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International Law Section

Perspectives on International Antitrust

SUSTAINABILITY AND ANTITRUST

Editors:
Leonardo Rocha e Silva and Miguel del Pino

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Sustainability and Antitrust

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Editors' Note

By Leonardo Rocha e Silva and Miguel Del Pino[1]

As the world is facing unprecedented environmental, social, and economic challenges, there is a growing demand for cooperation and innovation to achieve sustainability goals, such as reducing greenhouse gas emissions, promoting circular economy, and ensuring social justice. However, at the same time, sustainability agreements may restrict competition. Therefore, there is a need to ensure that such cooperation and innovation does not harm competition and consumer welfare or create barriers to entry and innovation for new or smaller players. The intersection of sustainability and antitrust law is one of the most topical and complex issues that businesses, regulators, and society are facing nowadays.

It is clear that there is a correlation between sustainability and antitrust, but there is a lack of a coordinated approach by agencies around the world to translate that correlation into a common understanding of antitrust policy.

The first country to incorporate sustainability benefits into antitrust analysis was Austria, which introduced the "world's first green exemption" in antitrust law, specifically enacted to promote environmental progress as this directly relates to consumer welfare. Previously, China had enacted an Anti-monopoly Law that included a public interest exception for "serving public interests in energy conservation, environmental protection and disaster relief." After these first moves, 2023 could be defined as a "green antitrust year", with sustainability related antitrust law developments in many jurisdictions.

While these initiatives are positive, companies considering a sustainable collaboration should be very mindful of the geographical scope of such collaboration to benefit from a legal exception rule, since different antitrust authorities have different approaches. At this point, it seems that it is more trustworthy for companies to evaluate the case law, regardless of whether there are different guidelines, considering that the principles adopted in the case law will most likely be referenced in their soft law.

In this context, this issue of the Perspectives on International Antitrust Magazine provides an overview of the current state of play, the recent developments and the prospects of environmental sustainability and antitrust law in various jurisdictions. Some of the questions that the authors of this issue address, from different angles and jurisdictions, are: How can antitrust law and policy accommodate and support environmental sustainability initiatives, while maintaining its core objectives of protecting and promoting competition? How can antitrust authorities and courts balance the short-term and long-term effects of sustainability agreements, mergers, and conduct on the relevant markets and society as a whole? How can antitrust law and policy evolve and adapt to the changing realities and expectations of the green transition, while ensuring legal certainty, consistency, and transparency for businesses and consumers?

[1] Leonardo Rocha e Silva is the co-chair and Miguel Del Pino is a former Co-Chair and a member of the International Antitrust Committee of the ABA International Law Section.

The 20 articles in this issue cover a range of topics such as:

- The role of the European Commission and the national competition authorities of the EU Member States, including Germany, Spain, Greece, the Netherlands, and Portugal, in aligning competition rules with sustainability goals, as reflected in the revised Horizontal Guidelines and the national guidelines and cases on sustainability agreements and mergers.

- The approaches and challenges of integrating sustainability into antitrust law in other jurisdictions, such as Australia, Brazil, Canada, Chile, China, Colombia, India, Mexico, New Zealand, Singapore, South Africa, Argentina, and the US, highlighting the similarities and differences in the legal frameworks, the enforcement practices, and the policy debates.

- The implications and risks of sustainability cooperation and shareholder stewardship for antitrust law, especially in the context of the lawsuit filed by 11 US State Attorneys General against BlackRock, State Street Corporation, and Vanguard Group, alleging antitrust violations related to their cooperation as shareholders in coal companies to reduce coal production.

- The potential reforms and strategies for achieving a proactive global consensus among antitrust agencies on sustainability agreements, such as international forums and working groups, research and analysis, case studies and workshops, and best practices guides.

This issue demonstrates that sustainability and antitrust law are not necessarily in conflict, but can be complementary and mutually reinforcing, if applied with flexibility, proportionality, and pragmatism. Furthermore, it offers valuable insights, perspectives, and recommendations for businesses, regulators, courts, academics, and practitioners who are interested in or involved in this fascinating and important field.

We hope that this issue encourages further discussion and debate on sustainability and antitrust law and contributes to the development of a more sustainable and competitive future for all.

We thank all the outstanding authors for their excellent contributions, and the staff of the International Law Section of the American Bar Association, as well as Pilar Moreyra, Delfina O'Farrell and Eliane de Souza Lopes for their support and cooperation for the release of this International Perspectives Magazine; and invite the readers to share their feedback and comments with us and the authors.

Co-Chairs Note

By John Eichlin, Tamara Dini and Leonardo Rocha e Silva

We are pleased to introduce the winter 2025 edition of Perspective on International Antitrust. This insightful issue, edited by Leonardo Rocha e Silva and Miguel del Pino, includes articles from a broad set of jurisdictions. We would like to thank each of the authors for their valuable contributions!

The intersection of sustainability and antitrust law has become an increasingly important topic for policymakers, legal practitioners, and businesses alike. This edition seeks to explore how antitrust frameworks can adapt to the rising tide of sustainability initiatives, balancing the need for robust competition with the imperative of combatting environmental and social crises.

Featuring perspectives from 20 different countries, this collection of articles provides a comprehensive, cross-jurisdictional view of how sustainability is shaping antitrust enforcement and regulatory approaches around the globe. From the European Union's Green Deal to antitrust concerns in emerging markets, the contributions highlight the diverse ways in which different regimes are navigating the tension between fostering competition and promoting sustainable practices.

As businesses and governments strive to meet international climate targets and implement social responsibility measures, the role of antitrust law in facilitating or hindering progress is becoming more pronounced. Our hope is that these articles are not only informative but also inspire further discussion on how competition laws can evolve to support the global shift towards a more sustainable future.

We are grateful to all the contributors for sharing their insights and expertise, offering a truly global perspective on a topic that will shape the future of both competition policy and environmental stewardship.

A final comment about our Committee, the International Antitrust Committee of Section of International Law of the American Bar Association: The International Antitrust Law Committee, through live programs, teleconferences, publications, and policy comments, provides a forum for members to learn about and share competition law developments, influence international competition law and policy, and connect with an interesting, diverse and fun group of professionals from all corners of the globe.

Argentina

Sustainability Agreements Navigate the Antitrust Maze:

Striking a Balance for a Greener Future

By Santiago del Rio and Pilar Moreyra[2] of Marval, O'Farrell, Mairal

I. What about Argentina?

Environmental concerns and sustainability have recently become the focus of antitrust enforcement in many jurisdictions. Argentina is certainly missing out in comparison to other countries when it comes to providing guidance on Sustainability Agreements. However, regardless of this legal uncertainty there are other regulations that complement the current antitrust landscape. This could be further encouraged and developed by the antitrust authorities in the country as a priority in their agendas.

As a member of the United Nations, Argentina has committed to the UN's Agenda 2030 for Sustainable Development[3]. There is a general consensus that a switch into "green" components or "clean" processes today is a must for businesses. But companies struggle when it comes to investment or innovation in these aspects, resulting in a general "first mover disadvantage". This is why in Argentina competitors also may seek to counter these risks by agreeing to modify their inputs, products, or processes in a coordinated manner[4].

Pursuant to Argentina's competition law No. 27,442 there is uncertainty as to how to tackle sustainability initiatives, but Section 2 of said law presumes that certain agreements between competitors are illegal under the "per se" rule, and the types of agreements enumerated are enunciative and not limited (e.g., price fixing). Even more, the fact that a sustainability agreement among competitors may result in "price fixing" or "establish obligations to (i) produce, process, distribute, purchase or market only a restricted or limited quantity of goods, and/or (ii) provide a restricted or limited number, volume or frequency of services" which are both foreseen in Argentina's antitrust law.

In addition to this, Argentina's antitrust law[5] provides in Section 29 that the antitrust authority may issue "permits" for the execution of agreements involving practices in Section 2 (i.e., cartels). Also, Section 29 of Decree No. 480/2018[6] which regulates the law states four conditions that these agreements need to meet in order to be authorized, namely: (i) they must contribute to improving the production or distribution of goods or

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[2] Miguel del Pino is a Partner at Marval, O'Farrell, Mairal and Pilar Moreyra is an associate at Marval, O'Farrell, Mairal.

[3] *See* https://sdgs.un.org/2030agenda#:~:text=We%20resolve%2C%20between%20now%20and,protection%20of%20the%20planet%20and

[4] *See* White paper, "When Chilling Competition Contributes to Warming; How Competition Policy Acts as a Barrier to Climate Action", available at: **https://iccwbo.org/content/uploads/sites/3/2022/11/when-chilling-contributes-to-warming-2.pdf** ("ICC White paper").

[5] *See* https://servicios.infoleg.gob.ar/infolegInternet/anexos/310000-314999/310241/norma.htm

[6] *See* https://www.argentina.gob.ar/normativa/nacional/decreto-480-2018-310663

services, (ii) they must encourage technical or economic growth, (iii) they must be indispensable in order to achieve conditions (i) and (ii), and (iv) they must not eliminate competition from a "substantial part" of the relevant market.

Even though it seems that Argentina is lacking practical enforcement in this area, the good news is that the regulation in force provides the necessary tools to keep up with other jurisdictions that are already well upfront in sustainability and competition[7].

II. Sustainability Agreements and Antitrust in Practice: What came first, the case or the soft law?

Environmental concerns and sustainability have recently become the focus of antitrust enforcement in many jurisdictions, creating a snowball effect. Still, there is skepticism, and that is understandable, because if antitrust is about maintaining competitive markets, *why* should we care? When discussing key antitrust considerations for companies implementing ESG, such as sustainability agreements, the answer to this question remains simple: sustainability agreements may restrict competition. There is a correlation between sustainability and antitrust, but there is a lack of a coordinated approach by agencies around the world to translate that correlation into a common understanding of antitrust policy.

The first country to step up its game was Austria, which introduced the "world's first green exemption" in antitrust law. In September 2021, Austria amazed the local antitrust community with a green exemption provision in its antitrust amendment: "Consumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress substantially contributes to an ecologically sustainable or climate-neutral economy." As a result, the Austrian sustainability exemption allows enforcers to consider granting an individual exemption to a sustainability cooperation between companies.

Previously, in 2007, China had enacted an Anti-monopoly Law that included a public interest exception for "serving public interests in energy conservation, environmental protection and disaster relief."[8]

After these first movers, last year could be defined as a "green antitrust year"[9], with sustainability related antitrust law developments in many jurisdictions to watch.

On June 1st, 2023, the EC published its revised Guidelines on Horizontal Cooperation (**Guidelines**)[10], which include a chapter on sustainability agreements. The EC's Guidelines include a broad definition of sustainability, which encompasses activities that

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[7] *See* Sustainability Agreements in Ligh of Argentina's Competition Law, CPI Columns, Latin America, Agustin Waisman, September 26, 2023, available at: Sustainability Agreements in Light of Argentina's Competition Law

[8] *See* http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471587.htm

[9] Was 2023 a green antitrust year? Five sustainability related competition law developments you need to know, Johan Ysewyn, Kevin Coates, Sophie Albrighton & Erini Marnera, March 11th, 2023. *See* https://www.covcompetition.com/2024/03/was-2023-a-green-antitrust-year-five-sustainability-related-competition-law-developments-you-need-to-know/

[10] *See* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01)

support economic, environmental, and social development (including labor and human rights development). Sustainability agreements are defined in the Guidelines, as any type of horizontal agreement between companies that pursues a sustainability objective, regardless of the form of cooperation. On October 4th, 2023, the Authority for Consumers & Markets (**ACM**) published new rules on sustainability agreements between companies[11], fully aligned with the EC's Guidelines, under which the ACM "does not want competition rules to stand in the way of agreements that contribute towards a more sustainable society."[12]

On October 12th, 2023, the UK Competition and Market Authority (**CMA**) issued Green Agreements Guidance[13], which explains how antitrust law applies specifically to environmental sustainability agreements that aim to prevent, reduce, or mitigate the adverse effects of economic activities on the environment or to support the transition to environmental sustainability. This approach is narrower than that of the EC, which includes social developments in the scope of its guidance on sustainability agreements. Other jurisdictions, outside of Europe, have also published their guidelines on sustainability.

On March 31st, 2023, the Japan Fair Trade Commission (**JFTC**) released its guidelines on how its Antimonopoly Act should be interpreted to achieve a green society.[14] Compared to the EC Guidelines, the JFTC guidelines aim to address a comprehensive set of antitrust issues raised by sustainability, taking a more holistic approach. The JFTC Guidelines cover antitrust (both horizontal and vertical aspects), mergers and abuse of superior bargaining coverage of areas (no equivalent in the EU law). This means that if an antitrust issue involves sustainability, private companies will be able to rely on a single document. This is different from all of the above guidelines, which seem to incorporate sustainability incrementally each time a guideline is revised.

Prior to these guidelines, authorities in different jurisdictions were already assessing cooperation agreements related to the green transition and sustainability. As a result, it is more practical for companies to evaluate the case law of the authorities as a source of trustworthy criteria, regardless of whether there are different guidelines, considering that the principles adopted in the case law will certainly be referenced in their soft law. The same approach can be applied in those jurisdictions where there are still no guidelines, or even case law yet, since it is already possible to anticipate which will come first.

The EC, for example, has yet to apply its guidelines, but it has already acknowledged the significance of sustainability advantages in influencing antitrust evaluations long before the existence of the Green Deal.

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[11] *See* https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf

[12] *See* https://www.acm.nl/en/publications/policy-rule-acms-oversight-sustainability-agreements

[13] See https://www.gov.uk/guidance/green-agreements-guidance-how-competition-law-applies-to-environmental-sustainability-agreements

[14] *See* https://www.jftc.go.jp/file/230331EN_GreenGuidelines.pdf

In the case of CECED (Washing Machine case of 1999)[15], the EC approved an agreement among producers and importers of washing machines, collectively representing over 95% of sales within Europe. This agreement aimed, among other objectives, to cease the production and importation of the least energy-efficient washing machines constituting approximately 10-11% of sales in Europe.

The agreement eliminated one aspect of competition among sellers, negatively impacting competition and leading to price increases (typically, the most environmentally harmful machines tend to be the cheapest), thus prohibited under European antitrust rules. However, the EC contemplated that the agreement could receive individual exemption based on the energy savings realized in terms of individual economic advantages and the pollution reductions achieved in terms of collective environmental benefits. Consequently, the EC concluded that the agreement would advance environmental interests, facilitating a reduction in energy consumption, an objective unattainable without the agreement.

The most recent decision was in 2021: The car emissions cartel case.[16] The EC considered that the five car manufacturers under investigation individually had the capacity and technology to reduce car emissions to an even greater extent than the current emission standards. The carmakers had agreed to a technological standard that would simply mirror the applicable standards, thereby limiting their ability to compete for even greener standards. This decision left as an indication that the EC will not tolerate that competitors who can achieve better or faster targets set a limit to compete for them in the area of sustainability. In other words, the five automakers had the technology to reduce harmful emissions beyond what was legally required by EU emissions standards.

As a result, the EC established a precedent where harsh cartel treatment was not necessarily for classic cartel behavior, such as price fixing, market sharing or customer allocation, but rather for "kindly intentioned, but not considerate" cooperation, since sustainability agreements must not only be well-intentioned; they must ultimately use the better technology that could achieve over-fulfillment of green goals. The importance of this case for companies looking for guidance on sustainability agreements lies in the fact that today's EC guidelines state that one of the conditions for a sustainability agreement not to have a negative impact on competition is that the members of the agreement must be free to go further. Binding requirements can be imposed on participating companies to ensure compliance with the standard, but companies must remain free to apply higher sustainability standards.

In 2022, the ACM allowed Shell and TotalEnergies to collaborate on the storage of CO2 in empty North Sea gas fields.[17] The decision, prior to the ACM's guidelines, involved an informal request for guidance from the companies on whether their collaboration might reduce competition or, in short, whether the benefits outweighed the costs. The ACM

[15] *See* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000D0475

[16] *See* Case AT.40178, Car Emissions, date: 08/07/2021, *available at*: https://ec.europa.eu/competition/antitrust/cases1/202330/AT_40178_8022289_3048_7.pdf

[17] *See* https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields

considered that if the project contributed to achieving the goals of the Paris Climate Agreement, the benefits to society as a whole could be taken into account for an exemption from antitrust rules. In this respect, the ACM concluded that the benefits to customers and society as a whole outweighed the costs of restricting competition and, more importantly, that competition was not restricted for the remaining 80% of transport and storage capacity. In addition, the ACM analyzed whether the companies could actually achieve this goal on their own and found that cooperation was necessary for the project to succeed. The criterion extracted from this case and later reflected in the ACM guidelines was that sustainability agreements do not fall under the scope of the prohibition if users are allowed a fair share of the sustainability benefits, and the restriction of competition is necessary to obtain the benefits (in this case 20%) and does not go beyond what is necessary (in this case there is a remaining 80%).

But what about what is not allowed? On January 25th, 2022, the German Federal Cartel Office (**FCO**) concluded that a proposed agreement in the dairy sector to introduce a surcharge in favor of milk producers was anti-competitive.[18] However, the FCO indicated that it would be open to considering a revised concept, including sustainability objectives, that was not based on a price agreement to the detriment of consumers. In this context, the FCO rejected the proposed agreement because it did not improve sustainability in the dairy sector, but the proposed system of surcharges would ultimately lead to price increases for consumers as they would not be able to switch to viable alternatives. The President of the FCO clarified that the economic interest in a higher level of income *per se* cannot justify the exemption of such an agreement from antitrust law. As a result, despite the fact that the FCO has not published any guidelines, the criterion applied to the case is also in line with those jurisdictions that have already published their soft law, i.e. a sustainability concept based on a price agreement to the detriment of consumers will not be subject to an exemption, whereas a sustainability concept with no negative impact on prices to the benefit of consumers will certainly serve as an initiative compatible with antitrust law, not only for the FCO but also for any other antitrust authority.

