that will lead to lower prices and higher output, quality, and innovation) are inconsistent with the DOJ's other obligations to enforce the Controlled Substances Act and other federal regulations of cannabis.

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State Antitrust Enforcers: Unlike the federal regulatory environment it is apparent that State Antitrust enforcers and statehouses are pursuing ESG-related agendas, but in very divergent ways. In anti-ESG circles, which tend toward Republican-controlled states, State AGs have sent letters to members of the Net Zero Alliances concerning *the legality* of commitments to collaborate with asset owners and insurers toward shared missions to achieve sustainability metrics.[16] Texas and Florida have pulled out of pensions funds invested in ESG – and this year, over 7 states have passed state anti-ESG legislation into law, with state legislatures filing nearly 99 bills aimed at restricting ESG business practices, up from 39 in 2022.[17] The NYC pension fund has also seen its first anti-ESG class-action litigation concerning its decision to divest its portfolio from fossil fuel funds.[18] On the other hand, pro-ESG statehouses (such as New York, Massachusetts, and Vermont) are pushing legislative efforts in the complete opposite direction, including requiring pension funds to divest interests in fossil fuel assets.[19]

03

WHERE TO FROM HERE?

One conclusion to be drawn from the above is that, if a more pro-ESG stance from antitrust authorities is to emerge, this has to be built on a platform of legitimacy. That is, any authority (or other actor) seeking to advance a pro-ESG tilted approach is likely to have to advance reasoning as to why the approach is built on appropriately strong public policy foundations that have embedded legitimacy given their democratic mandate or which otherwise reflect a sufficient public consensus.

A. Legislatively Led Approach to Incorporating ESG into Antitrust Assessments

The role of the private sector to promote ESG initiatives, and whether those costs should be borne by consumers or shareholders, remains a polarizing issue, even in jurisdictions with overwhelming public support for climate change action. In a Congressional hearing on ESG as recent as May 10th, several State Attorneys General emphasized that the current private-sector led approach amounted to a democratic capture.[20] Another common objection is that mandatory ESG laws and regulations requiring firms to change their practices to reduce their ESG impact is more effective to drive change, and removes the need for potentially anticompetitive private sector collaborations. However, such forms of *command and control* regimes come with significant drawbacks, including that they are often the outcome of significant political compromise, regulatory standards globally are typically slow to be adopted and limited in geographical reach, and can be poorly implemented and inconsistent between jurisdictions.

In this politically charged climate where there are differing views on the role (if any) of antitrust in promoting ESG initiatives, any new (or adapted) antitrust law or regulatory frameworks would have the most political legitimacy if reform were legislatively-led, so resting on the democratic mandate of the legislature.

Arguably, the most radical approach in a legislatively-led scenario would be to legislate a new public interest stan-

16 See Kane Wells, *Republican AGs Pen Critical Letter to NIZA Members Conveying "Legal Concerns,"* REINSURANCE NEWS (May 18, 2023) https://www.reinsurancene.ws/republican-ags-pen-critical-letter-to-nzia-members-conveying-legal-concerns/, and see Letter from State AGs to the Net Zero Asset Owner Alliance (Mar. 30, 2023) (available at https://www.legalbluebook.com/bluebook/v21/rules/17-unpublished-and-forthcoming-sources/17-2-unpublished-materials#b-320043).

17 "This year state legislators, chiefly Republicans, have filed roughly 99 bills aimed at restricting the rise of ESG business practices, up from 39 in 2022, according to law firm Morgan Lewis. As of April 3, seven of the bills had been enacted into law, 20 were effectively dead, and 72 were still pending." See Ross Kerber, *Business Fights Back as Republican State Lawmakers Push Anti-ESG Agenda*, REUTERS (Apr. 24, 2023), https://www.reuters.com/business/sustainable-business/business-fights-back-republican-state-lawmakers-push-anti-esg-agenda-2023-04-22/.

18 See Saijel Kishan & Martin Z Braun, *NYC Pension Funds Are Sued for Cutting Fossil-Fuel Stakes*, BLOOMBERG (May 12, 2023), https://www.bloomberg.com/news/articles/2023-05-12/nyc-pension-funds-are-sued-for-cutting-fossil-fuel-stake#xj4y7vzkg.

19 For example, "Democrats have also filed far-reaching bills such as a pair in California to require companies to disclose greenhouse gas emissions and for state pension funds to divest fossil fuel stocks… This month in Kansas, legislators softened language in a Republican bill aimed at limiting the use of ESG in investment decisions to address concern it would cost $3.6 billion over 10 years in lower pension system returns." See Kerber, *supra* note 17.

20 Undermining the U.S. system of government, "unelected Elites are making policy decisions outside of democratic processes. Groups like Climate Action +100 and Net Zero Banking Alliance require their members to coordinate on business activity to meet ESG standards not otherwise required by law this private coordination is designed to accomplish what could not be done through normal Democratic processes or the free market ESG requires companies to forego otherwise profitable economic transactions to achieve woke social policy." ESG Part I: An Examination of Environmental, Social, and Governance Practices with Attorneys General: Hearing Before the U.S. House Comm. on Oversight and Accountability, 117th Cong. (2023).

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dard, similar to that historically applied in some merger control regimes.[21] While a public interest standard would have the benefit of flexibility and evolve to reflect changing political, social and cultural norms (as well as being comfortably broad enough to bring sustainability goals into cognizance), it has the drawback of being highly uncertain and practically very challenging. Assuming that agencies would be left to determine the public interest status of an agreement or transaction, having officials making policy decisions as to what is in the *public interest* would itself potentially lack political legitimacy and would risk inconsistent applications of the law. Judicial interpretation of whether conduct is in the "public interest" is also fraught with difficulty, with some judges likely to adopt an overly deferential approach to the regulatory or administrative decision maker at first instance to avoid the perception of judicial overreach, while others may have to wrestle with difficult policy choices potentially better left to the legislature, neither of which is ideal.

An alternative approach is to retain the primacy of the consumer welfare standard but codify a broader range of non-economic factors which may be taken into account as part of the assessment. As noted above, this is the approach adopted in Austria where the legislature has formally introduced a sustainability exemption to Austrian cartel laws, albeit the exemption is strictly limited to ecological sustainability and contribution to a climate neutral economy rather than a broader range of ESG factors. A codified list of public interest factors has the benefit of greater clarity and predictability than an amorphous "public interest" test. The South African merger control regime also provides a helpful example, where in addition to competition effects, a merger must also be assessed by reference to a list of statutory public interest factors, which include impacts on employment and increasing the spread of ownership amongst historically disadvantaged persons. It would be open to legislatures to do the same for sustainability-led factors.

B. Agency-led Re-understanding of the Relevant Test

In the absence of (sufficient) legislative-led reform, an agency-led approach is also possible. Without the democratic underpinning of a legislatively-led reform, it is arguably more challenging for an antitrust authority to demonstrate sufficient legitimacy for its steps. However, the approaches of some authorities do bear analysis on how they are thinking about this.

First, the example of the CMA is striking. It visibly seeks to achieve legitimacy for the change described above (extending the category of cognizable beneficiaries for benefits arising from climate change agreements) by explaining that its approach is driven by (*inter alia*):

> "the exceptional nature of the harms posed by climate change (and therefore the exceptional nature of the benefits to consumers from combating or mitigating climate change or its impact); climate change represents a special category of threat that sets it apart and requires a different approach to the pass-on criteria. This reflects the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into."

It thus rests its approach on two sources of legitimacy: first, the "degree of public concern" – that is the degree of consensus that exists (or is said to exist) that this is an appropriate public policy good to pursue (arguably akin to the way in which traditional approaches to antitrust are underpinned by a consensus on the value of competition for consumers). Notably, the CMA has not sought to change its approach for sustainability agreements more broadly – perhaps reflecting a lower degree of consensus beyond climate change. Second, the UK's binding international commitments, a source of law that stems ultimately from the government's democratic mandate.

> ***In the absence of (sufficient) legislative-led reform, an agency-led approach is also possible***

Another alternative would be to make such a change part of a more wholesale re-understanding of the purpose or role of competition law and policy, resting on a more general social reimagining of that role and purpose. When the Biden Administration's Executive Order on Competition was introduced, some commentators suggested a new school of thought – the Neo-Brandeisian — was taking control of U.S. antitrust enforcement. The Neo-Brandeisian approach advocates for the adoption of a new legal standard asserted by its supporters to be "better" reflective of the social and political purposes of the antitrust statutes – such as embracing the concept of *total welfare*. Such a concept might well give space for a more progressive approach to ESG-related agreements.

Despite the gradual shift in enforcement to focus on labor markets, producers, and non-price metrics – we have yet to observe U.S. antitrust agencies embracing broader social factors – and it is likely to remain this way. An impediment to such a change is the lack of consensus on the legitimacy

21 For example, mergers in the UK were historically reviewed subject to a public interest test under the Fair Trading Act 1973, until the Enterprise Act 2002 came into force and codified an economics-based competition test subject to public interest interventions on limited grounds (including media plurality, financial system stability and public health emergencies).

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of this approach – it remains a view vocally put by some in the antitrust debate, and equally vocally resisted by others. In these circumstances, using a broader reimagining of antitrust to introduce a more progressive approach to sustainability may well lead simply to concerns about administrative overreach and exacerbate the political battles about both antitrust and sustainability.

C. Change by Stealth

Even if antitrust authorities are reluctant to publicly announce any formal change in interpretation of the legal standard to promote ESG collaborations, another option would be to enforce antitrust rules more leniently in given cases involving genuine pro-ESG collaborations.

Both the UK CMA and the Dutch ACM have indicated that they are prepared to stay their hand in relation to enforcement against businesses who "genuinely try to do the right thing"[22] (as well as the CMA's specific change in approach for climate change related agreements). Subject to some caveats, both authorities have also indicated that they will not issue fines against businesses who have obtained informal comfort from the authorities on their proposed collaboration, even if their conduct later crosses the line. In contrast, as explained above, the European Commission has not publicly announced any relaxation of enforcement against ESG collaboration, but it has signaled the need for vigorous enforcement of antitrust laws in order to drive competition and innovation and support the green transition.[23] It remains to be seen whether the European Commission will apply the rules more leniently in cases where parties have made a genuine and good faith attempt to comply with its guidance.

In the U.S., despite the DOJ and FTC publicly stating that there is *no antitrust exemption* for ESG measures, we have not (yet) seen enforcement against ESG collaborations from either agency that we might have expected under a Republican-led anti-ESG administration. Indeed, the high-profile investigations into climate groups affiliated with the Climate Action 100+ and Net Zero Asset Management network have been investigated by House Republicans and a number of Republican State Attorneys General, not the U.S. federal antitrust agencies who may perceive such collaborations as consistent with existing antitrust law and Biden-administration policy objectives.

