

ROUNDTABLE INSIGHTS: COMPETITION LAW AND RESPONSIBLE BUSINESS PRACTICES



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INTRODUCTION

A changing legal landscape means growing demands on companies to address human rights in global supply chains

The COVID-19 pandemic has sparked social and economic disruptions across the globe. Among those [most vulnerable to these impacts](#) have been workers lower down in supply chains. As the pandemic continues to create shortages in raw materials and reductions in orders, these workers are expected to face [worsening labour conditions](#), with companies seeking to recoup lost profits by shifting the damage and potential for losses onto suppliers and workers who could least afford it.

These challenges result in significant implications for a company's reputation and brand loyalty, particularly as [consumers](#) have increasingly cited social responsibility as a key consideration when choosing products. Consumers have also been calling for greater supply chain transparency through [digital activist movements](#) and [ethical shopping apps](#).

However, inequalities have always existed within global supply chains. The pandemic not only exposed these inequalities, but exacerbated them. International organisations have long sought to provide international standards and principles on responsible business conduct and due diligence to uphold labour standards and address labour violations in supply chains, such as:

- The Organisation for Economic Co-operation and Development's (OECD) Due Diligence Guidance for Responsible Business Conduct (the [OECD Guidelines](#));
- The UN Guiding Principles on Business and Human Rights ([UNGPs](#)); and
- The International Labour Organization's (ILO) [fundamental conventions](#).

Recognising the lack of progress achieved through voluntary standards and principles over the years, an increasing number of governments are turning these instruments into legal requirements. For instance:

- In February 2022, the European Commission adopted a [proposal for a Directive on corporate sustainability due diligence](#). Companies will be required to identify and - where necessary - prevent, end or mitigate adverse impacts of their activities on human rights, such as child labour and exploitation of workers, and on the environment, for example, pollution and biodiversity loss.
- [Mandatory human rights due diligence laws](#) have already been enacted in France, Germany, Norway, and Switzerland and are being considered in Austria, the Netherlands, [Spain](#), and the U.S.
- Import bans on products linked to severe human and labour rights violations, including forced and child labour, have been used in the [U.S.](#) under trade regulations. They are also being considered by the [European Parliament](#). The U.S. recently [passed a bill](#) that would introduce a presumption of forced labour in connection with any goods produced in Xinjiang, China.



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These mandatory requirements have received support from businesses and investors:

- Members of the [Investor Alliance for Human Rights](#), which includes asset management firms, trade union funds, public pension funds, foundations, endowments and more, equip investors with expertise to put the investor responsibility to respect human rights into practice. They have said that such mandatory regulation “increases the robustness of corporate risk management processes, helps investors achieve higher risk-adjusted returns, and contributes to economic growth”.
- Global investors and companies from the U.S. and Europe [have also noted](#) that with more countries introducing mandatory due diligence requirements, there is a need for greater policy coherence, as well as a “levelling of the playing field where consistent expectations across sectors and geographies allow for more efficient and predictable risk management throughout complex value chains and investment portfolios”.

Collaboration is key to human rights due diligence approaches

When addressing human rights due diligence in supply chains, collaboration is often highlighted as a critical element to achieving positive outcomes. In December 2020, the Geneva Centre for Business and Human Rights, the International Chamber of Commerce, and the World Business Council for Sustainable Development hosted a [panel discussion](#) on the challenges and concrete solutions to implement human rights due diligence in complex global business operations.

All panellists supported the need for a more proactive role by business associations and agreed that collaborative initiatives play an important role in helping to define and enforce a level playing field of human rights expectations for companies. Similarly, during a webinar discussion in March 2021 hosted by CSR Europe, a European business network working on corporate sustainability and responsibility, a representative from a global manufacturing company said: “In my opinion, collaboration is absolutely key because no company –

regardless of its size or financial turnover – can alone solve the complex issues affecting the supply chain.” They added that collaboration should engage all stakeholders since “[i]nvolving suppliers and local communities is essential for creating environmental, social, and shared economic value”.