Other initiatives to promote sustainability have been evaluated by antitrust authorities in Germany, the Netherlands, the United Kingdom, and Belgium that were considered unlikely to harm competition, namely voluntary commitments[19], agreements to offer multiple services to new customers[20], long-term supply agreements[21], the exchange of non-commercially sensitive data[22], and the creation of platforms for sharing sustainability

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[18] *See* https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.html?nn=3591568

[19] *See* https://www.lexology.com/library/detail.aspx?g=7e194cfa-8b4b-4424-beca-b6f0031a508a

[20] *See* https://www.acm.nl/system/files/documents/Letter%20Informal%20assessment%20of%20sustainability%20initiative%20regarding%20the%20recycling%20of%20commercial%20waste.pdf

[21] *See* https://assets.publishing.service.gov.uk/media/65799999095987001295dfb1/A._Fairtrade_Foundation_informal_guidance.pdf

[22] *See* https://www.belgiancompetition.be/sites/default/files/content/download/files/20230330_Press_release_11_BCA.pdf#:~:text=The%20Belgian%20Competition%20Authority%20considers%20that%20the%20sustainability,their%20effects%20on%20competition%2C%20on%20the%20other%20hand.

measurement data.[23] While each case is unique, these assessments suggest that companies can effectively cooperate on sustainability goals with appropriate guidelines and safeguards, such as non-binding measures and limited scope of cooperation, where necessary.

III. Different guidelines, but the same principles: How Do We Keep It Up?

How can we achieve proactive global consensus among antitrust agencies on what the approach of antitrust law should be to sustainability agreements?

While the initiatives of agencies around the world[24] are positive, there is a lack of a coordinated approach to translate that into a common understanding of antitrust policy. Therefore, if companies are considering sustainable collaboration or joining forces to achieve sustainability goals, they should be very mindful of the geographical scope of that collaboration based on the current landscape. The existence of these guidelines implies different jurisdictions, different antitrust authorities, and therefore different approaches. Instead of simplifying and encouraging companies to be greener, they might as well stay as they are to avoid a thorough self-assessment of whether or not their cooperation can benefit from the legal exception rule, especially in cross-border cases. However, there is one thing that all antitrust authorities in all jurisdictions should be able to do: provide case law that serves as an example for all kinds of guidelines and soft law approaches.

Although the antitrust authorities have adopted different guidelines, the case law that has inspired their soft law is undeniably coherent and uniform in most jurisdictions, even in those that have not yet published guidelines. The following criteria can be extracted from the above-mentioned cases (i) sustainability agreements must pursue sustainability goals; if there is no evidence that the agreement pursues sustainability, then it falls within the scope of a regular agreement between competitors, which *prima facie* does not fall within the scope of pro-competitive practices, (ii) the agreement must not restrict the companies'

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[23] *See* https://www.gov.br/cade/en/matters/news/cade-clears-joint-venture-for-the-development-of-sustainability-measurement-software

[24] Other initiatives include the Competition & Consumer Commission (**CCCS**) of Singapore, in September 2023, published its Environmental Sustainability Collaboration Guidance Note, to provide greater clarity to businesses on how the CCCS will assess collaborations with environmental sustainability objectives. This includes providing examples of when such collaborations would normally not be anti-competitive, when competition concerns may arise, explaining how the CCCS would assess them, and stating the conditions under which competition concerns are less likely to arise from collaborations with environmental sustainability objectives.
See https://www.cccs.gov.sg/-/media/custom/ccs/files/public-register-and-consultation/public-consultation-items/guidance-note-on-sustainability-for-business-collaboration-public-consult-20-jul-23/draft-environmental-sustainability-collaboration-gn-for-public-consultation_clean.ashx
See https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/proposed-guidance-note-on-business-collaborations-pursuing-environmental-sustainability-objectives?type=public_consultation
Also, in November 2023, the New Zealand Commerce Commission (NZCC) published its Collaboration and Sustainability Guidelines, which set out exemptions for cartel conduct under section 31 of the Commerce Act. The NZCC recognizes that parties may collaborate for a variety of reasons not directly related to lessen competition, such as to achieve environmental benefits, and those collaborative sustainability initiatives that may impact competition. In spite of not possibly identifying all types of collaboration that may breach the Commerce Act, the NZCC provides examples of competition considerations that may arise through different types of collaboration for sustainability objectives.
See https://comcom.govt.nz/__data/assets/pdf_file/0033/335985/Collaboration-and-Sustainability-Guidelines-30-November-2023.pdf

ultimate freedom to go beyond the proposed sustainability targets, i.e. if they want to be more environmentally friendly, they should not be constrained in their behavior, and (iii) the sustainability target pursued by the agreement must generate benefits for consumers, for society, that can proportionately and reasonably outweigh high costs or prices.

These are present in all the guidelines mentioned above and reflect the essence of the competition assessment that antitrust authorities might later make on a case-by-case basis. There are aggregations to this, but the overall picture remains the same.

Pursuant to the Argentina's Antitrust Commission's case law, when competitors exchange sensitive information, they may be facilitating collusion and harming competition to the detriment of the general economic interest. In this regard, competitively sensible information can be defined as information of a strategic nature which, if known by a competitor, may influence its decision in the market. Therefore, only information that is "reasonable" can be shared among competitors.

Following the Guidelines for associations, chambers and professional associations[25], which regulates the exchange of sensitive information, the following considerations should be taken into account when exchanging information between competitors: (i) the nature of the information, (ii) the timeliness of the information, (iii) the level of detail, (iv) the source of the information and (v) the territory in which the information is being exchanged.

Based on the above, in order to avoid any anticompetitive conduct under the exchange of commercially sensitive information, the information should be exchanged in a restricted manner without further details and references to production volumes, sales, prices, discounts, reductions, promotions, commercial strategies and future plans with respect to pricing, business plans, customer lists, etc.

So, if antitrust authorities are already applying uniform standards, what is left to achieve a proactive global consensus?

This will require a multifaceted that includes collaboration, communication, and a shared understanding of the issues at hand. To continue with the good work, the following initiatives could be pursued: (i) International forums and working groups, composed of representatives of antitrust agencies from around the world. These forums can serve as platforms for discussion, knowledge sharing, and cooperation on the intersection of antitrust law and sustainability agreements; (ii) Research and analysis, where antitrust agencies can discuss specific cases involving sustainability agreements. These discussions can help identify common challenges and potential solutions. For example, in 2020 the OECD published a Discussion Paper on Sustainability and Competition[26], where the main topics of discussion were: defining sustainability, determining whether antitrust law and policy should be affected by sustainability, and other related technical and procedural issues. Today, however, the landscape has evolved and a new and updated

[25] *See* https://www.argentina.gob.ar/sites/default/files/guia_para_camaras_y_asociaciones.pdf

[26] OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper, http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf

research by the OECD could be encouraged based on the various cases discussed above in relation to different jurisdictions and their guidelines; (iii) Case studies and workshops, where antitrust agencies can discuss specific cases involving sustainability agreements. These discussions can help identify common challenges and potential solutions. By pursuing these strategies, antitrust agencies can work towards a proactive global consensus on sustainability agreements, ultimately promoting a more harmonized and coordinated regulatory environment.

Australia

Giving the Green Light: The ACCC's Unique Approach to Weighing Environmental Benefits in Antitrust Cases

By Felicity McMahon, Jamie Hick and Morgan Houston of Allens[27]

1 Introduction

As many countries around the world have committed to transitioning their economies to net zero emissions by 2050, the intersection between competition law and environmental considerations has gained greater interest. Businesses are increasingly looking for 'green' opportunities, such as collaborations to reduce their carbon footprints and acquisitions to invest in renewable energy. These efforts can raise potential competition concerns, but Australia's competition law framework provides a clear pathway for companies to obtain comfort that they have protection from competition law enforcement in pursuit of these environmental objectives.

Australia's authorisation regime for merger and non-merger conduct stands out internationally. Not only because most regimes around the world have moved from authorisation models to 'self-assessment', but also because of the ability of the Australian Competition and Consumer Commission (***ACCC***) to balance competitive concerns against broader public benefits, including environmental and sustainability benefits. The ACCC has authorised a number of collaborative arrangements between competitors on the grounds of environmental benefits and, in a world first, authorised a merger in relation to which it identified anti-competitive effects on the basis that the transaction would lead to significant public benefits by accelerating the roll-out of renewable energy generation and leading to a more rapid reduction in Australia's greenhouse gas emissions. The ACCC's capacity to support environmental goals while safeguarding market integrity places Australia at the forefront of aligning competition law with sustainability priorities.

This paper is structured as follows:

- **Section 2** provides an overview of the legal framework under which the ACCC has jurisdiction to authorise both merger and non-merger conduct where sufficient public benefits exist.
- **Section 3** provides an overview of the ACCC's track record in authorising conduct with environmental and sustainability public benefits.
- **Section 4** compares the Australian authorisation framework to the approaches taken in other jurisdictions to considering environmental benefits.
- **Section 5** evaluates the benefits of the Australian approach and suggests some opportunities for further progress.

[27] Felicity McMahon is a Partner, Jamie Hick is an Associate, and Morgan Houston is a Lawyer in the Competition, Consumer and Regulatory team at Allens, based in Sydney, Australia. The paper is accurate as at 27 December 2024.

2 The ACCC's mandate and authorisation powers

The ACCC views the *Competition and Consumer Act 2010* (Cth) (***CCA***) as '*an economic law that serves important social and political objectives*'.[28] Australian competition law is not *'an end in itself*', but is *'a means to enhance the welfare of Australians*'.[29]

Australia has both merger and non-merger authorisation processes whereby the ACCC can authorise acquisitions or arrangements, such as collaborations, alliances or coordination between competitors, that would otherwise be anti-competitive. Authorisation gives the applicant parties statutory protection from legal action under the CCA for the authorised conduct, including action by the ACCC as well as third parties. In an increasingly litigious jurisdiction, this is a valuable benefit of seeking authorisation.

In relation to mergers, Australia currently has a voluntary merger control regime, with no legal requirement or thresholds for notification. There are two pathways for parties to obtain 'clearance' from the ACCC: informal clearance or formal merger authorisation. The only consideration under the informal process is whether the acquisition would have the effect or likely effect of substantially lessening competition in any market in Australia (in breach of s 50 of the CCA).[30] However, formal merger authorisation is subject to the test set out in section 90(7) of the CCA.[31] This provision permits the ACCC to grant authorisation where either the proposed acquisition would not have the effect or likely effect of substantially lessening competition, or the proposed acquisition would result or be likely to result in a benefit to the public and the benefit would outweigh any public detriment (ie, a net public benefit). While Australia will be moving from a voluntary merger control regime to a mandatory, suspensory regime from 2026, the net public benefit assessment that exists under the current merger authorisation process will subsist under the new regime's single clearance process and will be included as a second-stage test if clearance is not granted on competition grounds.[32]

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[28] See speech by Gina Cass-Gottlieb (Chairperson of the ACCC) at CEDA – Committee for Economic Development of Australia, *'2024-25 Compliance and Enforcement Priorities'* (7 March 2024): https://www.accc.gov.au/about-us/news/speeches/committee-for-economic-development-of-australia-ceda-speech-2024.

[29] Ibid. See also ACCC, '*Guidelines for authorisation of conduct (non-merger)'* (August 2024) (***ACCC Non-merger Authorisation Guidelines***), para 8.3: https://www.accc.gov.au/system/files/guidelines-authorisation-conduct-non-merger-aug24.pdf. The Guidelines state that competitive markets are '*the best way to enhance the overall welfare of Australians, because competition ensures that the goods and services Australian consumers want are developed and supplied at the lowest possible cost*'.

[30] The ACCC's final decision in respect of an informal merger review can be: (i) a decision to not oppose the merger; (ii) a decision to not oppose the merger subject to acceptance of remedies; or (iii) a decision to oppose the merger. Under the informal process, the ACCC does not formally clear or authorise the merger. For further detail on the informal merger process, see ACCC, '*Informal Merger Review Process Guidelines'* (November 2017): https://www.accc.gov.au/system/files/D17-156292%20Informal%20Merger%20Review%20Process%20Guidelines%20-%20updated%20November%202017_0.PDF.

[31] The relevant part of section 90(7) is as follows:

(7) The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless:

> *(a) the Commission is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or*
>
> *(b) the Commission is satisfied in all the circumstances that:*
>
> > *(i) the conduct would result, or be likely to result, in a benefit to the public; and*
> >
> > *(ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct;*

[32] On 28 November 2024, Australia passed into law the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* (***Merger Reform Bill***), pursuant to which Australia will adopt a mandatory and suspensory administrative

Similarly, for non-merger conduct that may otherwise breach Australia's competition laws, the ACCC can authorise the relevant conduct if it would result in a net public benefit under section 90(7) of the CCA. The non-merger authorisation process essentially recognises market failures, ie, circumstances where competitive markets may not work to deliver the most efficient outcome and may fail to maximise total welfare.[33] For example, in cases of market failure, restrictions on competition may achieve a more efficient outcome and therefore higher public benefit than if the market was left to operate freely.[34] Therefore, in certain situations, the public interest may be served by authorising otherwise anti-competitive behaviour.[35] If competitors were to proceed with collaborative action without authorisation, this may raise risks under the CCA, including possible cartel conduct in contravention of sections 45AA to 45AU of the CCA, putting the parties at risk of civil and criminal liability and individual and corporate penalties. Cartel conduct involves a contract, arrangement or understanding between competitors that:

(a) has the purpose or effect of fixing, controlling or maintaining prices for goods or services; or

(b) has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services; or

(c) has the purpose of allocating customers, suppliers or territories; or

(d) amounts to bid rigging (ie, agreeing on bids, whether or not to bid, the success or otherwise of a bid, or a material component of a bid).

Collaborative action between competitors may also raise other risks under the CCA, including pursuant to:

(a) s 45 of the CCA, if the agreement has the purpose or effect of substantially lessening competition in a market or if parties share competitively sensitive information (prohibited as a 'concerted practice' if the information sharing has the purpose or effect of substantially lessening competition in a market); or

(b) s 47 of the CCA, if the agreement includes conditions regarding who the parties do business with, what business the parties do, or where the parties do business. This will only breach s 47 where the exclusive arrangement has the purpose, effect or likely effect of substantially lessening competition.

The public benefits test that the ACCC applies when assessing applications for authorisation is a broad test. Although the CCA does not expressly define or limit the

merger process. The new merger regime is set to be in effect from 1 January 2026, with businesses able to make voluntary notifications under the new regime from 1 July 2025. Formal merger authorisation applications under the current regime cannot be made after 30 June 2025 and informal merger clearance applications cannot be made after 31 December 2025.

[33] ACCC Non-merger Authorisation Guidelines, para 8.4.

[34] Ibid.

[35] Ibid.

public benefits which may be taken into account by the ACCC, it has been accepted that public benefits include both economic and non-economic benefits. The Australian Competition Tribunal has defined public benefit as '*anything of value to the community generally, any contribution to the aims pursued by the society, including as one of its principle elements (in the context of trade practices legislation), the achievement of economic goals of efficiency and progress*'.[36] 'Public detriment' is also undefined in the CCA, but has been given an equally broad construction as *'any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency*'.[37]

In weighing public benefits and detriments, the ACCC considers the future with and without the proposed conduct. In doing so, the ACCC compares the expected state of the market with the proposed conduct (ie, the 'factual') with the likely state of the market without the proposed conduct (ie, the 'counterfactual'). In most cases, but not all, the counterfactual is the status quo.

The assessment of applications for authorisation is a public process. Applications for both merger and non-merger authorisation – which are published on the ACCC's website – must set out the details of the public benefits associated with the conduct. Public benefit claims must be substantiated, and applicants must demonstrate how those public benefits result from the proposed conduct. While the CCA does not require the ACCC to quantify numerically or arithmetically the exact level of public benefits and detriments, and the ACCC recognises that it is not possible to quantify public benefits and detriments in many cases,[38] the ACCC encourages parties to quantify the size of claimed benefits and detriments where possible to inform the relative weight to be attributed in the ACCC's assessment. Where it is not possible to quantify public benefits and detriments, the ACCC will conduct a qualitative assessment.[39]

The arguments put forward by the parties are tested through public consultation. The ACCC consults broadly with a range of parties that are likely to be affected by the proposed conduct. Third party submissions lodged with the ACCC in relation to the authorisation application are also published on the ACCC's website. The ACCC must make its decision on an application for merger authorisation within 90 days of a valid application being lodged,[40] and within six months for a non-merger authorisation application. In applications for non-merger authorisation, parties may also seek urgent authorisation on an interim basis while the ACCC is considering whether to grant final authorisation.

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[36] *Re Queensland Co-op Milling Assn Ltd* (1976) 25 FLR 169, 182-183; *Re 7-Eleven Stores* (1994) ATPR 41-357, 42,677.
[37] *Re 7-Eleven Stores* (1994) ATPR 41-357, 42,683.
[38] ACCC Non-merger Authorisation Guidelines, para 8.18-8.20; ACCC, '*Merger Authorisation Guidelines'* (October 2018) (***ACCC Merger Authorisation Guidelines***), para 8.21-8.25. See also *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150 at [68]: *'The assessment of benefits and detriments does not necessarily involve an arithmetical or accounting exercise*'.
[39] ACCC Non-merger Authorisation Guidelines, para 8.20; ACCC Merger Authorisation Guidelines, para 8.23-8.24.
[40] This time period will change under the new Australian merger regime. The Merger Reform Bill specifies review times of 30 business days for Phase 1 (competition review), a subsequent 90 business days for Phase 2 (competition review), and a further 50 business days for substantial public benefits assessment.

3 The ACCC's track record in authorising conduct with environmental benefits

The ACCC has made clear that it is willing to take environmental factors into account as part of the net public benefit test. The ACCC recently published its final guide on sustainability collaborations and Australian competition law, which expressly recognises that the ACCC can take sustainability benefits into account as part of its assessment if those benefits are likely to result from the conduct sought to be authorised.[41] The guide is designed to help businesses understand the competition law risks that may arise when contemplating working together to achieve positive environmental outcomes and explains how ACCC authorisation may be available to facilitate these agreements even if there are potential competition concerns. The guide gives specific examples of environmental public benefits, including reduced emissions, biodiversity benefits, reduced plastic waste and increased circularity, as well as other types of public benefits including human rights improvements, transaction cost savings and other economic efficiencies. The final guide is also supplemented by a 'quick guide' and a five-step checklist to help businesses swiftly evaluate competition law risks and exemption options.[42]

The ACCC's willingness to account for environmental benefits in the net public benefit test has also been demonstrated through the ACCC's world first decision to authorise a merger in relation to which it identified anti-competitive effects on the basis of environmental public benefits as well as the numerous collaborative arrangements that the ACCC has authorised on environmental grounds.

