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Corporate Sustainability Due Diligence and EU Competition Law:

Mandatory human rights and environmental due diligence co-operation in the form of sustainable products purchasing agreements exempted from the application of Article 101(1) TFEU?

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Abstract

Last year, the European Commission presented a Directive on Corporate Sustainability Due Diligence (CSDDD) as part of the EU's transition into a climate-neutral and green economy under the EU Green Deal (EUGD). For the first time in the EU, cross-sector supply chain compliance with human rights and environmental protection will become mandatory once the CSDDD enters into force. The CSDDD is one of many EU initiatives that seek to integrate sustainability considerations into corporate governance and risk management. It will introduce rules on the obligations for companies with regard to actual and potential adverse impacts on human rights and the environment that result from their own operations, the operations of their subsidiaries, and the supply chain operations carried out by entities with whom the company has a direct or indirect business relationship. Recognising that many companies lack the individual capability to coerce their suppliers into adhering to a specific human rights or environmental standard, the CSDDD will require companies to collaborate where that is necessary to prevent or end an adverse impact. Such mandatory collaborations under the CSDDD will undoubtedly pose intricate questions under Article 101 (1) of the Treaty on the Functioning of the EU (TFEU). Prompted by the EU's endeavours to a more just and sustainable economy, the European Commission is meanwhile ensuring that EU competition policy keeps up with the enhanced role it is expected to play in facilitating the objectives of the EUGD.

The interplay between sustainability and EU competition law is mostly focused on the balancing act under Article 101 (3) TFEU between public interest objectives and the economic rationale of EU competition law. However, the possibility to place agreements pursuing sustainability objectives outside the scope of Article 101 (1) TFEU remains relatively unexplored yet may provide the potential to avoid any conflict between sustainable development under the EUGD and competition as protected by Article 101 (1) TFEU. The *Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements* (Horizontal Guidelines) present an interesting possibility, namely to exclude *agreements that solely intend to ensure compliance with international standards* from the scope of Article 101 (1) TFEU. This possibility has not yet been discussed but may provide significant leeway for sustainability agreements that are implemented by companies as part of their due diligence obligations under the CSDDD. In particular, horizontal agreements whereby competitors collectively agree to no longer purchase from "unsustainable" suppliers – so-called "sustainable products purchasing agreements" are widely recognised as a powerful means to ensure supply chain compliance. Hence, this paper seeks to determine to what degree EU competition law permits the placement of future sustainable products purchasing agreements implemented by in-scope companies under the CSDDD outside the scope of application of Article 101 (1) TFEU. It illustrates that there is a specific need to place sustainability agreements under the CSDDD outside the scope of Article 101 (1) TFEU due to residual market failures that will distort the EU market. Furthermore, it confirms that the Horizontal Guidelines provide an opportunity to do that, and that such placement can be considered as an application of the public policy justifications accepted by the Court of Justice of the EU in the *Wouters*-judgment.

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List of Abbreviations

ACM	Netherlands Authority for Consumers and Markets
Board	Regulatory Scrutiny Board
CJEU	Court of Justice of the European Union / European Court of Justice
Commission	European Commission
Council	Council of the European Union
CSDDD	Corporate Sustainability Due Diligence Directive
DCA	Dutch Competition Act
DG COMP	Directorate-General for Competition
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EUGD	European Union Green Deal
GC	General Court
HBERs	Horizontal Block Exemption Regulations (on R&D and specialisation)
Horizontal Guidelines	Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements
ICC	International Chamber of Commerce
OECD	Organisation for Economic Co-operation and Development
Parliament	European Parliament
R&D	Research and development
SPPA	Sustainable products purchasing agreement
SSCM	Sustainable supply chain management
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNSDGs	United Nations Sustainable Development Goals

Introduction

The European Union (EU) is keen to deliver on the United Nations Sustainable Development Goals (UNSDGs) and committed to transform the EU into the first climate neutral continent. It presents itself as a "global leader" in sustainable development, and it recently introduced a new growth strategy under the EU Green Deal (EUGD) that aims to transform the EU into a more resource-efficient economy and ensure no net emissions of greenhouse gases by 2050.[1] Numerous proposals have been developed as a part of that "green" blueprint, including a European Climate Law that makes the 2050 climate neutrality target binding and that requires all EU policy sectors to contribute to the objectives of the EUGD. Furthermore, EU policies and legislation are being updated or drafted in order to promote sustainable and responsible corporate behaviour that takes into account the negative externalities linked to EU production and consumption and that is more stakeholder-centred according to the concept of economic, social and corporate governance (ESG). Exemplary is the proposed Corporate Sustainability Due Diligence Directive (CSDDD).[2]

The CSDDD will mandate that companies implement due diligence measures throughout their supply chains to address the actual and potential negative impacts on human rights and the environment linked to their production inside and outside the EU. These impacts must be identified and assessed, and, where appropriate, prevented, minimised, ceased, or remediated.[3] In an era of internationalised and outsourced production where supply chains are increasingly comprised of thousands of economic operators situated around the world, ensuring supplier compliance with social and environmental standards poses a major challenge. The accessibility of markets and production zones around the globe has provided companies who market their products in the EU the cost-saving opportunity to relocate their production or to source from countries outside the EU. This connection of the EU economy to operators outside the EU comes with a responsibility to make sure that standards on human rights and environmental protection are guaranteed.[4] However, due to increased globalisation and the prevalence of sourcing and outsourcing, supply chains have become more multi-faceted, dynamic and non-transparent, making it more challenging to monitor local conduct.[5] This has created a complicated situation where, on the one hand, monitoring supplier compliance with the applicable legal standards becomes more difficult whilst, on the other hand, businesses are increasingly being held responsible for ensuring their suppliers adhere to social and environmental standards and for taking action in case of misconduct. For the first time in the EU, cross-sector supply chain compliance will become mandatory once the CSDDD enters into force.

Problem statement

Despite the current pressure and the upcoming obligation to ensure supplier compliance, numerous companies lack the individual capability to compel their suppliers to adhere to a specific environmental or human rights

[1] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal' COM (2019) 640 final.
[2] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM/2022/71 final.
[3] COM/2022/71 (n 2) recital (16).
[4] COM/2022/71 (n 2) explanatory memorandum 1.
[5] European Commission, Lise Smit and others, *Study on due diligence requirements through the supply chain: Final report* (Publications Office of the EU 2020) 214.

standard. For that reason, the CSDDD will require companies to collaborate where that is necessary to prevent or end an adverse impact. This immediately taps into the broader debate held at present on the role of EU competition law in advancing the objectives of the EU under the EUGD. The demand for EU sectors to be aligned in terms of sustainability is becoming more relevant now that the mandatory collaborations under the CSDDD will undoubtedly pose intricate questions under Article 101 (1) of the Treaty on the Functioning of the EU (TFEU). But how should mandatory co-operation under the CSDDD be qualified under Article 101 (1) TFEU? The European Commission (Commission) soon acknowledged that agreements between competitors could contribute to the EUGD. To date, the debate on the interface between sustainability and EU competition law is mostly focused on the balancing act under Article 101 (3) TFEU between public interest objectives and the economic rationale of EU competition law.[6] However, the possibility to place sustainability agreements outside the scope of Article 101 (1) TFEU remains relatively unexplored yet may provide the potential to avoid any conflict between sustainable development under the EUGD and competition as protected by Article 101 (1) TFEU.[7] The *Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements* (Horizontal Guidelines) present an interesting possibility, namely to exclude *agreements that solely intend to ensure compliance with international standards* from the scope of Article 101 (1) TFEU.[8] Based on that concept, the Netherlands Authority for Consumers and Markets (ACM) informally agreed to an agreement among retailers in the garden sector that jointly excluded suppliers using illegal plant protection products because the agreement could be framed as one that solely intended to ensure compliance with a legal industry-wide standard.[9] However, it remains unclear as to whether similar agreements implemented under the CSDDD are likely to meet the requirements to be qualified as such an agreement. More clarity on this question is warranted, in particular because horizonal co-operation in the form of an agreement whereby companies agree to exclude an "unsustainable" supplier - a supplier that does not conform to the required social and/or environmental standard – could help overcome the challenge of unilaterally ensuring supply chain compliance.[10] In that regard, Holmes noted that "child and slave labour and other human rights violations in the supply chain cannot be eliminated absent industry-wide bans and rigorous, coherent action against non-compliant suppliers" who will not comply "as long as there are customers willing to accept" the negative externalities linked to production.[11] In the framework of EU competition law, an agreement amongst competitors to collectively exclude an unsustainable supplier from their supply chain amounts to a so-called "joint

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[6] Julian Nowag and Alexandra Teorell, 'Beyond Balancing: Sustainability and Competition Law' [2020] 4 Concurrences 34, 35.

[7] ibid.

[8] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (Communication) OJL 2023/C 259/01 (Horizontal Guidelines).

[9] Letter from Netherlands Authority for Consumers and Markets to Tuinbranche Nederland, *Informal Guidance regarding Sustainability Initiative of Dutch Garden Retail Sector (Tuinbranche NL)*, 2 September 2022.

[10] See, amongst others, the contributions by Simon Holmes (7), Slaughter and May (4), International Bar Association (6), Linklaters (9), Freshfields Bruckhaus Deringer (13), In-House Competition Lawyers' Association (2), Vattenfall (5), ERT (11), and AIM (5) to the European Commission's call for contributions on 'Competition Policy supporting the Green Deal'.

[11] See the contribution by Simon Holmes to the European Commission's call for contributions on 'Competition Policy supporting the Green Deal' 10.

purchasing agreement".[12] This paper will refer to agreements whereby competitors collectively agree to no longer purchase from "unsustainable" suppliers as a "sustainable products purchasing agreement" (SPPA).[13]

In light of the aforementioned, the research question that this paper seeks to answer is:

> *To what degree does EU competition law present an opportunity to place sustainable products purchasing agreements implemented by in-scope companies under the proposed EU Corporate Sustainability Due Diligence Directive outside the scope of application of Article 101 (1) TFEU?*

This question is of academic and societal relevance because it adds a practical-based account to the debate on the interface between EU competition law and sustainability. Furthermore, with the CSDDD to enter into force shortly, the specific compatibility of these two EU policy sectors is becoming highly relevant as in-scope companies are broadly advised to start preparing the required due diligence sooner rather than later.

Scope of this paper

Horizontal agreements that pursue a sustainability objective may vary in terms of shape and content. This paper will focus on agreements between direct and indirect competitors that exclude an "unsustainable" supplier in order to ensure the required supply chain due diligence under the CSDDD. The case of the *Dutch Garden Retail Sector (Tuinbranche NL)* where the ACM informally cleared an SSPA in the garden sector will be repeatedly used as a reference point for placing such agreements outside the scope of Article 101 (1) TFEU. Furthermore, as the term "supplier" implies, this paper will only focus on "upstream" economic operators, meaning those entities that design, extract, manufacture, transport, store and supply raw materials, products, parts of products, or provide services that are necessary to carry out the company's activities in the provision of a service or production of a good.[14] Last, following the proposal for the CSDDD by the Commission in February 2022, the Council of the EU (Council) and European Parliament (Parliament) have recently agreed on their positions on scope and content. The trilogue negotiations are to commence at any moment and are expected to be completed in 2024, with the CSDDD expectedly becoming applicable as of 2026 after a two-years transposition period. This 2022 proposal of the Commission will be used as a starting point, and, considering the recent developments on the side of the EU legislature, reference will be made to the proposed amendments by the Council and Parliament where appropriate.

This paper will make use of terminology that is commonly used in the academic literature on supply chain management. It will refer to an in-scope company under the CSDDD as a "lead company" in order to describe the company that is at the apex of the supply chain and who seeks to ensure supplier compliance to fulfil its obligations under the CSDDD. The term "tier-1 supplier" will be used in order to describe upstream economic operators that stand in a direct commercial relationship to the lead company, and the term "tier-n supplier" will describe remote upstream economic operators that do not stand in a direct commercial relationship and that operate beyond the direct control of the lead company.

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[12] Horizontal Guidelines para 524.

[13] European Commission, Directorate-General for Competition, Richard Whish and David Bailey, *Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions – Final report* (Publications Office of the EU 2022) (Horizontal Guidelines on purchasing agreements) 22.

[14] COM/2022/71 (n 2) recital (18).

Methodology

This legal-doctrinal paper is of a descriptive and evaluative nature, and is primarily based on a combined study of legal and quasi-legal documents (including the provisions of the TFEU but also informal guidance on EU competition law), national and EU decisional practice, and academic literature. As the topic of human rights and environmental supply chain due diligence is closely linked to practices of supply chain management, literature on "sustainable supply chain management" (SSCM) is consulted to place the discussion in a more practical-oriented context. Chapter 1 will lay out the general framework on mandatory supply chain due diligence to be introduced by the CSDDD and it will identify the main problems and solutions in supply chain management when it comes to issues of sustainability. Chapter 2 will elaborate upon the current debate on how EU competition policy must facilitate the EUGD, in particular when it comes to horizontal co-operation agreements that pursue a sustainability objective and their assessment under Article 101 (1) TFEU. More precisely, the assessment of joint purchasing agreements under Article 101 (1) TFEU will be discussed as this type of co-operation is central to this paper. The chapter will subsequently introduce a new category of agreements that are placed outside the scope of Article 101 (1) TFEU, and it will conclude with an analysis of the EU state action doctrine for conduct legally required under the CSDDD. The insights from Chapters 1 and 2 allow for a more normative and critical analysis in Chapters 3 and 4. Chapter 3 will analyse the possibility of framing joint purchasing agreements under the CSDDD as agreements that intend to ensure compliance with international standards in order to be placed outside the scope of Article 101 (1) TFEU. Chapter 4 will apply the concerns of EU competition law when it comes to joint purchasing to agreements implemented in the specific context of the CSDDD, and it will present a range of precautionary safeguards in an attempt to reconcile EU competition law with the need for collaborations under the CSDDD.