If there were a change in enforcement practice in any jurisdiction, this might be dubbed (perhaps unfairly) "change by stealth." There is always some leeway for authorities to determine where their enforcement priorities lie (which, depending on the jurisdiction, may be more or less led by political guidance or direction): this is recognized as being within their reasonable sphere of authority, and thus may be deemed to be within the bounds of legitimacy. Furthermore, to the extent that existing antitrust norms are not disturbed by any shift in enforcement priorities, this may be easier to fit within a sufficient social consensus, rather than explicitly adopting a novel reimagining of antitrust. Nonetheless, given that this approach relies essentially on administrative discretion in a given case, it may fail to give sufficient certainty to market actors making that "good faith" attempt to pursue sustainability within the boundaries of antitrust rules.

04
CONCLUSION

The multitude of approaches across jurisdictions towards ESG collaborations reflects the policy and political quagmire in which legislatures and regulators find themselves as they define the role that antitrust laws should play in promoting (or potentially being weaponized to hinder) ESG goals. The lack of political consensus about who should pay for climate action has paralyzed legislatures in many jurisdictions, leaving antitrust regulators walking the tightrope of executing their fundamental mandate – to enforce antitrust laws to maximize consumer welfare – and facilitating private sector action to tackle the biggest existential crisis of our time. Transparency and predictability for businesses is critical if they are to take the steps that government and society more broadly are increasingly expecting them to take. While, as we have explained, there are numerous routes open to agencies and legislators to build a pro-ESG approach in a way that has the necessary legitimacy, there currently is no international consensus on the best way to do so. Building that consensus internationally might be a good first step.

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22 *CMA Draft Guidance, supra* note 6, at 28.

23 See Margrethe Vestager, Executive Vice President, Eur. Comm'n, U.S. Fed. Trade Com'n, *Competition Policy in Support of the Green Deal*, keynote speech at the 25th IBA Competition Conference, delivered by Inge Bernaerts, Director, DG Competition (Sept. 10, 2021): "It's the need to compete that pushes companies to do more to meet consumers' needs, and use less costly resources – changing business models, for instance, or investing in green innovation. And so [we] need to support the green transition by enforcing our rules more vigorously than ever." (available at https://competition-policy.ec.europa.eu/consumers/green-gazette/competition-policy_en). See also Richard Pepper, Fiona Beattie & Andrew Morrison, *Environmental Sustainability And Competition Law In Europe - Where Are We Now?*, LEXOLOGY (October 15, 2021), https://www.lexology.com/library/detail.aspx?g=ebb545c7-e9c5-4b6d-8a5a-eada863b752d.

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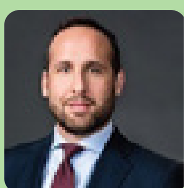
EUROPEAN COMMISSION SETS THE AGENDA: **ESG REPORTING REQUIREMENTS IN THE EU AND THE U.S.**



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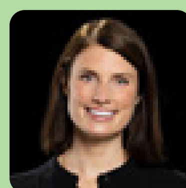

&
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01 INTRODUCTION

Reporting on ESG matters used to be reserved to companies hoping to attract investment based on their ESG credentials, and a few large European Union (“EU”) listed entities, who had to prepare high-level non-financial disclosures. This is all changing. On January 5, 2023, the EU’s Corporate Sustainability Reporting Directive (“CSRD”)[2] entered into law and is set to revolutionize the ESG reporting landscape, both in the EU and beyond.

2 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, p.15.

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The CSRD significantly expands the current non-financial reporting regime in the EU, in terms of the companies that are required to file sustainability reports and what they need to report on. It is getting a lot of attention both inside and outside the EU. This is largely because the CSRD makes reporting mandatory for most large EU companies as well as many United States and other non-EU companies that have an EU branch or subsidiary, regardless of whether they are listed or not. Although non-EU parent companies have the longest phase-in period for direct reporting (which will start to apply from financial year 2028), they will likely experience the effects of the CSRD much earlier, due to the impacts on other companies in their value chain, as well as earlier reporting requirements for EU their subsidiaries (which will start to apply from financial year 2025). As a result, many large companies are considering reporting at the parent level early, instead of producing a separate subsidiary-level report.

Mandatory sustainability reporting under the CSRD covers a wide range of environmental, social, and corporate governance topics. Of particular interest (and concern) to many is the requirement for EU companies to report on their entire value chain and to disclose in most likelihood their Scopes 1, 2 and 3 greenhouse gas ("GHG") emissions.

In the U.S. there is a parallel, but more limited, move toward an expansion of mandatory ESG reporting obligations. The Securities and Exchange Commission ("SEC") has adopted a more piecemeal approach than the CSRD, focusing its rulemaking on specific ESG topics, rather than mandating the publication of broad ESG reports. In particular, the SEC has proposed climate change and cybersecurity reporting rules, and is expected to propose human capital and board diversity disclosure rules over the next year.

02

ESG REPORTING IN THE EU

In this section we consider (1) which entities will be required to file sustainability reports under the CSRD and (2) what those reports will need to contain.

A. Who is Covered by the CSRD?

There is a phased introduction of the new ESG reporting requirements brought in by the CSRD. The key milestones are set out in the table below. These are subject to certain exemptions and carve-outs, and we recommend that businesses conduct tailored applicability assessments to understand if they will be covered, and if so, which entities will need to file CSRD-compliant reports.

Entity	Date
Large EU entities that are already subject to the current EU non-financial reporting regime (mostly large entities that are listed on the EU regulated markets)	Financial year starting on or after 1 January 2024 (reporting in 2025)
Large EU undertakings and groups, including EU subsidiaries of U.S. companies, whether listed or not, that are of a type listed in the Annexes to the EU Accounting Directive (generally limited liability companies), if they satisfy at least two of the following criteria: · A balance sheet total of over €20 million. · A net turnover of over €40 million. · An average of over 250 employees over the financial year.	Financial year starting on or after 1 January 2025 (reporting in 2026)
EU-listed small and medium sized enterprises ("**SMEs**"), except micro-undertakings	Financial year starting on or after 1 January 2026 (reporting in 2027) with option to opt out for 2 further years
Non-EU parent companies which satisfy the following two criteria: · Generate a net turnover of more than €150 million **in the EU** for each of the last two consecutive financial years at the consolidated (group) level; and · Have at least one subsidiary in the EU that is itself in-scope of the CSRD, or a branch that generated a net turnover of over **€40 million** in the preceding financial year.	Financial year starting on or after 1 January 2028 (reporting in 2029)

Even companies that are not covered by the new CSRD reporting requirements are likely to feel the impact of these requirements if they are part of the value chain of an entity that is required to report, since they will begin receiving ESG questionnaires from partners that are gathering the data necessary for their ESG reports.

There are various options available to companies that have several in-scope entities to consolidate their reporting. For example, parent companies can generally opt to report on a group level on behalf of their subsidiaries. If a company has several subsidiaries in the EU, there is also the possibility for the largest EU subsidiary to report on behalf of all of them until 2030. It is similarly possible for non-EU companies to report early on a consolidated (group) basis and this is increasingly becoming an attractive option for non-EU parents who wish to streamline the reporting process, and anticipate in any event receiving ESG data requests from partners in their value chain who are themselves required to report under the CSRD.

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B. CSRD Reporting

Under the CSRD, companies meeting the thresholds will now be required to produce a dedicated "Sustainability" section in their Management Report (for EU entities) or a standalone "Sustainability Report" (for non-EU entities), that will be subject to mandatory third-party assurance (audit) and the assurance opinion will need to be published alongside the report itself.

CSRD-compliant disclosures will need to include all "information necessary to understand the undertaking's impacts on sustainability matters, and information necessary to understand how sustainability matters affect the undertaking's development, performance and position."[3] The report should contain information both about the company's own operations as well as those of its value chain. This is significant, since in practice it will mean that companies will need to request information from their suppliers, business partners as well as their customers to enable them to prepare their sustainability reports. "Material" risks relating to sustainability matters identified in a company's value chain will need to be disclosed in the company's report, meaning the ESG practices of value chain partners will ultimately reflect back on the reporting company. We anticipate that this will naturally lead to a higher level of supply chain diligence, as companies subject to the CSRD will be discouraged from partnering with suppliers they deem "risky" from a sustainability perspective.

There are various options available to companies that have several in-scope entities to consolidate their reporting

The sustainability-related information companies are legally required to disclose under the CSRD must be reported in accordance with mandatory European Sustainability Reporting Standards which will be adopted by the EU via secondary legislation (known as "delegated acts"). Different reporting standards will be adopted for EU companies (including the European subsidiaries of non-EU companies), SMEs, non-EU companies and companies operating in sectors that have been identified as "high risk." It is anticipated that the standards for non-EU companies will be less onerous than those for EU entities.

For EU reporting entities (including the EU subsidiaries of non-EU parents), the draft reporting standards cover the following subject areas:

Climate change	Includes energy consumption, Scopes 1, 2 and 3 GHG emissions, GHG removal and mitigation initiatives. The reporting entity should disclose its plans, implementing actions, and related financial and investment plans for ensuring its business model and strategy are compatible with (1) the transition to a sustainable economy; (2) the limiting of global warming to 1.5 degrees Celsius and (3) achieving climate neutrality by 2050.
Pollution	Includes policies, targets and resource allocation affecting pollution of air, water, soil, living organisms and food resources, among others. Includes details on the pollutants generated or used during the production processes and that leave facilities as emissions, products, or as part of products or services, among others.
Water and marine resources	Includes how the company (including its value chain) affects water and marine resources, in terms of positive and negative impacts and any actions taken (including policies, targets, action plan and resources).
Biodiversity and ecosystems	Includes how the company affects biodiversity and ecosystems, in terms of positive and negative actual or potential impacts, as well as any actions taken and results of such actions to prevent, mitigate, or remediate adverse impacts and protect/restore biodiversity and ecosystems.
Resource use and circular economy	Includes the company's policies, targets and resources relating to the depletion of non-renewable resources and the regeneration of renewable resources, and any actions taken to prevent, mitigate, or remediate impacts arising from resource use and the circular economy. This includes resource inflows, outflows, waste and resource optimization, and the company's ability to create partnerships to accelerate the transition to a circular economy.
Own workforce	Includes details on how the undertaking affects the company's own workforce by covering working conditions, access to equal opportunities and other work-related rights.
Workers in the value chain	How the company affects workers in its value chain through its own operations and its upstream and downstream value chain (including its products and services, its business relationships, and its supply chain). This includes details on processes for engaging with such workers, channels through which workers can raise concerns, targets related to managing material impacts on such workers, and remediation of material impacts on workers in the value chain.

3 Articles 19a (for those reporting at an individual level) and Art. 29a (for those reporting on a consolidated basis), CSRD.