Merger authorisation: Brookfield / Origin

The ACCC has accepted environmental public benefits in one merger authorisation to date: the proposed acquisition of Origin Energy Limited (***Origin***) by EOS Aggregator Bermuda LP (a special purpose vehicle established for the proposed transaction, to be controlled by Brookfield) and MidOcean Reef Bidco Pty Ltd (owned by MidOcean Energy, LLC) (***MidOcean***) (***Brookfield / Origin***).[43] Origin is a major Australian energy company involved in the generation, distribution and retail of electricity and natural gas, and also operates a gas exploration and production business which includes a 27.5% interest in Australia Pacific LNG (***APLNG***) (a liquefied natural gas project in Queensland). Brookfield is ultimately controlled by Brookfield Corporation, a global asset manager based in Canada. Brookfield Corporation owns a 45.4% interest in AusNet, which owns a large part of the electricity transmission network in Victoria, one of five electricity distribution networks in Victoria, and one of three gas distribution networks in

[41] ACCC, *'Sustainability collaborations and Australian competition law: A guide for business'* (18 December 2024) (***ACCC Sustainability Collaborations Guidance***): https://www.accc.gov.au/system/files/sustainability-collaborations-and-australian-competition-law-guide_1.pdf

[42] See ACCC, *'Sustainability collaborations and Australian competition law – Quick guide*' (18 December 2024): https://www.accc.gov.au/system/files/sustainability-collaborations-and-australian-competition-law-quick-guide_1.pdf; ACCC, '*5 step checklist for businesses considering collaboration*' (18 December 2024): https://www.accc.gov.au/system/files/sustainability-collaborations-checklist.pdf.

[43] Brookfield LP and MidOcean proposed acquisition of Origin Energy Limited: https://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/brookfield-lp-and-midocean-proposed-acquisition-of-origin-energy-limited.

Victoria. Brookfield also has a 50% interest in Intellihub, a smart metering company. MidOcean Energy, LLC is a liquified natural gas company formed by EIG Partners, an institutional investor in the energy sector. At the time of the proposed acquisition, MidOcean Energy, LLC was due to acquire a small interest in Queensland Curtis LNG (***QCLNG***) (a liquefied natural gas project in Queensland).

The ACCC's review of the *Brookfield / Origin* merger examined both competition and public benefit considerations. The ACCC found that the proposed acquisition would have the effect of substantially lessening competition in certain markets due to the formation of vertical links between AusNet and Origin. The ACCC was concerned that Brookfield could use AusNet to discriminate against Origin's rivals, for example by delaying new connections for competing generators to AusNet's transmission network, making or influencing investment and maintenance decisions in favour of Origin, causing strategic outages of lines that competing generators use or reducing transmission service quality for competing generators. The ACCC was also concerned about horizontal competition effects due to MidOcean Group's ownership interests in both QCLNG and APLNG.

While the ACCC noted that the public benefits and public detriments in the matter were 'finely balanced',[44] the ACCC was ultimately satisfied that that the proposed acquisition was likely to result in public benefits that would outweigh the likely public detriments. The ACCC found that the proposed acquisition would likely enable substantial investments by Origin in renewable energy projects, which would support Australia's energy transition and net zero targets. The ACCC took into account Brookfield's commitment to a substantial capital expenditure plan to decommission some of Origin's coal assets and develop renewable energy assets, as well as Brookfield's global renewables expertise, procurement scale advantage and other financial, reputational and commercial incentives to deliver the proposed renewable build out. The ACCC also accepted that Origin's large retail customer base supported the investment and acceleration of the proposed build out, as it removed the need to negotiate offtake arrangements, which can increase time and project costs.

Furthermore, the authorisation was conditional on undertakings provided by AusNet, Brookfield and MidOcean which required functional separation and anti-discrimination measures, information sharing controls and reporting obligations in relation to the renewable build out.[45] These undertakings were important in achieving a net public benefit: the ACCC's view was that the undertakings reduced the likelihood of some public detriments and increased the likelihood of some public benefits, which resulted in a net public benefit overall.

The *Brookfield / Origin* merger authorisation decision demonstrates the complex balancing act that the ACCC undertakes in weighing environmental benefits while safeguarding competition and consumer interests in the Australian market. Ultimately,

[44] See ACCC Reasons for Determination, para 9.21: https://www.accc.gov.au/system/files/public-registers/documents/Reasons%20for%20Determination%20-%2010.10.23%20-%20PR%20-%20MA1000024%20Brookfield%20Origin.pdf?ref=0&download=y.

[45] The undertakings are available on the ACCC's public register: https://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/brookfield-lp-and-midocean-proposed-acquisition-of-origin-energy-limited.

while environmental benefits do not automatically override competition considerations, they are increasingly important in the ACCC's decision-making process.

Non-merger authorisation: Product stewardship schemes

In recent years, the ACCC has authorised collaborative conduct on environmental grounds on a number of occasions. As above, parties often seek authorisation for such arrangements to guard against contravention of the cartel provisions and other prohibitions in the CCA.

One common type of authorisation sought from the ACCC on environmental grounds is for product stewardship schemes, where businesses take responsibility for the environmental impact of their products throughout the entire product lifecycle. These schemes generally focus on reducing waste, promoting recycling and ensuring safe disposal. Responsibility is often shared between manufacturers, retailers and consumers, usually through the imposition of a levy on the relevant product. Some recent examples of product stewardship schemes that the ACCC has authorised include:

(a) **ResiLoop Limited (interim authorisation granted August 2024)[46]:** To establish and operate a voluntary, industry-led product stewardship scheme to collect and recycle resilient flooring waste. In its interim authorisation decision and draft determination, the ACCC considered the following public benefits: environmental benefits from reducing resilient flooring going to landfill; benefits arising from research and development into resilient flooring end-of-life products; pricing to better reflect the externalities of resilient flooring disposal; and increased job opportunities.

(b) **Coles Group on behalf of itself and participating supermarkets (authorisation initially granted June 2023,[47] further interim authorisation granted July 2024)[48]:** To collaborate via an industry-led 'Soft Plastics Taskforce', to mitigate suspension of the REDcycle soft plastics recycling program. The ACCC considered the following public benefits: development of more efficient, temporary soft plastic recycling solutions; maximisation of recycling efficiency

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[46] ACCC, '*Draft Determination & Interim Authorisation: Application for authorisation lodged by Resiloop Ltd in respect of a national product stewardship scheme for resilient flooring: Authorisation number: AA1000675*' (16 August 2024): https://www.accc.gov.au/system/files/public-registers/documents/Draft%20Determination%20and%20Interim%20Authorisation%20Decision%20-%2016.08.24%20-%20PR%20-%20AA1000675%20ResiLoop_0.pdf?ref=0&download=y.

[47] ACCC, *'Determination: Application for authorisation AA1000627 lodged by Coles Group Limited on behalf of itself and other participating supermarkets in respect of conduct in connection with the Soft Plastics Taskforce'* (30 June 2023): *https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2030.06.23%20-%20PR%20-%20AA1000627%20Coles%20%26%20Ors_0.pdf?ref=0&download=y*.

[48] ACCC, *'Coles Group on behalf of itself and participating supermarkets – Application for revocation of AA1000627 and the substitution of authorisation AA1000673 in relation to soft plastics recycling: Interim authorisation decision'* (18 July 2024): https://www.accc.gov.au/system/files/public-registers/documents/Interim%20Authorisation%20Decision%20-%2018.07.24%20-%20PR%20-%20AA1000673%20Coles%20%26%20Ors.pdf?ref=0&download=y. On 19 December 2024, the ACCC released its draft determination proposing to grant authorisation with conditions: https://www.accc.gov.au/system/files/public-registers/documents/Draft%20Determination%20-%2019.12.24%20-%20PR%20-%20AA1000673%20Coles%20%26%20Ors.pdf?ref=0&download=y.

to divert soft plastics away from landfill; and promotion and consumer awareness on recycling directions and initiatives.

(c) **Australian Bedding Stewardship Council (authorisation granted October 2022)[49]:** To establish and operate a voluntary, industry-led product stewardship scheme, 'Recycle My Mattress', to increase resource recovery and the diversion of waste from landfill and minimise the environmental and health and safety impacts of end-of-life mattresses. The ACCC considered the following public benefits: minimisation of environmental, health and safety impacts of end-of-life mattresses by encouraging changes in consumer behaviour; pricing that better reflects the cost of supply and disposal of mattresses; and employment opportunities for people who experience social disadvantage, by facilitating greater recycling.

(d) **Paintback Limited (authorisation initially granted October 2015;[50] reauthorised May 2021)[51]:** To impose a levy on the wholesale sale of certain architectural and design paints (***A&D paint***) to fund the Paintback scheme, a nationally co-ordinated approach to the collection and disposal of A&D paints. In its most recent decision re-authorising the scheme, the ACCC considered the following the following public benefits: environmental benefits from the reduction in improperly disposed of waste A&D paint; and cost efficiencies from the scheme compared to a number of separately operated schemes operating on a more limited scheme through economies of scale.

(e) **Battery Stewardship Council (authorisation granted September 2020)[52]:** A national voluntary battery stewardship scheme that would fund the costs of collecting, sorting and recycling batteries at end of life. The ACCC considered the following public benefits: significant environmental benefits through increasing the number of batteries that will be appropriately recycled; increased public awareness of battery disposal and re-use; and supporting increased innovation, research and development.

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[49] ACCC, *'Determination: Application for authorisation AA1000613 lodged by Australian Bedding Stewardship Council in respect of 'Recycle My Mattress' Product Stewardship Scheme'* (26 October 2022): https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2026.10.22%20-%20PR%20-%20AA1000613%20ABSC.pdf?ref=0&download=y.

[50] ACCC, *'Determination: Application for authorisation A91504 lodged by The Australian Paint Manufacturers' Federation on behalf of itself, Paint Stewardship Limited and certain paint manufacturers and importers in respect of a National Paint Product Stewardship Scheme which introduces a 15 cents per litre levy on Architectural and Decorative Paint'* (29 October 2015): https://www.accc.gov.au/system/files/public-registers/documents/D15%2B163825.pdf?ref=0&download=y

[51] ACCC, *'Determination: Application for authorisation lodged by Paintback Limited on behalf of itself and participating paint suppliers in respect of the Paintback Scheme which is funded through a 15 cents per litre levy on Architectural and Decorative Paint: Authorisation number: AA1000536'* (27 May 2021): https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20and%20Interim%20Authorisation%20Decision%20-%2027.05.21%20-%20PR%20-%20AA1000536%20Paintback.pdf?ref=0&download=y.

[52] ACCC, *'Determination: Application for authorisation AA1000476 lodged by Battery Stewardship Council in respect of the Battery Stewardship Scheme'* (4 September 2020): https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2004.09.20%20-%20PR%20-%20AA1000476%20-%20BSC_0.pdf?ref=0&download=y.

See also authorisations granted to Refrigerant Reclaim Australia Limited,[53] Tyre Stewardship Australia Limited[54] and AgStewardship Australia Limited.[55]

Non-merger authorisation: Collective bargaining and joint procurement arrangements

Another type of conduct for which ACCC authorisation is commonly sought is for collective bargaining or joint procurement arrangements. Some recent examples of ACCC authorisation for these types of arrangements on environmental grounds include:

(a) **1Circle Pty Ltd and Ors (authorisation granted March 2024)[56]:** To establish a joint renewable energy buying group. The ACCC considered the following public benefits: environmental benefits through a reduction in greenhouse gas emissions as a result of the group members being able to achieve a faster or more extensive transition to renewable energy at lower cost and with less risk than if they each sourced renewable electricity individually; and transaction cost savings for both the group members and potential retail electricity suppliers as a result of the joint tender process.

(b) **Metropolitan Waste and Resource Recovery Group (authorisation granted February 2022)[57]:** To establish a collaborative tender process for procuring recyclable waste sorting services for participating councils. The ACCC considered the following public benefits: higher quality and greater variety of recyclable resources recovered; increased recycling and resource recovery rates; greater diversion of recyclable waste from

[53] ACCC, *'Determination: Application for revocation of A91515 and the substitution of authorisation AA1000537 lodged by Refrigerant Reclaim Australia Limited in respect of its operation of a product stewardship program to recover ozone depleting and synthetic greenhouse gas refrigerants'* (12 May 2021): https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2012.05.21%20-%20PR%20-%20AA1000537%20-%20RRA.pdf?ref=0&download=y.

[54] ACCC, *'Determination: Application for revocation of AA1000409 and the substitution of authorisation AA1000655 lodged by Tyre Stewardship Australia Limited in respect of the continuation of the Tyre Product Stewardship Scheme'* (2 September 2024): https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2002.09.24%20-%20PR%20-%20AA1000655%20TSA.pdf?ref=0&download=y.

[55] ACCC, *'Determination: Application for revocation of A91382 and the substitution of authorisation AA1000429 lodged by AgStewardship Australia Limited in respect of the imposition of a levy on the sale of agricultural and veterinary chemicals'* (19 December 2018): https://www.accc.gov.au/system/files/public-registers/documents/AA1000429%20-%20Revocation%20and%20Substitution%20of%20A91382%20-%20AgStewardship%20Australia%20Limited%20-%20Final%20Determination%20-%2019.12.18%20-%20PR.pdf?ref=0&download=y.

[56] ACCC, *'Determination: Application for authorisation AA1000660 lodged by 1Circle Pty Ltd & the Business Renewables Buying Group members in respect of Establishing a joint renewable energy purchasing group'* (27 March 2024): https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2027.03.24%20-%20PR%20-%20AA10000660%201Circle%20%26%20Ors.pdf?ref=0&download=y.

[57] ACCC, *'Determination: Application for revocation of AA1000451 and the substitution of authorisation AA1000581 lodged by Metropolitan Waste and Resource Recovery Group in respect of a collaborative tender process for recycling sorting services'* (18 February 2022): https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2018.02.22%20-%20PR%20-%20AA1000581%20MWRRG.pdf?ref=0&download=y.

landfill; and alignment with overarching government policy to reduce waste and increase resource recovery.[58]

(c) **Equinix (Australia) Enterprises Pty Ltd & Ors (authorisation granted August 2021)[59]:** Joint procurement process for an aggregated hedged volume of electricity and equivalent volume of 'Green Products'. The ACCC considered the following public benefits: environmental benefits through a reduction in greenhouse gas emissions; transaction cost savings; and greater investment in and competition for electricity supply.

4 The ACCC's approach compared to other jurisdictions

The authorisation regime for merger and non-merger conduct in Australia is largely unique. Apart from a similar authorisation approach in New Zealand, it is not common for regulators to be able to expressly authorise potentially anti-competitive mergers and collaborative conduct between competitors on the basis of broad public benefits, including environmental benefits. This is despite the fact that antitrust regulators around the world are increasingly turning their attention to the role of environmental and sustainability considerations in competition analysis and the principles of the total welfare standard underpinning competition law frameworks.

Merger analysis

In a number of jurisdictions, there may be scope for regulators to consider environmental benefits in mergers albeit through narrow tests based on economic efficiency. For example, in the United Kingdom (***UK***), the Competition and Markets Authority (***CMA***) can approve a merger that would substantially lessen competition if the parties can prove that the deal would create merger efficiencies (in the form of either rivalry-enhancing efficiencies or relevant customer benefits) that outweigh the anti-competitive harm.[60] In its Merger Assessment Guidelines, the CMA notes that *'benefits in the form of environmental sustainability and supporting the transition to a low carbon economy are relevant customer benefits in some circumstances'*.[61] Similarly, in Europe, the legal framework allows for efficiencies substantiated by the merging parties to be taken into account,[62] and the European Commission (***EC***) has indicated that *'sustainability-related*

[58] See also similar authorisations granted to the following councils: Bayside Council & Georges River Council; Eastern Metropolitan Regional Council & Ors; The Northern Sydney Regional Organisation of Councils; Hurstville City Council & Ors; Burwood Council & Ors.

[59] ACCC, *'Determination: Application for authorisation AA1000558 lodged by Equinix (Australia) Enterprises Pty Ltd & Ors in respect of establishing a joint renewable energy purchasing group'* (11 August 2021): https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2011.08.21%20-%20PR%20-%20AA1000558%20-%20Equinix%20and%20Ors.pdf?ref=0&download=y.

[60] CMA, '*Merger Assessment Guidelines*' (18 March 2021) (***CMA Merger Guidelines***), paras 8.2-8.7: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf.

[61] CMA Merger Guidelines, para 8.21.

[62] *Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* (20 January 2004), para 29: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139.

aspects may play a role in the assessment of merger cases when it comes to efficiency considerations'.[63]

Apart from Australia, some jurisdictions do allow mergers to be considered through the lens of a broader public benefits test. For example, the New Zealand Commerce Commission has a similar ability to the ACCC to authorise mergers based on a net public benefit test.[64] While the New Zealand Commerce Act merely requires consideration of efficiencies that are likely to arise from the relevant conduct in assessing public benefits,[65] according to the New Zealand Commerce Commission's authorisation guidelines, environmental benefits as well as health, media and social welfare benefits can be taken into account when making a decision on a merger.[66] The South African Competition Commission must also assess the impact of a proposed merger on 'public interest grounds'.[67] While the factors to be considered by the Commission when determining whether a merger can be justified on public interest grounds do not expressly include the assessment of environmental factors, some in the South African Competition Commission have expressed the view that these factors are '*broad enough to allow these benefits to be taken into account*'.[68]

Assessment of non-merger conduct

In a similar way, in several overseas jurisdictions, there is limited scope for public benefit arguments in the context of assessing the competitive effects of non-merger conduct. Any public benefit assessment is usually based on narrow exemptions for anti-competitive agreements. Given the 'fine line' between preventing anti-competitive conduct and hindering the benefits of genuine sustainability initiatives, a number of competition authorities have issued targeted guidance that seeks to mitigate reluctance on the part of businesses to collaborate for sustainability purposes.