In 2018, the law firm Norton Rose Fulbright and the British Institute of International and Comparative Law [published a report](#). Companies that were interviewed as part of the research methodology consistently suggested that collaboration offers the potential for increased leverage, particularly with respect to challenges which a single company is unable to address. The report noted that collaboration could also alleviate the financial burden on suppliers who were expected to undertake measures at the request of their buyers. It further stated that without effective collaboration between industry peers in carrying out human rights due diligence, suppliers might be subject to unnecessary cost and time burdens to comply with multiple requests from several companies which buy from them. Coordination between industry peers, or across industries, would allow suppliers to streamline these processes and share information, the report concluded.

Business collaborations have also been found to have consumer benefits. A study by The Fairtrade Foundation, ‘[Building Sustainable Supply Chains through Business Collaboration: Exploring the Implication of Competition Law](#)’, found that collaborations between businesses would provide consumers with improved choice and pricing over the medium to long term by increasing resilience against environmental shocks.

Collaboration in the context of ensuring responsible business practices has a broad range of methods and outcomes. In a 2015 paper, the OECD highlighted [four common forms of collaboration](#) to promote responsible business practices, which include:

- Participation in trade associations;
- Participation in industry initiatives;
- Exerting leverage; and
- Engaging in dialogue and information sharing.

Similarly, in its 2011 report, ‘Guiding Principles on Business and Human Rights’, the UN Office of the High Commissioner for Human Rights (OHCHR) noted that businesses should use their [leverage to mitigate the impact of any harmful practices](#). According to the UNGPs, leverage is considered to exist where “the enterprise has the ability to effect change in the wrongful practices of an entity that causes harm”. However, in cases [where a business may lack leverage](#), the report stated that “leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors”.

While there is broad support for legitimate forms of collaboration to increase responsible practices and drive positive impacts, they also pose legal risks.

THE ISSUE: COMPETITION LAW AND CHALLENGES TO COLLABORATION

The Thomson Reuters Foundation hosts strategic convenings to bring together key stakeholder groups on a number of issues related to responsible business conduct, such as: preparing for the EU legislative proposal on mandatory human rights due diligence; the importance of social performance as part of the Environmental, Social, and Governance (ESG) investing; and how trade agreements are being used to combat human rights violations.

At the start of the COVID-19 pandemic, the Foundation hosted a series of roundtables for business and legal professionals. The objective was to provide legal insights to businesses looking to uphold responsible business practices during a time of uncertainty due to supply chain disruptions and increased threats to the human rights of workers. The roundtables provided a safe space for businesses to discuss their challenges, and encouraged peers to connect and collaborate beyond these roundtables to achieve practical and scalable solutions for addressing human rights in supply chains.

As mandatory human rights laws proliferate, there will be an even higher expectation for businesses to increase their influence on suppliers through collaboration with peers as part of their due diligence strategies. The Foundation identified **competition law, or anti-trust law, as a challenge for businesses that wish to act responsibly and collaboratively in tackling human rights abuses in their supply chains**, and acknowledged the potential legal risk posed by such collaboration. In response to this growing concern among companies that wish to act responsibly, the Foundation hosted a roundtable with a panel of legal experts and businesses to discuss the current legal context, key challenges for business, and recent developments in several countries. Recommendations for businesses were also shared on how best to mitigate risks posed by competition law.

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INSIGHTS: THOMSON REUTERS FOUNDATION CONVENES GLOBAL ACTORS TO DISCUSS SOLUTIONS

Competition law, while specific to each jurisdiction, broadly defines any activity that prevents, restricts, or distorts collaboration as anti-competitive. This includes collaborations between direct competitors, as well as collaborations along the supply chain. The law largely aims to protect consumers from predatory business practices that may result in higher prices and/or limited supplies.