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Affected communities	How the undertaking affects local communities through the company's own operations and its upstream and downstream value chain (including its products and services, its business relationships, and its supply chain), any actions taken, and how the undertaking manages risks and opportunities relating to impacts and dependencies on affected communities.
Consumers and end users	Includes policies and targets that address the management of the material impacts its products and services have on consumers and end users – including impacts to a consumer's privacy or health, processes for consumer and end-user engagement, mechanisms through which consumers and end users can raise concerns, and approaches to mitigating material risks and remediating actual impacts.
Business conduct	Includes information on the company's strategy and approach, processes, procedures, and performance in respect of business conduct, including business ethics, corporate culture, anti-corruption, anti-bribery, etc.

There are also draft "general requirements" and "general disclosure" standards that provide further guidance on the principles of CSRD reporting, such as how to interpret value chain and how to conduct the materiality assessment.

Certain disclosures (most likely including the company's Scopes 1, 2 and 3 greenhouse gas emissions) will be mandatory regardless of whether or not any material impacts are identified. For other disclosures, e.g. relating to biodiversity metrics, it will be mandatory for companies to do materiality assessments, but full disclosures may not always be required if no "material" impacts, risks or opportunities are identified.

For the purposes of the materiality assessment under the CSRD, it is necessary to consider impacts, risks, and opportunities both for the business itself as well as for people or the environment (sometimes referred to as "double materiality").

03 PROPOSED ESG REPORTING REGULATIONS IN THE U.S.

Over the last two decades, ESG practices such as investor policies, green finance, and voluntary sustainability reporting have generally developed at a faster clip in European markets, with adoption in the United States often lagging and on a more limited basis. This pattern is repeating itself when it comes to ESG disclosure regulations. Although the SEC and other U.S. bodies have proposed numerous significant ESG-related disclosure mandates in recent years, these regulations all await final approval and cover a more limited range of topics than the CSRD and other current or proposed EU requirements.

Despite numerous proposed statutes and regulations at the state and Federal level, the SEC's proposed climate change disclosure rules have received by far the most attention and political controversy. The publication of the proposed rules in March 2022 followed a series of tentative SEC actions over the preceding twelve years, including the publication of interpretative guidance in 2010 regarding the potential triggers for climate-related disclosures under existing rules, as well as series of comment letters in 2021-2022 questioning companies regarding the adequacy of their disclosure of climate-related risks, regulations, and costs under such rules and the 2021 formation of an ESG task force in the Division of Enforcement focused on climate and ESG issues.

Although these rules have attracted enormous attention and political controversy, the overall content of the rules largely aligns with existing international climate disclosure practices. Under the proposal, climate disclosure would be required in the annual reports that publicly listed U.S. companies already file with the SEC. This climate disclosure would primarily consist of disclosure requirements derived from the Task Force on Climate-Related Financial Disclosures ("TCFD") and GHG Protocol frameworks, which both establish standardized frameworks that are the basis of many international climate disclosure regulations and are the most influential standards for voluntary climate reporting.

Following the TCFD, the proposed SEC rules would require qualitative disclosure on climate-related governance, strategy, risk management, and targets. In particular, the rule would require disclosure related to:

- Acute (e.g. wildfires) and chronic (e.g. sea level rise) physical risks, including acute and risks related to the climate transition, such as regulatory, market, liability, and reputational exposures.;
- Impacts of climate risks on the company's strategy, business model, and outlook, including an analysis of how climate impacts are integrated into strategic and financial planning and details of any climate transition plans;
- Analytical tools used for assessing climate-related business and financial statement impacts, including detailed qualitative and quantitative disclosure regarding the use of scenario analyses;
- Board and management oversight of climate-related matters, as well as processes and standards for climate risk management; and

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- Details of climate-related targets and goals plans adopted by the company, including progress metrics and strategies.

In addition to this narrative disclosure, the SEC proposal also includes quantitative GHG emissions disclosure (in both gross terms and per unit of economic value) requirements that are largely derived from the GHG Protocol. While all issuers would be required to disclose direct (Scope 1) and purchased energy (Scope 2) emissions, value chain (Scope 3) emissions disclosure would be subject to a phase-in period and would only apply if such emissions are material or are included in the company's emissions targets. Given the difficulty in tracking and measuring value chain emissions over which companies do not have direct control, the proposed rules – unlike the EU's CSRD – would effectively provide a safe harbor for Scope 3 unless made without a reasonable basis or disclosed in bad faith.

Perhaps the most notable element of the SEC's proposed climate rules is that they remain a proposal. Although the publication of the final version of the rules was initially expected in October 2022 (with an effective date in December), the final rules are still pending and are now not expected until Fall 2023. This delay is not surprising given the enormous volume (4,000+) of often highly detailed public comments received from issuers, industry groups, activists, and investors, as well as the intense political scrutiny and controversy surrounding the proposal. Given the acute political polarization in the U.S. regarding all things ESG and recent judicial skepticism regarding the validity of various Federal regulations on climate change, the delay also may reflect an attempt to craft final rules less likely to provoke, and less vulnerable to, litigation.

As a result, numerous press reports have indicated that the final rule is likely to eliminate or modify several of the more burdensome features of the proposal, such as the (albeit limited) application of Scope 3 reporting to all industries, attestation requirements for GHG emissions disclosure, and the requirements related to the inclusion of climate-related metrics in companies' audited financial statements. The latter was one of the more unexpected elements of the proposed rules, particularly as such financial statement disclosure is an innovation relative to the TCFD, GHG Protocol, and current market practice. Responsive disclosure would include impacts of climate risks on line items and risk-mitigation expenditures, both subject to a 1 percent change threshold. Given the novelty of such disclosure and the expected administrative and financial burdens, many commentators see these requirements as particularly likely to be eliminated in the final rules.

In addition to these long-delayed SEC climate rules, numerous other climate and ESG disclosure requirements have been proposed at the Federal and state level. For example, the Department of Defense, General Services Administration, and NASA issued joint proposed rules in November 2022, which would require Scope 1 and 2 emissions disclosure for Federal suppliers with annual Federal contract obligations over $7.5 million, and Scope 3 emissions and additional narrative climate disclosure for suppliers with over $50 million in annual contract obligations.

Although these rules broadly overlap with the disclosure requirements of the SEC's proposal, they would potentially cover a large number of private Federal contractors who otherwise would not be subject to the SEC rules. Similarly, two statutes currently under consideration in the California state Senate would create, respectively, Scopes 1,2, and 3 reporting obligations for companies with over $1 billion in revenue doing business in California, and TCFD-aligned disclosure requirements for companies with over $500 million in revenue doing business in California. In addition to climate disclosures, in March 2022 the SEC also proposed new cybersecurity disclosure rules, also now expected to be finalized this fall. Under this proposal, issuers would be subject to new event-based and ongoing reporting obligations related to cybersecurity incidents and board and management oversight of cybersecurity matters. In addition, the SEC continues to explore potential rulemaking related to board diversity and more detailed human capital disclosure, such as employee retention and demographics.

04

ALIGNMENT IN GLOBAL REPORTING OBLIGATIONS

At present, there is no alignment between the CSRD and other voluntary and mandatory reporting frameworks. The reporting standards under the CSRD for EU entities go beyond the TCFD recommendations and also the upcoming SEC climate rules, since they also cover environmental topics other than climate (namely pollution, water and marine resources, biodiversity and ecosystems and resource use and circular economy), as well as social and corporate governance matters.

If the SEC climate rules are adopted, it will be possible that the same company may need to report under both the CSRD and the SEC climate rules, e.g. dual-listed entities, or U.S. public companies with EU subsidiaries meeting the thresholds. Under the CSRD, reporting under the SEC rules would not exempt the company from the obligation to report under the CSRD. However, we anticipate that these companies will aim to align their reporting as much as possible, which in practice will mean reporting to the

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stricter standards (likely those adopted by the EU under the CSRD).

The CSRD allows the EU to recognize other ESG reporting standards as "equivalent" to the ESRS, meaning that companies reporting to those recognized standards would be deemed in compliance with the EU standards. However, the EU has not recognized any standards as equivalent as yet. Since the SEC has not and is not currently expected to propose equally broad sustainability reporting rules, it is unlikely that the SEC rules will be recognized as equivalent to all CSRD reporting standards (although there is a possibility that some, such as climate change, may be recognized as equivalent). As a result, for U.S. issuers that fall within the scope of the new EU rules, compliance with the CSRD is likely to require the publication of a dedicated report. In addition, the CSRD's scope extends beyond that of most voluntary reporting standards currently applied by companies in the U.S. and elsewhere, such as the TCFD framework or the 77 industry-specific standards of the International Sustainability Accounting Standards Board ("ISSB").

While the application of the CSRD is based on domicile and/or economic activity, the SEC's climate rules only cover companies subject to the SEC's periodic reporting requirements, i.e. domestic public companies, and certain non-U.S. companies with SEC registered securities. As a result, even the largest U.S. private companies and many international public companies will be exempt from any direct obligations under the SEC's proposed rules. Nonetheless, given the global appeal of the U.S. capital markets, many non U.S. domiciled corporations list their securities on U.S. exchanges and either qualify as domestic issuers or as so-called "Foreign Private Issuers" and would therefore be subject to the climate rules. Unlike the CSRD, the proposed rules would not allow such non-U.S. issuers to opt to comply with substantively equivalent home country rules. As a result, SEC reporting companies subject to the CSRD or climate disclosure mandates in jurisdictions such as the United Kingdom, Japan, and Australia, would need to provide disclosures fully aligned with the SEC rules, including with respect to matters such as climate-related financial statement metrics and GHG emission organizational boundaries where the SEC proposal deviates from international practices derived from the TCFD or the GHG Protocol. That being said, the SEC solicited public comments on the treatment of Foreign Private Issuers and the final rules could include a more flexible approach to home country rules and international standards such as the ISSB.

05
CONCLUSION

The past half decade has witnessed a rapid growth in both ESG investing and voluntary corporate sustainability reporting. Despite numerous attempts by market actors at producing standardized reporting frameworks and performance metrics, for many investors and corporates the ESG space remains frustratingly chaotic, with the former complaining of greenwashing puffery and lack of comparability, and the latter often at a loss to understand what is expected of them and what really matters. In such an environment, it is small surprise that market regulators worldwide have started proposing ESG disclosure regulations in the attempt to introduce standardization, rigor, and predictability.

What is perhaps more striking, but not necessarily surprising, is the central role that EU regulation is playing. The European market has already shown itself to be a key incubator for many ESG trends and the EU is taking on an increasingly prominent role as a global regulatory power. In addition to being the first-mover on the ESG reporting rules - adopting them well before the SEC, and covering a significantly broader set of reporting categories, the CSRD is also likely to have a much greater influence in shaping global (including U.S.) ESG reporting practices due to its expansive value chain requirements and application to non-EU companies. Whether companies are direct reporting entities under the CSRD through their subsidiaries or parent companies, or are merely in the value chain of companies required to report, the CSRD will play a central role in shaping ESG disclosures over the coming decade regardless of the fate of the SEC rule. Even for companies without any CSRD reporting companies in their wider value chain, the CSRD is likely to be highly influential in setting global investor ESG disclosure.

