



AUGUST 2022

## 6 Sustainability Takeaways in EU Antitrust & Regulatory

Latham lawyers highlight key takeaways and developments in the sustainability space from the first half of the year.

1

### EU Parliament and Council reach agreement on CSRD

*European Parliament and European Council | 21 June 2022*

The European Parliament and European Council reached a provisional political agreement on the terms of the EU's proposed Corporate Sustainability Reporting Directive (CSRD). The CSRD will extend the current sustainability reporting requirements in the EU (namely those under the Non-Financial Reporting Directive (NFRD)), to include more companies and topics and to require more detailed disclosures, and represents a key piece of legislation in the international trend towards increasing sustainability-related reporting by companies. If the agreed text is formally enacted, the requirements of the CSRD will enter into effect between 1 January 2024 and 1 January 2028. The European Sustainability Reporting Standards, which will provide the specific disclosure requirements for companies subject to the CSRD, are also subject to a consultation which closed on 8 August 2022. See more [here](#) and [here](#).

2

### European Commission publishes proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD)

*European Commission | 23 February 2022*

The European Commission (the Commission) published a proposal for a Directive on Corporate Sustainability Due Diligence (the Directive). If approved, the Directive would require large companies based in the EU (and certain large companies based outside of, (but operating in,) the EU) to conduct due diligence on a number of ESG-related issues throughout their supply chain, with failure to do so leading to possible fines or civil liability. In addition, the Directive requires certain large companies to prepare and adopt plans that identify the extent to which climate change is a risk for, or impacts, their operations. Such companies must ensure their business model and strategy are compatible with a target of limiting global warming to 1.5 degrees Celsius. [See more](#)

3

### European Commission publishes first part of its Circular Economy Package

*European Commission | 30 March 2022*

The Commission published the first part of its Circular Economy Package, which included proposed amendments to the Unfair Commercial Practices Directive (UCPD), in an attempt to combat greenwashing in the EU. The proposed amendments would require traders to avoid misleading and vague claims on the sustainability of products, including adding environmental characteristics such as a product's environmental and social impact, durability, and reparability to the list of main product characteristics about which consumers must not be misled. In addition, traders would be required to only make environmental claims that relate to an entire product if such a claim in fact holds true with respect to the entire product. The Commission's proposal follows a number of instances across the EU in which regulators have investigated allegations of greenwashing by companies. [See more](#)

4

### European Commission adopts final RTS on the Sustainable Finance disclosure Regulation (SFDR)

*European Commission | 6 April 2022*

On 6 April 2022, the European Commission adopted a Delegated Regulation supplementing SFDR with regulatory technical standards (RTS), which prescribe the:

- information that must be annexed to pre-contractual and periodic product documentation;
- content and presentation of the information that financial market participants must publicly disclose on their website in relation to Article 8 and Article 9 products;
- mandatory reporting template to describe how principal adverse impacts on sustainability factors are taken into consideration in investment decisions; and
- requirements on compliance with the "do not significant harm" principle for products that make "sustainable investments".

The RTS are subject to a three month-scrutiny period, which can be extended by a further three months. Assuming the RTS pass this process they will take effect from 1 January 2023.

SFDR sets out sustainability-related disclosure requirements for financial market participants, financial advisers, and financial products. Its aim is to improve sustainability-related disclosures, comparability of the disclosures for end investors and to reduce the occurrence of adverse sustainability impacts and greenwashing. [See more](#)

5

### European Parliament marks nuclear and natural gas-fired power plants as sustainable

*European Parliament | 6 July 2022*

On 2 February 2022, the European Commission adopted a Complementary Climate Delegated Act on certain nuclear and gas activities (the Complementary Delegated Act) incorporating certain nuclear and gas activities into the list of economic activities falling under the EU Taxonomy. In July 2022, the European Parliament has finally voted in favor of the Complementary Delegated Act.

The EU Taxonomy is part of the European Commission's plan to finance sustainable growth and to boost green investments by creating a classification system, establishing a list of environmentally sustainable economic activities.