In June 2023, the EC adopted revised horizontal block exemptions regulations (***HBERs***) and issued accompanying Horizontal Guidelines to clarify the circumstances under which agreements between competitors that pursue genuine sustainability objectives do not contravene European Union (***EU***) competition rules.[69] The updated Horizontal

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[63] European Commission, *'Competition merger brief*' (September 2023), page 4: https://competition-policy.ec.europa.eu/system/files/2023-09/kdal23002enn_mergers_brief_2023_2.pdf

[64] *Commerce Act 1986* (New Zealand) s 67(3)(b). This section provides that, if the Commission is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted, the Commission may grant an authorisation for the acquisition. Available at: https://www.legislation.govt.nz/act/public/1986/0005/latest/dlm87623.html.

[65] *Commerce Act 1986* (New Zealand) s 3A: *'Where the Commission is required under this Act to determine whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct.'*

[66] New Zealand Commerce Commission, *'Authorisation Guidelines'* (June 2023), page 9: https://comcom.govt.nz/__data/assets/pdf_file/0012/91011/Authorisation-Guidelines-June-2023.pdf

[67] *Competition Act 1998* (South Africa) s 12A. Available at: https://www.compcom.co.za/the-competition-act/

[68] Daniela Bove, '*Sustainability considerations in the antitrust mandate: A Green Evolution or a prioritisation of Sustainable development Goals*' (August 2024): https://www.co mpcom.co.za/wp-content/uploads/2024/08/Daniela-Bove-Sustainability-considerations-in-the-antitrust-mandate.pdf.

[69] European Commission, Press Release, *'Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines*' (1 June 2023): https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2990.

Guidelines include a chapter dedicated to sustainability agreements in a bid to clarify that the EU's antitrust rules, in particular Article 101(1) of the Treaty on the Functioning of the European Union (***TFEU***), do not prevent the implementation of agreements between competitors that pursue a sustainability objective.[70] A sustainability agreement that restricts competition within the meaning of Article 101(1) of the TFEU can benefit from the exception in Article 101(3) if the parties can show that the following four conditions within that provision are satisfied:

(a) the agreement contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress;

(b) the agreement must not impose restrictions of competition that are not indispensable to the attainment of the benefits generated by the agreement;

(c) consumers receive a fair share of the claimed benefits; and

(d) the agreement must not allow the parties the possibility to eliminate competition in respect of a substantial part of the products in question.[71]

A unique feature in the EU is the 'soft safe harbour' established for sustainability standardisation agreements, which are agreements used to specify requirements that products, processors, distributors, retailers or service providers in a supply chain have to meet in relation to a wide range of sustainability metrics, such as CO2 emissions or recycling rates. The 'soft safe harbour' recognises the fact that these types of agreements often have positive effects on competition and for consumers. To benefit from a 'soft safe harbour', a number of conditions must be satisfied.[72]

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[70] European Commission, *'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements'* (1 June 2023) (***EC Guidelines***), chapter 9: https://competition-policy.ec.europa.eu/document/download/fd641c1e-7415-4e60-ac21-7ab3e72045d2_en?filename=2023_revised_horizontal_guidelines_en.pdf

[71] Article 101(3) of the TFEU provides:

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[72] EC Guidelines p 152:

(a) The procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process of selecting the standard.

(b) The sustainability standard must not be compulsory, either directly or indirectly, on those that do not wish to participate.

(c) Participating undertakings must remain free to apply higher sustainability standards.

(d) Parties to the sustainability standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard.

(e) There must be effective and non-discriminatory access to the outcome of the standard-setting process.

(f) The sustainability standard must satisfy at least one of the following:

(i) The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned;

(ii) The combined market share of the participating undertakings must not exceed 20% in any relevant market affected by the standard.

Businesses contemplating entering into sustainability agreements in the EU are only able to seek informal guidance from the EC in the form of a guidance letter under specific circumstances. Businesses are considered to be *'well placed to assess the legality of their actions in such a way as to enable them to make an informed decision on whether to go ahead with an agreement or unilateral practice and in what form'*.[73] However, in cases of 'genuine uncertainty', parties can seek informal guidance from the EC which will assess the validity of the request and issue a guidance letter where the assessment raises novel or unresolved questions or would provide added value with respect to legal certainty.[74] In any case, the EC Guidelines make clear that these written statements are just guidance and applicants remain responsible for carrying out their own self-assessment of the conduct under the TFEU.[75] Unlike ACCC authorisation that may grant protection from legal action, the guidance letters issued by the EC do not create any rights or obligations for the applicants or any third party and the relevant arrangements remains open to challenge.[76] The guidance letters do not represent a decision by the EC and do not bind Member States' competition authorities or courts that have the power to apply Articles 101 and 102 of the TFEU.[77]

In October 2023, the UK CMA published guidance on the application of Chapter 1 of the UK *Competition Act 1998*, which prohibits agreements between businesses that are restrictive of competition, to agreements relating to environmental sustainability between competitors (***UK Green Agreements Guidance***).[78] According to the UK Green Agreements Guidance, environmental sustainability agreements which have the object or effect of restricting competition are prohibited unless the agreement is exempt under section 9(1) of the *Competition Act 1998* on the basis that the benefits of the agreement outweigh the competitive harm.[79] Almost identical to the approach in the EU, to benefit from this exemption, parties must be able to demonstrate that their agreements meets each of the following four conditions:[80]

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[73] Official Journal of the European Union, '*Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters)*' (2022/C 381/07), paragraph 3. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52022XC1004%2802%29

[74] Ibid, para 7.

[75] Ibid, para 23.

[76] Ibid.

[77] Ibid, para 27.

[78] CMA, *'Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements'* (12 October 2023): https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf

[79] UK Green Agreements Guidance, p 27. Section 9(1) of the Competition Act 1998 provides:

(1) An agreement is exempt from the Chapter 1 prohibition if it –

(a) contributes to –

(i) improving production or distribution, or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit, and

(b) does not –

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

[80] UK Green Agreements Guidance, p 27.

(a) the agreement must contribute to certain benefits, namely improving production or distribution or contribute to promoting technical or economic progress;

(b) the agreement and any restrictions of competition within the agreement must be indispensable to the achievement of those benefits;

(c) consumers must receive a fair share of the benefits; and

(d) the agreement must not eliminate competition in respect of a substantial part of the products concerned.

Notably, to benefit from the relevant exemption in both the EU and UK, consumers of the products or services to which the agreement relates must receive a fair share of the public benefits. The contrasts to the position in Australia where there is no requirement that the public benefits from an agreement flow back to the consumers impacted by that agreement[81] although the more any benefits can be identified and quantified in a concrete manner, the greater the potential benefit and the more likely the benefits are to outweigh and detriments. However, this slight difference in approach means the ACCC can take broader sustainability benefits into account that flow to society generally, with a particular focus on public benefits to Australians, even if it is more difficult to precisely identify which flow to consumers directly.

The CMA also has an 'open-door policy' for informal guidance on sustainability agreements. This involves a 'light touch review' proportionate to the size, complexity and likely impact of the agreement, conducted on the basis of publicly available information and information shared with the CMA by the businesses.[82] Under this process, the CMA indicates any options, concerns, risks and possible solutions available to the parties in relation to the proposed agreement. In some circumstances, the CMA may agree adjustments with the parties that should be made to the agreement before it is implemented.[83] The CMA has stated that it will not take enforcement action against an agreement discussed with the CMA in advance and where the CMA did not raise concerns (or where those concerns were addressed by the parties).[84] However, while the 'open-door policy' does afford businesses some protection, the CMA has clarified that the policy's purpose *'is not to provide a definitive statement on the legality of an agreement, but to provide clarity on the application of the Guidance, and comfort on the CMA's expected approach to taking enforcement action'*.[85] As of November 2024, the CMA has published two informal opinions under the 'open-door policy'.[86] Given CMA informal assessment does not constitute a definitive conclusion as to the legality of the agreement in question,

[81] ACCC Sustainability Collaborations Guidance, p 21.
[82] Ibid, p 42.
[83] Ibid, p 42-3.
[84] Further, provided parties do not withhold relevant information, if the CMA were to subsequently conclude that further consideration of the agreement was necessary, the CMA would not issue fines before the parties had the opportunity to bring the agreement back into line with any required adjustments. Ibid, p 43-4.
[85] Ibid, p 2.
[86] CMA, *'CMA Informal Guidance: Green Agreements Guidance WWF-UK: WWF Basket – Climate Action'* (19 March 2024): https://assets.publishing.service.gov.uk/media/65f9aa38703c42001a58efc4/CMA_Informal_Guidance_-_Green_Agreements_Guidance.pdf; CMA, *'Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements'* (12 October 2023): https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf

it would seem that third parties are not precluded from bringing legal action, whether or not the parties sought informal guidance from the CMA. However, this has not yet occurred. Further, despite any informal assessment by the CMA, if it subsequently transpires that the relevant agreement appreciably restricts competition, the parties will be required to consult with the CMA regarding adjustments to *'bring the agreement to the right side of competition law*'.[87]

Following in the footsteps of its international peers, as set out above, the ACCC published its final guide on sustainability agreements in December 2024 to make it *'clear that competition law need not be a barrier for those considering sustainability collaborations that benefit the public*'.[88] The final guide followed the ACCC's release of its draft guide for consultation in July 2024 in response to which the ACCC received over 35 submissions. In addition to providing guidance to businesses on when sustainability collaborations are likely to breach the CCA and when they are unlikely to do so, the ACCC's final guide goes into detail about the ACCC's authorisation process, including examples of types of sustainability benefits that the ACCC will take into account. The final guide is also accompanied by a 'quick guide' and five-step checklist to assist businesses to quickly assess their competition law risk and exemption options.

5 Assessment of the Australian approach

The Australian authorisation process and the ACCC's approach to the net public benefit test provides parties wishing to make acquisitions with environmental benefits or to enter into sustainability agreements with a clear pathway to proceed with such arrangements, while at the same time mitigating the competition law risks of these arrangements, by providing immunity from ACCC investigation and third party action. Businesses are able to make their case to the ACCC on the basis of real, verifiable and significant environmental benefits, without being required to precisely quantify the benefit as is the case in other jurisdictions. While still maintaining a rigorous and evidence-based approach, the ACCC can take a qualitative approach where required,[89] and is afforded sufficient discretion to weigh any claimed benefits against potential public detriments within the specific circumstances of the particular case, product, service or industry.

The ACCC's authorisation process also provides greater certainty to parties about their exposure to enforcement action in relation to non-merger conduct by definitively 'authorising' a collaborative arrangement on public benefit grounds, and necessarily making a declaration as to its legality. With the ACCC's approval and exemption granted, businesses can focus on implementing the sustainability measures in question and generating the desired outcomes for the environment, safe from the risk of ACCC or third party action.

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[87] UK Green Agreements Guidance, p 43.
[88] ACCC, Media release, *'ACCC releases final guide on sustainability collaborations*' (18 December 2024): https://www.accc.gov.au/media-release/accc-releases-final-guide-on-sustainability-collaborations.
[89] *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150 at [68].

However, opportunities exist to further streamline the ACCC's authorisation process to make it easier for parties with regard to certain types of sustainability agreements or to reduce the upfront burden of information requirements. As discussed above, the EC Guidelines establish a 'soft safe harbour' for sustainability standardisation agreements where particular conditions are met. To further encourage the swift adoption of widespread sustainable practices by businesses in Australia, the ACCC could similarly grant a 'class exemption' under section 95AA of the CCA in relation to similar sustainability standardisation agreements.[90] Alternatively, there is scope for the ACCC to delineate particular types of arrangements (for example, sustainability standardisation agreements) by requiring a shorter review period or less information requirements for those particular arrangements. There may also be scope to reduce the burden of upfront information requirements for a broader range of authorisation applications, such as smaller entities, not-for-profits or particular arrangements that are unlikely to raise competition concerns.

Nevertheless, the ACCC's authorisation process generally provides businesses with flexibility and certainty. The number and variety of sustainability arrangements authorised by the ACCC has proved the authorisation process to be a robust and transparent framework capable of accommodating mergers and collaborative arrangements on environmental grounds when considered in the broader context of public good and public detriment.

6 Conclusion

As increasing numbers of businesses seek to collaborate around environmental and sustainability projects, there has necessarily been an increased focus on what kinds of acquisitions and collaborations could be authorised notwithstanding the competition law risks of doing so. Frameworks in other jurisdictions have a narrower focus on economic efficiency and competitive analysis. Through its broad public benefit test, the authorisation process in Australia provides a pragmatic framework that enables businesses to seek approval for both merger and non-merger conduct that serves societal and environmental objectives while addressing traditional competition law considerations. Nonetheless, as the antitrust world continues to grapple with balancing competitive markets and environmental benefits, a continued examination of alternative international approaches is an important way of continually assessing the effectiveness of the Australian approach and of facilitating international consistency as sustainability initiatives and practices are likely to continue into the future.

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[90] See section 95AA (Commission may determine class exemptions). Subsection 1 states:
(1) The Commission may, by legislative instrument, determine that one or more specified provisions of Part IV do not apply to a kind of conduct specified in the determination, if the Commission is satisfied in all the circumstances:
(a) that conduct of that kind would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
(b) that conduct of that kind would result, or would be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from conduct of that kind.
The ACCC already provides a collective bargaining class exemption that allows eligible small businesses to negotiate with their customers or suppliers as a group, without risking a breach of Australian competition law. To be covered by the class exemption, the collective bargaining group is required to submit a one-page notice form to the ACCC.

Brazil

Sustainability and Antitrust: Challenges and Opportunities in Brazil

By Leonardo Rocha e Silva and Alexandre Horn Pureza Oliveira

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Introduction

In Brazil, the discussion on the interface between sustainability and antitrust is still in its incipient stages. The Brazilian antitrust authority, the Administrative Council for Economic Defense (CADE), has not issued any specific guidance on how to assess sustainability agreements among competitors, nor has it taken a clear stand on whether (and, if so, how) it would consider environmental benefits in its analysis, despite the existence of legal grounds and policy reasons for CADE to consider environmental sustainability benefits in analyzing agreements among competitors. This article explores the challenges and opportunities surrounding the integration of sustainability considerations in CADE's antitrust enforcement, based on existing legal framework and recent case law. The article also contains recommendations to be followed by companies before clear guidance is given by CADE on this matter.

Legal framework

The 2011 Brazilian Competition Act (Law No. 12,529/2011) prohibits any acts that have as their object or may have the effect of 'limiting, restraining or in any way injuring free competition or free initiative' (article 36, main section). The Competition Act also provides a non-exhaustive list of examples of such acts, which includes 'promoting, obtaining or influencing the adoption of uniform or agreed business practices among competitors', 'creating difficulties for the establishment, operation or development of a competitor company or supplier, acquirer or financier of goods or services', and agreeing on prices, dividing markets, and restricting the supply of products and services (article 36, paragraph 3).

The Competition Act does not contain any express exemption for agreements among competitors that have the legitimate purpose of protecting, preserving or restoring the environment. In our view, however, this does not mean that such agreements are illegal in and of themselves or that CADE cannot take into account environmental benefits in its analysis. The Competition Act must be interpreted in keeping with the 1988 Brazilian Constitution and the international treaties incorporated into the Brazilian legal system, which establish the protection of the environment as a fundamental principle and a collective right.

The Brazilian Constitution lists the 'defense of the environment, including through differentiated treatment according to the environmental impact of products and services

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and their production and provision processes' as one of the pillars of the Brazilian economic order (article 170, item VI). The Brazilian Constitution also warrants the right to an ecologically balanced environment and imposes on the public authorities and society alike the duty to defend and preserve it for present and future generations (article 225, main section). Moreover, Brazil has assumed obligations related to the protection, preservation and restoration of the environment through the incorporation of international treaties, such as the Convention on Biological Diversity and the Paris Agreement. The Brazilian Federal Supreme Court has recently ruled that 'treaties on environmental law are a species of the genus of human rights treaties' and have a supra-legal status.

Therefore, the Competition Act, interpreted in accordance with the Brazilian Constitution and the international treaties adopted by Brazil, allows CADE to balance the benefits of environmental sustainability in analyzing agreements among competitors that have the legitimate purpose of protecting, preserving and restoring the environment. In fact, the Competition Act itself allows CADE to consider issues not related to price and quantity in its analysis. Article 88, paragraph 6 of the Competition Act establishes that mergers implying the elimination of competition in a substantial part of a relevant market, that may create or reinforce a dominant position, or that may result in control of a relevant market of goods or services may be authorized if they (i) aim to achieve one or more of the following objectives: (i.a) to increase productivity or competitiveness; (i.b) to improve the quality of goods or services; or (i.c) to foster efficiency and technological or economic development; (ii) are essential to achieve these benefits; and (iii) allow a relevant part of the benefits resulting from the merger to be passed on to consumers.

Although this provision is in the chapter of the Competition Act concerning merger control, CADE's Tribunal has already held that it also extends to conduct control. Indeed, there is no logical basis to assert that, while merger agreements restricting competition are authorized if they meet the requirements of article 88, paragraph 6 of the Competition Act, agreements not constituting a merger cannot be subject to the same rule.

Article 88, paragraph 6 of the Competition Act lists collective purposes which, when interpreted in light of the constitutional precepts and international treaties incorporated into the Brazilian legal framework, undoubtedly include objectives linked to environmental sustainability. For example, the development of goods or services that are more environmentally sustainable certainly entails an improvement in the quality of those goods or services, while the development and deployment of new sustainable technologies may just as well be characterized as a technological development.

Case law

From 2012 to 2016, CADE dealt with some cases involving agreements related to compliance with rules on pollution reduction, waste management and reverse logistics, which could be regarded as containing some aspects of sustainability agreements. They were not called 'sustainability agreements' by then, but did contain several aspects of agreements that have been recently regarded as 'sustainability agreements' by some authorities. During this period, various competitors submitted such agreements for prior approval by CADE as 'associative agreements'. In some cases, CADE imposed some

conditions concerning the access to information to be exchanged among companies and the governance of their joint efforts to manage waste.

However, due to a change in the concept of 'associative agreements' adopted by CADE in 2016, CADE decided, in 2018, that a waste management scheme involving direct competitors should not be analyzed by CADE, as the companies involved did not share risks and results regarding the operation. As a result, since 2018, companies need no clearance decision from CADE approving their waste management / reverse logistics arrangements even when those companies are organizing production factors in the pursuit of a common sustainability objective if they are not sharing risks and results.