In addition, the EU's next big-ticket piece of ESG regulation, the soon-to-be finalized Corporate Sustainability Due Diligence Directive ("CSDDD") is also expected to greatly increase demands for rigorous ESG data from companies and investors operating in the EU. If adopted as proposed, the CSDDD will impose concrete behavioral obligations on in-scope companies (which again could include U.S. companies with activity in the EU). For example, there would be an obligation to identify and bring to an end (or, if not possible, mitigate) the company's negative human rights or environmental impacts. Bigger companies would also need to adopt a plan to make sure that their business strategy is compatible with limiting global warming to 1.5 degrees Celsius.

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Whether companies are subject to the SEC, EU, or other rules, it is clear that we are entering an era of greater transparency around ESG matters. Although various international rules contain different standards regarding third-party audits and apply varying standards of liability, the consistent trend is that ESG claims and sustainability targets, once treated as marketing puffery, are increasingly moving towards levels of rigor and regulation similar to that of financial reporting.

> *The past half decade has witnessed a rapid growth in both ESG investing and voluntary corporate sustainability reporting*

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THE STATE OF ESG IN ANTITRUST IN EUROPE

BY CHRISTIAN RITZ

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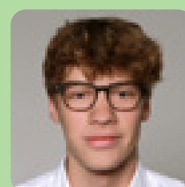

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01 INTRODUCTION

"ESG," short for "environmental, social, and governance" values, have gone from being a mere buzzword to being both an asset and a challenge for many companies within just a few years. Investors, consumers, and other stakeholders are paying increasing attention to the fact that companies are taking these criteria seriously when taking business decisions. It is thus not surprising that ESG has become a defining feature of modern corporate strategies. From the introduction of travel policies and recycling rules to increasing boardroom diversity and corporate ESG strategies, ESG has and will continue to reshape the corporate landscape. However, when pursuing sustainable practices, companies are not just confronted with the challenge of satisfying their stakeholders, investors, and customers.

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They may also face the challenge that the existing and rapidly evolving regulatory landscape calls for the implementation of compliance systems and processes, or even complicates it. This is also true for the legal discipline of competition law, which is designed to promote the proper functioning of markets and to discourage any behavior that is detrimental to this goal. A major challenge at the intersection of competition law and ESG in this respect is to understand how ESG can accommodate the demands of competition law and the other way round. This raises several complex and sometimes even novel questions at the intersection of competition law and ESG compliance, some of which will be addressed in this article.

We will first provide an overview of what ESG actually is (II), then deal with some competition law implications of ESG (III.) and outline the current position of selected European competition authorities on the subject (IV). Finally we will provide a practical outlook on what companies should look out for when tackling these issues more closely (V).

02 WHAT IS ESG ANYWAY?

"ESG" stands for "environmental, social, governance." But what exactly do these terms mean, especially in a legal or competition law context and which concrete goals are covered by ESG?

Recognizing its increasing practical importance, the European Commission's Directorate General for Competition ("DG COMP") has decided to include an entire chapter on Sustainability Agreements into its just now adopted recast of the Horizontal Guidelines, the main non-binding guidance for companies to assess EU competition law compliance of their agreements or cooperation agreements. The new Horizontal Guidelines set out criteria according to which cooperation arrangements with competitors serving sustainability objectives ("sustainability cooperations") can be exempted from the prohibition of cartels in Art 101(1) TFEU.[2] DG COMP derived its understanding of sustainability from the United Nations' 2030 Agenda for Sustainable Development, to which all EU member states are committed.[3] The Agenda 2030 is built around 17 so-called sustainability development goals ("SDGs") which should be implemented by today's generations in order to ensure a qualitative life on our planet for future generations as well. The SDGs include aspects such as climate action, no poverty or responsible consumption and production.[4]

A similar approach has been taken by the Future Group Competition & Sustainability at German Heinrich Heine University Düsseldorf ("HHU") in its latest study.[5] In the study, sustainability is deliberately defined broadly, as the specific aim is to create a life that is more livable for people and nature and to decouple economic growth from the consumption of natural resources.

The term ESG is a broad umbrella term ESG covering constantly changing aspects of sustainability with generally fluid boundaries. Investors, consumers, and other stakeholders who pay attention to ESG issues when making decisions therefore want companies to, among other things, produce their products sustainably, offer workers fair wages and working conditions throughout the production and supply chain, and commit to climate neutrality.

At best, therefore, this interest leads to a general push towards business practices that promote ESG. However, as these are usually major challenges, companies may feel compelled to collaborate and share risks and financial burdens to achieve ESG goals more efficiently. But, even when “serving a good cause,” competition laws still apply.

03 WHY DOES COMPETITION LAW MATTER WHEN COMPANIES COMPLY WITH ESG REQUIREMENTS?

In this section we show how the relationship between competition law and ESG can lead to tensions (A), provide an overview on potential approaches to reconcile the some-

2 Draft Guidelines on the applicability of Art. 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, adopted by the EU Commission on 1 June 2023, but not yet officially published ("Draft Horizontal Guidelines"), paras. 515 et seq.

3 *Ibid*.

4 SDGs, https://sdgs.un.org/.

5 (in German) HHU-Zukunftsgruppe Competition & Sustainability, Wettbewerb und Nachhaltigkeit in Deutschland und der EU, Studie im Auftrag des Bundesministeriums für Wirtschaft und Klimaschutz, p. 1.

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times diverging interests (B) and summarize the current views taken by the EU Commission and selected national competition authorities in Europe (C).

A. ESG and Competition Law as a Field of Tension

By observing ESG criteria, companies are trying to meet the increasing demands placed on them by various stakeholders. At the same time, ESG efforts are usually costly and the competitive advantage they bring may neither be obvious nor pay our from the beginning.[6] In this context, companies will in many cases be tempted and in some cases even forced to enter into cooperations with competitors in order to avoid "first-mover risks" when observing and promoting ESG objectives. Competition law, by contrast, wants to promote the proper functioning of markets and strives to discourage any behavior that is detrimental to this goal. This can lead to a rather conflictful relationship.

> ***By observing ESG criteria, companies are trying to meet the increasing demands placed on them by various stakeholders***

Take, for example, production or purchasing agreements between competitors: While they can be certainly helpful in the context of ESG to gain a better overview of the supply chain and to better manage human rights or environmental risk and resources in the same, they can become problematic from a competition law perspective.[7] The same applies to certain vertical agreements, i.e. agreements between companies that do not compete with each other but operate at different levels of the supply chain. For example, companies may have an interest in having their customers set a higher resell price for their products vis-à-vis their customers in order to make a statement for the higher product quality resulting from increased supply chain standards or to guarantee the supplier a sufficient margin for its ESG efforts.[8] Notwithstanding the noble objectives, such agreements could constitute illicit resale price maintenance and would likely be considered a hardcore restriction under EU competition law, making it quite difficult to avoid competition law liability.

Another gateway for competition law violations is the exchange of strategic information that companies could undertake as part of an ESG collaboration.[9] The EU Commission and the national competition authorities in the EU generally take a strict stance against the exchange of competitively sensitive information being qualified as an illicit restriction of competition pursuant to Art. 101 (1) TFEU. This should be borne in mind when, with the European Green Deal and the general trend towards stricter supply chain legislation, such exchanges may become even more frequent in the future, given that several ESG aspects that are now largely a matter of voluntarily set targets will even become legally binding obligations.[10]

To give just two examples of how obligations implemented by EU ESG regulations could lead companies to engage in a range of actions and cooperations that could be problematic under competition law:

- It is conceivable that supply chain laws may encourage companies to exchange information horizontally about their choice of suppliers (see above), which could be regarded as a competition law violation depending on the type and scope of the information exchange.[11]

- Also within the context of remedial action in the event of a violation of human rights or environmental positions in the supply chain, competitors may find themselves in a situation where an exchange of strategic information horizontally may actually facilitate compliance with supply chain due diligence laws.[12]

6 As an example, one can think of a cooperation between competitors in the meat production industry, where chicken from sustainable, animal welfare-oriented husbandry is produced and sold at double the price of chicken from non-sustainable husbandry.

7 See Horizontal Guidelines 2011, paras 157, 158, paras. 201 et seqq.

8 Ritz & von Schreitter: Chain(ed) Reaction? Das Lieferkettengesetz und seine kartellrechtlichen Hürden, NZKart 2022, 251, p. 254.

9 Regarding information exchange, see Horizontal Guidelines 2011, paras. 86 et seqq.

10 The German Supply Chain Due Diligence Act (in German: "Lieferkettensorgfaltspflichtengesetz" or "LkSG"), which came into force on January 1, 2023, and the draft EU's Corporate Sustainability Due Diligence Directive ("CSDDD") are perfect examples of current supply chain legislation.

11 More details on competitive challenges in horizontal relationships in the context of the implementation of the German LkSG: (in German) Ritz von Schreitter: Chain(ed) Reaction? Das Lieferkettengesetz und seine kartellrechtlichen Hürden, NZKart 2022, 251, p. 255 et seqq.

12 See (in German), Denzel & Hertfelder, in Wagner, Ruttloff & Wagner, Das Lieferkettensorgfaltspflichtengesetz in der Unternehmenspraxis, § 7, para. 1158.

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Another – more recent – challenge arises from the fact that the use of technology plays an increasingly important role in achieving both ESG goals and ESG compliance and most importantly reporting on ESG targets. Just to provide two examples:

- When a company wants to assess its environmental footprint, measure its social impact, or monitor its governance practices, it will almost certainly rely on technical solutions such as specialized software, business applications or other tools. To this end, these solutions are constantly supplied with data, which is then processed and analyzed to monitor compliance with set or legally binding targets. For example, a manufacturer who wants to assess its environmental footprint needs data on CO2 emissions to determine the total emissions caused by the production of its product. Perhaps the supplier also wants to contribute to a better circular economy and therefore needs additional information about the (raw) materials used in a product in order to pass this information on to the recycler at a later stage. Clearly, all this data needs to be collected, processed, and shared at some point between the manufacturer and other companies that are part of its supply chain. However, to ensure full compliance with competition law, it is crucial that clear and transparent competition law safeguards are in place that accompany such (automated) exchanges to avoid any illicit exchange of competitively sensitive information between competitors.

- The need to share information to achieve ESG goals and comply with ESG regulations requires continuous technological advancements. Currently, the problem in various industries is that companies within a certain supply chain are hesitant to share data because they fear repercussions such as data leaks, lock-in effects, or lack of data control. Commonly used proprietary technological solutions have so far failed to provide them with the comfort they need, leading to a trend towards increased co-development of open source and/or standardized solutions in certain industries to help overcome the hurdles that currently exist. In terms of competition law compliance, it is important to understand that such collaborations raise complex competition law compliance questions and should therefore be closely guided from the beginning.

As these examples show, competition law does not (yet) provide a broad scope exception for agreements that aim at increasing or contributing to ESG in general or sustainability in particular. Companies must therefore pay attention to competition law compliance to ensure that the partially diverging interests of ESG and competition law can be reconciled. How this might be tackled will be shown in the following.