The Taxonomy Regulation — which was approved through Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amended Regulation (EU) 2019/2088 — was published in the Official Journal of the European Union on 22 June 2020 and entered into force on 12 July 2020. The Taxonomy Regulation established the four conditions that an economic activity has to meet in order to qualify as environmentally sustainable. The purpose of such Taxonomy Regulation has been to allow the European Union to meet its 2030 energy targets and the objectives set out under the [European Green Deal](#). [See more](#)

6

### Sustainability initiatives encouraged in the European Commission's revised horizontal block exemption regulations and guidelines

*European Commission | 1 March 2022*

On 1 March 2022, the Commission published two draft revised Horizontal Block Exemption Regulations on Research & Development (R&D) and Specialisation agreements (R&D BER and Specialisation BER respectively, together HBERs) and the draft revised Horizontal Guidelines) — all of which were opened to public consultation. The HBERs set out how competitors can work together on projects without breaching cartels and anticompetitive agreement prohibitions.

The Draft Guidelines cover a range of topics, including agreements on R&D, specialisation and joint production, joint purchasing, joint commercialisation, standardisation, and standard terms. The most important amendment is the addition of a separate chapter on sustainability agreements. This chapter covers all agreements that pursue a sustainability objective (e.g., environmental, labour, or human rights-related initiatives). Commission Executive Vice-President Margrethe Vestager said that "Horizontal cooperation may lead to substantial economic and sustainability benefits, including support for the digital and green transition", in line with the European Green Deal objectives. Analysing the responses to the draft HBER public consultation, Vestager announced in a recent statement that the proposals have "been very positively met". However, she cautioned, "some of the comments [...] are also comments to say 'be careful that you do not enable greenwashing'. That would only lead to higher prices and a lack of trust. The balance is absolutely crucial". [See more](#)

## Additional News

- On 27 June 2022, the Dutch competition authority (the ACM) published a comfort letter allowing an **agreement between TotalEnergies and Shell to collaborate in the storage of CO2 in empty natural-gas fields in the North Sea**. In its press release, the ACM indicated that the agreement creates a new market for the storage of CO2 in empty gas fields and that it will bring sufficient benefits to customers and society with regard to its objective of reducing CO2 emissions. Interestingly, the ACM also indicated that the agreement is allowed "under both Dutch and European competition rules" while it applies its own draft guidelines in the reasoning. [See more](#)
- On 14 April 2022, the **German government adopted a package of legislative measures aimed at accelerating the development of renewables in Germany**. By 2030, Germany aims to nearly double the share of renewables in its total electricity consumption from the current 42% to 80%, taking into account the increasing demand of renewable energies for electrification of vehicles, industry, and heating. The government plans to cover nearly 100% of the electricity demand by renewables in 2035. This goal is in line with the plans of other countries with deadlines to reach 100% renewable power (e.g., Austria in 2030 and the UK in 2035). The German Easter package classifies the use of renewable energy as being in the "overriding public interest", which should help project developers against blocking permits. The invasion of Ukraine has clearly shown that Germany must reduce its reliance on Russian fossil fuels, adding additional urgency to its green ambitions. At the beginning of July 2022, the legislative package passed the German parliament and the chamber of the German states, with the main changes coming into force in 2023. [See more](#)
- On 9 April 2022, **The Spanish Act 7/2022 on waste and contaminated soils for a circular economy (the Spanish Waste and Contaminated Soils Regulation) was published on the Spanish Official Gazette**, and implements (i) Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste; and (ii) Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment.

The Spanish Waste and Contaminated Soils Regulation (i) introduces important restrictions to the use of plastics; (ii) prohibits the destruction or disposal by landfill of unused surplus of non-perishable products such as textiles, toys, or electrical appliances; (iii) extends the current producer responsibility; and (iv) introduces two new taxes to discourage producers from using non-reusable plastic packaging and landfilling or incinerating waste.

These measures aim to achieve, by 2030, 15% reduction in weight of waste generated compared to that of 2010, and a 50% reduction in food waste, per capita at the retail and consumer level and a 20% reduction of food losses along the production and supply chains compared to that of 2020. [See more](#)