Chapter 1 – Corporate Sustainability Due Diligence in the EU

The CSDDD is one of many EU initiatives that seek to integrate sustainability considerations into corporate governance and risk management. However, present EU initiatives on mandatory supply chain due diligence are limited in the sense that they only cover a small group of undertakings or a particular sector. The CSDDD will complement existing or planned EU due diligence instruments due to its cross-sectoral scope and broad coverage of impacts on human rights and the environment.[15] This chapter will briefly elaborate upon the scope of the CSDDD, the mandatory supply chain due diligence, and the rationale behind a mandatory due diligence regime. Furthermore, it will place the CSDDD in a more practical context where supply chains are becoming increasingly complicated and multi-tiered, and where ensuring supplier compliance with social and environmental standards is all but an easy assignment.

1.1. Proposal for a Corporate Sustainability Due Diligence Directive

1.1.1. Scope

1.1.1.1. Personal scope (covered entities)

The CSDDD will apply to companies that are incorporated in the EU (EU companies) or in a third country (non-EU companies) provided that they meet the required threshold. The inclusion of non-EU companies that carry out activities of a certain scale in the EU needs to ensure that non-EU companies are not granted a competitive advantage compared to EU companies when operating in the EU.[16] EU companies with more than 500 employees and a net worldwide turnover of more than EUR 150 million will be captured by the CSDDD (EU companies Group 1).[17] For those EU companies that do not meet these thresholds but that do have more than 250 employees and a net turnover of more than EUR 40 million, the CSDDD will apply provided that at least 50 percent of the net turnover of these companies (EU companies Group 2) is generated in one or more defined "high impact" sectors.[18] The selection of sectors where adverse impacts are most likely to occur is based on sectoral guidance of the Organisation for Economic Co-operation and Development (OECD).[19] Non-EU companies with net turnover of more than EUR 150 million in the EU (non-EU companies Group 1) will be captured, just as those do not meet that turnover threshold but have a net turnover of more than EUR 40 million of which at least 50 per cent was generated in one or more high impact sectors (non-EU companies Group 2).[20] Important to note is that small- and medium enterprises (SMEs) are not directly caught by the CSDDD despite the fact they account for around 99 per cent of all companies operating in the EU.[21] However, SMEs may be impacted and exposed to related costs and burdens due to the fact that they are a business partner of an in-scope company. The CSDDD's applicability to the financial sector will be subject to debate during the trilogues as the Commission and Parliament proposed to

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[15] COM/2022/71 (n 2) explanatory memorandum 6.
[16] European Commission, 'Commission Staff Working Document – Impact Assessment Report accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' SWD/2022/42 final (Impact assessment) 68.
[17] COM/2022/71 (n 2) article 2 (1) (a).
[18] ibid article 2 (1) (b).
[19] The OECD developed sectoral guidance in order to promote the effective observance of the OECD Guidelines for Multinational Enterprises. See the list of sectoral guidance documents at: http://mneguidelines.oecd.org/sectors/.
[20] COM/2022/71 (n 2) article 2 (2) (b).
[21] ibid explanatory memorandum 14.

include the financial sector whilst the Council would like to pass on that question of applicability for the Member States to decide.[22]

1.1.1.2. Material scope (value chain coverage)

Businesses will face a difficult challenge under the CSDDD given that they are not only required to monitor their own business operations, but also those of its subsidiaries and any other entity with whom the company has a business relationship.[23] The business relationship can be immediate or distant as the CSDDD will require due diligence on *direct* business partners (with whom the company has a commercial agreement or to whom the company provides financial services) and *indirect* business partners (whom perform business activities related to the operations, products or services of the company).[24] These business partners are present in the so-called "value chain" that encompasses both upstream and downstream activities involved in the provision of service or production of a good.[25] For downstream economic operators, the EU legislature intends to change the proposed material scope by excluding the use and disposal of the product from the scope of the CSDDD.[26] Depending on the final outcome, the operations to be captured by the due diligence will cover that of upstream direct and indirect business partners that design, extract, manufacture, transport, store, and supply raw materials, and it will cover the activities of downstream direct and indirect business partners that distribute, transport, store, and dispose the product.[27]

1.1.2. Due diligence on human rights and environmental protection

1.1.2.1. Identify, prevent and end adverse impacts in the supply chain

In-scope companies will be required to integrate supply chain due diligence into all their corporate policies and to identify, prevent and mitigate *potential* and end and remediate *actual* adverse impacts on human rights and the environment.[28] Due diligence must be mapped and prioritized in a way that is proportionate to the adverse impact's likelihood and severity.[29] Once a potential or actual impact has been identified and must be prevented or ended, companies are required to do so by a variety of measures outlined in the CSDDD.[30] Disengagement – terminating the business relationship – is considered to be a measure of last resort that is only reserved for severe adverse impacts and impacts that could not be prevented, mitigated or ended by any of the other measures proposed. The idea is that cutting off a business relationship from the value chain does not help those that are adversely impacted

[22] ibid article 2 (8).
[23] ibid article 1(1)(a).
[24] Council of the EU, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach' 2022/0051(COD); European Parliament (n 23).
[25] The final term to be used in the CSDDD will be subject to debate between the Council and the European Parliament, given that the Council prefers the neutral term "chain of activities" whilst the European Parliament concurs in the terminology of the Commission of "value chain".
[26] European Council (n 28); European Parliament (n 23).
[27] ibid.
[28] COM/2022/71 (n 2) article 4.
[29] ibid article 6a.
[30] ibid articles 7 (2) and 8 (2).

and may even increase their exposure to the impact. Disengagement may exacerbate the impact and contravene the zero-tolerance policies that the EU has on some pressing issues, such as child labour.[31]

1.1.2.2. Mandatory collaborations between horizontal competitors

If approved, Articles 7 (2) (e) and 8 (3) (f) will mandate in-scope companies to "collaborate with other entities, including, where relevant, to increase the company's ability to bring the adverse impact to an end, in particular where no other action is suitable or effective" whilst acting "in compliance with Union law including competition law". These mandatory collaborations are included in order to foresee in the limited ability of companies to manage and steer the activities of an indirect business relationship.[32] By teaming up with another company, the lead company might be able to better handle the impact. These collaborations are likely to be used in practice given the recognised deficiencies in ensuring lower-tier supplier compliance.[33] Furthermore, whilst the CSDDD seems to indicate that this is not a preferred course of action, the provisions of the CSDDD *de facto* encourage companies to collaborate.[34] The presence of a collaboration is a relevant and positive factor for supervisory authorities in their decision to impose sanctions and in determining the nature and appropriate level of sanctioning.[35] Likewise, it is a relevant factor in the assessment of the existence and extent of civil liability.[36] Put briefly, companies subject to the CSDDD are not merely required to collaborate by means of a "last resort", but are encouraged to team up in earlier stages of their due diligence given the importance of such collaborations in the assessment of potential sanctions and liability.

1.1.3. Reasons for and objectives of a mandatory due diligence regime

Being the first EU instrument to mandate cross-sectoral value chain due diligence, the CSDDD intends to complement the current landscape of due diligence standards in the EU.[37] There are at present no general mandatory supply chain due diligence standards in the EU.[38] Existing reporting and disclosure requirements and mandated sector-specific due diligence do not translate into concrete action given that cross-sector due diligence is rare and the impacts of reporting and disclosure requirements on corporate behaviour have proved extremely limited.[39] The dominant short-term-oriented model of corporate governance is not able to properly facilitate voluntary action on human rights and environmental protection. Long-term investments into sustainable production and more resilient internal risk management on social and environmental impacts are hesitantly implemented as they run counter to the predominant focus on short-term liquidity and financial performance.[40] This makes that current EU policies and voluntary corporate action do not provide sufficient counterbalance to that market failure of competitive pressure being systemically focused on short-term cost reductions and financial performance-oriented models of corporate governance.[41] Furthermore, sustainability initiatives frequently suffer

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[31] ibid recital (32).
[32] ibid recital (36).
[33] Smit and others (n 5) 217.
[34] COM/2022/71 (n 2) articles 7 (2) (e) and 8 (3) (f).
[35] ibid article 20 (2).
[36] ibid article 22 (2).
[37] COM/2022/71 (n 2) explanatory memorandum 3; Smit and others (n 5) 225.
[38] Smit and others (n 5) 225.
[39] Smit and others (n 5) 218 and 226; Claire Bright and others, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22(4) Business and Politics 66, 684.
[40] Impact assessment (n 16) 17; Smit and others (n 5) 238.
[41] Impact assessment (n 16) 9 and 10.

from problems of collective action and co-ordination, including the problem of free-riding[42] and the first-mover disadvantage[43]. These phenomena have led some Member States to introduce national legislation on responsible business conduct.[44] However, the many national attempts to regulate have added to the complexity as they have led to a fragmented regulatory landscape that is at present undermining legal certainty in the EU on expected corporate behaviour and the conditions for liability.[45] Furthermore, disparities between national legislation may obstruct the freedom of establishment.[46] Hence, the recourse to Article 50 TFEU as one of the legal bases of the CSDDD. Fragmented due diligence requirements that differ per sector, company size, country and area of applicability undermine the level playing field and distort competition between companies operating in the EU.[47] In order to overcome the described barriers to the internal market, the CSDDD is also based on Article 114 TFEU. By harmonising the due diligence requirements for companies operating in the EU, the CSDDD intends to remove obstacles to free movement and distortions of competition.[48] The creation of a single and harmonised EU-wide standard must ensure a cross-border level playing field in the EU and provide companies the required legal certainty.[49]

1.1.4. Impact assessment

The collaborations mandated by the CSDDD closely resemble the kind of corporate conduct regulated by EU competition law. Prior to its adoption, the CSDDD was twice the subject of an impact assessment conducted by the Commission[50] and scrutinized by the Regulatory Scrutiny Board (Board).[51] The Commission indicated that concerns of anti-competitive behaviour are unlikely to arise when companies collaborate on due diligence for purposes of sustainability.[52] In case they do arise, lead companies would allegedly find sufficient flexibility in the updated Horizontal Block Exemption Regulations on research & development (R&D) and specialisation agreements (together: HBERs)[53], and the Horizontal Guidelines. Furthermore, despite the general assumption that disengagement is to be considered a means of last resort, the Commission recognised that the option to limit or terminate a commercial relationship is necessary to prevent illicit competition based on the adoption of lower

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[42] Giorgio Monti and Jotte Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' [2017] 42 European Law Review 635, 636.
[43] ibid.
[44] See, for example, the French Duty of Vigilance Law that served as the main inspiration for the CSDDD and that imposes a general mandatory due diligence requirement for human rights and environmental impacts, and the Dutch Child Labour Due Diligence Law that requires companies to exercise due diligence to prevent their goods and services being made using child labour. For a more detailed overview, see Smit and others (n 5) para. 3.2.6.
[45] COM/2022/71 (n 2) explanatory memorandum 3.
[46] ibid 11.
[47] Smit and others (n 5) 238; COM/2022/71 (n 2) explanatory memorandum 11.
[48] COM/2022/71 (n 2) explanatory memorandum 11.
[49] Smit and others (n 5) 142.
[50] Impact assessment (n 16).
[51] European Commission, 'Regulatory Scrutiny Board Opinion – Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937' [2021] SEC(2022)95.
[52] ibid 24.
[53] European Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2023] OJ L 143/9; European Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2023] OJ L143.

standards than required. Not curbing such practices would lead to moral hazard opportunities and a distortion of the level playing field that the CSDDD intends to pursue.[54] Basically, respect for the obligations under the CSDDD may not result in a competitive disadvantage. In that regard, the Commission emphasized that competition based on exploitation rather than on the merits does not seem durable and is counter to the values that the EU commits so proudly to uphold. This acknowledgement is important. Prima facie, SPPAs seem to run counter to the presumptions favouring engagement under the CSDDD. However, the Commission considers disengagement justified in order to curb below-legal-standard competition.