As these examples show, competition law does not (yet) provide a broad scope exception for agreements that aim at increasing or contributing to ESG in general or sustainability in particular

B. ESG and Competition Law as a Symbiosis

There are many – in parts only rather theoretical - suggestions for how ESG could be given more consideration in competition practice. Some of them are presented in the following:

- One approach could be a far-reaching competition law exemption for ESG collaborations. An example of such an approach is Art. 210a CMO, which was introduced in 2021. According to Art. 210a CMO, farmers are exempted from the prohibition of cartels under Art. 101 (1) TFEU if their concerted practices are aimed at ensuring a higher standard of sustainability than required by Union law. Art. 210a (3) CMO mentions, among others, environmental protection, and animal welfare as sustainable objectives. However, this is a sector-specific exception that is justified by the particularities of the agricultural industry, such as the politically intended strengthening of the negotiating position of food producers.[13] Therefore, this exception does not apply to ESG collaborations in general and there is also no equivalent for other sectors. Nevertheless, Art. 210a CMO clearly represents a step towards a greater importance of ESG in competition law.

- A different approach is taken by DG COMP in its now adopted new Horizontal Guidelines, which represents a rather cautious advance with regard to the promotion of sustainability agreements under competition law. The new Horizontal Guidelines emphasize that such agreements do not fall under a block

13 Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021, recital 62.

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exemption, but can at most be exempted under Art. 101 (3) TFEU[14] if specific requirements are met.[15] To this end, the Horizontal Guidelines mention possible efficiency gains and the requirements for their proof[16] and refer to direct benefits consumers could derive from sustainability agreements.[17] However, these new Horizontal Guidelines are controversial because they call for the competitive harm to be fully compensated by the efficiency gains for consumers and refuses to take into account out-of-market efficiencies, i.e. efficiencies that arise for consumers outside the relevant market.[18]

- A completely different, more progressive approach is the so-called "sustainable competition" approach. It is based on the understanding that only sustainable competition is competition in the sense of the law.[19] Under this approach, competition that is harmful to the climate (and therefore not sustainable) could henceforth constitute an abusive behavior, as ecological considerations would have to be included in the supervision and assessment of abusive behavior by competition authorities. Although interesting and progressive, this approach is an idea that is not yet fully developed and is therefore of little relevance to practitioners (as of now).

> *A completely different, more progressive approach is the so-called "sustainable competition" approach*

Overall, there are already some interesting approaches and many ideas on how to integrate ESG and sustainability issues more strongly into competition law and, at least in Europe, there is a chance we will see regulatory efforts to move further into such direction. To date, however, these approaches have not yet been reflected in concrete decision practice too much. It thus remains to be seen to what extent legislators, competition authorities, and courts will take further steps in this area.

04

HOW DO COMPETITION AUTHORITIES VIEW ESG?

Having looked at current developments of ESG in competition legislation, we will turn now to the question of how competition authorities in the EU stand on the issue of ESG. Overall, competition authorities in Europe are generally open to supporting ESG cooperation but have a keen eye on the competitive effects of any such cooperation – in particular its effect on innovation and prices. Among others, the Dutch competition authority ACM in particular has taken a progressive approach in the past.[20]

- In the *SER Energieakkord* case from 2013,[21] the Dutch ACM declared the closure of five coal-fired power plants illegal under competition law, finding that the relevant agreement was not exempt from the ban on cartels. In this context, the ACM recognized lower pollutant and greenhouse gas emissions as efficiency benefits. However, in the opinion of the ACM these advantages did not outweigh the disadvantages for Dutch consumers in

14 Draft Horizontal Guidelines, para. 522.

15 Draft Horizontal Guidelines, paras. 556 et seq.

16 Draft Horizontal Guidelines, paras. 557 et seq.

17 Draft Horizontal Guidelines, paras. 571 et seq.

18 See Draft Horizontal Guidelines, paras. 569 et seq. and especially the example given in para. 585; For classification cf. HHU-Zukunftsgruppe Competition & Sustainability, *op. cit.*, p. 104 et seq. For an overview see Gassler, Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go, Journal of European Competition Law & Practice, pp. 430, 438 et seqq.; Regarding a "greener" Art. 101(3) TFEU, see Monti, Four Options for a Greener Competition Law, Journal of European Competition Law & Practice, 2020, pp. 124, 128 et seq.

19 Cf. HHU-Zukunftsgruppe Competition & Sustainability, op. cit. (footnote 4), p. 42 et seq.

20 See ACM Guidelines on Sustainability Agreements - https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination.

21 See (in Dutch) https://www.acm.nl/nl/publicaties/publicatie/12032/Afspraak-sluiting-kolencentrales-is-nadelig-voor-consument.

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the relevant case, which is why the agreement was declared inadmissible. From a competition law perspective, the consideration of lower emissions as an efficiency advantage remains interesting as it highlights the recognition of ESG goals as efficiency advantages.

- In the *Chicken of Tomorrow* case,[22] the ACM in 2014 quantified the increased animal welfare of chickens resulting from species-friendly husbandry, thus considering animal welfare as a potential efficiency gain from a sustainability initiative between competitors. The logic of the ACM in the case reads as follows: If animal welfare and the environment represent a concrete quantifiable value for consumers, then this is a benefit that consumers also derive directly in the relevant market, so that there may be an efficiency gain under competition law.

In Austria, too, ESG has already found its way into competition law. The Austrian Competition Act ("KartG"), now explicitly provides in Sec. 2 (1) that sustainability aspects are considered as a possibility to exempt collaborations from the prohibition in Sec. 1 KartG. In this context, the Austrian Competition Authority also published guidelines on the application of the Austrian ban on cartels to sustainability cooperations.[23]

At EU level, DG COMP has also taken sustainability considerations into account in various cases in the past such as in *CECED* or *Philips/Osram*.[24] Although sustainability aspects were usually not the key aspects in these cases, this practice shows that DG COMP is also willing to take sustainability considerations into account when applying Art. 101 (3) TFEU.

Further examples come from the Hellenic Competition Commission ("HCC") which seems also open to the topic of sustainability cooperations. After publishing a Draft Staff Discussion Paper on the topic of competition and sustainability in 2020,[25] it launched its own sandbox for sustainability and competition in 2022,[26] which is intended to promote innovative business models and clarify competition law issues at an early stage.

Looking at these cases, there is a certain tendency for competition authorities in Europe to be more open to the issues of sustainability and ESG. However, it remains to be seen how this trend continues and to what extent this trend will be reflected in further concrete decision-making practice.

At EU level, DG COMP has also taken sustainability considerations into account in various cases in the past such as in CECED or Philips/Osram

22 See *Chicken of Tomorrow,* Reference: ACM/DM/2014/206028, p. 5 et seq.

23 See (in German), https://www.bwb.gv.at/fileadmin/user_upload/Leitlinien_zur_Anwendung_von____2_Abs_1_KartG_auf_Nachhaltigkeitskooperationen__Nachhaltigkeits-LL__final.pdf.

24 See for brief description of the relevant cases, HHU-Zukunftsgruppe Competition & Sustainability, op. cit. (footnote 4), p. 94 et seq.

25 See https://epant.gr/files/2020/Staff_Discussion_paper.pdf.

26 See https://www.epant.gr/en/enimerosi/press-releases/item/2226-press-release-creation-of-the-sandbox-for-sustainable-development-and-competition.html.

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05

OUTLOOK AND PRACTICAL COMPETITION LAW IMPLICATIONS

ESG is steadily gaining economic as well as strategic relevance. Companies are being forced to focus on ESG both by increasing demand for sustainable products and services and by legislators, which inevitably raises the question of ESG triggered agreements and cooperations between competitors. In the absence of a clear legal competition law exemption, such cooperations cannot be generally approved, but require an in-depth assessment under EU competition law. However, current developments show that competition authorities across the EU are generally inclined to give more weight to the issue of ESG in the competition law context. Looking at these developments, the following initial key questions should form part of any self-assessment under EU competition law that companies need to conduct when dealing with ESG agreements among competitors: Does the cooperation really promote specific ESG goals? Does the cooperation restrict competition, in particular with regard to key parameters of competition, such as prices, costs, margins? Can the cooperation be exempted from the ban of anti-competitive agreements?

Answering these questions may not always be straight forward; however, the result of such competition law assessment will certainly be crucial for the overall risk assessment of entering into such agreements with competitors. Companies should be aware of these challenges in the dynamic field of ESG collaborations and may even consider reaching out to the EU Commission or the respective national competition authority for – at least – informal guidance, e.g. in the form of a "Comfort Letter" from DG COMP. After all, it will be key for companies to ensure their antitrust compliance systems are updated with regard to these issues to ensure their employees and management are aware and sensitive to ESG and its antitrust compliance implications. Only with an effective antitrust compliance, companies will ensure collaboration for a better planet will not end up in cartel proceedings before competition law enforcement authorities.

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CORPORATE SUSTAINABILITY REPORTING: **A REAL GREEN DEAL**

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In recent years, there has been an increased focus on sustainable and responsible investing, which has led to the emergence of the ESG (Environmental, Social, and Governance) regulatory framework in the European Union ("EU"). This framework is intended to guide companies and investors in their decision-making processes to take into account environmental and social factors, as well as governance considerations, when making investments and conducting business operations.

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01

CORPORATE REPORTING: A PIECE OF THE PUZZLE

The Green Deal[2] – the EU's comprehensive plan to make the Union's economy sustainable and climate-neutral by 2050 – sets out a number of initiatives to address climate change and environmental sustainability, including reducing greenhouse gas emissions, increasing the use of renewable energy, promoting sustainable food systems, and protecting biodiversity.

The central piece in this comprehensive framework is the EU Taxonomy Regulation,[3] providing a classification system for environmentally sustainable economic activities. By setting out criteria to identify activities that contribute to climate change mitigation, adaptation, and other environmental objectives, the EU Taxonomy establishes a common language that helps all stakeholders identify the economic endeavors which are consistent with the EU's sustainability goals.

Recognizing the crucial role of finance in driving sustainability by influencing investment decisions, corporate behavior and the allocation of resources towards sustainable activities, the EU triggered the cascade of legislation underpinning the European Green Deal by approving the Sustainable Finance Disclosure Regulation[4] ("SFDR"). It came into effect in March 2021, establishing the rules on transparency and disclosure requirements for financial market participants and financial advisers with regard to the integration of sustainability risks and factors in their investment decisions and financial products. This was the first piece of legislation to be enacted, setting the context for the legal frameworks following suit, some of which are still to come.