Recently, CADE's Commissioner Victor Fernandes rendered an important vote[92] when reviewing a consultation on a proposed joint venture, whose business strategy would be to create Special Purpose Entities (SPEs) between Grupo Lara and Grupo MDC to capture, process, and commercialize biogas from landfills. According to him, *"Grupo Lara, which manages the landfills, will supply the biogas to the SPEs, which in turn will be responsible for building and operating biomethane plants. This structure allows Grupo Lara to monetize a byproduct of its landfills, while Grupo MDC gains preferential access to a valuable input. The SPEs will have operational autonomy, with Grupo Lara holding a majority stake and Grupo MDC a minority stake. The business initiative, therefore, aims to enable the transformation of potentially harmful waste (landfill biogas) into a renewable energy source (biomethane). This not only reduces landfill emissions but also contributes to diversifying the national energy matrix with a clean energy source. The project aligns with public sustainability policies and demonstrates how innovative business models can create economic value from environmentally responsible practices"*.

Commissioner Fernandes stated that the joint venture would be *"a form of cooperation between competitors that is pro-circularity, as it aims to utilize biogas to offer a new product"*. He concluded that "*initiatives of this kind may be added to the list of cooperations that are unlikely to raise competition risks. The only caveat to be verified in concrete terms would concern possible exchanges of competitively sensitive information, which could also be mitigated through antitrust protocols"*.

In his vote, Commissioner Fernandes went further to indicate his understanding that *"cases of sustainability agreements that would require the authority to exercise balancing or efficiency assessments in the form of general benefits to the community tend to be exceptional. In general, the literature and the experience of foreign antitrust authorities tend to agree that certain types of business cooperation rarely raise competition concerns a priori. This particularly applies to collaborative arrangements that: (i) seek to comply with mandatory international standards; (ii) promote the adoption of better sustainable practices within companies; (iii) develop open databases and green labels; or (iv) coordinate sectoral awareness initiatives. Such agreements are generally seen as having low potential to harm competition and, therefore, would not even require balancing exercises. Therefore, even while firmly committed to its mission of preserving undistorted competition in markets, CADE has much to contribute to the debate by recognizing*

[92] Vote rendered in the Consultation No. 08700.004130/2024-11, on September 17, 2024.

convergence zones where horizontal agreements promote sustainability and are generally pro-competitive."

In any event, as this was an opinion of one of the CADE's Commissioners and no guidelines have been issued as of yet, companies remain unable to advance even further on the sustainability agenda in Brazil for fear that joint actions involving competing companies may be challenged by CADE's General Superintendence, which is in charge of the investigations. Uncertainty looms large, the more so after CADE's enhanced focus on cooperative arrangements and on the exchange of information among competitors.

All things considered, there is a demand for guidance from CADE regarding the precautions that must be observed by companies interested in collaborating with competitors for the adoption of environmental sustainability measures / agreements. Companies are understandably concerned to share their strategies with the antitrust authority without a clear sign that CADE is in fact willing to evaluate their joint efforts in a manner to help companies avoid unnecessary anticompetitive effects and challenges related to compliance with antitrust rules.

Proposals by the ICC Brazil

Given this lack of clear guidance from CADE, the Competition and Sustainability Task Force of the International Chamber of Commerce (ICC), Brazil Chapter, has recently released a working paper on competition and sustainability, proposing measures for CADE to adopt in order to ensure that the Competition Act does not discourage legitimate and desirable collaborative actions among companies aimed at protecting the environment and combating climate change. The working paper prepared by us and other members of the Task Force emphasizes the legal feasibility and the need for clear directives to encourage cooperation among companies to address sustainability issues, including the pressing matter of climate change, while ensuring compliance with the Competition Act.

One of the main proposals referred to the creation of a specific system of consultation for companies interested in entering into environmental sustainability agreements, understood as any agreement that pursues a sustainability objective, regardless of the form of cooperation. The Task Force suggested that this system of consultation should be independent, specific, and detailed, and should allow companies to seek clarification from CADE about the legality of their proposed agreements, as well as to adjust them if necessary to comply with the Competition Act. The proposed consultation system should rely on the following general standards:

- The set of information to be submitted by the companies should be reduced and contain a self-assessment of the sustainability nature of the initiative, with reference to the criteria of analysis established in the guidance and the law;

- The companies should indicate the benefits to the environment generated by the agreement and how these benefits will be passed on to consumers;

- The authority should respond the consultation in a timely manner;

- The response of the authority should be simple and objective, confirming or not the legality of the agreement or indicating that no further investigation will be conducted;

- The guidance should be made public, respecting the confidentiality of information on the parties and on the agreement; and

- The decision should have a binding nature, ensuring greater legal certainty in implementing the proposed sustainability measures.

The working paper also suggested that, in addition to the formal consultation system, CADE should establish an open-door policy, whereby businesses considering entering into an environmental sustainability agreement can approach CADE for informal guidance on their proposed agreement if there is uncertainty over application of the guidance. This initiative would resemble other initiatives adopted by CADE in the past, such as the petition procedure admitted by CADE during the Covid-19 pandemic to facilitate the parties' understanding of the legality of cooperative arrangements put in place to cope with the pandemic fallout.

CADE expected to issue guidelines for collaboration between competitors in 2025

CADE has recently implemented a selection process for consultancy services to support the preparation of guidelines for collaboration between competitors. The draft guidelines are expected to include a chapter on environmental sustainability agreements and their limits to be considered lawful under the Competition Act, although CADE's officials have not confirmed that possibility as of yet. The draft guidelines are to be released for public consultation by the end of 2024 and eventually issued in 2025.

While CADE is currently discussing the introduction of guidelines for agreements between competitors, some contend that it would be important to define a list of examples of environmental sustainability agreements that do not raise competition concerns and, as such, should be deemed lawful by CADE. The list below, based on documents published by competition authorities of other jurisdictions, contains examples of such agreements:

- Agreement to influence internal corporate conduct, without restricting the strategic decisions of the companies, such as eliminating the use of single-use plastic, moderating / reducing the use of air conditioning in the offices, or limiting the number of printed materials by the companies;

- Agreement to jointly raise funds and expertise for the development of activities for each company to mitigate, adapt, or compensate the effects of greenhouse gas emissions generated in production;

- Agreement to develop training activities for people working in the industry to achieve environmental sustainability goals;

- Agreement to carry out a joint campaign to raise awareness about environmental sustainability issues within an industry or among customers, as long as the campaign is not a joint sale or advertisement of specific products;

- Agreement to establish environmental sustainability goals for the entire industry, without mechanisms of punishment or exclusion of competitors in cases of non-compliance with the goals;

- Agreement to raise awareness about the environmental impact or other negative externalities of consumption habits;

- Agreement to ensure compliance with requirements or prohibitions already defined in international treaties or conventions that deal with environmental sustainability, even if such instruments are not yet in force in Brazil (because they have not gone through the process of internalization);

- Agreements to create a database containing information on environmentally sustainable suppliers or distributors, without requiring that the parties necessarily buy or sell from them;

- Agreement to establish criteria for granting a green label for a certain agricultural good, provided that the traders buying such products remain free to negotiate the products under other labels or without labels, participation is voluntary and non-exclusive, there is no exchange of sensitive information (such as prices, production volumes, margins, etc.), and there is no definition of surcharges or mandatory minimum prices; and

- Agreements to develop environmental sustainability standards for the industry as a whole, aiming to make products more ecologically sustainable.

Our expectation is that the new guidelines on agreements between competitors to be issued by CADE in 2025 will include not only a chapter on sustainability agreements, but also a list similar to the one above with examples of agreements not raising competition concerns at all. Such a list would provide legal certainty and transparency to companies doing business in Brazil, and would allow them to conduct a preliminary self-analysis and to move forward with their initiatives without consulting with the antitrust authority.

Further, it would also be important for CADE's guidelines to contain additional orientation on the exchange of competitively sensitive information, including: (i) the concept of competitively sensitive information; (ii) the types of information exchanges that may pose restrictions to competition; (iii) the possible pro-competitive effects of information and data pooling practices; (iv) indirect forms of information exchange, including hub-and-spoke arrangements; and (v) practical measures that companies can adopt to avoid infringements, such as limiting the scope of the exchange (in terms of time, aggregation, and precision of data), using clean teams and independent trustees to

intermediate the relationship, among others. However, it is unclear to us whether CADE will go that far.

What to do while waiting for CADE's guidance?

Until CADE rolls out specific guidelines, a possible path for companies to mitigate risks in the cooperation between competitors in Brazil is to carefully design the governance rules for these arrangements. Through well-established governance rules, it may be possible to set forth mechanisms that reduce the risks of antitrust investigations. Some examples of measures along these lines involve the creation of (i) ethical walls to prevent access to competitively sensitive information; and (ii) decision-making bodies that preserve as much as possible the independent sphere of action between the parties. Companies willing to enter into sustainability agreements with effects towards the Brazilian market should also make sure to look for legal advice to discuss the terms and potential effects of those arrangements.

At this point, companies should make efforts to be able to clearly demonstrate that: (i) the proposed arrangements translate into environmental benefits; (ii) these benefits could not be achieved by other means; (iii) consumers will receive a fair share of those benefits; and (iv) there will still be sufficient competition in the affected markets. The problem is that these conditions may not be enough to shield cooperation agreements in case of antitrust challenges, in view of the lack of specific guidelines from CADE.

Conclusion

The integration of sustainability considerations in antitrust enforcement is a timely and relevant topic, given the urgency and complexity of the global climate crisis and the need for coordinated action from all stakeholders. There are legal grounds and policy reasons for the Brazilian antitrust authority, CADE, to incorporate environmental sustainability benefits in its analysis of agreements among competitors. Nonetheless, CADE has not yet developed a clear and consistent approach to assessment of this type of agreement, leaving businesses in a state of uncertainty and discouraging them from engaging in pro-environmental cooperation.

However, pressure is increasingly brought to bear on CADE to provide clear guidelines on the subject, which brings hope that the guidelines for collaboration between competitors, expected to be published by CADE in 2025, may contain a specific chapter on sustainability agreements. Until CADE provides clear directives on the matter, companies interested in collaborating to meet more ambitious environmental sustainability goals should be careful with the governance rules of arrangements made and seek specialized legal advice to discuss the terms and potential effects of collaborations.

Canada

A New Era of Canadian Green Antitrust

By Kate McNeece[93], Lucinda Chitapain[94] and Samantha Steeves[95] of McCarthy Tétrault LLP

I. Overview: A New, "Greener" *Competition Act*?

After years of discussion of Canadian competition law reform, the Canadian government has introduced the most comprehensive slate of amendments to Canada's *Competition Act* (the "**Act**") since 2009.[96] The legislative changes passed in Bills C-56 and C-59 touch on nearly every aspect of competition law in Canada, including deceptive marketing, abuse of dominance, civil anti-competitive collaborations and mergers; expand the private action regime to cover more of the civil conduct provisions in the Act; and introduce new concepts such as drip pricing, "greenwashing", and an advance certificate framework for environmental agreements into the Act.

These amendments will significantly impact the treatment of sustainability initiatives in Canada, which will be described in more detail herein. However, the use of competition law to address environmental and sustainability concerns is not a new dynamic in Canada. Indeed, this area has been a key enforcement focus for the Competition Bureau (the "**Bureau**") even before the amendments. In addition to highlighting the key changes and potential implications for businesses active in Canada on a go-forward basis, we review in this article the Bureau's history of enforcement action and evolving guidance concerning environmental and sustainability initiatives.

This article will proceed in four parts, each concerning a different aspect of the Act. First, we review the application of the deceptive marketing provisions set out in Part VII.1 of the Act to environmental claims, including the introduction of an explicit "greenwashing" provision and the Bureau's history of enforcement action to address misleading environmental claims. Next, we discuss the new "advance certificate" provision for environmental agreements set out in section 124.1 of the Act. We then review the implications of the amendments to the general application sections of the Act – including abuse of dominance, civil competitor collaborations and mergers – to environmental agreements. Finally, we assess the newly expanded private action regime in Canada and its potential impact on environmental and sustainability initiatives.

II. Environmental Claims

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[96] The amendments were passed in stages, with the most relevant provisions included in Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023 (assented to 15 December 2023) ["**Bill C-56**"], and Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2023 (assented to 20 June 2024) ["**Bill C-59**"].

Companies' environmental impacts have increasingly been the subject of public and legislative scrutiny. As research demonstrates that consumers are seeking products and brands that are socially and environmentally responsible,[97] many companies have built representations regarding their environmental strategies, performance and targets into public statements (including marketing, advertising, and disclosure materials). However, where companies make statements about the environmental benefits of a product or business interest that may be false or misleading, or that do not have adequate factual support, a practice known as "greenwashing", they may be at risk of enforcement action under the Act.[98] This section reviews the amendments to the Act that directly concern environmental statements, as well as the Bureau's past enforcement practice in this area.

A. Deceptive Marketing: Greenwashing and Greenhushing

Even prior to the recent amendments, greenwashing claims have been understood to be covered by the deceptive marketing provisions of the Act.[99] Two general application civil prohibitions relating to deceptive marketing have been particularly important to the historical enforcement of environmental claims in Canada. The first holds that conduct is reviewable where—to advance a product or business interest — a representation is made to the public that is false or misleading in a material respect ("**Misleading Claims**").[100] The second holds that conduct is reviewable where a representation is made to the public in the form of a statement, warranty of guarantee of the performance, efficacy or length of life of a product that is not based on adequate and proper testing ("**Performance Claims**").[101]

As originally tabled in December 2023, Bill C-59's amendments to the deceptive marketing provision were intended to clarify that such statements regarding a product's benefits for protecting the environment or mitigating the environmental or ecological effects of climate change would be assessed the same way as other Performance Claims.[102] However, on March 1, 2024, the Commissioner of Competition (the "**Commissioner**") sent a letter to members of the House of Commons Standing Committee on Finance, requesting that legislators strengthen the greenwashing provision introduced by Bill C-59.[103] In particular, the Commissioner urged Parliament to expand

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[97] *See, e.g.*, "Consumers care about sustainability—and back it up with their wallets," McKinsey & Company (Feb. 6, 2023), *available at* https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets.

[98] Canadian Competition Bureau, "Environmental claims and greenwashing" (2 December 2021), online: *Government of Canada* <https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/environmental-claims-and-greenwashing>.

[99] *Ibid*.

[100] *Competition Act*, RSC 1985, c C-34, s 74.01(1)(a).

[101] *Ibid*, s 74.01(1)(b).

[102] As originally tabled, Bill C-59 proposed to forbid the promotion of a product or business interest by a person who, "makes a representation to the public in the form of a statement, warranty or guarantee of a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change that is not based on an adequate and proper test, the proof of which lies on the person making the representation". See, Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2023 (first reading November 30, 2023), cl 236(1).

[103] Commissioner of Competition, "Letter to the Chair and Members of the House of Commons Standing Committee on Finance" (1 March 2024), online (pdf): *Senate of Canada*

the new greenwashing provision to also include claims about a business or brand as a whole as well as to incorporate a reverse onus standard requiring that environmental claims be substantiated prior to being made.[104] The Commissioner's proposal was ultimately incorporated in the final bill, which upon royal assent created new explicit "greenwashing" provisions.[105]

The new greenwashing provisions explicitly prohibit deceptive environmental claims by forbidding: (i) claims that promote the environmental, social and ecological benefits of using or supplying a product if the claim is not based on an adequate and proper test (a "**Product Claim**"); and (ii) claims that promote the environmental and ecological benefits of a business or business activity that are not based on adequate and proper substantiation in accordance with internationally recognized methodology (a "**Business Claim**").[106] The amendments do not change the application of the general Misleading Claims provision to environmental claims that may be misleading in other respects. In addition to the substantive changes to the law, the amendments also increase the quantum of penalties that are applicable to conduct contravening the deceptive marketing provisions of the Act.[107]

The new Product Claim provisions capture a broader range of statements and representations than the more generic provision on Product Claims set out in s. 74.01(b) of the Act, suggesting a greater regulatory burden for companies that want to promote their efforts to be more environmentally responsible. First, s. 74.01(b) applies only to representations in respect of products, whereas the greenwashing provisions incorporate the concept of a Business Claim relating to "benefits of a business or business activity." Second, the new provisions refer to the "benefit" of a product or business, which may be interpreted more broadly than the "performance, efficacy or length of life" of a product under s. 74.01(b). While misleading statements relating to businesses, or to "benefits" would have been reviewable under the general Misleading Claims provision prior to the amendments, this provision does not impose the same testing requirements or reverse onus as the Performance Claims provision. Accordingly, post-amendments, both environmental claims relating to specific products or services as well as those relating to the business itself will require substantiation before the representation is made.

While the Act is now clear that all environmental Product Claims and Business Claims must be substantiated prior to making a representation, there remains ambiguity as to the meaning of the terms "adequate and proper test" and "internationally recognized methodology" in the environmental context. Neither term is a defined term under the Act.

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https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiX5q7E-NSJAxVrjYkEHbkUHoQQFnoECBUQAQ&url=https%3A%2F%2Fsencanada.ca%2FContent%2FSen%2FCommiFCom%2F441%2FNFFN%2Fbriefs%2FSM-C-59_CompetitionBureauofCND_e.pdf&usg=AOvVaw3j1SDUXWJoF0bmZ6Ek5OgD&opi=89978449.

[104] *Ibid* at 5.

[105] *Competition Act*, RSC 1985, c C-34, ss 74.01(1)(b.1-b.2).

[106] *Ibid*, cl 236(1).

[107] *Competition Act*, RSC 1985, c C-34, ss 74.1(1)(c)-(d).