1.2. Finding a balance: Profit, people and the planet

Ensuring supplier compliance with social and environmental standards became more difficult as production shifted elsewhere and products are increasingly sourced from outside the EU. The supply chain-oriented CSDDD taps into the broader question of how to integrate social and environmental considerations into supply chains that are multi-tiered and overly complicated. These questions keep many businesses occupied at this moment. Likewise, an increase in interest amongst academia resulted in a separate line of literature called "sustainable supply chain management" (SSCM). The concept of SSCM can be best defined as "the management of material and information flows as well as cooperation among companies along the supply chain while taking goals from all three dimensions of sustainable development, i.e. economic, environmental and social, and stakeholder requirements into account".[55] Put simple, how must companies balance profit, people and the planet?[56] Literature on SSCM highlights the importance of cross-sector or industry collaborations in purchasing practices as these are considered a powerful means to enforce supplier compliance beyond tier 1.[57]

1.2.1. Purchasing power as a means to supplier management beyond tier 1

International standards on responsible business conduct – such as the United Nations Guiding Principles on Business and Human Rights (UNGPs) – emphasize the importance of "leverage" in due diligence which is deemed to exist "where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm".[58] Leverage is also recognised by the CSDDD as an important way to pressure a supplier.[59] The influence over a business relationship is one of the factors that is taken into account in determining the adequacy of a due diligence measure. This influence can be created by means of ownership and factual control or market power, or by the degree of influence or leverage that the company could reasonably exercise, for example through collaborating with another entity.[60] Lead companies that are characterised by having "captive value chains" – where small suppliers are transactionally dependent on large buyers – may be able to individually exert pressure

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[54] ibid 26.
[55] Stefan Seuring and others, 'Sustainability and supply chain management – An introduction to the special issue' [2008] 16(15) Journal of Cleaner Production 1545, 1545.
[56] Veronica H Villena and Dennis A Gioia, 'On the riskiness of lower-tier suppliers: Managing sustainability in supply networks' [2018] 64 Journal of Operations Management 65, 65.
[57] Anne Touboulic, Daniel Chicksand, and Helen Walker, 'Managing Imbalanced Supply Chain Relationships for Sustainability: A Power Perspective' [2014] 45(4) Decision Sciences 577, 603
[58] UN, 'Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework' [2011] UN Doc HR/PUB/11/04, commentary to Guiding Principle 19.
[59] COM/2022/71 (n 2) recital (20).
[60] ibid recital (29).

on their supplier by virtue of their market power.[61] However, the CSDDD impact assessment acknowledges that companies may not have sufficient individual leverage, in particular when it comes to suppliers beyond tier 1.[62] Multiple studies on SSCM confirm that finding due to the many obstacles in lower-tier supplier management. Due to an internationalisation of production, modern supply chains consist of multiple levels (tiers) of production (see Figure 1). Depending on their commercial distance to the lead company, suppliers are grouped into a particular category. Those that stand in a direct commercial relationship to the lead company or that are in another way directly tied to that company, are called a "tier-1 supplier" whilst those that stand in a more distant commercial relationship to the lead company are referred to as "tier-2 supplier", "tier-3 supplier" et cetera, and, more generic, as "tier-n supplier'.

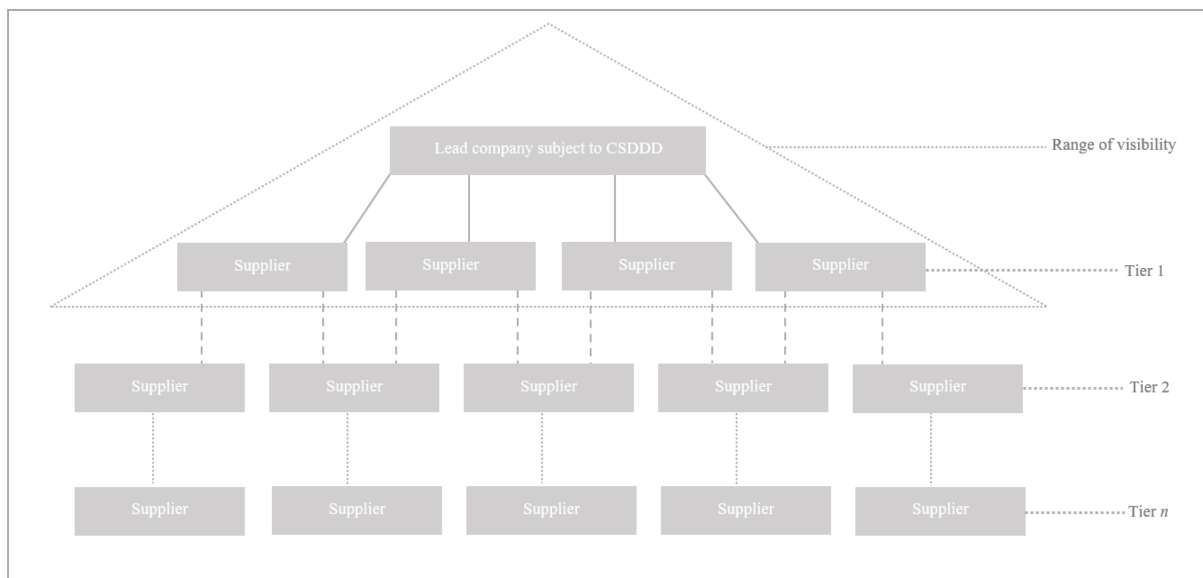

Figure 1. A multi-tiered supply chain structure with low visibility beyond tier 1

From a human rights and environmental protection angle, including tier-n suppliers in the CSDDD is to be welcomed as they are considered the "riskiest members" in a supply chain due to many social and environmental malpractices being located beyond tier 1.[63] But that same inclusion adds to the complexity of supply chain management. Firms' management and control beyond tier 1 is complicated due to the frequent absence of a direct contractual agreement as explicitly mentioned in the CSDDD.[64] Furthermore, visibility and traceability of tier-n suppliers and their practices is limited.[65] Tier-1 suppliers tend to be reluctant to provide information on the entities

[61] Gary Gereffi, John Humphrey, and Timothy Sturgeon, 'The governance of global value chains' [2005] 12 Review of International Political Economy 78, 84.
[62] Impact assessment (n 16) 26.
[63] Jörg H Grimm, Joerg S Hofstetter, and Joseph Sarkis, 'Exploring sub-suppliers' compliance with corporate sustainability standards' [2016] 112 Journal of Cleaner Production 1971, 1971.
[64] Smit and others (n 5) 217; Grimm, Hofstetter & Sarkis (n 89) 1972; Veronica H Villena and Dennis A Gioia, 'A More Sustainable Supply Chain' [2020] Harvard Business Review 84, 88.
[65] Smit and others (n 5) 217; Sini Laari and others, 'Leveraging supply chain networks for sustainability beyond corporate boundaries: Explorative structural network analysis' [2022] 377 Journal of Cleaner Production 134475, 2; Grimm, Hofstetter & Sarkis (n 89) 1972.

and activities present in their supply chain[66] for reasons of competitiveness and trust.[67] This means that lead companies frequently have no or limited knowledge on who their tier-n suppliers are or where they are located.[68] Even if they are known to the lead company, tier-n suppliers may be least equipped to operate more sustainably because many – smallholders in particular – lack the resources to change their production.[69] These challenges notably take place in a context where tier-n suppliers do not face the same amount of external pressure, meaning that they may be uninformed and unaware of conduct that is socially or environmentally (un)acceptable.[70] Last, tier-n suppliers are frequently located in developing countries where social and environmental standards are non-existent or not properly regulated or enforced.[71]

The studies in the field of SSCM do not merely offer a pessimistic picture, but also emphasise that purchasing power is one of the most important means to sustainable supplier management.[72] In a similar spirit, the CSDDD impact assessment notes that companies' purchasing policies can exert control over suppliers located beyond tier 1.[73] However, an individual purchasing policy is frequently not sufficient.[74] Literature on SSCM indicates that cross-sector or industry collaborations are desirable for lower-tier supplier management.[75] Companies that are unable to (adequately) monitor and pressure lower-tier suppliers are advised to participate in joint industry collaborations in order "to benefit from the collectively represented 'sourcing volume' [in] requesting specific sustainability standards".[76] This concept of "joint leverage" is a recurrent theme in the UNGPs that presume that leverage can be increased by means of "collaborating with other actors"[77] and that businesses should actively take steps to gain and use leverage.[78] In that regard, the UN Secretary General remarked that there are positive developments by means of "more meaningful collaborative approaches to joint leveraging efforts" as part of social and environmental due diligence.[79] Likewise, the CSDDD impact assessment mentions that companies are required, where necessary, to join forces where they do not have the individual leverage to persuade the business relationship to change its behaviour.[80] Despite a clear and pressing need for cross-sector or industry economic

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[66] Smit and others (n 5) 217.

[67] Yijie Dou, Qinghua Zhu, and Joseph Sarkis, 'Green multi-tier supply chain management: An enabler investigation' [2017] 24 Journal of Purchasing and Supply Management 95, 99.

[68] Villena & Gioia (n 56) 66.

[69] ibid; Villena & Gioia (n 64) 88.

[70] ibid.

[71] ibid.; Elcio M Tachizawa and Chee Yew Wong, 'Towards a theory of multi-tier sustainable supply chains: a systematic literature review' [2014] 19 Supply Chain Management 643, 644.

[72] Touboulic, Chicksand & Walker (n 81) 603; Fahian Huq and Mark Stevenson, 'Implementing Socially Sustainable Practices in Challenging Institutional Contexts: Building Theory from Seven Developing Country Supplier Cases' [2020] 151 Journal of Business Ethics 415, 418; Fahian Huq, Mark Stevenson and Marta Zorzini Bell, 'Social Sustainability in Developing Country Suppliers: An Exploratory Study in the Ready Made Garments Industry of Bangladesh' [2014] 34(5) International Journal of Operations and Production Management; 610, 621; Cees J Gelderman and others, 'The impact of buying power on corporate sustainability – The mediating role of suppliers' traceability data' [2021] 3 Cleaner Environmental Systems 100040, 4.

[73] Impact assessment (n 16) 25.

[74] Huq & Stevenson (n 72) 418.

[75] Nelly Oelze, 'Sustainable Supply Chain Management Implementation–Enablers and Barriers in the Textile Industry' [2017] 9(8) Sustainability 1435, 3; Villena & Gioia (n 64) 91.

[76] Grimm, Hofstetter & Sarkis (n 63) 1982.

[77] UN (n 58) commentary to Guiding Principle 19.

[78] UN Secretary-General, 'Working Group on the issue of human rights and transnational corporations and other business enterprises' (2018) A/73/163 para 10.

[79] ibid paras 10 and 29.

[80] Impact assessment (n 16) 38.

actors to collaborate via their purchasing policies, the practical implementation of such collaborations is hindered by – the fear of – "unnecessary restrictive or unpredictable competition law enforcement".[81]

[81] International Chamber of Commerce, 'Competition Policy and Environmental Sustainability' (2020) 6; Jurgita Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives' [2022] 13(5) Journal of European Competition Law and Practice 336, 338.

Chapter 2 – EU Competition Law and Sustainability Agreements

The EUGD and the European Climate Law require "that all EU policies contribute to the climate neutrality objective and that all sectors [must] play their part".[82] In response, the Commission communicated that, whilst EU competition law is not the principal instrument to be used in the green transition, the EUGD objectives will require it to play an "enhanced role".[83] This chapter will briefly recap the current debate on the interplay between EU competition law and sustainability. More importantly, it will elaborate upon the recently introduced exclusion of sustainability agreements that intend to ensure compliance with international standards from the scope of Article 101 (1) TFEU. Furthermore, it will analyse whether sustainability agreements under the CSDDD can be placed outside the scope of Article 101 (1) TFEU by the so-called "EU state action doctrine'. The chapter will conclude with a brief account of the main competition concerns that accompany a joint purchasing agreement.

2.1. Reconciling sustainability objectives with EU competition law

Finding the right balance between playing an "enhanced role" and preventing the use of sustainability as a cover for otherwise anti-competitive conduct – otherwise known as "greenwashing" – is complicated. Examples of greenwashing include the case of *Consumer Detergents* where multiple producers of laundry detergents coordinated on price which was considered unnecessary for the objective of improving the products' environmental performance[84] and the *IAZ* case where competitors created entry barriers to prevent parallel imports under the cover of labelling washing machines to make them environmentally friendly.[85] However, EU competition law can also be used to facilitate *genuine* sustainability agreements that contribute to the EUGD. From a constitutional angle, the provisions of the TEU and TFEU seem to positively plead for the integration of sustainable development goals into EU competition law.[86] Despite that, some commentators have argued that non-economic goals should not be integrated into EU competition law as that will turn this area "into a defunct form of market monitoring and market regulation".[87] Others have pleaded for a more holistic conception of EU competition law that moves away from the dominant consumer welfare standard in order to better reflect the political, economic and environmental realities of our planet.[88] The question of which interests should be protected under EU competition law arises only if a conflict cannot be prevented.[89] The present debate is characterised by the distinction of "supportive" and "preventative" integration[90] or, as more easily formulated by Holmes, that EU

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[82] COM (2019) 640 (n 1) 4.
[83] European Commission, 'The European Green Deal'.
[84] *Consumer Detergents* (COMP/39.579) Commission Decision C(2011) 2528 [2011]OJ C 193/14.
[85] Joined Cases 96-102, 104, 105, 18 and 110/82 *NV IAZ International Belgium and others v Commission* [1983] ECR 1983-00369; Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' [2017] 40 World Competition 539, 543 and footnote 19.
[86] Gerbrandy (n 85) 540; Suzanne Kingston, 'Introduction to Competition Law, Climate Change and Environmental Sustainability' in Holmes S, Snoep M, and Middelschulte D (eds), *Competition Law, Climate Change and Environmental Sustainability* (Concurrences 2021) 4; Simon Holmes, 'Climate change, sustainability, and competition law' [2020] 8 Journal of Antitrust Enforcement 354, 359-361.
[87] Luc Peeperkorn, 'Competition Policy is not a Stopgap!' [2021] 12(6) Journal of European Competition Law 415417.
[88] Gerbrandy (n 85) 5; Kingston (n 86) 4; Malinauskaite (n 81) 338; Holmes (n 86) 362.
[89] Julian Nowag and Alexandra Teorell, 'Beyond Balancing: Sustainability and Competition Law' [2020] 4 Concurrences 34, 36.
[90] Julian Nowag, 'Competition Laws' Sustainability Gap?' [2022] 5(1) Nordic Journal of European Law 149, 152.