Another pillar of this framework is the Corporate Sustainability Reporting Directive[5] ("CSRD"), published just as 2022 was coming to an end. The CSRD's aim is to establish a comprehensive EU sustainability reporting framework, setting out new disclosure requirements for companies to report on ESG factors and non-financial information. Its objective is to increase transparency and accountability in corporate reporting on sustainability issues, which is critical to achieving the goals of transitioning to a more sustainable and resilient economy. Companies operating in the EU – including, as of 2028, foreign corporations with a turnover surpassing 150 million Euro (around 165 million USD) – will have to report on their sustainability performance in line with the EU taxonomy, making it easier for investors to identify sustainable investments and companies that are aligned with the EU's sustainability objectives.

Companies will have to report according to the European Sustainability Reporting Standards[6] ("ESRS"), which are being developed by the European Financial Reporting Advisory Group ("EFRAG"), in response to the European Commission's mandate for the development of a comprehensive set of sustainability reporting standards for companies operating in the EU.

Another pillar of this framework is the Corporate Sustainability Reporting Directive ("CSRD"), published just as 2022 was coming to an end

The ESRS aim to provide a standardized reporting framework for environmental, social, and governance information that is comparable, consistent, and reliable. The standards are expected to cover a wide range of issues, including climate change, resource depletion, social inequality, and human rights.

Following a public consultation, the EFRAG submitted the draft of its first set of cross-cutting ESRS standards (sector agnostic) to the European Commission for endorsement and subsequent adoption and implementation across the EU. The European Commission has reviewed the EFRAG's proposal and submitted to public consultation (open until July 7) a draft delegated regulation which will approve the standards (expected mid-2023). The timeline for the EFRAG to present a second set of standards (sector specific and initially expected for the first semester 2024) has recently been postponed by one year, as the European Commis-

2 A European Green Deal (europa.eu).

3 EUR-Lex - 32020R0852 - EN - EUR-Lex (europa.eu).

4 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R2088.

5 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464.

6 First Set of draft ESRS – EFRAG.

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sion requested the EFRAG to focus attention on providing additional guidance for companies to apply the first set of horizontal standards[7].

The development of the ESRS standards is being guided by a technical expert group as well as a stakeholder group which includes representatives from business, civil society, investors, and academia. This is an important aspect of the development process, aimed at ensuring that the standards reflect the needs and expectations of a diverse range of parties.

Once adopted, the ESRS standards are expected to have a significant impact on corporate reporting practices across the EU. Investors and other stakeholders will gain access to new data with greater transparency and comparability regarding a company's sustainability performance and this, in turn, will encourage companies to take a more proactive approach in this front.

02
REPORTING & TECHNOLOGY

Following its approach with the EU Taxonomy Regulation and the EU Taxonomy Navigator – a simple and practical guide for users of the EU Taxonomy Regulation[8] – the European Commission acknowledges that technology plays an increasingly major role in getting consumers, end users and, ultimately, all company key stakeholders in the civil society to actually understand and be able to differentiate one company´s sustainability performance from another's.

One of the key requirements of the CSRD is that companies must provide their sustainability information in a machine-readable format that can easily be processed by computers, including artificial intelligence ("AI"). To achieve this, the CSRD requires companies to provide their sustainability information in XHTML format – a markup language that is similar to HTML but follows stricter rules and is designed to be machine-readable.

In addition, companies are required to use the European Single Electronic Format ("ESEF") to publish their financial statements in XHTML format. The ESEF is a standard format that was introduced by the European Securities and Markets Authority ("ESMA") to make financial reporting more transparent and accessible. This ensures that the information can be easily integrated and analyzed together with the financial information, in line with the CSRD's requirement that both financial and sustainability data are to be conveyed under a single annual report.

Finally, the CSRD requires that sustainability information must be incorporated into the European Single Access Point[9] ("ESAP") – an online portal that provides easy access to regulatory information from across the EU, thus making it possible for investors, analysts, and other stakeholders to assess it using AI or other tools.

03
DOUBLE MATERIALITY

Based on the premise that companies must be evaluated on a dynamic basis, addressing the overall outbound and inbound effects of their activity, the CSRD follows a double materiality assessment approach, by providing a framework that holistically evaluates the financial and non-financial impacts that external sustainability factors have on the company's performance (internal or financial materiality), and how the company's operations have an environmental and social impact on the external world (external or impact materiality).

By incorporating the concept of sustainable development that underpins the materiality assessment – based ultimately on the United Nations 2030 Agenda and its Sustainable Development Goals –, companies will be better equipped to understand and manage the impact of their activities on the environment and society and vice versa. The intention is ultimately to incentivize companies to create a robust and effective corporate strategy that incorporates ESG factors and balances the interests of all their stakeholders, including shareholders, employees, customers and clients, suppliers, and the broader society. Such a strategy will be paramount for a company to survive and thrive in the long run.
It is worth noting that the International Sustainability Standards Board ("ISSB") – a standard-setting organization formed under the International Financial Reporting Standards ("IFRS") Foundation in 2021 – aims to develop a comprehensive set of reporting standards to be used globally as a common framework for measuring and disclosing ESG

7 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13765-European-sustainability-reporting-standards-first-set_en.

8 EU Taxonomy Navigator (europa.eu).

9 Carriages preview | Legislative Train Schedule (europa.eu).

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information. The ISSB's approach to materiality focuses essentially on a unidirectional outside-in assessment of the potential impacts of sustainability issues on a company's operations and financial performance and their significance considering the company's specific circumstances (e.g., size, sector, geography).

04

CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE (CSDDD): ANOTHER PIECE OF THE PUZZLE IN THE MAKING

When looking at key regulatory developments that took place in the first quarter of 2023 and are expected later in 2023, due diligence is undeniably one of them. Corporate due diligence is definitely not a new legal concept, however, having to apply it to the specific context of environment and human rights issues and across businesses´ value chain will certainly represent a paradigm shift, that will require companies trading in the EU to rise up to the challenge if they want to ensure risk mitigation, regulatory compliance, and, overall, reinforcement of their social license to operate.

About the social license to operate requiring companies to step up and help fix the climate change issue there is also no way in denying that, today, that is not enough and for companies to claim that license they need also to address, what some call, the social impact imperative – i.e., the need to underpin social issues such as human rights, equality, safe working conditions and a living wage and to actively engage with their full supply chains in these issues.

This is what the Corporate Sustainability Due Diligence Directive[10] ("CSDDD") is all about and this is why it will be such a game changer for companies and the bad (good) news is that all of them – big and small – will be affected by this new piece of legislation, no one will be left behind. Although scope of application is still being discussed as this article is being written, in its proposal, the European Commission suggested that companies with 500+ employees on average and a net turnover greater than 150 million Euro in the last financial year, as well as companies with 250+ employees on average and a net turnover greater than 40 million Euro in the last financial year, if at least 50 percent of this turnover is connected with one or more of the listed high impacts sectors,[11] be directly subject to the obligations of the directive. However, for these companies to comply with the abovementioned obligations they will need small and medium enterprises in their value chain to do so too and this is why this piece of legislation has such a huge potential of affecting the economy as a whole. Finally, it´s worth mentioning that the Directive will also apply to non-European Union companies if they fulfill the abovementioned turnover thresholds, when they are generated in the EU. In itself this rule has the potential to create a level-playing field for all companies doing business in the EU, regardless of the fact that they are incorporated there or in a third-party country.

> *When looking at key regulatory developments that took place in the first quarter of 2023 and are expected later in 2023, due diligence is undeniably one of them*

After the favorable vote from the European Parliament on June 1, trialogue discussions between the Parliament, the European Council and the European Commission are expected to begin in the coming weeks and a final approval is expected by the end of 2023 or early 2024. As soon as this piece of legislation is approved and transposed into the member states (in the following couple of years), companies directly covered by these obligations will be expected to:

- Integrate due diligence into their policies, with an updated due diligence policy that is published annually where they: (i) describe the company's approach in the long term, (ii) have in place a code of conduct describing the rules and principles that the company's employees and subsidiaries must follow, and (iii) describe the processes put in place to implement due diligence;
- Identify actual and potential adverse impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships;

10 Corporate sustainability due diligence (europa.eu).

11 In its original proposal, the following were listed as High Impact Sectors: Manufacture of textiles, leather and related products (including footwear), and wholesale trade of textiles, clothing and footwear.

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· Prevent and minimize potential adverse impacts, and ending actual adverse impacts, as well as mitigating their extent in accordance with the Directive;
· Establish and maintain a complaints procedure for (i) the ones who have been affected or have reasonable ground to believe they might be affected by an adverse impact, (ii) trade unions and other workers' representatives of individuals working in the value chain concerned, and (iii) civil society organizations active in the areas related with that value chain;
· Monitor the effectiveness of their due diligence policy and measures, by carrying out periodic assessments; and
· Publicly communicate the due diligence results.

In addition, companies with 500+ employees on average and a net turnover greater than 150 million Euro in the last financial year, will also need to have a plan to ensure that their business strategy contributes towards limiting global warming to 1.5°C, in line with the Paris Agreement.

Moreover, among its obligations the Directive also requires that company directors take into account the interests of those affected by the company's decisions as part of a broader, integrated commitment to long- and short-term sustainability strategies.

Unlike the case with the SFDR and the CSRD, the CSDDD will actually force companies to do more than just report on what they do that has an impact on Human Rights and the Environment and require them to actually make some changes to their *governance* models and internal processes to ensure that businesses are not thriving at the cost of human beings´ rights and lives, and of the environment, namely, in their operations and value chains. For companies this also means that these topics are slowly but surely moving out from the voluntary and best practices (efforts) field and becoming a whole new set of obligations in the compliance arena.

Until then companies that wish to remain ahead of the game, and that start now and start smart by tackling these challenges and identifying their salient risks according to their business context will surely see rewards in the long term by gaining a competitive advantage over their competitors, before this approach effectively becomes a new whole set of corporate obligations.

05

EU TAXONOMY, CSRD AND CSDDD: CONNECTING THE DOTS OF THE PUZZLE-PIECES...

Despite its differences and although at first sight it might not seem so, the EU Taxonomy Regulation, the CSRD and the CSDDD are, nevertheless, closely related and, above all, very coherent pieces of legislation, with the central piece of the puzzle being the Human Rights Due Diligence ("HRDD") process.

The Final Draft Report on the requirement of Minimum Safeguards ("MS") of the EU Taxonomy regulation, by the Sustainable Finance Platform,[12] recommends that (i) failure to implement adequate Human Rights Due Diligence Processes, and (ii) lack of proper implementation of due diligence processes resulting in human rights violations to be considered as the relevant criteria to assess (non) compliance with the MS. Let´s not forget that a company considered as non-compliant with the MS, rules out the possibility of any of the economic activities it carries being considered as "environmentally sustainable" under the EU Taxonomy Regulation.

The CSRD reporting requirements will make companies identify and report on their ESG risks and opportunities, which, in turn, will inform their due diligence efforts. Conversely, the due diligence process required by the CSDDD can help companies identify areas for improvement in their ESG performance, which will make it possible to report more satisfactorily on their ESG performance, which, in turn, will facilitate access to ESG ratings, labels, sustainable financing and related advantages.