The term "adequate and proper test" has been judicially considered and is the subject of substantial guidance from the Bureau under the general Performance Claims provision of the Act. The assessment of whether a given test is "adequate and proper" will depend on "the nature of the representation made and the meaning or impression conveyed by that representation. Subjectivity in the testing should be eliminated as much as possible. The test must establish the effect claimed. The testing need not be as exacting as would be required to publish the test in a scholarly journal. The test should demonstrate that the result claimed is not a chance result."[108] The test must also be conducted prior to the representation being made.[109]

Accordingly, most of the ambiguity surrounding the substantiation of greenwashing claims will stem from the new requirement that the substantiation be "in accordance with internationally recognized methodology." In response to public calls for guidance, the Bureau launched a public consultation to gather feedback in July 2024, shortly after Bill C-59 received royal assent. Following the closing of the consultation period on September 27, 2024, the Bureau released draft guidelines addressing Act's new prohibitions on greenwashing in late December 2024 (the "**Draft Guidelines**"). [110] In comparison to the Federal Trade Commission's *Green Guide* and the Competition & Markets Authority's *Green Claims Code*, the Bureau's Draft Guidelines are far less prescriptive. With a broad and flexible approach, the Bureau retains its ability to assess environmental claims on a case-by-case basis. In so doing, however, the Draft Guidelines inevitably fail to address all of the concerns raised by stakeholders during the consultation period. Nonetheless, the Draft Guidelines do provide some clarity on the "internationally recognized methodologies" requirement. In particular, the Draft Guidelines provide that a methodology that has been recognized in two or more countries will generally be considered by the Bureau to be "internationally recognized", provided it results in adequate and proper substantiation. The Draft Guidelines note that this does not require that the methodology be recognized by the *governments* in two or more countries.

Prior to the release of guidance from the Bureau , the June 2024 greenwashing amendments caused concern among the business community that their well-meaning statements may not be in line with the Act. Certain companies reacted to this uncertainty by removing environmental claims from public statements (including marketing content, websites and social media) and securities disclosure, a practice referred to as "greenhushing". [111] For example, Pathways Alliance removed all content from its website

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[108] *Canada (Competition Bureau) v. Chatr Wireless*, 2013 ONSC 5315 at para. 295, *citing Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2008 Comp. Trib. 2 at para.s 122, 124, 126 and 127. *See also* Canadian Competition Bureau, "Performance claims not based on an adequate and proper test" (last modified 24 June 2022), online: *Government of Canada* https://competition-bureau.canada.ca/deceptive-marketing-practices/types-deceptive-marketing-practices/performance-claims-not-based-adequate-and-proper-test.

[109] *Ibid.*

[110] Canadian Competition Bureau, "Environmental claims and the Competition Act" (December 23, 2024), online: *Government of Canada* https://competition-bureau.canada.ca/how-we-foster-competition/consultations/environmental-claims-and-competition-act.

[111] Jon McGowan, "Canada's New Greenwashing Law Will Impact U.S. Companies' Climate Marketing", *Forbes* (21 June 2024), online: https://www.forbes.com/sites/jonmcgowan/2024/06/21/canadas-new-greenwashing-law-will-impact-us-companies-climate-marketing/.

and social media, replacing it with a statement that the measure was due to the uncertainty associated with the impact of Bill C-59 on environmental claims in Canada.[112] The statement from Pathways Alliance said, "[w]ith uncertainty on how the new law will be interpreted and applied, any clarity the Competition Bureau can provide through specific guidance may help direct our communications approach in the future. For now, we have removed content from our website, social media and other public communications. This is a direct consequence of the new legislation and is not related to our belief in the truth and accuracy of our environmental communications."[113] It remains to be seen whether the Bureau's new Draft Guidelines will encourage these companies to reissue their environmental disclosures and claims, or whether companies will wait for additional guidance from the Bureau or the Competition Tribunal.

Though there remain questions about the application of the greenwashing amendments – and such questions remain despite further guidance from the Bureau– companies who make environmental claims should be aware of the increased scrutiny such claims are likely to receive, and should make best efforts to appropriately substantiate such claims given the reverse onus that will apply in most cases.

B. Previous Enforcement Action

Canadian companies' fear of increased enforcement action is not without merit. Even prior to the amendments, misleading environmental claims have been an enforcement priority for the Bureau. The following section summarizes the key cases in Canada that have considered misleading environmental claims.

- ***ENERGY STAR Spas Cases.*** From 2009-2011, the Bureau entered into consent agreements with several distributors of hot tubs for alleged claims that their hot tubs were eligible for the ENERGY STAR certification, an international standard for energy efficient and environmentally friendly consumer products.[114] These statements were found to be false or misleading as no hot tubs for sale in Canada were eligible for certification by, or in association with, the ENERGY STAR program.[115] The consent agreements resulted in the imposition of administrative monetary penalties on the companies and/or their owners; required the companies to publish corrective notices in all stores and across their websites, informing customers of the alleged misleading representations; and required the companies to develop corporate compliance programs.[116]

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[112] *Ibid*.
[113] *Ibid*.
[114] *See, The Commissioner of Competition v Dynasty Spas* (17 January 2011), CT-2010-06, online: Competition Tribunal https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463511/1/document.do; *The Commissioner of Competition v Polar Spas (Edmonton) Ltd* (7 October 2009), CT-2009-013, online: Competition Tribunal https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463611/1/document.do; *The Commissioner of Competition v Subzero Hot Tubs & Pool Tables* (25 June 2009), CT-2009-010, online: Competition Tribunal https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463616/1/document.do; *The Commissioner of Competition v Valley Spas Invermere* (25 June 2009), CT-2009-006, online: Competition Tribunal https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463610/1/document.do.
[115] *Ibid.*
[116] *Ibid*.

- ***Volkswagen, Audi and Porsche Diesel Engines.*** In 2016, the Bureau entered into a consent agreement with Volkswagen Group Canada Inc. ("**Volkswagen**") and Audi Canada Inc. ("**Audi**"), requiring them to pay an administrative monetary penalty of $7.5 million each for allegedly misleading consumers by promoting their 2.0 litre diesel vehicles in Canada as has having clean diesel engines with reduced emissions that were cleaner than an equivalent gasoline engine.[117] A consent agreement between the Bureau, Audi and Volkswagen was also entered into in 2018 for identical alleged conduct, this time accompanied by Porsche Cars Canada, Ltd, relating to the promotion of their 3.0 litre diesel vehicles.[118] The 2018 consent agreement required each party to pay an administrative monetary penalty of $2.5 million.

  Immediately following each of these consent agreements, separate class actions were launched by buyers and lessees of 2.0 litre diesel vehicles in 2016 and 3.0 litre diesel vehicles in 2018. Each of these class actions ended in large settlements, providing buyback and restitution payments of up to $2.1 billion for consumers of 2.0 litre diesel vehicles in 2016[119] and payments of up to $290.5 million for consumers of 3.0 litre diesel vehicles in 2018.[120]

- ***Recyclability of Keurig K-Cup Pods.*** In 2022, Keurig Canada Inc. entered into a consent agreement with the Bureau over alleged misleading representations regarding the recyclability of Keurig K-Cup pods. The Bureau's investigation claimed that Keurig's instructions allegedly misled consumers by stating that if consumers removed the metallic lid and emptied the pod, K-Cups were recyclable, when this was not the case in every location where the claims were made. As a result, Keurig agreed to pay an administrative monetary penalty of $3 million, as well as $85,000 to cover expenses from the Bureau's case and donate $800,000 to an environmental charity.[121] The company was also required to complete a number of corrective measures, including: (i) changing its recycling claims and the K-Cup packaging; (ii) publishing notices about the recyclability of K-Cup pods on its websites and social media, to news outlets, on the packaging of new

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[117] Canadian Competition Bureau, News Release, "Volkswagen and Audi to pay up to $2.1 billion to consumers and $15 million penalty for environmental marketing claims" (19 December 2016), online: *Government of Canada* https://www.canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html.

[118] Canadian Competition Bureau, News Release, "Up to $290.5 million in compensation for Canadians in Volkswagen, Audi and Porsche emissions case" (12 January 2018), online: *Government of Canada* https://www.canada.ca/en/competition-bureau/news/2018/01/up_to_290_5_millionincompensationforcanadiansinvolkswagenaudiand.html.

[119] Canadian Competition Bureau, "Volkswagen and Audi to pay up to $2.1 billion to consumers and $15 million penalty for environmental marketing claims", *supra* note 26.

[120] Canadian Competition Bureau, "Up to $290.5 million in compensation for Canadians in Volkswagen, Audi and Porsche emissions case", *supra* note 27.

[121] Canadian Competition Bureau, News Release, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (6 January 2022), online: *Government of Canada* https://www.canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html.

machines, and via email to subscribers; and (iii) improving its corporate compliance program.[122]

A class action settlement was subsequently launched in the United States, wherein Keurig agreed to pay $10 million to affected parties and add language to the packaging of K-Cup pods, indicating that the pods are "not recycled in many communities".[123]

The introduction of the new greenwashing provisions of the Act, along with the increased penalty amounts, is likely to empower the Bureau to continue its practice of strongly addressing misleading environmental claims.

III. *Environmental Collaborations: A Safe Harbour?*

The amendments to the Act introduced a new, voluntary pre-approval regime for environmental collaborations, which enables the Commissioner to issue a certificate insulating parties to an agreement from the application of sections 45, 46, 47, and 49 (covering criminal cartel agreements and bid rigging) and 90.1 (covering civil competitor collaborations that harm competition) of the Act where the agreements are found to be for the purpose of protecting the environment, and are not likely to prevent or lessen competition substantially (result in an "**SPLC**") in a market.[124]

The certificate must be registered with the Competition Tribunal;[125] must specify a term of validity not to exceed 10 years;[126] and may include any terms that the Commissioner considers appropriate.[127]

Canadian jurisprudence has developed a robust approach to assessing whether an agreement is likely to result in a SPLC, and the Bureau's limited guidance that has been issued on the advance certificate regime indicates that the Bureau will follow the assessment framework set out in the *Competitor Collaboration Guidelines*.[128] However, the Act does not define when an agreement is "for the purpose of protecting the environment". As such, the scope of agreements captured by this provision will largely depend on the Bureau's interpretation of that term. At the time of writing, the Bureau has not yet issued any guidelines as to how it will consider whether an agreement is "for the purpose of protecting the environment." Guidance from similarly situated jurisdictions

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[122] *Ibid*.
[123] Sheila A Millar, Jean-Cyril Walker & Anushka N Rahman, "Keurig Agrees to Pay $10 Million to Settle Class Action Over Charges of Misleading Recyclable Claims", *The National Law Review* (1 March 2022), online: https://natlawreview.com/article/keurig-agrees-to-pay-10-million-to-settle-class-action-over-charges-misleading.
[124] *Competition Act*, *supra* note 4, s 124.3(1).
[125] *Competition Act*, *supra* note 4, s 124.4.
[126] *Competition Act*, *supra* note 4, s 124.3(6).
[127] *Competition Act*, *supra* note 4, s 124.3(5).
[128] Competition Bureau, "Agreements between companies to protect the environment," online, https://competition-bureau.canada.ca/bid-rigging-price-fixing-and-other-agreements-between-competitors/agreements-between-companies-protect-environment.

suggests that a broad range of agreements may be considered to be "for the purpose of protecting the environment," including:

- sustainability standardization agreements (e.g., an agreement between manufacturers to phase out a particular production process which involves the emission of carbon dioxide or an agreement among book publishers to use only recycled paper);[129]

- agreements to develop green solutions (e.g., an agreement to pool funds to support the development of more effective technology to capture and store carbon dioxide);[130] or

- agreements to restrict product or service offerings with the environment in mind (e.g., an agreement between financial service providers not to provide financing or insurance to fossil fuel projects or an agreement among manufacturers and retailers to phase out the production and sale of outdated, energy intensive, washing machines).[131]

While the issuance of a certificate is discretionary, the newly enacted regime requires that the Commissioner consider any request for a certificate as a soon as practicable.[132] The regime also contains provisions concerning extension, recission and variation, and challenge of issued certificates.[133]

Stakeholders in Canada, including the Commissioner, have questioned the purpose and efficacy of the new regime. While the mechanism is designed to shelter anti-competitive agreements from enforcement action under the Act's civil collaboration and criminal conspiracy provisions, the substantive test for certification as well as the nature of environmental collaborations undermine the practical utility of the new regime.

Unlike the approach developed by competition authorities in the UK and Europe, Canada's new certification tool does not provide a safe harbour for anti-competitive agreements; rather, it only allows applicants to insulate potentially problematic agreements from enforcement action by proactively demonstrating that they are not likely to result in an SPLC.

By contrast, the legal frameworks adopted in the UK and Europe grant an exemption for agreements that give rise to civil/administrative violations of competition laws, where the impugned agreement produces specified benefits. In the UK, the CMA's Green Guidance

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[129] Competition & Markets Authority, "Green Agreements Guidance" (12 October 2023) at para 2.6, online (pdf): < https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf> ["**CMA Green Agreements Guidance**"]; European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" (21 July 2023) at para 538, online (pdf): https://competition-policy.ec.europa.eu/system/files/2023-07/2023_revised_horizontal_guidelines_en.pdf ["**EU Guidelines**"].

[130] CMA Green Agreements Guidance**,** *supra* note 35 at para 2.5.

[131] *Ibid* at para 2.5; EU Guidelines, *supra* note 35 at para 603.

[132] *Competition Act*, *supra* note 4, s 124.3(2).

[133] *Competition Act*, *supra* note 4, s 124.3(6), s. 124.6, s. 124.7.

contemplates the possibility of agreements that "restrict competition appreciably but are capable of exemption […] because the benefits of the agreement outweigh the competitive harm."[134] Provided that the prescribed conditions are satisfied (i.e., the agreement contributes certain benefits; any restrictions of competition within the agreement are indispensable; consumers receive a fair share of the benefits; and the agreement does not eliminate competition), an otherwise anti-competitive agreement could be exempt from antitrust enforcement under the UK's civil regime.[135] Likewise, the European Commission's Guidelines provide that sustainability agreements that restrict competition, either by object or by effect, can nonetheless be insulated from enforcement so long as certain conditions, similar to those set out in the CMA's Green Guidance, are satisfied.[136]

The Canadian government's unwillingness to follow this approach may be related to skepticism in Canada of the efficiencies defence under sections 90.1 (civil collaborations) and 92 (mergers), which historically excused anticompetitive conduct or mergers where it could be demonstrated that the efficiencies exceeded outweighed the competitive effects. The efficiencies defence was repealed in the same amendments that introduced the advance certificate regime.

However, it is unclear how much the advance certificate mechanism adds to the operation of the Act. For example, the ancillary restraints defence protects agreements that are ancillary to a broader legitimate agreement and are reasonably necessary for achieving the objective of that broader agreement.[137] Parties to an environmental agreement subject to scrutiny under the Act's criminal conspiracy provision may opt to simply invoke this defence instead of undergoing the time-consuming procedure involved with obtaining a certificate. The Commissioner, in his submission to the Canadian House of Commons Standing Committee on Finance, raised doubts about whether an environmental agreement would fall within the purview of the Act's criminal conspiracy provisions, which are reserved for addressing "hardcore" conduct: "[i]t seems very unlikely that businesses would have to resort to such conduct to protect the environment."[138]

Given these concerns, Canada's new certification tool for anti-competitive agreements, while a step towards addressing collaborative efforts in environmental matters, may fall short in incentivizing private entities to participate or engage in an environmental collaboration, in particular with competitors. Unlike the more forgiving frameworks in the UK and Europe, Canada's more rigid approach does not provide a safe harbour for agreements with significant anti-competitive effects from enforcement action, likely limiting its use.

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[134] CMA Green Agreements Guidance**,** *supra* note 35 at para 5.1.
[135] *Ibid* at para 5.2.
[136] EU Guidelines, *supra* note 35 at paras 556-96.
[137] *Competition Act*, *supra* note 4, s 45(4).
[138] Commissioner of Competition, "Letter to the Chair and Members of the House of Commons Standing Committee on Finance", *supra* note 8 at 11.

IV. Scrutiny Under Other Provisions of the Act

Amendments to other provisions may also impact how environmental matters are treated under the Act. The broadening of the civil collaboration and abuse of dominance provisions may result in greater scrutiny of arrangements aimed at improving the environment. The expansion of factors under the merger provisions suggest that the Bureau may consider environmental harms and benefits during the course of merger reviews. In this section, we summarize other areas in which recent amendments may impact the assessment of environmental and sustainability initiatives in Canada.

- ***Civil Collaborations.*** As previously drafted, the Act's civil collaboration provision only applied to agreements that include actual or potential competitors (i.e., horizontal agreements). Following the amendments (in force December 15, 2024), both agreements between competitors and agreements between non-competitors (i.e. including vertical agreements) for which "a significant purpose" of "all or any part" of the agreement is to "prevent or lessen competition in any market" may be subject to a Tribunal order.[139] (In each case the applicant must demonstrate that the agreement will result in an SPLC.) The term "significant purpose" is not defined in the Act, though the Bureau's guidance relating to the revised section 90.1 indicates that the Bureau would likely look to subjective evidence of intent as well as the likely outcome of the behaviour to infer an anti-competitive purpose.[140] Proponents of environmental agreements that may result in competitive effects therefore would act prudently to document the pro-competitive or pro-environmental purpose of the agreement or part of the agreement that could be perceived to be anticompetitive.

- ***Abuse of Dominance.*** The amendments revised the substantive test for establishing abuse of dominance under the Act. Previously, both intent (to engage in an anti-competitive act) and effect (substantial prevention or lessening of competition) were required to establish an abuse of dominance. The revised provision sets out a lower threshold, which eliminates the need to prove both anti-competitive intent and anti-competitive effects. The Tribunal may now make a prohibition order where the applicants shows that a dominant firms has either (i) engaged in a practice of anti-competitive acts (i.e., intent) or (ii) engaged in conduct that substantially lessens or prevents competition (i.e., effects).[141] Therefore, the new substantive test could in theory capture any conduct among one or more dominant firms relating to the environment (for example, standard setting used to phase out, withdraw, or replace non-sustainable products) that

[139] Bill C-56, *supra* note 1, cl 8(1).
[140] *See* Competition Bureau, "Competitor Property Controls and the *Competition Act*" (Aug. 7, 2024), *online*: https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/competitor-property-controls-and-competition-act.
[141] *Competition Act*, *supra* note 5, s 79(1).

result in a SPLC, notwithstanding that the conduct is pursued with the intention of protecting the environment.

- ***Mergers.*** The Act's merger provisions have been amended to expressly include new substantive assessment factors under the merger control provisions. While non-exhaustive, the set of factors that the Tribunal may consider during the course of merger reviews has been expanded to now expressly include a transaction's impact on the labour markets.[142] This suggests an evolution towards a holistic assessment model which may increasingly account for a transaction's impact on the environment.