competition law can be used as a "shield" to sustainability initiatives and as a "sword".[91] EU competition law can prevent conduct that is considered harmful from a sustainability point, whilst it can also facilitate genuine sustainable conduct that would otherwise be prohibited.[92] Nowag further clarified the supportive/preventative dichotomy by narrowing these concepts down into "first" and "second" forms of integration.[93] The first form of supportive integration is a matter of scope and refers to the placement of a sustainability measure outside the scope of Article 101 (1) TFEU, whilst the second form refers to the balancing act under Article 101 (3) TFEU. He mentions several possibilities that could place sustainability agreements outside the scope of Article 101 (1) TFEU, including the EU state action defence that will be discussed later.[94] However, the fourth sample agreement recently added to the Horizontal Guidelines has not yet been analysed. Despite the value in exploring these first forms of integration, the sustainability-competition debate has been mostly focused on the balancing act under Article 101 (3) TFEU.[95] Despite the acknowledgement that EU competition law positively influences sustainability because it ensures competition, spurs innovation, and creates an efficient allocation of resources[96], the current course pursued by EU competition law is mainly perceived as an obstacle to *genuine* sustainability collaborations between competitors that should be welcomed instead of condemned.[97]

2.2. Guidelines on the applicability of Article 101 (1) TFEU to horizontal co-operation agreements

2.2.1. New chapter on sustainability agreements

The Horizontal Guidelines set out the principles that are relevant for the assessment under Article 101 (1) TFEU and provide an analytical framework to facilitate self-assessment of an agreement's compatibility with Article 101 (1) TFEU.[98] The Horizontal Guidelines have been updated recently as part of a revision of the HBERs in order to align them with the digital and green transition of the EU, in particular for the sake of allowing beneficial cooperation to take place for purposes of R&D, production and sustainability. The Commission introduced a new chapter on sustainability agreements in its revised Horizontal Guidelines in order to contribute to the objectives of the EUGD by providing guidance on how agreements between competitors will be assessed under Article 101 TFEU when they pursue one or more objectives related to sustainability.[99] The Commission made it clear that public policies and regulation are preferred over co-operation but in case of a residual market failure that is not or not fully addressed, private initiatives may enter.[100] Despite this acknowledgement, sustainability agreements are not a distinct type of co-operation and the mere fact that an agreement pursues a sustainability objective does not acquit it from being subject to Article 101 (1) TFEU.[101] The sustainability agreement must be assessed in

[91] Holmes (n 86).
[92] OECD, Directorate for Financial and Enterprise Affairs Competition Committee, Julian Nowag, 'Sustainability & Competition Law and Policy – Background Note' [2020] DAF/COMP(2020)3, 12; Malinauskaite (n 81) 337.
[93] Nowag (n 90) 153.
[94] ibid 154.
[95] Nowag & Teorell (n 89) 35.
[96] Horizontal Guidelines para 518.
[97] Gerbrandy (n 85) 543; Netherlands Authority for Consumers and Markets, 'Draft Guidelines Sustainability agreements: Opportunities within competition law', 4; Kevin Coates and Dirk Middelschulte, 'Getting Consumer Welfare Right: the competition law implications of market-driven sustainability initiatives' [2019] 15 European Competition Journal 318319.
[98] Horizontal Guidelines para 2
[99] ibid paras 3 and 517.
[100] ibid para 520.
[101] ibid paras 521 and 523.

accordance with the guidance that is given for the type of co-operation agreement.[102] The Sustainability Chapter is divided into agreements that are placed outside the scope of Article 101(1) TFEU, and agreements that are subject to an assessment under Article 101 (3) TFEU.

2.2.2. Examples of agreements likely to fall outside the scope of Article 101 (1) TFEU

Not all sustainability agreements are caught by Article 101 (1) TFEU as some are unlikely to raise any competition concerns if they do not affect parameters of competition, such as price, quantity, quality, choice or innovation. Hence, they are placed outside the scope of Article 101 (1) TFEU.[103] The Commission initially only provided a safe harbour for three sample agreements that would fall outside the scope of Article 101 (1) TFEU, including agreements relating to internal corporate conduct, agreements creating a database on sustainable suppliers without a purchasing or selling requirement attached to that, and agreements relating to the organisation of awareness campaigns without such an agreement amounting to joint advertising. Importantly, this safe harbour means that no efficiencies will have to be proved and balanced. However, in the adopted Horizontal Guidelines, a fourth sample agreement is now included that may be of great importance for sustainability agreements that intend to ensure compliance with international standards on human rights and environmental protection.

2.2.2.1. Ensuring compliance with international legal standards that are not or inadequately enforced

During the public consultation on the HBERs and Horizontal Guidelines, a clear demand for the inclusion of one particular type of agreement was voiced: agreements whose sole purpose is to respect national or international standards.[104] This category is borrowed from the decisional practice of the ACM who is one of the leading national competition authorities taking a liberal stance on the topic of sustainability and who is frequently cited as a pioneer example. The ACM replied to the public consultation that agreements whose sole purpose is to respect national or international standards by limiting so-called “below-legal-standard competition” – i.e. competing on sub-standards due to non-compliance with the applicable rules – should be placed outside the scope of Article 101 (1) TFEU.[105] Indeed, §528 of the Horizontal Guidelines now reads that “agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions, whether or not they have been implemented in national law (for example, compliance with fundamental social rights or prohibitions on the use of child labour, the logging of certain types of tropical wood or the use of certain pollutants) and which are not fully implemented or enforced by a signatory State, fall outside the scope of Article 101 [TFEU]”.[106]

2.2.3.2. Below-legal-standard competition not worthy of protection by EU competition policy

The rationale behind allowing horizontal agreements that intend to ensure compliance with international standards is that they intend to counter below-legal-standard competition. In the absence of any guidance by or decisional

[102] ibid para 523.
[103] ibid paras 527-531.
[104] See, for example, the contributions by the Netherlands Authority for Consumers & Markets (7), Castrén & Snellman (3), AIM (12), Independent Retail Europe (12), Cefic (2), Simon Holmes (2), Baker McKenzie (11), Natuur & Milieu Netherlands (1), ERT (11), Dutch Ministry of Economic Affairs and Climate Policy (3 and 12), ICC (26), and Linklaters (4) to the public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines.
[105] ibid.
[106] Horizontal Guidelines para 528.

practice of the Commission on this category of agreements that are exempted from the scope of Article 101 (1) TFEU, the decisional practice of the ACM on the possibility to restrict below-legal-standard competition is most valuable. The Dutch *Guidelines on Sustainability Agreements* and the ACM's submission to the public consultation provide more insight as to the rationale behind this category. The ACM opined that agreements that restrict below-legal-standard competition are particularly useful for companies that are unable to (adequately) check whether their business partners comply with the required standard, because it allows these companies to ensure compliance jointly.[107] The legal standards in question are usually international conventions or treaties that are subsequently laid down in the national legislation of either the country where the supplier is situated or the country where the importer is officially registered.[108] However, sometimes these standards are not or not sufficiently implemented or monitored. This could lead to a situation where non-compliance with the applicable legal standard would result in a competitive advantage. The ACM considers restricting below-legal-standard competition inside *and* outside Europe as generally not being anti-competitive since it does not restrict the type of *genuine* competition that competition law seeks to protect.[109]

2.2.3.2.1 The case of *Dutch Garden Retail Sector (Tuinbranche NL)*

This notion of illicit competition not deserving protection under EU competition law laid at the heart of the assessment by the ACM of agreements implemented by the *Dutch Garden Retail Sector (Tuinbranche NL)*.[110] The ACM used this category in order to clear agreements between Dutch garden centres – implemented via the Dutch Garden Retail Sector (Tuinbranche NL) – that intended to curtail suppliers' use of pesticides that are illegal.[111] This case is exemplary for how agreements that (temporarily) exclude unsustainable suppliers can be placed outside the scope of Section 6 (1) of the Dutch Competition Act (DCA) and Article 101 (1) TFEU. The ACM held that this type of agreement could be considered as an agreement "whose sole purpose is to make the undertakings involved, their suppliers and/or their distributors respect the national or international standards". The ACM considered that the agreement did not intend to restrict competition but genuinely intended to combat illicit competition that would not have been there if the applicable standard was properly respected. The ACM opined that this is not the type of competition that should be protected. However, because suppliers may not be too easily excluded, private measures that counter illicit competition must be necessary and proportional. The retailers' agreements were considered necessary because, despite public oversight and previous private initiatives, illegal pesticides were still used. The agreements were also considered proportional because multiple safeguards were implemented in order to make sure that competition was not unnecessarily restricted. These included, amongst others, transparency on the content and the voluntary participation and open accessibility of the agreement. Furthermore, the plant growers were only excluded in terms of the products that had been illegally produced; the centres remained free to purchase other products from the same supplier. In that sense, the agreement did not entail a blanket boycott of the supplier but only of the illegally produced product. Put together, the ACM is of the opinion that exclusionary agreements must be conducted in an open, objective and transparent manner, and a due process needs to be followed before any supplier is excluded.

[107] Netherlands Authority for Consumers & Markets (n 97) 7.
[108] ibid.
[109] Netherlands Authority for Consumers & Markets (n 9).
[110] ibid.
[111] ibid.

2.2.3.2.2. The *Slovenská Sporitelna* judgment of the CJEU

The clearance by the ACM seems to go against the ruling of the CJEU in *Slovenská Sporitelna*.[112] The CJEU is not as benevolent on competitors that agree to curb illegal practices on the market. In 2013, the CJEU held that private companies should not take on the public task of ensuring compliance with the legal standards that apply to a particular sector, nor with respect to illegal conduct by a competitor. The Slovak Competition Authority had fined three banks that agreed to terminate the account contracts of competitor Akcenta CZ, a.s. (Akcenta) and to no longer conclude any new contracts. The banks decided to collectively boycott Akcenta because, by performing foreign exchange transactions in Slovakia without the licence required by Slovak law, it had been operating unlawfully on the market.[113] Though the CJEU remarked that Article 101 TFEU intends to protect not only competitors or consumers, but also the structure of the market and the competition present on that market, it considered the alleged illegal operating by Akcenta irrelevant for the assessment of whether the agreement infringed Article 101 (1) TFEU. That is because "it is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements" since "the application of statutory provisions may call for complex assessments which are not which are not within the area of responsibility of those private undertakings or associations of undertakings".[114] The CJEU particularly noted that the banks had not challenged Akcenta's conduct in any way prior to being investigated.[115] Furthermore, the CJEU commented that the indispensability requirement of Article 101 (3) TFEU was not met since the banks should not have taken it upon themselves to eliminate Akcenta from the market, but should have lodged a complaint with the competent authorities instead.[116] Prima facie, this judgment seems to suggest that the clearance by the ACM of the garden sector agreement is incompatible with EU law, possibly also forming an obstacle to future agreements under the CSDDD that are placed outside Article 101 (1) TFEU. However, on a closer look, this judgment is not as problematic. First and foremost, the case concerns the exclusion of a competitor, not a supplier. The conclusion that the agreement constituted a by-object restriction seems inapplicable in the case of excluding an unsustainable supplier since the object thereof is not to restrict competition. Furthermore, the CJEU attached particular importance to the fact that the parties immediately boycotted their competitor. By contrast, the enforcement mechanism in the *Dutch Garden Retail Sector* made sure that due process would be followed before a supplier could be excluded. Last, the statutory rules that were infringed in that judgment related to a licensing requirement, something that seems better enforceable than the practices under the CSDDD. This may explain the CJEU's strict stance on the ability of private undertakings to regulate conduct on the financial market. In any case, the judgement seems to fall short of recognising the existence of residual market failures that cannot be properly addressed by public authorities and that require private initiatives to enter.

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[112] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporitelna a.s.* [2013] ECLI:EU:C:2013:71.

[113] Heinrich Kühnert, and Igor Augustinic, 'Slovak Bank Case: Court of Justice Rejects Illegality Defence for Boycotts' [2013] 4(4) Journal of European Competition Law and Practice 314314.

[114] Case C-68/12 (n 112) para 20.

[115] ibid para 19.

[116] Kühnert & Augustinic (n 113) 315.