12 Final Report on Minimum Safeguards (europa.eu).

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06

SOME OF THE PUZZLE-PIECES STILL TO COME...

At this point it becomes clear how the ESG regulatory framework in the EU is still a puzzle in the making, a complex and evolving landscape with many moving frameworks that work together to promote corporate transparency and sustainability. Companies should take a holistic approach to this framework to effectively manage their ESG risks and make the best of its opportunities.

Many claim social concerns are now as unescapable to tackle by companies in their day-to-day business as environmental concerns have been for a while now. In the EU regulation landscape, the Final Report on Social Taxonomy,[13] by the Platform of Sustainable Finance, suggests that companies could have to face in the upcoming years a whole new/ different EU Taxonomy Regulation, that complements and further extends the goals of the existing one.

A social taxonomy would represent a change of course for sustainable finance in Europe as it would bring a classification of economic activities that significantly contribute to social goals and provide for a common code for investors, businesses and regulators regarding what is sustainable from a social perspective and what is not, rewarding those activities.

Another very interesting and up-to-date topic that should be followed up closely by companies, particularly from the financial sector, is the one concerning EU labels for benchmarks (climate, ESG) and benchmarks' ESG disclosures[14], as well as credit rating agencies regulation[15] - which feels increasingly more and more necessary in order to combat greenwashing risks.

On this topic it is worth mentioning that unlike the case in the UK and the U.S., the EU does not (yet) have a labelling regime, since the SFDR was designed not as a labelling regime but as a disclosure regime, to assist the market in identifying products that have environmental and social characteristics or have sustainable investment as an objective. However, the market has been using the SFDR more as a labelling regime than as a disclosure which has been contributing to some legal uncertainty and finally resulted on the publication of a public consultation, on November 18, 2022 by ESMA on "Guidelines on Funds' Names Using ESG or Sustainability-related Terms"[16] adding rules on the use of fund names that are related to ESG or sustainability to the SFDR framework ("Guidelines"). According to the Guidelines only if there is material evidence that they meet the sustainability characteristics and investment objectives described in the fund documentation based on quantitative thresholds could the funds be permitted to have ESG and sustainability related names. The consultation closed on February 20, 2023 and ESMA plans to release final guidelines by Q2/Q3 2023.

> ***Many claim social concerns are now as unescapable to tackle by companies in their day-to-day business as environmental concerns have been for a while now***

13 Platform on Sustainable Finance's report on social taxonomy (europa.eu).

14 EU labels for benchmarks (climate, ESG) and benchmarks' ESG disclosures (europa.eu).

15 finance-2022-esg-ratings (europa.eu).

16 https://www.esma.europa.eu/press-news/consultations/consultation-guidelines-funds%E2%80%99-names-using-esg-or-sustainability-related.

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All the above leads us to conclude that the future EU sustainability-related regulatory landscape is still unclear in many aspects but the need for companies to start working on a strong ESG due diligence process that is adequate to their business context and enshrined in a strong governance model, seems to be one of the clear key learnings so far, to surf the EU regulatory tsunami successfully and ensure long term value creation for all stakeholders involved.

But then again… as someone once said: "There is no need to change, survival is not mandatory." [17]

> *There is no need to change, survival is not mandatory*

17 William Edwards Deming (1900-1993), widely acknowledged as the leading management thinker in the field of quality. He was a statistician and business consultant whose methods helped hasten Japan's recovery after the Second World War and beyond.

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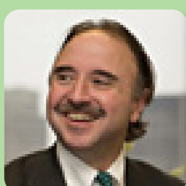
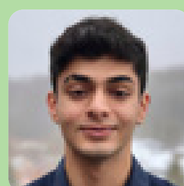
IMPLICATIONS OF THE OUTPERFORMANCE **OF ACTIVE SUSTAINABLE INVESTING**



BY CARY KROSINSKY



& SAHIL MULJI

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01 INTRODUCTION

Although many U.S. states such as Florida[2] and Texas[3] have been recently passing legislation preventing their pension systems from considering environmental, social, and corporate governance ("ESG") factors, active sus-

2 https://www.wfla.com/news/politics/desantis-senate-house-leaders-to-speak-in-naples/.

3 https://www.bloomberg.com/news/articles/2023-03-03/texas-anti-esg-bill-targets-public-pensions-insurers.

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tainable investors have been financially outperforming over the long term, earning higher returns for their clients while managing tens of billions more dollars on the back of such financial success.

Other states such as Indiana,[4] Kentucky,[5] and North Dakota[6] considered similar legislation, but are understandably passing on adopting new "anti-ESG" rules out of concern that such laws could reduce the financial returns experienced by beneficiaries.

Florida, however, has persisted,[7] even though evidence suggests such "anti-ESG"/"anti-woke" rules are likely to negatively impact financial returns.

To further illustrate this point of pension funds potentially experiencing lower financial returns due to "anti-ESG" legislation, the Sustainable Finance Institute endeavored to look at how sustainability-focused funds have been performing for their beneficiary clients.

The study focused on active sustainable investors, who aim to maximize financial returns for their clients while prioritizing sustainability. For our analysis we selected active fund managers with over $10 billion in assets under management, more than 10 years of operation, and accessibility to U.S. investors.

We found 10 such funds as listed below and analyzed their returns against their chosen benchmarks up through December 31, 2022 (Figure 1).

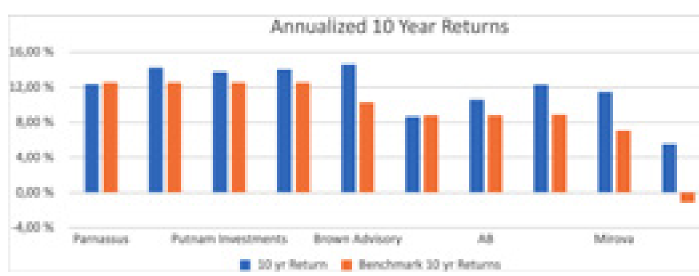
Selected Funds		Annualized Returns		
Fund Manager	**Fund Name**	**3 yr Return**	**5 yr Return**	**10 yr Return**
Generation Investment Management	Generation Core Equity	2.48%	6.91%	12.38%
Parnassus	Parnassus Core Equity Fund	7.95%	10.41%	12.39%
Calvert Research and Management	Calvert Equity Fund I	9.99%	13.92%	14.26%
Putnam Investments	Putnam Sustainable Leaders Fund	7.31%	10.87%	13.75%
Saturna Capital	Amana Growth Fund	12.09%	13.92%	14.02%
Brown Advisory	Brown Advisory Large-Cap Sustainable Growth	7.92%	12.28%	14.61%
Mirova	Mirova Global Sustainable Equity Fund	7.34%	11.89%	11.53%*
Impax	Impax Global Environmental Markets Fund	5.85%	5.35%	8.67%
Stewart Investors	Global Emerging Markets Sustainability Fund	2.12%	3.19%	5.57%
AB	AB Sustainable Global Thematic	7.74%	7.97%	10.64%
*Mirova Global Sustainable Equity Fund has been operating for 9.5 years. 10-year returns therefore show annualized returns since inception				

Figure 1: The 3-, 5-, and 10- year performance of active sustainable investing in the U.S.

Source: Sustainable Finance Institute

Looking at 10-year annualized returns, eight of the ten funds outperformed their benchmark by a margin of 100 bp or more. Four of the eight funds, the largest sustainable funds managed by Generation Investment Management, Stewart Investors, Brown Advisory, and Mirova, beat their benchmark by more than 3 percent. On average, sustainability-focused funds earned 2.48 percent more than then their benchmark. Only two funds barely underperformed, yielding returns within 30 bp of the benchmark. Over 10 years, none of the funds significantly underperformed demonstrating some of the benefits and resilience of ESG-focused investing.

Figure 2: The 10-year returns of active sustainable funds in the U.S. vs. benchmark



Source: Sustainable Finance Institute

4 https://www.wfyi.org/news/articles/anti-esg-bill-passes-indiana-house-with-fewer-losses-expected-for-state-pensioners.

5 https://www.natlawreview.com/article/conflict-kentucky-over-esg-investing.

6 https://www.pionline.com/esg/north-dakota-house-rejects-bill-create-esg-boycott-list.

7 https://www.orlandosentinel.com/politics/os-ne-florida-bill-banning-esg-20230301-pz6bcdcxyvf5lny6qg5g6qeocy-story.html.

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Following the worst of the COVID pandemic and related supply chain constraints, and amid heightened geopolitical tensions, 2022 was a year of turmoil for most investors. The S&P 500 fell 18 percent making it the worst year for markets since 2008. This shock hit fund managers across most global markets including sustainability-focused investors. 8 out of 10 funds underperformed relative to their benchmark.

While 2022 may have been a bad year, in both 2020 and 2021 the investors in our study consistently beat benchmarks. For example, eight of these ten funds in 2021 beat their benchmarks with an average of 3.17 percent higher return across all funds analyzed.

Figure 3: 2021 Returns

Source: Sustainable Finance Institute

Looking at these funds' performance through different time periods helps frame how these funds can benefit pension fund beneficiaries and other long term focused investors.

Active sustainable investors seek to protect investors from risks incurred by badly run companies (e.g. recent governance scandals tend to wipe out 50 percent of shareholder value) while seizing the many opportunities emerging from ongoing innovation as well as potential shifts in consumer preference and in the global economy. We endeavored to study such funds, and found financial outperformance against benchmark after fees over the long term.

This outperformance for active sustainable investing has been seen as well over longer time periods. Going back to 2008, in our first book on the subject, *Sustainable Investing: The Art of Long Term Performance*, we looked at all of the 850 funds then publicly available globally using sustainability as a primary consideration and found outperformance over 1-, 3- and 5- years for funds similarly taking a positive approach.[8] In 2013, our Value Driver Model study for the Global Compact and PRI[9] found significant outperformance for the previous 3 years for companies transforming towards sustainability in terms of increased market share from evolving towards offering more sustainable products and services, better risk management and increased productivity from energy efficiency savings and human capital optimization strategies. In 2018, a Brown University study found comprehensive outperformance for active sustainable investing in the U.S. as opposed to passive approaches which did not outperform, more on this just below.

And so our studies have demonstrated over 3-, 5-, 10-, and 20- years that active sustainable investing outperforms financially more often than not, at a time when most active managers underperform their benchmarks after fees. This fully then refutes arguments that "ESG" leads to lower financial returns, and makes active sustainable investing the strategy of choice for investors, making this a key opportunity for all active fund managers to consider to drive maximized financial performance while helping achieve societal improvement.

02

USE OF ESG CONSIDERATIONS BY FUNDS IS UNLIKELY TO BREACH FIDUCIARY DUTIES

With this outperformance in mind, there is little evidence to suggest that any use of ESG considerations in a fund's primary, active investment strategy is a breach of fiduciary duty.