Since intent is not recognised as a defence against violating competition law, common forms of collaboration to promote **responsible business practices can pose a risk of breaching competition law**. In the case of trade associations, the OECD explained in its 2015 study that [trade association practices](#), such as frequently meeting to discuss business issues, could “easily spill over into illegal coordination”. The OECD also found that industry initiatives could lead to market monopolisation.

Additionally, the OECD found that exerting leverage through [divestment campaigns](#) could be considered to be secondary boycotts under competition law. An example of such legally liable behaviour includes collective decisions to not use suppliers from a certain sourcing country because of the risk of forced labour. On [information sharing](#), the OECD noted that increased transparency which resulted in businesses knowing each other’s market strategies could result in a decrease in competition. This legal risk, according to the OECD, includes incidents where direct competitors meet to discuss outlooks and forecasts of specific markets.

To assess whether a practice is anti-competitive, the OECD presented six questions for businesses to consider [before entering a collaborative agreement](#). These questions are:

- Does the collaboration involve competitors?
- Can the agreement be viewed as a violation of competition law?
- Does the agreement have an anti-competitive effect?
- Do the pro-competitive effects outweigh the anti-competitive effects?
- Does the agreement have public interest benefits?
- Is the agreement exempt from competition law?

Beyond unintentional violations of competitive law, the UK’s Competition and Markets Authority (CMA) also warned in its 2021 report against the [use of sustainability agreements](#) to cover up a business cartel or other illegal anti-competitive activities.

RECENT DEVELOPMENTS

Competition law is inherently focused on defining what is not justified under its purview, as opposed to outlining what is justified. As a result, **there is usually a lack of guidance on how companies can move forward on collaborative initiatives without triggering competition law risks**. However, this is changing.

Over the past few years, competition authorities in some countries have been exploring and/or introducing new guidance on competition law that would allow for more flexibility in the context of sustainability agreements. In 2020, the [Dutch Authority for Consumers and Markets \(ACM\)](#) published draft guidelines addressing sustainability agreements between competitors or vertically linked companies. In this guidance, ACM acknowledged that “pursuing sustainable growth may in some instances trump manageable antitrust concerns, especially where society as a whole is better off as a result of a sustainability agreement entered into by competitors”.

In 2020, [Greece’s Hellenic Competition Commission \(HCC\)](#) launched an initiative to analyse the convergence and conflicts between sustainable development and competition law. The initiative has so far included a paper, offering recommendations on how HCC should approach the topic, and the setting up of a “regulatory sandbox”, where participating companies can experiment with innovative approaches to collaboration without immediately facing regulatory restrictions.

In Austria, several amendments were introduced to the [country’s competition law](#) in 2021. One such amendment explicitly acknowledges sustainability contributions as a possible justification for restrictive agreements by “stipulating consumers are deemed to ‘also’ participate in the benefits resulting from the agreement if the agreement contributes significantly to an ecologically sustainable or climate-neutral economy”.

Lastly, the UK’s [Competition and Markets Authority \(CMA\)](#) launched a public consultation, seeking input on how the competition and consumer regimes could support the country’s net-zero and environmental sustainability goals.

“Companies tend to welcome guidance because it can open up new opportunities and discussions for collaboration.”

Jesse Glickstein, Environmental & Human Rights Council,
Hewlett Packard Enterprise

The measures discussed above focus on issues related to climate change and the environment, rather than social issues such as human rights and labour concerns. However, [sustainability goals](#) cannot be achieved without also addressing social issues, which are interlinked with environmental issues, and the two should not be addressed separately.

There is, therefore, a need for a policy on competition to catch up to regulatory developments in the business and human rights space. In particular, when issuing guidance that allows for flexibility in competition laws to promote collaboration on sustainability issues, such guidance should take into account both activities that aim to address both social and environmental issues.