2.2.3. EU state action doctrine as a defence to the applicability of Article 101 (1) TFEU

EU competition law does not exist in a vacuum and it can sometimes be applicable in parallel to other legislation regulating a specific sector or industry. Regarding the CSDDD collaborations, companies are likely to be placed in a situation of conflict where one EU instrument requires them to positively act and "join forces" with other companies, whilst another prohibits them to collaborate in an anti-competitive manner.[117] If national regulation comes into conflict with EU competition law, the Horizontal Guidelines acknowledge that the EU state action doctrine may provide for a defence that could place the agreement outside the scope of Article 101 (1) TFEU.[118]

2.2.3.1. The doctrine of state action as a defence to anti-competitive conduct

The EU state action doctrine is firmly established in EU competition law and undertakings may appeal to it in order to claim that their alleged anti-competitive conduct falls outside the scope of Articles 101 and/or 102 TFEU because it was required by national legislation. The CJEU held in 1975 in *Suiker Unie and Others v Commission* that the applicability of Articles 101 and 102 TFEU depends on whether the national legislation in question had a "determinative effect on some of the most important aspects of the course of conduct" so that, in the absence thereof, the conduct would not have taken place or would have been implemented differently.[119] The idea behind this doctrine is that EU competition law is solely applicable to autonomous conduct without any state compulsion. The CJEU refined this doctrine in *Commission and France v Ladbroke Racing*, where it held that the Articles 101 and 102 TFEU do not apply where the anti-competitive conduct is "required of undertakings by national legislation" or where national legislation created "a legal framework which itself eliminates any possibility of competitive activity on their part".[120] However, in case national legislation does not entirely foreclose competition and it is the autonomous behaviour of the undertakings that distorted competition, then Articles 101 and 102 TFEU do unequivocally apply because the undertakings behaved independently.[121] The EU state action doctrine is interpreted restrictively as the CJEU is only willing to declare EU competition law inapplicable insofar as the economic operators are deprived of any autonomy in implementing the legally required conduct.[122] The mere encouragement by public authorities or the fact that anti-competitive conduct was favoured or facilitated is not sufficient to escape scrutiny under Article 101 TFEU[123], as became clear in the case *Aluminium Imports From Eastern Europe* where the UK authorities had supported and encouraged the restrictive agreements but had not legally obliged the companies to enter into that agreement.[124] Furthermore, undertakings cannot invoke the state

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[117] Impact assessment (n 16) 38.
[118] Horizontal Guidelines para 598.
[119] Joined Cases 40-48, 50, 54-56, 111, 113 and 114-73 *Suiker Unie and Others v Commission* [1975] ECR 1975-01663, para 65.
[120] ibid; This judgment has been upheld in subsequent case-law, see, for example, Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR 2010 I-09555 para 80, and Case T-370/09 *GDF Suez v Commission* [2012] ECLI:EU:T:2012:333, para 312; See also Case C-198/01 *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato* [2003] ECR 2003 I-08055, Opinion of AG Jacobs, para 23.
[121] Case T-370/09 (n 120) para 312.
[122] Case C-280/08 P (n 120) para 81; Case T-216/13 *Telefónica SA v Commission* [2016] ECLI:EU:T:2016:369, paras 115 and 118; Case C-29/92 *Asia Motor France and Others v Commission* [1992] ECR 1992 I-03935, para 61.
[123] Horizontal Guidelines para 597; Case C-198/01 (n 120) para 56; See also Fernando Castillo de la Torre, 'State Action Defence in EC Competition Law' [2005] 28 World Competition 407, 416.
[124] *Aluminium Imports From Eastern Europe* (Case IV/26.870) Commission Decision 85/206/EEC [1984] OJ 92/1; Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (OUP 2014) 227.

action defence in order to circumvent the applicability of Articles 101 and 102 TFEU when they have been involved in the adoption of the measure prescribing the anti-competitive conduct.[125] For example, they may not have been consulted prior to the adoption of the measure nor may the measure be adopted in order to ratify a pre-existing agreement in a given sector.[126]

2.2.3.2. CSDDD collaborations under the EU state action doctrine

The proposed Articles 7 (2) (e) and 8 (3) (f) of the CSDDD specify that companies shall be required to "collaborate with other entities, including, where relevant, to increase the company's ability to bring the adverse impact to an end, in particular where no other action is suitable or effective" whilst acting "in compliance with Union law including competition law". These collaborations are mandatory if they can help to address an adverse impact.[127] Furthermore, the case-law on the EU state action doctrine is set in the context of *national* legislation mandating anti-competitive conduct. There is a strong case to be made for the equal applicability of the EU state action doctrine to EU legislation. In any case, the CSDDD is a directive that will need to be transposed into the domestic order meaning that the ultimate source that will require companies to collaborate is a national implementation act. The collaborations would also pass the stringent test of state action in terms of the absence of any undertakings' involvement in the national provision mandating the conduct. However, despite the fact that in-scope companies are clearly compelled by the CSDDD to collaborate, the absence of any specification on the type and content of such an agreement seems to negate a successful reliance on the doctrine. The CSDDD does not require plain anti-competitive conduct from in-scope companies nor does it create a legal framework that eliminates any possibility of competitive activity in the sense of the settled case-law of the CJEU. The CSDDD – where the general regulatory framework is set out by the EU legislator but the implementation thereof is left to be decided on by the undertakings active in the market – can be classified as what Kingston has termed "co-regulation".[128] She argued that the stringency of the EU state action defence test, as developed by the CJEU, is rarely met where the precise conditions of the agreement are left for the undertakings to decide.[129] Likewise, the chances of a successful recourse to the EU state action defence in order to place any form of sustainability agreements under the CSDDD outside the scope of Article 101 (1) TFEU are slim under the current course of the CJEU.

2.3. The assessment of sustainable products purchasing agreements under EU competition law

By collectively excluding unsustainable suppliers in a particular industry, competitors are able to create leverage that can help them in ensuring the required supplier compliance under the CSDDD, as has been explained in Chapter 1. However, joint purchasing agreements are generally subject to an effects analysis under Article 101 (1) TFEU.[130] These agreements seek to create a degree of buying power vis-à-vis suppliers that "individual members of the joint purchasing arrangement might not attain if they acted independently".[131] This buyer power is the leverage needed to ensure supplier compliance under the CSDDD.[132] Purchasing agreements – rather than

[125] Case T-216/13 (n 122) para 116; Case C-29/92 (n 122) para 60.
[126] ibid.
[127] COM/2022/71 (n 2) recital (36).
[128] Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012) 345.
[129] ibid 346.
[130] Horizontal Guidelines para 284.
[131] Horizontal Guidelines para 275.
[132] European Commission, 'Call for contributions on competition policy supporting the Green Deal', 13 October 2020.

competition between competitors – are considered to lead to more sustainable supply chains and greener outcomes, in particular at an industry-wide level.[133] Despite the merit of such agreements for companies that try to fulfil their due diligence obligations under the CSDDD, EU competition law may come into play because even a "green competition policy has to be a competition policy".[134] The Horizontal Guidelines mention that sustainability agreements must be assessed in accordance with the prevailing guidance for the particular type of horizontal agreement.[135] This means that SPPAs must be assessed according to the guidance provided for a regular purchasing agreement. Put briefly, joint purchasing agreements that do not genuinely concern joint purchasing but are merely a disguised "buyer cartel" must be treated as any other cartel, meaning that they constitute by their nature an appreciable restriction of competition that requires no detailed assessment.[136] Purchasing agreements between two or more purchasers who jointly negotiate and conclude an agreement with a given supplier and who thereby genuinely seek joint purchasing do not, however, amount to a restriction of competition by object.[137] These agreements must be assessed in their legal and economic context with regard to their actual and likely effects on competition.[138] EU competition law has acknowledged the potential benefits of joint purchasing agreements as they may lead to lower prices, more variety or better quality for the consumer.[139] However, coordinated buying behaviour may also lead to higher prices, less output, reduced quality, variety, or innovation, market allocation, or anti-competitive foreclosure of other purchasers operating on the market.[140] Restrictions of competition may occur on the market(s) where the joint purchasing agreement interacts with upstream suppliers (the purchasing market) and the market(s) where the participating undertakings may individually compete as sellers (the selling market) (see Figure 2).[141] For that reason, all markets where the participating undertakings are competitors of one another must be assessed.[142]

[133] See the contributions by Freshfields Bruckhaus Deringer (13), Slaughter and May (4), and FoodDrinkEurope (11) to the European Commission's call for contributions on 'Competition Policy supporting the Green Deal'.
[134] Executive Vice-President Margrethe Vestager's keynote speech at the 25th IBA Competition Conference, 10 September 2021.
[135] Horizontal Guidelines paras 523 and 533.
[136] ibid para 279; OECD, Directorate for Financial and Enterprise Affairs Competition Committee, 'Purchasing Power and Buyers' Cartels – Note by the European Union' [2022] DAF/COMP/WD(2022)16, 5.
[137] ibid para 278; Horizontal Guidelines on purchasing agreements (2022).
[138] Horizontal Guidelines para 285.
[139] ibid para 275.
[140] ibid para 277; Faull & Nikpay (n 124) 973.
[141] Horizontal Guidelines para 288.
[142] ibid para 290.

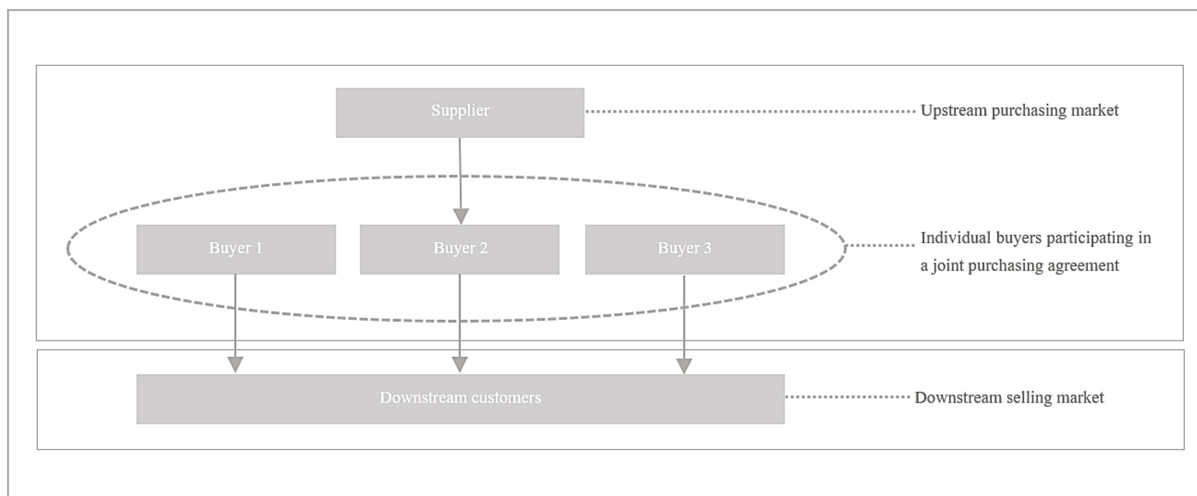

Figure 2. Upstream and downstream markets in a joint purchasing agreement

2.3.1. Main competition concerns of joint purchasing

2.3.1.1. Main competition concerns on the upstream purchasing market

There is a general concern that pooling buyer power may harm competition in the upstream market because suppliers can be forced to reduce the range or quality of the products they supply which can lead to reductions in quality, investments and innovation, or lead to sub-optimal supply.[143] These restrictions are less likely to occur when suppliers have considerable countervailing seller power on the purchasing market(s) to offset the significant buyer power.[144] The situation where suppliers have significant seller power – enabling them to refuse to adapt their production to the standards required by one purchaser – is precisely the scenario where sustainable products purchasing agreements may be able to counter that. As the CJEU recognised in the judgment *Gøttrup-Klim v DLG* concerning a Danish cooperative purchasing cooperation in the agricultural sector, joint purchasing may have the legitimate and pro-competitive effect of constituting "a significant counterweight to the contractual power of large producers", or more general, producers with considerable seller power not necessarily grounded in size.[145]

2.3.1.2. Main competition concerns on the downstream selling market

For the downstream market, purchasing agreements may lead to the foreclosure of competitors that purchase from the same purchasing market as their access to efficient suppliers becomes limited (see Figure 3).[146]

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[143] ibid paras 294 and 295; Faull & Nikpay (n 124) 973.
[144] Horizontal Guidelines para 295.
[145] Case C-250/92 *Gøttrup-Klim Grovvareforening and Others v Dansk Landbrugs Grovvareselskab (DLG) AmbA* [1994] ECR 1994 I-05641, para 32; Horizontal Guidelines on purchasing agreements (2022) 18.
[146] Horizontal Guidelines para 296.

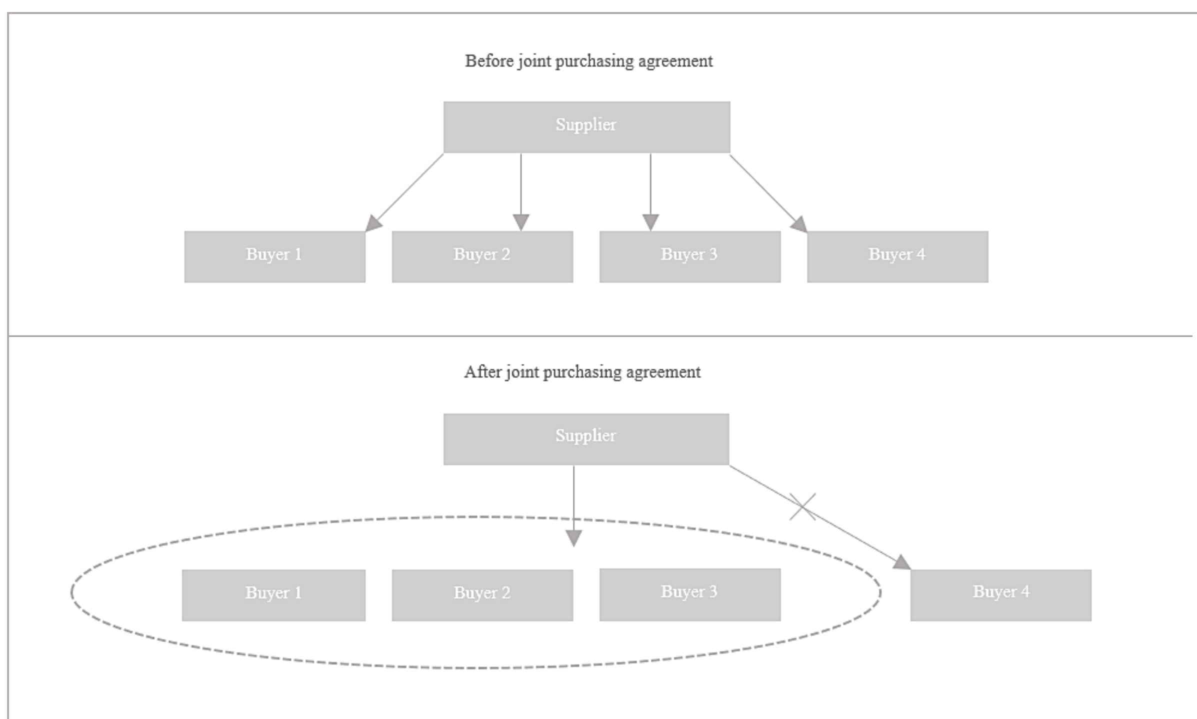

Figure 3. Foreclosing a competitor purchasing from the same purchasing market as the members of the joint purchasing agreement

Furthermore, there is a fear that upstream coordinated purchasing will lead to downstream coordinated selling, meaning that where the parties to a purchasing agreement are also actual or potential competitors on the selling market, the agreement may reduce their incentives to compete on price in that market.[147] This concern was raised in the assessment of a joint buying pool amongst manufacturers of sulphuric acid for the purchase of elemental sulphur in the case *National Sulphuric Acid Association*.[148] The Commission cleared the agreement under Article 101 (3) TFEU and considered in that regard that sufficient competition remained on the downstream market.[149] The concern of a "collusive outcome" is more likely in case the purchasing agreement extends beyond mere joint negotiation or purchasing to include other types of anti-competitive coordination or where the parties are able to achieve cost alignment.[150] Likewise, collusion can be facilitated by the exchange of commercially sensitive information in the context of joint purchasing. Such exchanges can be considered ancillary to an unproblematic agreement under Article 101 (1) TFEU, and thereby the exchange itself does not fall within that prohibition either if the exchange is objectively necessary and proportionate to the objectives of the joint purchasing agreement.[151] To conclude on a positive note, it is generally assumed that where the parties participating in joint purchasing do not have market power (that can lead to a significant degree of buyer power) or are not active on the same selling market, the agreement is unlikely to be problematic.[152]

[147] ibid para 297.
[148] *National Sulphuric Acid Association* (Case IV/27.958) Commission Decision 80/917/EEC [1980] OJ 260/24; Horizontal Guidelines on purchasing agreements (2022) 49.
[149] *National Sulphuric Acid Association* (n 148) para 47.
[150] Horizontal Guidelines paras 299 and 300.
[151] ibid para 301.
[152] ibid paras 286 and 298.