Opponents of these practice argues that including ESG factors in investment decision making is a violation of fiduciary duty, arguing that investment decisions should be made solely on a company's potential returns rather than including extraneous factors. This argument hangs on the fact that including ESG factors will result in lower returns. In reality, ESG considerations can lead to improved financial performance.

Other evidence of such improved financial outcomes includes at NYU Stern's Center for Sustainable Business which hosts a freely accessible body of academic case

8 https://www.routledge.com/Sustainable-Investing-The-Art-of-Long-Term-Performance/Krosinsky-Robins/p/book/9781844075485.

9 https://unglobalcompact.org/take-action/action/value-driver-model.

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studies[10] of corporate strategies which specifically lead to better financial returns while also improving environmental and social impacts. It is hard to see how any interpretation of fiduciary duty can be forced to ignore improving societal outcomes when there is clear evidence of better financial performance over time when pursuing such specific strategies.

To illustrate, let's consider the Brown Advisory Sustainable Growth Fund, which aims to invest in a concentrated portfolio of companies with internal sustainability strategies that generate tangible business benefits, such as revenue growth, cost improvement, or enhanced franchise value. The fund looks for companies whose products have a competitive advantage due to sustainability drivers, such as resource-efficient design or manufacturing, and that offer solutions to long-term sustainability challenges.[11]

Over the last ten years, the Brown Advisory Large Cap Sustainable Growth Strategy has generated an average annual return of 15 percent. At the same time, they seek to generate positive outcomes ranging from emission reductions to improved health outcomes.

Further, fund managers who perform shareholder engagement with public companies, such as say Norfolk Southern, are looking to help avoid the sort of disasters that have affected so many lives in small towns such as East Palestine, Ohio.

> ***Other evidence of such improved financial outcomes includes at NYU Stern's Center for Sustainable Business which hosts a freely accessible body of academic case studies of corporate strategies which specifically lead to better financial returns while also improving environmental and social impacts***

Shareholder engagement is an important check and balance on the financial system which ensures corporations hear from leading investors to ensure their practices meet a minimum acceptable standard of safety for communities and employees alike, especially when governments at times remove safety protocols which can lead to less safe conditions for the average American family.

This ties to how companies are governed, when left on their own volition, can result in situations seen recently at companies such as Boeing or Southwest Airlines, who saw dramatic share price declines due to safety concerns or a lack of minimum operational competence, while trying to be too efficient on behalf of maximizing returns for shareholders.

Investors focused on governance can help establish minimum standards on how companies perform, which can preserve shareholder value for investors. Without such checks in balances in place, and with ongoing pressure on removing regulations in the U.S., more disasters like train derailments and other incidents creating significant pollution could damage more communities, lowering property value and affecting lives and families.

Governance is also essential when it comes to non-U.S. investment. Asia is already half of the global economy by many measures. Would you ever really want to consider trusting your money to invest in a developing economy's public companies without knowing how those companies are being governed? Without consideration of corporate governance, such investments would be a clear breach of fiduciary duty. Are "anti-ESG" bills being put forward in states such as Florida and Texas suggesting that their pension funds should ignore Asia altogether? Fiduciary duty would seem to require consideration of global market opportunities and whether you can trust and therefore whether your money is being invested in well run companies or not in the process, making it hard to understand how "anti-ESG" legislation can be allowed to stand up under reasonable scrutiny, regardless of the outperformance evidence seen in the managers analyzed above.

As a result of the outperformance being seen over time, and the possibility of "anti-ESG" legislation accelerating or getting stronger, this also creates concerns about U.S. competitiveness, not only for the states in question, but for the U.S. more generally. If not leading on issues such as climate change, the EU has made clear that they intend on establishing tariffs such as those in the Carbon Border Adjustment Mechanism of December 2022.[12] Such tariffs if

10 https://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/center-sustainable-business/research/return-sustainability-investment-rosi.

11 https://www.brownadvisory.com/mf/funds/sustainable-growth-fund.

12 https://www.euronews.com/2022/12/13/eu-agrees-a-carbon-tariff-at-borders-for-polluting-industrial-imports#:~:text=The%20European%20Union%20has%20announced,the%20highest%20polluting%20products%20first.

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increased over time (and the EU ETS carbon price is already over 100 Euros a metric ton of carbon) could make selling domestic goods overseas more expensive, making them less competitive over time.

All is not always wine and roses for the sustainable investing industry in the U.S. There are legitimate concerns that need to be addressed when it comes to greenwashing, as well as the true impact of sustainable investing. It is important to understand, first of all, that there isn't one thing called "ESG Investing," but rather seven distinct investment strategies investors use when considering sustainability issues.

> *As a result of the outperformance being seen over time, and the possibility of "anti-ESG" legislation accelerating or getting stronger, this also creates concerns about U.S. competitiveness, not only for the states in question, but for the U.S. more generally*

Let's look at the impact outcome potential for what we call the Seven Tribes of Sustainable Investing.

1. Negative Screening represents the origins of the field of what used to be called Socially Responsible Investing. We believe it is okay, of course, for any investor, whether an individual, a family, or a large asset owner such as a pension fund, university endowment, or foundation not to invest in every single company or investment opportunity that might come their way. Most investors put money into specific opportunities that they think will make money for themselves and their beneficiaries. Pension funds need to maximize financial returns within the asset allocation and annual return expectations they set for themselves and their beneficiaries. Divestment it needs to be said, as a primary strategy, often does not create meaningful change. One person or organization sells shares, another buys them and there has been no evidence that there is likely to be a lack of potential buyers of any asset that has financial value or potential value. Calls to "ban ESG" are just one more negative screen, in effect, and are similarly not the best way to optimize financial performance for investors as a result.

Negative screening started with calls for divestment from Apartheid, for example, which was an easier ask, as South African business was a very small component of corporate supply chains, versus say divestment from fossil fuel production which use is embedded in the supply chains of all large public companies. Some calls for divestment from sectors are more complex than others as a result. Here is likely where the "anti-ESG" focus has come from, as there would be a logical concern that if enough investors didn't want to own specific assets, it could increase the cost of capital or otherwise create a stigma on such assets, but sustainable investing is more than just divestment.

2. Positive or "best in class" approaches are the polar opposite of negative screening. Rather than investing in an index and subtracting out a few perceived bad actors (which tends not to perform all that well financially by the way, Norges Bank for example, one of the world's largest asset owners, lost money divesting away from tobacco and weapons they reported a few years ago),[13] positive approaches look for specific opportunities, especially perhaps for solving climate change.

Such opportunities include companies providing solutions which can help make industries more efficient, or as is increasingly seen in this age of COVID, healthcare has become a key focus for investors interested in investing in companies aiming to help solve social challenges that relate to health. VC is also increasingly being tilted toward companies seeking to solve sustainability challenges, with over $100B invested in recent years and no slow down seen in climate focused fund activity.[14] As was seen in our recent study, these are all active investment strategies, not passive, where impact and the potential to maximize financial performance while seeking positive opportunities can be more challenging.

3. Impact investing is again different, now seeing over $1.1 Trillion in investment, largely in solutions for those less well-off such as involves access to

13 https://www.ai-cio.com/news/tobacco-weapons-exclusions-reduce-norway-funds-returns/.

14 https://www.ctvc.co/a-year-of-climate-tech-by-the-headlines-131/.

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healthcare, financial services, housing, education, and similar largely private market investments.[15]

4. Thematic investing is also essential, with Bloomberg New Energy Finance calling for more trillions per year to solve climate change,[16] much of this funding will come in the form of renewable energy project finance, including derisking strategies as has been largely deployed to date. Many case studies for example of solving the SDGs using finance can be found in our InvestNYC white paper for example, published in 2021.[17]

5. Integration is where greenwashing concerns have largely come in to play. Concerns about the quality of ESG Data are well documented.[18] ESG focused ETFs may be unlikely to qualify for the SEC's climate disclosure proposed categorizations of focus or impact, potentially making them less attractive over time for investors seeking positive impact and better financial returns,[19] further clarifying that there are many different strategies and outcomes from sustainable investing that makes categorizing ESG Investing as one single thing inappropriate.

> *"Integration is where greenwashing concerns have largely come in to play*

6. Shareholder engagement creates an essential otherwise missing check and balance on the financial system. Some pension funds invest in indexes and then engage with the companies they own to seek better outcomes. CalPERS, for example previously reported financial outperformance that was attributed to shareholder engagement efforts targeted at improving poorer performers on governance.[20]

7. Minimum Standards represents one more methodology to "lift the tide of all boats." For example, if one visits a restaurant in Manhattan, there is a letter in the window telling you whether the food is safe to eat, yet investment has not had this "seal of approval" in place historically. Increasingly, asset owners such as the Yale Endowment,[21] NYS Common[22] and Norges Bank[23] have been putting such minimum standards in place, which in Asia for example, could be quite useful for investors and society if put in place comprehensively.

15 https://thegiin.org/research/publication/impact-investing-market-size-2022/.

16 https://about.bnef.com/blog/investment-requirements-of-a-low-carbon-world-energy-supply-investment-ratios/.

17 https://www.stern.nyu.edu/sites/default/files/assets/documents/Invest%20NYC%20SDG%20Finance%20White%20Paper%20 3.12.21.pdf.

18 https://academic.oup.com/rof/article/26/6/1315/6590670.

19 https://www.sec.gov/news/press-release/2022-92.

20 https://www.calpers.ca.gov/docs/board-agendas/201505/invest/item08a-03.pdf.

21 https://news.yale.edu/2021/04/16/new-principles-regarding-fossil-fuels-guide-yales-endowment.

22 https://www.top1000funds.com/2019/04/ny-state-commons-climate-plan/.

23 https://www.nbim.no/.

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As a result of these very different strategies above, we recently wrote about the 10 common misunderstandings when it comes to ESG, which could be useful for readers to further reference and clarify unnecessary confusion.[24] Opportunities clearly exist to target both financial outperformance and sustainability and impact improvement. The overarching goal should be for a majority of investors to fully consider sustainability issues across all asset classes, so that these become embedded into financial decision making. Progress is being made, but more is necessary. The outperformance of active sustainable investing is an encouraging sign that the future of active investment across asset class is sustainable.

As a result of these very different strategies above, we recently wrote about the 10 common misunderstandings when it comes to ESG, which could be useful for readers to further reference and clarify unnecessary confusion

24 https://cskrosinsky.substack.com/p/esg-reality-check-cheat-sheet.

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COMPETITION LAW COMPLIANCE AND CSDDD – A TICKING TIME BOMB?

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"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

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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]

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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.

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.

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.

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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] 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 mean-

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/.

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

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ing 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.

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

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

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=Cj0KCQjwlumhBhClARIsABO6p-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=1433F45701451B72476960E6C983D26F.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.

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.

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· 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 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 com-

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.

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monly 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).

Today, the discussion is mostly structured to follow the method of EU antitrust law, with its two-step-assessment process

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 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

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."

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.

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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]

> *Today, the discussion is mostly structured to follow the method of EU antitrust law, with its two-step-assessment process*

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.

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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