V. Expansion of Private Applications for Environmental Conduct

Unlike its neighbors in the U.S., Canada's competition law regime has limited the ability of private litigants to address anticompetitive conduct. Prior to 2022, Canada's civil private action regime was only available for conduct falling under the refusal to deal, price maintenance, exclusive dealing, tied selling, and market restriction provisions of the Act. These regime has gone mostly unused, due at least in part to strict leave requirements; rigid substantive tests under these provisions; and the inability for private parties to obtain monetary relief (all of which were intended to avoid perceived excess private litigation and the risk that tactical, opportunistic private actions might 'chill' pro-competitive or desirable commercial conduct.

Private parties seeking recourse under the Act were limited to class actions under section 36 of the Act (which is restricted to conduct that violates the criminal provisions of the Act),[143] or, for deceptive marketing, abuse of dominance, or civil competitor collaborations, either informally complaining or making a "six resident complaint" to spur the Commissioner to act.[144] However, the amendments to the Act have expanded the private action regime to cover deceptive marketing, abuse of dominance, and civil agreements that harm competition, as well as implementing increased administrative monetary penalties and disgorgement remedies to incentivize "private attorneys general" to address anticompetitive conduct under the Act.

A. A New Leave Test and Additional Incentives

The amendments' revision of the leave test for private actions under the Act removes a significant barrier to private enforcement. Prior to the amendments, to grant leave to a private applicant, the Tribunal would have to find that the applicant's business was "directly and substantially affected by the conduct in question."[145] This has been

[142] *Ibid*, s 93.
[143] *Competition Act*, *supra* note 5, s 36.
[144] *Competition Act*, *supra* note 5, s 9.
[145] *Competition Act*, *supra* note 5, ss 103(7-7.1)(Act as read until until June 2024).

interpreted by the Tribunal to require the entirety of the applicant's business to be directly and substantially affected, not just part of the business.[146]

Following the amendments, private applicants will only have to satisfy the Tribunal that part of their business is directly and substantially affected by conduct falling under the refusal to deal, price maintenance, exclusive dealing, tied selling, and market restriction, abuse of dominance, and civil anti-competitive conduct provisions of the Act. The Tribunal may also grant leave for conduct falling under these provisions where it finds that it is in the "public interest" to do so. Potential disgorgement damages for these provisions will also be available beginning June 20, 2025 for private applications, up to the value of the benefit derived from the conduct. Private leave applications for deceptive marketing conduct, including greenwashing, will only have one test for granting leave—that the Tribunal to find it in the "public interest" to do so—and there will be no damages available.

The introduction of a public interest leave test is novel in Canadian competition law, and the state of the law will likely not be considered settled until it has been tested at the Tribunal. The Tribunal may take inspiration from the public interest leave test that is used to determine standing in constitutional challenges and other public law cases. This test has three prongs that ask: (i) does the claim raise a serious justiciable issue; (ii) does the party have a genuine interest or stake in the matter; and (iii) is this suit a reasonable and effective means to bring the claim forward?[147] However, it is likely that a workable test will have to modify this standard, to ensure that it is sufficiently distinct from the "directly and substantially affected" prong of the leave test and that it does not undermine the Commissioner's own public interest mandate.

As of November 2024, the Tribunal has not received an application for a private action concerning environmental issues. However, a number of environmental groups have made use of the above-noted "six-resident complaint" mechanism to bring environmental concerns to the Commissioner's attention.[148] The availability of public interest standing to address environmental concerns may prove attractive to environmental groups looking to advance a green enforcement agenda.

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[146] *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1, at 29-31.

[147] *Canada (Minister of Justice) v Borowski* , [1981] 2 SCR 575 at 598; *Canada (Attorney General) v Downtown Eastside Sex Workers*, 2012 SCC 45 at para 37.

[148] *See, e.g.*, CAPE: Canadian Association of Physicians for the Environment, News Release, "Canada's Competition Bureau opens investigation into the Canadian Gas Association's alleged greenwashing of methane gas as clean" (10 November 2022), online: https://cape.ca/press_release/canadas-competition-bureau-opens-investigation-into-the-canadian-gas-associations-alleged-greenwashing-of-methane-gas-as-clean/; "Competition Bureau probe of 'flushable' wipes goes down the drain", *City News* (9 October 2022), online: < https://ottawa.citynews.ca/2022/10/09/competition-bureau-probe-of-flushable-wipes-goes-down-the-drain-5932340/>; "Canada's watchdog launches investigation into RBC over climate complaints", *Reuters* (12 October 2022), online: https://www.reuters.com/world/americas/canadas-watchdog-launches-investigation-into-rbc-over-climate-complaints-2022-10-12/; Jon McGowan, "Canada Launches Greenwashing Investigation Into Lululemon", *Forbes* (13 May 2024), online: https://www.forbes.com/sites/jonmcgowan/2024/05/13/canada-launches-greenwashing-investigation-into-lululemon/.

VI. Conclusion: Greener On The Other Side?

It is clear that environmental and sustainability issues are covered by Canada's *Competition Act* and the amendments passed from 2022-2024 provide additional tools for assessing potential concerns. However, as at this writing, the amendments create more questions than answers. It will only be after additional guidance is issued by both the Competition Bureau and the courts that whether the amendments have made the "grass greener" for the promotion of environmental initiatives clear.

Chile

Sustainability and competition in Chile: review of the Chilean reality after the implementation of Law No. 20.920 on waste management, extended producer responsibility and promotion of recycling

By Catalina Iñiguez Morales[149] and Diego Hernández De Lamotte[150] of FerradaNehme

I. Chilean antitrust system does not have an *ad hoc* procedure for analyzing collaboration between competitors, nor does it typically take into consideration factors other than market efficiency

Chile, like several other jurisdictions of reference, does not have an *ad hoc* system that allows competition authorities to analyze the effects that collaboration agreements between competitors may have on the markets. Indeed, this type of collaborations would be analyzed in exercise of the general powers of the authorities referred to: **(i)** by the National Economic Prosecutor's Office ("FNE", for its acronym in Spanish)[151] in exercise of its general powers of investigation of any fact, act or convention that may affect competition; **(ii)** by the FNE itself in application of the merger control procedure, in the event that the collaboration agreement between competitors meets the requirements to be considered a fully functional *joint venture*; or, **(iii)** by the Court for the Defense of Competition ("TDLC", for its acronym in Spanish)[152] in exercise of its general consultive powers.

On the other hand, it is also possible to state that Chilean competition policy and law have historically not considered environmental or sustainability factors as part of their analysis.

Chilean antitrust authorities conduct their assessments based on a technical analysis exclusively focused on antitrust considerations. This approach has been consistent since the establishment of said authorities in Chile. The primary justification for this approach is rooted in the legal standard applicable to competition cases. The first article of the Chilean Antitrust Law ("DL 211") explicitly states that its purpose is to promote and defend competition.

In the case of mergers, the legal standard is "*substantially lessening competition*" (as outlined in articles 54 and 57 of DL 211). The FNE interprets this standard as reducing "*the incentives of the merging parties to compete, to the detriment of consumers*".[153] This reduction could manifest in various ways, with a common minimum being the impact on competitive variables. According to the TDLC, this standard is based on the United States'

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[151] The FNE is the agency in charge of investigating possible antitrust violations and conducting merger analysis.

[152] The TDLC is the specialized court in charge, among other things, of resolving cases in which a lawsuit is filed alleging the existence of anticompetitive conduct, or a consultation is initiated for the TDLC to establish the consistency of a fact, act or agreement with antitrust regulations.

[153] TDLC, Judgment No. 182/2022, third recital.

Clayton Act, which prohibits concentration operations if they result in substantially lessening competition or tend to create a monopoly.

A review of case law validates the statements above. Merger control analysis by the FNE has consistently followed a classic approach, assessing the effects of concentration operations on competition in relevant markets. The FNE employs various tools, including qualitative analyses of competitive proximity and indices like GUPPI (gross upward pricing pressure index), CMCR (compensating marginal cost reduction), and IPR (illustrative price rise), focusing exclusively on competition considerations.

The TDLC's analysis also aligns with a traditional competition-based approach, as mandated by law, evaluating whether the examined conduct has the objective aptitude to prevent, restrict, or hinder competition. Discussions before the TDLC have made it clear that the protected interests under the DL 211, could be social welfare, market efficiency, consumer surplus, competition, the competitive process, and economic freedom. Interestingly, in some cases related to the media, the TDLC has also referred to the need to ensure political freedom and pluralism; however, as a result of assuring competition in the media relevant markets.[154]

Accordingly, the FNE has clearly stated that it will not consider other factors, as a part of its analyses. This has been evident in utility merger analyses, like the CGE case,[155] and natural resources operations (i.e., lithium, such us in the SQM-Tianqi case).[156] In these situations, the authority has stuck to a strict antitrust evaluation approach.

In the CGE case,[157] the parties submitted to the FNE the acquisition by State Grid International Development Limited (SGIDL) of Compañía General de Electricidad S.A. (CGE). The sellers were NII Agencia, an agency in Chile of Naturgy Inversiones Internacionales S.A. (a company incorporated in Spain), and CGE Magallanes (a closed corporation incorporated in Chile). SGIDL was an investment holding company incorporated in China, 100% owned by State Grid Corporation of China (SGCC). Both are state-owned enterprises incorporated in China, as the State-owned Assets Supervision and Administration Commission, a ministerial-level authority of China, has sole ownership over SGCC.

On March 31, 2021, the FNE approved the transaction. The FNE specified that it would only consider the aptitude of the operation to substantially reduce competition. The report indicates: "*However, this Division received opinions from industry players who expressed various concerns regarding matters of national interest and security, in a broad sense, which, in their opinion, the materialization of the operation would entail. Such*

[154] TDLC, Judgment No. 20/2007, fifth recital.

[155] Acquisition of control by State Grid International Grid International Development Limited in NII Agency in Compañía General de Electricidad S.A. and others. Docket No. F255-2020. At: https://www.fne.gob.cl/wp-content/uploads/2021/04/aprob54_F255_2020-2.pdf.

[156] CORFO's complaint regarding the acquisition of shareholding in SQM. Docket No. 2493-18 FNE.

[157] Acquisition of control by State Grid International Grid International Development Limited in NII Agency in Compañía General de Electricidad S.A. and others. Docket No. F255-2020. At: https://www.fne.gob.cl/wp-content/uploads/2021/04/aprob54_F255_2020-2.pdf.

considerations are unfamiliar to the defense of competition, exceed the scope of the attributions of this Prosecutor's Office according to articles 1° and 2° of DL 211, and are not part of the legal standard of review applicable to concentration operations. Therefore, it does not correspond to the National Economic Prosecutor's Office to analyze their merit and plausibility".[158]

In the lithium market, in turn, in the SQM-Tianqi case, where the Chinese state-owned entity Tianqi acquired a relevant participation in the Chilean corporation SQM[159] the FNE established in its report approving the acquisition that: "*This limitation concerning the powers of public agencies to intervene for reasons of national interest in a broader sense (economic interest or national development) marks a difference concerning the existing regulation in foreign jurisdictions. As a general rule, foreign jurisdictions contemplate mechanisms for considering public interest elements in the analysis of concentration operations, at least for markets considered sensitive or strategic for the country. However, these are powers that, in general, are granted to authorities other than those empowered to exercise competition controls. In these cases, the possibility of intervening in the development of transactions has been developed based on powers explicitly granted by law to specific bodies to safeguard the elements of predictability and objectivity of competition* procedures"[160], which, the FNE added, is not the case in Chile.

The two previous FNE heads, Felipe Irarrázabal Philippi and Ricardo Riesco Eyzaguirre have expressly endorsed this criterion of excluding any consideration outside of the technical competition analysis -including sustainability and environmental arguments- from the authority's decisions. Particularly, the latter expressed that "*the National Economic Prosecutor's Office cannot legally take into account in its analysis geopolitical, national security, strategic or any other kind of considerations" and added that "such additional considerations are 'extraneous or irrelevant to the technical competition analysis'".* [161]

The Competition Court, in turn, has explicitly rejected defenses based on environmental factors.[162] However, it must be pointed out that in the Helicopters case (Judgment No. 185/2023), the TDLC took into consideration, for the purpose of determining the amount of the fine, that "*the agreement affected a sensitive market since this service plays a key role in protecting the lives of people and for the environmental care and preservation of our country's forestry heritage*".

In a different but related subject, regarding a private health insurance entities merger, the FNE held that the risks that the operation would generate should be evaluated based on the applicable legal standard, considering, however, the sensitivity of the market and the essential nature of the health insurance service for consumers. The FNE added that "*it is*

[158] FNE Report on Docket No. F255-2020, par. 89. At: https://www.fne.gob.cl/wp-content/uploads/2021/04/inap1_F255_2020-1.pdf

[159] CORFO's complaint regarding the acquisition of shareholding in SQM. Docket No. 2493-18 FNE.

[160] FNE Report on Docket No. 2493-18, para. 126.

[161] At: https://centrocompetencia.com/riesco-fne-seguridad-nacional-inversiones-extranjeras/

[162] TDLC, Judgment No. 175/2020, recitals 74 and 75.

illustrative that, in sensitive markets such as health, both this FNE and comparative jurisprudence have indicated that even small price increases in this type of market can imply a substantial reduction in competition, given the importance that consumers would give to it, and the percentage of expenditure that the good or service would represent in the total expenditure of families".[163] Hence, the FNE did not fail to apply the legal standard, although in stringent terms, due to the sensitivity of the market under analysis.

II. The exception to the general rules: the REP Law

In that context, one in which there was no *ad hoc* analysis for collaboration agreements between competitors and in which environmental considerations were not relevant in the analyses performed by antitrust authorities, Law No. 20,920 on waste management, extended producer responsibility and promotion of recycling ("REP Law") issued in 2016, but whose implementation has been gradual in time, brought about a substantive change in Chile.

Indeed, the REP Law enshrined the possibility for competing firms to act jointly, through a common legal personality, for the purposes of complying with their waste management and recovery obligations, and established an *ad hoc* procedure so that the TDLC can be aware of the impacts that such joint action could have on competition. In this sense, although the TDLC must continue to watch over the same legal values that it is called to protect under DL 211, it must now make the protection of competition compatible with the principles pursued by the REP Law.[164]

II.1. Intervention of the Competition Authorities in the application of the REP Law

In general terms, the REP Law is an economic instrument for environmental management whereby manufacturers and importers of finished products must take responsibility for the waste generated by these products at the end of their life, including financing their storage, transportation and treatment.[165]

In order to meet waste collection and recovery targets, firms must set up management systems, which may be individual or collective. Thus, in order to generate economies of scale, the REP Law allows -and even encourages- firms -often competitors in the same relevant market- to participate jointly in organizations aimed at achieving certain recycling goals.[166] Indeed, according to Article 19 of the REP Law, the extended producer responsibility obligations can be fulfilled through individual or collective management systems, specifying, in its second paragraph, that: "*The decrees that establish goals and other associated obligations may restrict the application of one or the other [individual or collective] system, in order to avoid market distortions that jeopardize the effectiveness*

[163] At: https://www.fne.gob.cl/wp-content/uploads/2022/02/inf_prohib_F271_2021.pdf

[164] However, Article 2 letter e) of the SR Law mentions competition as one of the principles that inspire it: "*The functioning of the management systems and the operation of the managers may in no case be detrimental to competition*".

[165] At: https://centrocompetencia.com/medio-ambiente-y-libre-competencia-acople-pacifico/

[166] At: https://centrocompetencia.com/medio-ambiente-y-libre-competencia-acople-pacifico/

of the extended producer responsibility, or affect competition in the terms established in the [DL 211], previously hearing the FNE".

For its part, paragraph 4 of Article 24 of the REP Law states that "*The collective management systems must have a report from the TDLC stating that there are no rules in its constitution that prevent, restrict or hinder competition*".

In addition, Article 26 letter c) of the REP Law provides that "*The management systems will be authorized by the Ministry of the Environment, for which they must submit a management plan containing at least the following: (...) c) The rules and procedures, in the case of a collective management system, for the incorporation of new associates and operation of the system, which guarantee respect for antitrust laws.*

To ensure compliance with the above, it will be necessary to attach a report from the TDLC stating that in the rules and procedures for the incorporation of new members and operation of the collective management system, there are no facts, acts or conventions that may prevent, restrict or hinder competition".

II.1.1. Participation of the FNE in the application of the REP Law

In January 2019, the Ministry of the Environment consulted the FNE regarding its understanding of the intervention of the competition authorities in the implementation of the REP Law and requested its collaboration in the drafting of the decrees that establish collection and recovery goals and other obligations, in order to specify the requirements to be imposed on collective management systems ("CMS"), thereby limiting anti-competitive risks.[167]

Regarding the first point, the FNE at the time answered[168] indicating that: **(i)** the REP Law gives the exclusive competence to issue the reports indicated in Articles 24 and 26 to the TDLC, which is consistent with other special laws; and, **(ii)** the CMSs could constitute a concentration operation if the association gives rise to an independent economic agent, different from them, with a permanent performance of activities over time, and could have to be notified to the FNE under the merger control regime if the requirements of Article 48 of DL 211 are met.[169]

With respect to the second point, during the consultation process of the preliminary drafts of respective decrees issued by the Ministry of the Environment, which establish targets for the collection of priority waste and other obligations to producers, extended operational committees ("EOC") have been constituted, in which a representative of the

[167] Ordinance No. 190186 of the Ministry of the Environment, dated January 18, 2019.

[168] FNE Official Letter No. 0538, dated February 25, 2019.

[169] Article 48 paragraph 1: "*The National Economic Prosecutor's Office shall be notified, prior to their perfecting, of the concentration operations that produce effects in Chile and that comply with the following copulative requirements: a) That the sum of the sales in Chile of the economic agents that plan to concentrate have reached, during the fiscal year prior to that in which the notification is verified, amounts equal to or greater than the threshold established by resolution issued by the National Economic Prosecutor. b) That in Chile, separately, at least two of the economic agents that plan to concentrate have generated sales, during the fiscal year prior to that in which the notification is verified, for amounts equal to or higher than the threshold established by resolution issued by the National Economic Prosecutor*".

FNE has normally participated. This allows the perspective of protection of competition to be considered during the process, even before the producers appear before the TDLC.