Chapter 3 – Framing CSDDD collaborations as agreements that seek adherence to international standards that are not or inadequately enforced

Multiple stakeholders indicated during the public consultation on the HBERs and Horizontal Guidelines that EU competition law should not hinder the due diligence obligations of the upcoming CSDDD.[153] Though the Commission included in §528 of the Horizontal Guidelines that sustainability-related agreements intended to ensure compliance with international standards fall outside the scope of Article 101 (1) TFEU, it did not make an explicit reference to the CSDDD. However, it did note that said agreements may be particularly suitable for the implementation of sustainability due diligence obligations under national or EU law or as part of industry or multi-stakeholder collaborations "to identify, mitigate and prevent adverse sustainability impacts in their value chains or their sector".[154] This undeniably mirrors the content of the CSDDD. This chapter will analyse the need and possibility to place sustainability agreements under the CSDDD outside the scope of Article 101 (1) TFEU by framing them as agreements in the sense of §528 Horizontal Guidelines.[155] Furthermore, it will illustrate that such an interpretation can be seen as an application of the doctrine of public policy justifications as developed by the CJEU in the *Wouters*-judgment.

3.1. Desirability of placing CSDDD collaborations outside the scope of Article 101 (1) TFEU

3.1.1. Below-legal standard competition as a residual market failure under the CSDDD

Most impacts on human rights and the environment occur outside the EU due to the fact that public authorities in third countries omit to properly implement or enforce the regulatory standards that should guide production and labour.[156] Due to the increased globalisation of trade and continued (out)sourcing practices from countries outside the EU – especially from the developed world – the production of products marketed in the EU is frequently accompanied by ethical dilemmas and exploitative practices such as poor labour conditions and child labour.[157] This "compliance deficit" may be caused by a lack of institutional capacity or an unwillingness of local authorities to regulate corporate conduct more intensively out of fear that foreign investors will retreat from their territory and invest elsewhere.[158] It can also be due cultural relativism where conduct that is considered unethical or harmful at the international stage may be widely accepted by and embedded in the cultural and ethical norms and values of a local community.[159] The CSDDD aspires and is expected to have a strong impact on third country legislation and enforcement when it comes to human rights and protection of the environment.[160] Third countries will expectedly benefit from the CSDDD because of an increased engagement between EU companies and third country supply chain partners by means of support of multi-stakeholder alliances or accompanying support

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[153] See, for example, the contributions by Castrén & Snellman, Net Zero Lawyers Alliance, and ERT to the European Commission's call for contributions on 'Competition Policy supporting the Green Deal'.
[154] Horizontal Guidelines para 528.
[155] ibid.
[156] Impact assessment (n 16) 63; Smit and others (n 5) 496.
[157] Thomas Clarke, and Martijn Boersma, 'The Governance of Global Value Chains: Unresolved Human Rights, Environmental and Ethical Dilemmas in the Apple Supply Chain' [2017] 143 Journal of Business Ethics 111, 111.
[158] UN Special Representative of the Secretary-General, 'Report on the issue of human rights and transnational corporations and other business enterprises' [2008] A/HRC/8/5, 6 and 11.
[159] Elisa Giuliani, 'Human Rights and Corporate Social Responsibility in Developing Countries' Industrial Clusters' [2016] 133 Journal of Business Ethics 39, 43.
[160] Impact assessment (n 16) 63.

provided through EU policies on development and international cooperation.[161] Though it cannot be denied that the CSDDD will positively contribute to third country suppliers' compliance with social and environmental standards, the impact on third country regimes must not be overestimated. The EU is not able to remedy the present situation in the developed world with the CSDDD. The integration of developing countries into global human rights and environmental standards is challenging in a practical and moral sense, and attempts to do so tend to overlook the complexity of local conditions, constraints and politics that may withhold those countries from strengthening their local regime.[162] Furthermore, the CSDDD is threatened by a so-called "waterbed effect" now that around 99 per cent of all companies operating in the EU will be excluded from its scope.[163] The CSDDD will only subject large and relatively-large sized companies that operate in the EU to mandatory supply chain due diligence. Many EU and non-EU companies will not meet the thresholds of the CSDDD meaning that their due diligence on adverse impacts remains (largely) of a voluntary nature. The fact that only part of an industry is covered by the CSDDD enables third country suppliers to continue to enter the EU market via the companies that are not subject to the CSDDD. Furthermore, those companies that will be subject to the CSDDD are required to conduct a risk-based assessment that requires them to map and prioritise impacts based on their severity and likelihood. Risk-based assessment is perhaps the most feasible method for handling impacts throughout the supply chain, but it risks creating a permissive environment for impacts that are not prioritized. Those impacts may go unnoticed or, at least, untargeted and may enable companies to continue their cheap and outsourced production, potentially resulting in a competitive advantage on the market. Together, these phenomena will make it difficult for the CSDDD to prevent below-legal-standard competition in the EU. This would undercut the EU's own stated objective under the CSDDD of creating a level playing field and would enable distortions of competition to continue to exist. Notably, it runs counter to the Commission's pledge in its impact assessment that respect for the obligations under the CSDDD may not result in a competitive disadvantage.[164] Furthermore, it may undercut the ability to conduct due diligence of companies that do comply with the CSDDD. The occurrence of below-legal-standard competition must be considered as a residual market failure under the CSDDD. EU competition law recognises that residual market failures may be targeted by co-operation agreements where these failures cannot or cannot fully be addressed by public policies and regulation.[165] As mentioned earlier, the presence of a residual market failure may remedy the strict interpretation of the *indispensability* requirement of Article 101 (3) TFEU. Literature on SSCM indicates that human rights and environmental interests are best protected by co-regulation between administrative enforcement and civil liability on the one hand (as is the case under the CSDDD), and industry collaborations on the other.[166] Likewise, in the EU, it is widely recognised that private initiatives must be included in the policy mix, and that traditional conceptions of public and private regulatory instruments are becoming blurred.[167] Through collaborations between competitors that intend to ensure compliance with the standards set out in the CSDDD, not only the challenges in supplier management described

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[161] ibid 64.
[162] Mahmood Monshipourit, 'Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries' [2001] 4 Yale Human Rights and Development Law Journal 25, 29 and 60.
[163] COM/2022/71 (n 2) explanatory memorandum 14.
[164] European Commission, 'Commission Staff Working Document – Follow-up to the second opinion of the Regulatory Scrutiny Board 2019/1937 2022' SWD/2022/39 final, 26.
[165] Horizontal Guidelines para 520.
[166] Clarke & Boersma (n 157) 127.
[167] Suzanne Kingston, 'Competition Law in an Environmental Crisis' [2019] 10(9) Journal of European Competition Law and Practice 517, 517.

in Chapter 1 can be accommodated, but the possibility to compete on sub-standards can be reduced. For that reason, collaborations that genuinely seek to ensure compliance with international standards in order to target the residual market failure of below-legal-standard competition under the CSDDD must be given appropriate clearance under EU competition law and placing them outside the scope of Article 101 (1) TFEU is, at this point, most promising. The new category in §528 Horizontal Guidelines may provide an opportunity to do that.

3.1.2. Limited scope for CSDDD collaborations under Article 101 (3) TFEU

The European Commission has presented itself as an active enforcer of EU competition law against anti-competitive conduct, including where these pursue sustainability objectives that are applaudable.[168] Despite the novel guidance in the Sustainability Chapter, the EU policy on the balancing act under Article 101 (3) TFEU is by many depicted as "narrow". This current course will have implications for collaborations under the CSDDD. The acknowledgment in the Horizontal Guidelines that the first condition of Article 101 (3) TFEU, on "the promotion of technical or economic progress", must be understood as allowing for a broad range of sustainability benefits is to be welcomed.[169] However, the requirement that they need to be "objective, concrete, and verifiable" seems problematic, specifically for environmental protection where benefits are frequently not immediate, tangible nor concrete. The third condition of "indispensability" requires that the agreement does not impose restrictions that are not indispensable to the attainment of the benefits generated by the agreement. The Commission does not consider a cooperation agreement indispensable if the parties are also individually subject to EU or national law requiring them to comply with specific obligations that have a sustainability objective.[170] This will present a major conflict for collaborations under the CSDDD when they are not placed outside the scope of Article 101 (1) TFEU but subject to an assessment under Article 101 (3) TFEU. Fortunately, even in the presence of regulation, agreements that target residual market failures that are not addressed by regulation, or that aim for a more cost-efficient or quicker way to attain the objective are considered indispensable.[171] The obligations imposed by sustainability agreements may not go beyond what is necessary to achieve the objective of the agreement.[172] The main point of critique on the current course seems, however, to be the requirement that consumers are allowed a "fair share" of the benefit. The net effect of the agreement must at least be neutral for consumers directly or likely affected by the agreement.[173] The Commission is willing to take into account "individual use value benefits" (benefits directly derived from consumption of the product)[174], "individual non-use value benefits" (benefits indirectly derived from the appreciation of the broader positive impact of sustainable consumption)[175], and "collective benefits" (benefits that accrue to a wider section of society beyond the consumers in the relevant market and that occur irrespective of the consumers' individual appreciation)[176]. For the CSDDD, the collective or so-called "out-of-market" benefits is of particular importance given that it is to a certain extent decoupled from the EU consumer. But unfortunately, its practical use is limited due to the requirement that the

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[168] Mariska van de Sanden and Wolf Sauter, 'Greening Antitrust: The Dutch and EU Assessment of Sustainability Agreements' [2023] 37(2) Antitrust 32, 36.
[169] Horizontal Guidelines para 557.
[170] ibid para 564.
[171] ibid para 565.
[172] ibid para 568.
[173] ibid para 569.
[174] ibid para 571.
[175] ibid para 575.
[176] ibid para 582.

consumers in the relevant market substantially overlap with or form part of the beneficiaries of the agreement.[177] This will be problematic given that the negative impacts that the CSDDD aims to tackle and the interests it seeks to protect, are primarily located outside the EU and will most likely not substantially overlap with the EU consumer. For example, the CSDDD will require companies to account for forms of environmental degradation that denies a person access to safe and clean drinking water or that affects ecological integrity.[178] Furthermore, due diligence obligations are included with respect to indigenous people and their right to lands, territories and resources in the third country.[179] Horizontal agreements that intend to ensure that such interests are protected will most likely not meet the third requirement of Article 101 (3) TFEU. These examples illustrate that the current sustainability course is likely to negate a successful reliance on Article 101 (3) TFEU for sustainability agreements under CSDDD, increasing the need to place such collaborations outside the scope of Article 101 (1) TFEU.

3.2. Requirements under §528 of the Horizontal Guidelines

3.2.1. Requirements or prohibitions that are sufficiently precise and stem from an international standard

In order to be placed outside the scope of Article 101 (1) TFEU based on the fourth sample agreement, the sustainability agreement must meet several criteria. First, it must solely intend to ensure compliance with "sufficiently precise" requirements or prohibitions in "legally binding international treaties, agreements, or conventions".[180] In that regard, the CSDDD is based on a list of selected and for signatories legally binding international conventions and agreements, such as the core conventions of the International Labour Organisation (ILO) and the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. In response to a request from the Board to be more precise on the international standards covered by the CSDDD, the Commission added a list of concrete violations of human rights standards that must be prevented. It noted that the CSDDD due diligence obligations cover human rights and environmental adverse impacts that stem from universal legal standards that include "precise and specific rights and obligations".[181] Furthermore, with regard to environmental due diligence, which can be quite openly formulated and unclear, the CSDDD only includes environmental requirements and prohibitions that are "sufficiently precise and implementable" and that can be translated into "clear obligations".[182]

3.2.2. Failed implementation or inadequate enforcement

The second requirement of the international standard not being "fully implemented or enforced by a signatory State" implies that this category of agreements placed outside the scope of Article 101 (1) TFEU is only reserved for scenarios where the international standard is not or not properly embedded in national legislation, or where, despite proper implementation, public oversight is inadequate. This requirement limits the range of this category as it makes it only available in case of local shortcomings in ensuring compliance with the standard. The requirement stems from the idea that an agreement to ensure compliance with international standards is mainly

[177] ibid para 587 clause (c).
[178] Annex to COM (2022)71 (n 2) 3.
[179] Annex to COM (2022)71 (n 2) 3 and 4.
[180] Horizontal Guidelines para 528.
[181] Follow-up impact assessment (n 164) 8.
[182] ibid 9 and 48.

aimed at ensuring compliance in developing countries since many EU companies source from suppliers located there and where, as mentioned earlier, human rights and environmental standards are frequently not guaranteed due to weak state capacity.[183] This compliance deficit was mentioned by the ACM and other stakeholders in response to the public consultation. The CSDDD also recognises this deficit as it explicitly requires the Commission and the Member States to work in partnership with third countries in order to help upstream economic operators build the capacity to handle adverse impacts in their operating environment.[184] Based on what has been mentioned in **§3.1.1. Below-legal standard competition as a residual market failure under the CSDDD**, the CSDDD will not be able to fully remedy legal or regulatory shortcomings in third countries and therefore it is plausible that this requirement will – when it comes to suppliers situated in third countries – be met.