- On 29 March 2022, the **Bundeskartellamt approved the animal-welfare surcharge introduced across the milk industry**. The QM+ program for farmers, dairies, and food retailers is voluntary and designed to allow farmers to implement increased standards of animal welfare, with food retailers paying dairies a surcharge for milk products that fulfil the QM+ criteria. The dairies then pay out this surcharge to participating farmers. The Bundeskartellamt explained that for milk, there are many different competing labels and vigorous competition between the different brands. After the first phase that ends in 2024, the Bundeskartellamt will reassess to what extent additional competition elements can be introduced. [See more](#)
- On 28 March 2022, the **European Securities and Markets Authority (ESMA) issued its Final Report on the European Union Carbon Market**, which analyses the trading of emission allowances (EUA) and emission allowance derivatives under the European Emission Trading System (EU ETS) on the lookout for major abnormalities or fundamental issues from a financial supervisory perspective, and for the need of further regulatory actions. While concluding that the observed evolution of carbon prices and volatility seem to have followed market fundamentals, including market concerns around possible gas supply disruptions or import bans in connection to the war in Ukraine, ESMA still formulated a number of policy recommendations for EU legislators aimed at improving transparency and monitoring in the carbon market, including: (1) extending position management controls applied to commodity derivatives to EUA derivatives; (2) amending EUA position reporting and the Union Registry in order to allow for the identification of ultimate beneficial owners of accounts; (3) tracking the chain of transactions in MiFIR regulatory reports; and (4) providing ESMA with access to primary market transactions.

ESMA also took into consideration recommending the introduction of position limits on carbon derivatives and of centralized market monitoring of the carbon market at EU level. [See more](#)

- On 14 March 2022, the **UK Competition Authority (CMA) published advice on how competition and consumer laws can help meet the UK's environmental goals and outlined plans for a "Sustainability Taskforce"**. By way of broad overview of the CMA's advice, the CMA has recommended a number of actions for the Government to consider and expressed views around the following: (1) Clarifications around laws on providing environmental information to consumers - including having standard definitions for terms like "carbon neutral"; (2) Potential exemptions for environmental initiatives that restrict competition; and (3) A "Sustainability Taskforce" to lead the CMA's continuing efforts to support the UK's transition to a low carbon economy.

Additionally, the CMA has noted in its advice that (i) supporting the transition to low-carbon activity has been, and continues to be, a strategic priority for the CMA; and (ii) sustainability and its interplay between competition and consumer regimes has been a major topic of discussion in international competition and consumer forums (i.e., OECD/ICN). The CMA also noted that it believes it is important to play an active part in this debate and aspires to be an international thought-leader in this area. [See more](#)

- On 8 February 2022, the **Italian Parliament approved an amendment to include the protection of the environment, biodiversity, and ecosystems into the Italian Constitution**. It is the first time that the "Fundamental Principles" of the Constitution are amended since their adoption in 1948. The new wording takes the interests of future generations into account and provides for public and private economic initiative to be oriented and coordinated for environmental protection purposes.

The amendment has been welcomed as an incorporation of the Italian Constitution Court's case law developed over the past decades, which had built on the principles of landscape protection, right to health, and solidarity in order to develop environmental protection principles grounded on a constitutional basis. [See more](#)

- On 26 January 2022, the **Bundeskartellamt concluded that milk producers' proposed financing model to help cover the costs of raw milk production is not compatible with competition law**. The "Agrardialog Milch" project wanted to agree on a raw milk price that would be paid out to dairy farmers, but the authority said this was unacceptable because it essentially meant agreeing on surcharges that would be passed on to customers. While agricultural producers can cooperate for agreements aimed at achieving sustainability goals, sustainability played no role in Agrardialog Milch's plan. [See more](#)
- On 18 January 2022, the **German competition authority (the Bundeskartellamt) concluded the examination of two separate business cooperations and sustainability initiatives**. These reviews are part of the authority's offer to advise businesses on cooperation and provide guidance especially on how to ensure that sustainability strategies are embedded in competition law.

The first project concerns an initiative launched by the German retail sector and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH to introduce living wages in the banana sector. The core objective is to jointly introduce procurement practices and develop processes to monitor transparent wages. At the same time, the participating companies are planning to gradually increase the sales volume of bananas that are produced and procured in line with living-wages criteria. In this context, no information on procurement prices, other costs, production volumes or margins is exchanged. Nor are compulsory minimum prices or surcharges introduced at any point of the supply chain.

The second project concerns current plans on expanding the animal welfare initiative "Initiative Tierwohl" to include cattle fattening. "Initiative Tierwohl" is a project based on an agreement between the agricultural, meat production, and food retail sectors and aims to reward livestock owners for improving the conditions in which animals are kept. The Bundeskartellamt encouraged the initiative to introduce in several stages a clear labelling for meat produced in line with animal welfare criteria to make the conditions in which animals are kept and their origin transparent for consumers. [See more](#)

## Contacts

Should you have any questions or would like further information in relation to any of these topics, please do not hesitate to contact us.



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