For example, in their response to the UK CMA's call for input, The Fairtrade Foundation noted that their research had found that fear of an unfavourable ruling under competition law was a deterrent to a significant number of retailers from collaborating on sustainability issues, particularly on issues of low incomes and wages in the supply chain.



CASE STUDIES

Balmoral vs. Competition and Markets Authority (CMA)

In 2016, Balmoral, a supplier of galvanised steel water tanks, was fined £130,000 by CMA for taking part in an exchange of “competitively-sensitive” information on prices and pricing intentions with three competitors. The exchange took place at a meeting in 2012, at which Balmoral was invited to join a cartel to allocate customers and fix prices. Balmoral refused to join the cartel but exchanged “competitively-sensitive” information with its competitors. CMA secretly recorded the meeting. In 2017, the Competition Appeal Tribunal upheld the fine with a judgement that emphasised the risk for businesses that may share information with competitors. The Court of Appeals dismissed Balmoral’s efforts to challenge the rulings.

Infineon vs European Commission

In 2014, Infineon, a smart card chip producer, was fined €82.8 million by the European Commission as part of an anti-trust investigation. The commission found that four semiconductor companies, including Infineon, infringed anti-trust law through sporadic and casual bilateral meetings at various trade shows between 2003 and 2005. During these meetings, the four “discussed and exchanged pricing information generally and prices charged to specific customers, contract negotiation, production capacity, or utilisation of that capacity and their future conduct on the market”. The fine was eventually reduced to €6 million on the grounds that Infineon, compared to the three others, had limited participation.



Practical steps for businesses provided by experts

Beyond changes in the law and the introduction of new guidance, there are additional ways for businesses to proactively avoid competition law issues. Competition law experts have also recommended providing comprehensive training to employees. These sessions would teach employees how to identify and deal with potential competition law breaches and show them how to avoid such violations in the first place, such as steering clear of discussions with competitors about volumes, prices, and market share.

“Competition law can play into seemingly benevolent, positive, healthy initiatives that aim to improve environmental and human rights standards. However, this should not lead to paralysis or panic. The key is to seek advice.”

Tim Johnston,
Brick Court Chambers

In its 2015 [report on competition law and responsible business conduct](#), the OECD also recommended seeking advice from competition enforcers, such as the European Commission in the EU, the Department of Justice’s Business Review Procedure in the US, and CMA in the UK. Another recommendation from the OECD was to [practise transparency](#) when pursuing collaborative initiatives. With greater transparency, potential anti-competitive practices can be quickly identified and addressed. Lastly, the OECD encouraged businesses to have [antitrust compliance programmes](#) in place, which could be referred to when pursuing collaborations. This, the OECD added, might include having a process that involved discussions with in-house counsel before proceeding with collaborative agreements and initiatives.

Ultimately these recommendations, combined with the efforts of various national competition authorities, suggest that concerns about competition law in the context of collaborations are being heard. Therefore, companies looking to address human rights concerns in their supply chains should not recede from collaborative initiatives out of fear of the law. Instead, they should actively pursue these collaborations while staying engaged, informed, and committed to better business practices.

Way forward

Businesses should as a starting point:

- Provide comprehensive training to employees on competition law such as how to identify potential breaches such as discussions on volumes, prices, and market share.
- Before entering discussions with competitors, seek advice from competition enforcers.
- Practice transparency when pursuing collaborative initiatives.
- Implement anti-trust compliance programmes, including consultation with counsel before proceeding with collaborations.

If you have ideas for resources we could develop or [legal research projects](#) that would be of assistance after attending this meeting or reading this summary, please get in contact. TrustLaw, the global pro bono legal service of the Thomson Reuters Foundation, can offer support to non-profits and social enterprises around the world working on issues such as these. If you are already a TrustLaw member, please log in to submit a request through our [TrustLaw Portal](#). Not a member yet? Find out more about the service [here](#) and [join TrustLaw](#) for free.



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