3.2.3. Economic operators in the supply chain must be covered by the agreement

The third requirement relates to the coverage of the entire supply chain as the undertakings concluding the agreement, their suppliers and/or their distributors must comply with the international standard. This is undoubtedly applicable to collaborations under the CSDDD, where, as discussed earlier, companies must not only account for negative impacts in their own operations or those of its subsidiaries, but also with respect to the activities of their direct and indirect upstream business partners – i.e. tier-1 and beyond – and a limited group of business partners on the downstream market. The phrasing of this requirement seems to indicate that it is an absolute requirement that the participating undertakings and their suppliers are covered by the agreement. The coverage of distributors – the downstream economic operators – seems, by contrast, to be optional due to the alternative conjunction. For SPPAs in particular, this requirement will be met as the participating undertakings commit to excluding unsustainable suppliers in order to ensure their and their suppliers' compliance with the international standard.

3.3. The CJEU's public policy justification in the context of the CSDDD

The limited categories in the adopted Horizontal Guidelines of agreements that can be placed outside the scope of Article 101 (1) TFEU present a missed opportunity for the Commission to incorporate the CJEU's developments in the spheres of public policy justifications under Article 101 (1) TFEU. The research question of this paper mirrors the content of a range of judgments of the CJEU whereby restrictions of competition that were considered necessary and proportionate for the attainment of a legitimate public interest were placed outside the scope of Article 101 (1) TFEU. Transposing this case-law to sustainability agreements under the CSDDD could strengthen the argument that sustainability agreements under the CSDDD can be placed outside the scope of Article 101 (1) TFEU on the basis of §528 Horizontal Guidelines, and could remedy the fact that the Commission missed out on the opportunity to incorporate the *Wouters*-doctrine in the first place.

3.3.1. The case of *Wouters* and subsequent case-law

The CJEU already enunciated in 1994 in the case *Gøttrup-Klim v DLG* that restrictive clauses in the statutes of a cooperative purchasing association could escape the application of Article 101 (1) TFEU when they are "limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in

[183] Giuliani (n 159) 42.
[184] COM/2022/71 (n 2) recital (49).

relation to producers".[185] Eight years later, the CJEU held in a similar fashion that a prohibition of the Dutch Bar Association to enter into multidisciplinary partnerships between lawyers and accountants did not infringe Article 101 (1) TFEU because the restrictive effects on competition inherent to that prohibition were "necessary for the proper practice of the legal profession".[186] More general, the CJEU ruled in *Wouters* that:

> [N]ot every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85 (1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the *overall context* in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its *objectives*, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. It has then to be considered whether the consequential effects restrictive of competition are *inherent* in the pursuit of those objectives [emphasis added].[187]

Though *Gøttrup-Klim v DLG* seems to have underpinned the rationale applied in the *Wouters*-judgment, it is the latter that established the so-called "inherent restrictions" doctrine or "*Wouters*-doctrine" that permits agreements that contain anti-competitive clauses in order to pursue a legitimate objective to be placed outside the scope of Article 101 (1) TFEU. The CJEU considered the prohibition on multidisciplinary partnerships to be liable to restrict competition, but considered this restriction to be inherent to the safeguarding of proper legal practice. The same rationale was subsequently applied in the case of *Meca-Medina* where the CJEU declared the rules adopted by the International Olympic Committee on doping control to not infringe upon Article 101 (1) TFEU because the restriction on competition was considered "inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes".[188] The CJEU essentially repeated the "inherent restrictions" test as established in *Wouters* but added a requirement of proportionality: the restriction may not go beyond what is necessary for the attainment of the legitimate public interest.[189] Restrictions of competition related to the rules of the Portuguese Order of Chartered Accountants (OTOC), that required chartered accounts to earn a certain amount of training credits through training provided by the OTOC, were subjected to a similar test.[190] Though the CJEU recognised that those restrictions could potentially be justified because they contribute to the guaranteeing of the quality of accounting services on the Portuguese market, the concomitant elimination of competition on training sessions went beyond what is "necessary" to guarantee that quality and could not escape the application of Article 101 (1) TFEU.[191] Later Italian cases of *CNG* – on restrictive professional rules for geologists concerning reference fees[192] – and *API* - on national legislation setting minimum

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[185] Case C-250/92 (n 145) para 35.
[186] Case C-309/99 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR 2002 I-01577.
[187] Case C-309/99 (n 186) para 97.
[188] Case C-519/04 P *David Meca-Medina en Igor Majcen v Commission* [2006] ECR 2006 I-06991 para 45.
[189] ibid para 42.
[190] Case C-1/12 *OTOC v Autoridade da Concorrência* [2013] ECLI:EU:C:2013:127 para 93.
[191] ibid para 100.
[192] Case C-126/12 *Consiglio nazionale dei geologi (CNG) v Autorità garante della concorrenza e del mercato* [2013] ECLI:EU:C:2013:489.

prices for road haulage services[193] – also turned to the *Wouters*-judgment to assess whether the restrictive agreement at hand could be placed outside the scope of Article 101 (1) TFEU.[194] The pioneering *Wouters*-judgment and subsequent case-law – by some labelled as the "EU rule of reason"[195] – marked a new era where non-economic interests can potentially justify an agreement otherwise unlawful under Article 101 (1) TFEU. Ever since, the precise scope of this doctrine has been questioned as the CJEU did not formulate a general notion of what constitutes a "public interest". Turning back to the spheres of sustainability, some have argued that sustainability agreements could be kept outside the scope of Article 101 (1) TFEU based upon the *Wouters*-doctrine as sustainable development could be considered a "legitimate public interest".[196] Prima facie, transposing the *Wouters*-judgment and subsequent rulings to sustainability agreements under the CSDDD might seem odd given that they see to a different factual constellation – with *Wouters, OTOC* and *CNG* set in the market for liberal professions[197] and *Meca-Medina* in the sports market – thereby taking different public interests at heart than under the CSDDD. However, when looking at these judgments in a more abstract manner – decoupled from the specific market at hand – multiple general principles can be distilled that seem to guide the rationale behind these judgments and that can similarly be applied when placing CSDDD collaborations outside the scope of Article 101 (1) TFEU.

3.3.2. Principles guiding the public policy justifications of the CJEU

3.3.2.1. Principle I – Market regulation in case of remedial market failure

The CJEU held that the "overall context" and the "objectives" of the agreement must be taken into account when determining whether it can be placed outside Article 101 (1) TFEU. Though it must be acknowledged that it is not easy to generalise from the *Wouters* line of rulings[198], the judgments all seem to be situated in the context of market regulation whereby private agreements are considered necessary to remedy the residual market failures that the market would otherwise suffer. This concept of market regulation, as enunciated by Advocate-General Cosmas whose opinion in *Deliége* is reflected in *Wouters,* means that the "inherent restrictions" exemption is here to introduce "rules which, at first sight, reduce competition, but are necessary precisely in order to enable market forces to function or to secure some other legitimate aim" and thereby do not infringe upon Article 101 (1) TFEU.[199] Perhaps most illustrative in this regard is the judgment of *Gøttrup-Klim v DLG* that was mentioned earlier where the restrictions on competition were considered necessary to remedy "the contractual power of large producers and [to] make way for more effective competition".[200] Likewise, the rulings in *Wouters, OTOC*, and *CNG* are all situated in professional service markets that are notable to suffer from information asymmetries meaning that consumers may turn to lower-priced but poorer quality services because they are rarely in a position to assess the quality of the service provided. This may drive good-quality services (or products in a product-

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[193] Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API and others v Ministero delle Infrastrutture e dei Trasporti* [2014] ECLI:EU:C:2014:2147.
[194] Charlotte Janssen and Erik Kloosterhuis, 'The Wouters case law, special for a different reason?' [2016] 8 European Competition Law Review 335, 336.
[195] Giorgio Monti, 'Article 81 EC and public policy' [2002] 39 Common Market Law Review 1057, 1086.
[196] Gerbrandy (n 85) 556.
[197] Janssen & Kloosterhuis (n 194) 337.
[198] Monti & Mulder (n 42) 646.
[199] Joined Cases C-51/96 and C-191/197 *Deliége v Ligue Francophone de Judo et Disciplines Associées ASBL and others* [2000] ECR 2000 I-02549, Opinion of AG Cosmas para 110. See also Monti (n 195) 1088.
[200] Case C-250/92 (n 145) para 32.

market) out of the market, and, given the absence of an incentive to maintain a high standard on quality, is likely to lead to a race-to-the-bottom that ultimately harms the consumer.[201] The "deontological" regulatory measures adopted by the Dutch Bar Association, the OTOC, and the National Association of Geologists served to remedy this particular market failure.[202] In that regard, Advocate-General Léger noted in his opinion to the *Wouters*-judgment that some restrictive rules may be necessary "to ensure that the market operates in normal competitive conditions" and that such rules "capable of encouraging or guaranteeing normal competition on the market" might be placed outside Article 101 (1) TFEU.[203] The element of "guaranteeing normal competition" is the building block of every justification invoked in the *Wouters* line of rulings discussed here. The notion of "proper practice of the profession" laid at the heart of the *Wouters*-judgment. Likewise, in *Meca-Medina,* "the organisation and proper conduct of competitive sport" and "healthy rivalry between athletes" stood central. Furthermore, the rules of *OTOC* served a similar purpose, namely that of the "proper exercise of the profession of chartered accountant". The recurrent finding of the CJEU that the objectives in these rulings are considered "legitimate" seems to be rooted in an economic analysis of the market at hand. More concrete, the *Wouters*-doctrine seems to be accessible to private regulatory measures that are liable to restrict competition but that pursue fair "rules of the game" and intend to ensure healthy and normal competition on the market. Based on that general principle, it can convincingly be argued that the rationale behind placing CSDDD collaborations outside the scope of Article 101 (1) TFEU finds confirmation in the CJEU's *Wouters*-doctrine. The beginning of this chapter argued that below-legal standard competition is likely to constitute a residual market failure under the CSDDD. Deficiencies under the CSDDD may lead companies to compete on sub-standards in circumstances where regulation does not apply or does not provide for oversight. Looking at the *Wouters*-judgment and subsequent rulings, the curbing of illicit competition seems to constitute a "legitimate public interest" in the eyes of the CJEU. The overall context and objectives of sustainability agreements under the CSDDD that seek to eliminate below-legal-standard competition resemble those of the agreements scrutinized in the *Wouters* case-law. The agreement would be adopted in the *overall context* of a market where the presence of a market failure hinders normal competitive conditions to exist and the agreement would have the *objective* to bring back healthy and normal competition and restore the functioning of that market. The fact that companies entering into a sustainability agreement under the CSDDD act as a "regulator" whilst being active on the market does not seem to be problematic since the ruling in *OTOC* extended the scope of the *Wouters*-doctrine from instances where the professional bodies had a "purely regulatory function" to instances where the "regulator is also active on the market".[204]

3.3.2.3. Principle II – Regulatory ancillarity

The second overarching element that can be distilled from the *Wouters* case-law is the involvement of the legislature or the concept of "regulatory ancillarity".[205] Each ruling concerned a professional body or group of practitioners tasked by the legislature to regulate and supervise professional activity on that particular market in accordance with purposes specified by the legislature.[206] The CJEU did not formulate as such that the involvement

[201] Janssen & Kloosterhuis (n 194) 337.
[202] ibid.
[203] Case C-309/99 (n 186) Opinion AG Léger para 112.
[204] Julian Nowag, 'Wouters, when the condemned live longer: a comment on OTOC and CNG' [2015] 36(1) European Competition Law Review 39, 42.
[205] Whish and Bailey, *Competition Law* (UOP 2013) 132.
[206] Erik Kloosterhuis, 'Wouters: All in the Family?' [2016] 3 Markt en Mededinging 113, 115.

of the legislature is a sine qua non requirement for the application of the *Wouters*-doctrine. For some, including Gerbrandy, it is “precisely because there is government involvement that the restriction on competition by private parties can be allowed; it is the public interest, as defined by the public authority, that necessitates the restriction”.[207] She argued that this element is present where the government charged the market parties with self-regulation.[208] This seems to closely resemble the instances of “co-regulation” as defined by Kingston, and it would justify the conclusion that sustainability agreements under CSDDD can be considered a form of “regulatory ancillarity”.[209] The General Court provided more clarity on this overarching element in the judgment *ONP*.[210] The General Court considered that the applicability of the *Wouters*-doctrine depends upon whether the agreement was adopted “within the limits of the French legal framework”.[211] The action must be covered by an application of the legal provisions and must serve to attain the objective intended by the law. Though the actions of the pharmaceutical association in this case could not be placed outside the scope of Article 101 (1) TFEU, the judgment makes it clear that the presence of a legislative framework is, indeed, a second principle guiding the *Wouters*-doctrine. It seems that also this second principle is likely to be transposable to sustainability agreements under the CSDDD. These agreements are covered by an application of the CSDDD and serve to attain objectives outlined under both national and EU law. Where the open phrasing of Articles 7 (2) (e) and 8 (3) (f) CSDDD were not sufficiently concrete for a successful recourse to the EU state action doctrine, it can be argued that agreements implemented under those provisions are adopted within the legal framework of the CSDDD and, on that notion, can be reconciled with the *Wouters*-doctrine.

[207] Gerbrandy (n 85) 556.
[208] ibid.
[209] Kingston (n 128) 345.
[210] Case T-90/11 *Ordre national des pharmaciens (ONP) v Commission* [2014] ECLI:EU:T:2014:1049.
[211] ibid para 44.

Chapter 4 – Recommendations to safeguard competition when placing sustainable products purchasing agreements under the CSDDD outside the scope of Article 101 (1) TFEU

This paper has so far illustrated that sustainability agreements under the CSDDD will meet the requirements to be placed outside the scope of Article 101 (1) TFEU by placing them in the category of §528 Horizontal Guidelines. There is a clear need to do that in light of the CSDDD's residual market failure of continued below-legal-standard competition in the EU. However, it is questionable whether the Commission will be prepared to place such agreements – and in particular SPPAs – outside the scope of Article 101 (1) TFEU. This final chapter will identify the main competition risks of SPPAs under the CSDDD in an attempt to reconcile the interests of EU competition law in regulating joint purchasing agreements with the need for collaborations under the CSDDD. In that regard, it will recommend several precautionary safeguards that can be implemented in such a purchasing agreement that may make it less objectionable from a competition enforcement perspective to place such agreements outside the scope of Article 101 (1) TFEU.

4.1. Sustainable products purchasing agreement under §528 of the Horizontal Guidelines

Future horizontal agreements under the CSDDD seem eligible to be placed outside the scope of Article 101 (1) TFEU based on a literal interpretation of §528 Horizontal Guidelines and a contextual interpretation of the *Wouters* case-law on public policy. However, it is questionable whether the Commission will be prepared to place such agreements outside the scope of Article 101 (1) TFEU, in particular when it comes to an SPPA. For one, the other sample agreements mentioned in the Horizontal Guidelines that are likely to be placed outside the scope of Article 101 (1) TFEU are strictly demarcated to avoid any interference with parameters of competition. For example, agreements that set up a database containing general information about (un)sustainable suppliers can only be placed outside the scope of Article 101 (1) TFEU if they do not prohibit or oblige the parties to the agreement to engage in a purchasing agreement.[212] Furthermore, the amount of information that can be exchanged in the context of a database is limited, even if that would help undertakings to fulfil their sustainability due diligence obligations under national or EU law.[213] The database may not reduce uncertainty regarding recent or future behaviour on the market and the parties may not even identify or share who their current or future suppliers are.[214] Besides that, an SPPA remains a joint purchasing agreement. In light of the competition concerns set out in **§2.3.1. Main competition concerns**, those agreements are generally subject to an effects-assessment under Article 101 (3) TFEU. Given the open phrasing of Articles 7 (2) (e) and 8 (3) (f) CSDDD, it is questionable whether the Commission will be prepared to honour the choice for a vertical purchasing restraint that is normally subject to an analysis of its legal and economic context, and to permit to place it outside the scope of Article 101 (1) TFEU.

4.2. Safeguarding competition when placing sustainable products purchasing agreements outside Article 101 (1) TFEU

4.2.1. Preventing the main competition concerns of joint purchasing in the upstream purchasing market

[212] Horizontal Guidelines para 530.
[213] ibid para 530.
[214] ibid footnote 370.

For the upstream market, one of the concerns that was mentioned is that significant joint buying power may harm the range or quality of products or lead to sub-optimal supply because suppliers' investment incentives could be reduced.[215] These concerns are more likely to occur when the supplier does not have countervailing seller power. However, when it comes to SPPAs under the CSDDD, the existence of countervailing seller power is frequently precisely the reason why cross-sector or industry collaborations are warranted. In those instances where companies collaborate in order to create leverage vis-à-vis the supplier, restrictions of competition in the upstream market are less likely.[216] Furthermore, joint purchasing could potentially foreclose competing purchasers that are active on the purchasing market, because their access to "efficient" suppliers would be limited. However, it is questionable whether the access to "efficient" but unsustainable suppliers is worthy of protection by EU competition law, in particular if what makes these suppliers "efficient" is the competitive advantage they gained by operating below the legal standard. In line with the Commission's view as expressed in the CSDDD impact assessment, it is unlikely that such foreclosure is to be considered a relevant competition concern that could present an obstacle to placing such agreements outside Article 101 (1) TFEU.

4.2.2. Preventing the main competition concerns of joint purchasing in the downstream selling market

First, SPPAs between competitors that jointly do not have market power on the selling market are unlikely to raise competition concerns in that market. In case parties do have market power, the main concern is that of a collusive outcome where coordinated purchasing leads to coordinated selling because the purchasers that align their practices on the upstream market are also actual or potential competitors on the selling market. This could reduce price competition in the downstream market. However, this concern is relevant in the case of purchasing agreements that regulate the purchasing price or the volumes to be purchased, but not when it comes to a SPPAs that regulate neither.[217] Furthermore, the fear of a high alignment of costs is inapplicable to the case of sustainable products purchasing agreements because these agreements do not contain a requirement to jointly *purchasing*, but merely jointly *negotiating* with the supplier.[218] Last, the collaborations that are required under the CSDDD do not only concern collaborations between companies operating in the same selling market. Cross-sector purchasing agreements are equally important and, in some cases, even more suitable to ensure supplier compliance. For example, a lead company that wants to ensure lower-tier supplier compliance and that intends to collaborate with a company that has a direct relationship with that supplier, is more likely to find that direct business relationship in another sector possibly a raw materials or semi-finished products sector. They could share the same supplier because they are both reliant on a particular input product whilst operating on an unrelated selling market. In that regard, cross-sector purchasing agreements under the CSDDD do not need to worry about potential restrictions on the downstream market.[219]

4.2.3. Exchange of commercially sensitive information in the context of sustainable products purchasing agreements

More problematic is the potential exchange of information that is needed in order to implement an SPPA. It was already mentioned that the sharing of information on purchase prices (or parts thereof) and volumes could

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[215] ibid para 294.
[216] ibid para 295.
[217] ibid para 297.
[218] ibid para 300.
[219] ibid para 298.

facilitate a collusive outcome in the selling market due to coordination between the parties on sales prices and output. In this respect, the CJEU in *T-Mobile* has held that the exchange of information is "tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings".[220] In particular, the Commission is of the opinion that exchanges of information with regard to individualised data on future prices or quantities is deemed to be harmful, and as such constitutes a restriction of competition by object.[221] But such concerns do not seem to be applicable to SPPAs because there is no need to share information on price or output. The ACM noted in the *Dutch Garden Retail Sector* that the agreement did not restrict competition because the retailers did not set joint prices, did not try to share the market nor tried to limit or control their production. However, even the sharing of "sources of supply" (both in terms of suppliers and territories) is considered to be commercially sensitive.[222] In that regard, companies may not share information that would allow the identification of their suppliers.[223] EU competition law is only willing to allow limited forms of exchange of information, even if such sharing may help the undertakings fulfil their sustainability due diligence obligations under national or EU law.[224] The undertakings must refrain from identifying their current or future suppliers to each other. This is problematic for companies under the CSDDD that seek to join forces with entities with whom they share a supplier. Identification is key in that context. However, the limited room for exchange of information in the context of joint purchasing can be circumvented by engagement of an independent third-party service provider that would gather the individual information but that would not pass on any information to the purchasers that are participating. The Commission has coined such a party a "trustee".[225] Trustees are independent third-parties who are bound by strict confidentiality requirements with regard to the information they receive from the purchasers.[226] Due to the independent nature of trustees, the likelihood that commercially sensitive information will be passed on from one purchaser to another will be significantly reduced – if not eliminated altogether. In the alternative, companies could implement technical or practical measures that protect confidentiality and that limit parties' access to such information, such as creating so-called "clean teams" or enacting confidentiality rules for those processing the information. A "clean team" refers to a restricted group of persons within an undertaking which are not involved in the business operations of the undertaking, and are furthermore bound by strict confidentiality protocols and requirements.[227] Members of the clean team provide information to purchasers only insofar as such information is strictly necessary, provide information in an aggregated manner, and only provide such information to a limited number of relevant persons within the business operations of the purchasers in question.[228] The selected persons receiving the information from the clean team are bound to a so-called "clean team agreement", which they are required to sign prior to receiving the information.[229]

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[220] Whish & Bailey (n 205).
[221] Existing case-law, both on the EU and national level, illustrates that the prohibition to exchange of commercially sensitive information is rigorously enforced by competition authorities, in particular when the exchange of information relates to current or future prices, future volumes of purchases, and purchasing prices. See inter alia Case C-563/19 P *Car Battery Recycling* [2021] ECLI:EU:C:2021:428, and Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 *Timber Cartel* [1988] ECR 1988-05193.
[222] Horizontal Guidelines para 281.
[223] ibid para 530.
[224] ibid.
[225] ibid para 372.
[226] ibid paras 407 and 408.
[227] ibid para 407.
[228] Altice/PT Portugal (Case M.7993) Commission Decision C(2018) 2418 final [2014] footnote 221.
[229] ibid.

4.2.4. Final recommendations on sustainable products purchasing agreements

Parties to an SPPA are in general advised to lay down their agreement in writing, in particular when it comes to the form of the agreement, its scope and the general functioning of the agreement.[230] In particular, the scope should be delineated in such a way that the agreement is solely focused on ensuring supplier compliance with the international standard. Going beyond that or implementing unnecessary restrictions on competition may make an authority reluctant to place the agreement outside the scope of Article 101 (1) TFEU. This could mean that a supplier that produces multiple raw materials or products cannot be boycotted in its entirety if the adverse impact only occurs in the production line of one product. In a similar spirit, the garden centres in *Dutch Garden Retail Sector* did not collectively boycott the *company* that violated the rule, but rather the particular *product* that was illegally produced. Furthermore, when it comes to the functioning of the agreement, it is advisable to include a provision that specifies how an unsustainable supplier can become sustainable again so that it is possible to re-enter the EU market. This would also be consistent with the focus of the CSDDD on engagement rather than disengagement, and the temporary character of the exclusion was one of the factors that made the ACM clear the Dutch Retail Garden Sector. Likewise, a clear and objective enforcement mechanism must accompany the agreement that makes it clear on what conditions suppliers are precisely excluded, that a due process is followed, and on what conditions they may resume the trade relationship. It must be noted that a written agreement does not shield the parties from being subject to Article 101 (1) TFEU, but it would allow *ex post* verification of the agreement's compliance with EU competition law and transparency seems to be another important requirement in the *Dutch Retail Garden Sector*.[231] Building upon the importance of transparency, the parties must make it clear that they are *jointly* excluding the supplier (or product from that supplier) so that it is clear to the supplier that the trade relationships with the parties to the agreement are governed by the terms and conditions of the agreement.[232]

[230] Horizontal Guidelines para 282 clause (b).
[231] ibid para 282 clause (b).
[232] ibid para 282 clause (a).

Conclusion

The overarching question answered in this paper concerned the possibility to place mandatory sustainability agreements under the proposed CSDDD outside the scope of Article 101 (1) TFEU by means of qualifying them as agreements that solely intend to ensure compliance with international standards that are not or inadequately enforced locally. This question is of academic and practical relevance given that the CSDDD is to enter into force shortly whilst the specific compatibility between this EU instrument and that of EU competition law remained hitherto unexplored.

First, this paper has identified to what extent in-scope companies are required to collaborate with other entities under the CSDDD, and how such an obligation must be understood when considering it from a more practical context where contemporary supply chains are overly complicated and multi-tiered. Related to that, this paper argued, based on practical insights derived from stakeholder contributions to multiple public consultations and literature on sustainable supply chain management, that a sustainable products purchasing agreement is a promising manner of co-operation to give effect to that due diligence obligation. Furthermore, this paper illustrated that there is a specific need to place sustainability agreements under the CSDDD outside the scope of Article 101 (1) TFEU due to residual market failures that will distort the EU market and undermine the level playing field that the CSDDD intends to pursue and the limited leeway under the current course of EU competition law. It confirmed that the Horizontal Guidelines provide an opportunity to place such agreements outside the scope of Article 101 (1) TFEU, and that such placement can be considered as an application of the public policy justifications accepted by the CJEU in the *Wouters*-judgment.

In sum, this paper has primarily illustrated that the upcoming interplay between sustainability agreements mandated by the CSDDD and their assessment under EU competition law is problematic due to the unavailable recourse to the EU state action doctrine and the limited scope for their efficiencies under Article 101 (3) TFEU. Hence, there is a clear and pressing need to place such agreements outside the scope of Article 101 (1) TFEU. The Horizontal Guidelines provide an opportunity to do that and, based on a literal interpretation of the requirements in §528 and a contextual interpretation in light of the overarching principles in the *Wouters*-doctrine, such placement seems objectively feasible and grounded in the notion of what the CJEU has qualified as a "legitimate public interest". The demand for EU sectors to be aligned in terms of sustainability is becoming more urgent, and the CSDDD will soon accelerate that. In order to be able to genuinely contribute to the EU's objectives under the EUGD, private collaborations must receive sufficient leeway under EU competition law, in particular when they are mandated by EU law.

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