This is relevant because, as indicated, the Ministry of the Environment can restrict the application of CMSs or individual management systems. In fact, in the case of lubricating oils, the intention of the Ministry of the Environment was to prohibit the individual management of this waste, making it mandatory for producers to join a CMS. In the opinion of the Ministry of the Environment, the existence of individual systems would jeopardize the effectiveness of the REP Law and this type of system would generate risks to competition, given that: **(i)** there would be an actor with a very high market share in the lubricating oil market (Copec), which would generate efficiencies of scale that the other actors could not achieve, thus accentuating its dominant position by ensuring access to lubricating oil waste that is easier to collect; and, **(ii)** the two main competitors would have preferential access to waste from the mining sector (being suppliers of that industry), which would generate a competitive disadvantage to the other producers. At that time, the FNE had not been requested to participate in the EOC.

In view of the above, the Ministry of the Environment sent an official request to the FNE for its opinion on the relevance of the aforementioned restriction. The FNE replied that it was not possible to confirm a dominant position of Copec in the lubricating oil market in Chile in general, nor in its segments in particular; and that no information was provided regarding the economies of scale that Copec could achieve, identifying that the other market agents could reach similar or higher levels than Copec through CMS.

In addition, the FNE pointed out that although there could be advantages in favor of some agents that operate in the mining customers segment, due to the possible lower capillarity in the generation of waste, there is no information that would allow dimensioning the impact of these possible advantages at the cost level, nor how and to what extent such differences could affect the lubricating oil market; or justify for what reasons whoever supplies the lubricating oils would necessarily be the one who collects the waste. Ultimately, the FNE concluded that the risks to competition put forward by the Ministry of the Environment - and which justified the prohibition of individual management systems for lubricating oils - were not sufficiently substantiated.

Based on what the FNE pointed out, the environmental authority changed its criteria and decided to partially limit the individual management systems, in the sense that they will only be able to meet their collection and recovery goals with the lubricating oil waste that they have introduced into the market. According to the MMA, "*this partial restriction encourages producers to internalize in their cost function the value of managing the waste into which the products they place on the market are transformed, which is fundamental for the success of the REP and for the effectiveness of its* environmental *objectives*."[170]

[170] Ministry of the Environment. Supreme Decree N°47, dated December 2, 2023, recital 27.

Moreover, the same partial restriction has been imposed in relation to all priority products[171] for which the Ministry of the Environment has issued decrees to date.

In short, the participation of the FNE in the application of the REP Law translates into participation in the EOCs cited by the Ministry of the Environment for the regulation of each priority product and, eventually, to pronounce on the relevance of restricting or not the individual systems or collective management systems in order to avoid market distortions that jeopardize the effectiveness of the extended producer responsibility or affect competition.

II.1.2 Participation of the TDLC in the application of the REP Law

Regarding the participation of the TDLC, Report No. 26/2022 ("Report No. 26") was the first opportunity in which the TDLC had to apply the REP Law and rule on a request filed by the Packaging Management System ("SIGENEM", for its acronym in Spanish), made up of 25 companies from different sectors of the mass consumption segment.[172]

Although, after Report No. 26, six other reports have been issued[173-174] and two requests for modification of reports already issued[175] are currently being processed, in the following, this paper focuses on that first report, since it was the one that set the basis for the analysis of competition that the TDLC has carried out in the following years and, in general, what was indicated in that opportunity has been repeated in the following reports.

The TDLC reviewed both the bylaws of SIGENEM ("Bylaws") and the bidding conditions for the selection of managers ("BCSM"). Specifically, the TDLC examined, on the one hand, the Bylaws to evaluate the conditions of entry and operation of such CMS; and then, it studied the design of the BCSM.

To carry out its analysis, the TDLC identified the following relevant markets: **(i)** the CMS market at the national level; **(ii)** related *upstream* markets in which two or more members of the same CMS participate as sellers of the same product or service or substitute products or services; and, **(iii)** related *downstream* markets related to waste management

[171] Priority products are oils and lubricants, electrical and electronic equipment, containers and packaging, tires, batteries and accumulators.

[172] These include food, beverage, personal and household cleaning, tobacco and *retail* companies.

[173] TDLC. Reports N°27/2022, N°28/2022, N°29/2022, N°30/2022, N°31/2023 and N°32/2023.

[174] In addition to the reports issued by the TDLC, the TDLC recently ruled in Resolution No. 82/2024 on a consultation submitted by a third party regarding the way in which SIGENEM's BCSM, now called ReSimple, should be interpreted. Specifically, the TDLC rejected the consultation, since it indicated that ReSimple should not disclose the minimum price or the economic offers submitted by the other participants in the bidding processes.

[175] In the case NC No. 535-2024, the modification of Report No. 26 governing SIGENEM, now called ReSimple, is being requested regarding the BCSM. Specifically, a modification was requested regarding the terms of the contracts, the background information requested from the participants, the technical requirements, maximum terms to start operations, the form and scope of subcontracting, fines, the collection of guarantees, the obligation of supervision and quality assurance of the services, the incorporation of the transportation services in the collection bidding conditions, the electronic processing of the bidding process and the possibility of requesting clarifications and complements to the bidders. On the other hand, in the case NC No. 539-2024, the modification of the bylaws of another CMS (ProRep) is being requested, in the sense that the incorporation fee itself is not detailed in the bylaws, but only the mechanism to determine the amount to be paid is indicated in said instrument. This, in order to have greater flexibility in setting the incorporation fee, without having to consult the TDLC every time the amount is to be modified.

(collection, reception and storage, sorting and pre-treatment of waste, and sale of waste for recovery, which, in turn, should be segmented according to waste material: glass, plastic, paper, metal or cardboard).

II.1.2.1. *Anti-competitive risks and mitigation measures related to CMS Bylaws*

Regarding the Bylaws, Report N°26 expressly stated that the TDLC should ensure that CMSs can operate as autonomous economic entities and compete to attract members; and, especially, that they "*(i) have incentives to form, and that market players or producers have incentives to join such management systems; (ii) allow the change of producers from one system to another, so that their incentives to compete and be more efficient once established in the market are maintained; (iii) act for the benefit of all their associates and not for the particular interests of some members; and (iv) do not encourage or facilitate coordination, collusion or the exchange of sensitive information among their* associates"[176].

Thus, the anticompetitive risks that occur in this type of entities are both unilateral (exclusion of members with respect to others interested in entering the CMS and exclusion of a CMS with respect to other CMSs that wish to enter such market),[177] and coordinated (facilitating coordination between members competing in an *upstream* market[178] with respect to production agreements, price agreements or boycotts, as well as the exchange of sensitive commercial information).

Regarding the first type of risks, Report N°26 indicated that since SIGENEM groups a significant part of the producers that introduce containers and packaging, it could have sufficient purchasing power to materialize unilateral risks. Therefore, it focused on analyzing the following elements of the Bylaws:

(i) *The categories of members and their political rights*: the TDLC considered that it was reasonable that SIGENEM's Bylaws contemplate three categories of members (permanent, active class A and active class B), with different incorporation fees and dissimilar political rights, in order to avoid *free riding* practices in the conformation and management of the CMS.[179]

On this point, it was only required to contemplate the possibility that members could opt to change category and that fines for non-compliance with the goals required by the REP Law be distributed among SIGENEM members in

[176] TDLC. Report N°26, ¶41.

[177] In fact, the TDLC noted that the risk of foreclosure with respect to other CMSs was particularly relevant in the case of an incipient market.

[178] It is important to keep in mind, as correctly identified by the TDLC, that producers that are part of the same CMS are not necessarily competitors, since different economic activities can generate the same types of waste, in this case, containers and packaging; and, in fact, that is what happened in the case of SIGENEM. However, there may be cases in which different members of the CMS are indeed competitors in one or more markets (as was also the case with SIGENEM), hence the importance of adopting the necessary safeguards to mitigate coordinated risks.

[179] The FNE had criticized the existence of differences between members and had advocated for a single equal membership for all members with the same cost and political rights, but, in the TDLC's opinion, this would have discouraged the entry into the CMS of smaller companies or those that produce less waste.

proportion to the amount of waste introduced by each one of them, in order to encourage SIGENEM members that generate more waste to become involved in its operation, thus mitigating the risks of having different political rights.

(ii) *The restriction of political rights by business group*: the TDLC determined that business groups may participate as a single member of a CMS with one vote if they voluntarily join the CMS in such capacity, but if any of the subsidiaries of the companies that make up the business group joins independently, it will have the corresponding political rights according to the category of partner it chooses.[180] This is because the interests of the companies forming a corporate group are not necessarily homogeneous in relation to the REP Law.[181-182]

(iii) *The determination of the joining fee*:[183] it should be based on objective and non-discriminatory economic cost criteria and not on the applicant's willingness to pay.[184]. The fee for permanent members and class A active members may take into account sunk costs. In the case of class B active members, it should only cover the administrative costs of their incorporation.

(iv) *The determination of ecotaxes* (fees to be paid by producers to the CMS for the cost of management): it should reflect the cost of each unit of measurement of containers and packaging that enters the system, with the value being different for each material involved (cardboard, glass, plastic, metal or other), but the same for all those who produce the same type of waste.

Regarding coordinated risks, although the TDLC recognized that CMSs, as collaboration agreements between firms, may affect competition by facilitating coordination between competitors, it also found that the risks of exchanges of commercially sensitive information were duly mitigated if the following measures are complied with: "*(a) representatives of the members must not be relevant executives of the members in*

[180] The FNE had proposed that SIGENEM members belonging to the same business group should be entitled to only one joint vote at the general meeting, since it would not be compatible with competition for economic agents to be treated unequally based on their corporate structure.

[181] It should be noted that this determination had the dissenting vote of two ministers of the TDLC, who shared the concerns of the FNE.

[182] However, as of Report No. 30/2022, the TDLC changed its criteria and ordered to modify the bylaws of the CMSs in the sense that the members that are part of the same business group have only one vote in the general meetings. This, because it indicated that although different members belonging to the same business group may have an individual interest different from the rest, such interest is subordinated to the interests of the whole and all members of the same business group must be understood as a single economic entity. Thus, the change in the bylaws was ordered to prevent the risk that the interests of a business group end up being overrepresented within the CMS.

[183] The FNE had questioned the existence of differentiated incorporation fees and the fact that these covered the sunk costs, since in its opinion, these should be incorporated in the eco-taxes.

[184] Along the same lines, in the context of Report No. 27/2022, some interveners questioned the possibility that the CMS in question could set extraordinary fees. However, the TDLC indicated that this does not infringe, prevent or hinder competition, since there are measures that would mitigate possible risks, but also provided that such fees should not violate the rules of access, fair participation or operation of the CMS and should be determined on the basis of objective and non-discriminatory criteria and be duly justified.

commercial matters; (b) there is an explicit duty not to exchange information, opinions, sensitive commercial background or any other background outside the general meetings of SIGENEM and its formal bodies; (c) the information to which SIGENEM may have access must be the minimum necessary, namely: (i) information to decide on the request for access of new members and (ii) information on the E&E [containers and packaging] incorporated in the market; (d) the delivery of disaggregated information must always be channeled through the Audit and Compliance Management, which will group it to deliver it to SIGENEM's internal bodies that require it for the exercise of their functions; (e) the receipt and delivery of information must be recorded in writing; (f) a Confidentiality Agreement must be signed with respect to the information received. Infringement of this duty must be reported to the appropriate public authorities, without prior notice to the Board or to SIGENEM's members; (g) independence of the Audit and Compliance Manager to inform the FNE of any possible infringements of competition; and (h) members may not access confidential information in connection with the auditor*'s reports*".[185-186]

II.1.2.2. *Anti-competitive risks and mitigation measures related to the design of BCSM*

Regarding the design of the BCSM, the TDLC was clear in stating that its role was to ensure that they: **(i)** did not incorporate evaluation criteria that favored the award to an actor or group of actors related to any of SIGENEM's members; **(ii)** did not unjustifiably exclude a supplier; **(iii)** provided for operating risks once the service was awarded and was in operation; and, **(iv)** avoided the risk of collusion in the bidding process.

In this regard, the TDLC positively valued the BCSM contemplated bidding processes with a technical stage, establishing a minimum technical and service quality standard; and then, an economic stage, based on the lowest price to the user -in the case of the bidding conditions for the collection service, reception and storage facilities and the waste classification and pretreatment service-, or the highest price to be paid -with respect to the bidding conditions for the sale of waste-. It also agreed with the incorporation of a

[185] TDLC. Report N°26, ¶151.

[186] In Report No. 27/2022, the TDLC considered that the following safeguards were sufficient: "*(i) each partner will only share with the system the information indispensable to achieve the Corporation's own purposes, which will refrain from requiring more information than strictly necessary; (ii) the Corporation will handle the information with reserve and care will only be shared in aggregate form, when relevant; (iii) sensitive commercial information that is delivered by members to the Corporation for the fulfillment of its purpose will always be confidential, in addition, this will be delivered by appropriate means to ensure its confidentiality; (iv) there will be a platform through which the information provided will be channeled; (v) members may not access in any way or become aware of the information of other members; likewise, the Board of Directors, Senior Management, and other personnel and external service providers are obliged to maintain absolute confidentiality in the performance of their duties; (vi) any breach of these obligations must be reported to the Compliance Department, which will act in accordance with the provisions of the Bylaws and applicable legislation; (vii) there will be an institutional design dedicated to identifying and mitigating risks in the area of coordinated conduct, such as an Audit and Compliance Committee, which will ensure the protection of competition; (viii) there will be a Compliance Management that, among other functions, will review the items on the board and materials delivered to the members, as well as the participation in the general assemblies, will manage anonymous complaint channels and will carry out the corresponding investigations; and (ix) there will be a compliance policy embodied in a manual that will define procedures and risk mitigation measures related to the handling of commercially sensitive information*".

maximum secret reserve price, a minimum guaranteed demand and considered that the bidding terms were reasonable.

However, the TDLC also ordered adjustments to the BCSM, in order to: **(i)** incorporate the possibility that interested parties may participate in consortiums or *joint ventures*, to reduce barriers to entry; **(ii)** allow the participation of municipalities under equal conditions; and **(iii)** eliminate the requirement of prior experience in the bidding conditions for reception and storage facilities services, as it was unnecessary.

Ultimately, the TDLC found that the Bylaws and the BCSM do not prevent, restrict or hinder competition, provided that they incorporate the modifications described above, in addition to other minor adjustments.

As indicated, the reports that have been subsequently issued by the TDLC with respect to the bylaws and bidding conditions of other CMSs have generally been along the same lines. However, it should be noted that since Report No. 29/2022, the TDLC has provided an additional measure to avoid coordination between CMSs that are in competition with each other, which consists in that the members that are members of another CMS for the management of the same type of waste, either directly or through a related company, must opt for one of the CMSs, within a period of three months. This is to mitigate possible coordinated risks between CMSs.

III. Conclusions

Chilean antitrust institutional design does not have an *ad hoc* system to analyze collaboration agreements between competitors. Also, competition law has not historically considered in its analysis factors other than market efficiency, such as sustainability, environmental care, recycling or other public policy goals that are legitimately desirable to achieve. This has been expressly stated by both the FNE and the TDLC, emphasizing that they can only apply the substantive standard of analysis provided by DL 211 in each case.

However, the REP Law implied a relevant change, since it provided for a mechanism to assess certain agreements between competitors and forced the competition authorities to maintain the technical analysis from the legal and economic perspective that they had traditionally applied, but including also sustainability considerations that allow compliance with the objectives of reducing the generation of waste, promoting its reuse, recycling and recovery. To this end, the constitution of CMS is fundamental as they allow firms to achieve their sustainability goals.

In this line, the FNE has helped the Ministry of the Environment to define whether or not it is appropriate to prohibit individual waste management systems, as occurred in the case of lubricating oils, and has provided background information in the various proceedings before the TDLC at the request of various CMSs. For its part, the TDLC has already ruled seven times on requests for reports requested by CMS, either for the approval of its bylaws and/or the bidding conditions for the selection of waste managers.

Regarding the analysis of the CMS statutes, the TDLC has sought to ensure that they can develop as autonomous economic entities and compete among themselves to attract members, for which they must have incentives to form and other actors must want to join, and mobility from one CMS to another must be allowed. Also, CMSs must act for the benefit of all their members and not in favor of one or more of their associates and, of course, the necessary safeguards must be taken to ensure that they do not facilitate anti-competitive coordination or the exchange of commercially sensitive information among their members. In Report No. 26 and subsequent reports, the TDLC has ordered the adoption of mitigation measures that go precisely in the line of limiting exclusionary risks (both of possible members and of other CMSs) and coordinated risks.

On the other hand, regarding the design of the BCSM, the TDLC has sought to ensure that evaluation criteria that favor companies related to any of the members of the CMS are not incorporated; that a supplier is not unjustifiably excluded; that the operating risks that could be incurred by the successful bidder once the service is in operation are prevented; and that risks of collusion in the bidding process are avoided. The TDLC has also ordered adjustments to the BCSM that seek to prevent such risks.

In summary, the REP Law has introduced a significant challenge to Chile's institutional framework for competition by establishing a link between DL 211 and legal principles associated with environmental protection and sustainability. The evolution of this jurisprudence remains to be seen, as, to date, only a few decrees concerning priority products have been issued, and only a limited number of CMSs programs are currently operational. This model is still in its initial stage and the intervention of antitrust authorities has already been crucial in ensuring its proper development.

China

Antitrust and Sustainability: China Perspective

By Yingling Wei, Janet Hui, Zhe Dong and Yuhang Ding of Junhe

Introduction

Sustainability concerns have brought increasing attention to our community. Correspondingly, the rising social awareness, such as ESG (Environmental, Social, and Governance) mandates, also create challenges to the traditional antitrust law framework. The interplay between these somewhat conflicting interests leads to constant queries in academia and among legal practitioners about how the two can be compatible. For business operators, navigating sustainability goals and antitrust compliance rules is tricky. Although China has yet to publish specific regulations or guidelines on resolving the conflict between sustainability and antitrust, compromises are evident in sustainability considerations in both merger control reviews and individual exemptions to monopoly agreements. This article explores the interplay of sustainability and Chinese anti-monopoly law, including China's path towards its sustainability goals, the sustainability concerns embedded in Chinese antitrust rules, the potential antitrust risks of sustainability agreements in China, and how such considerations are applied in practice.

1. Sustainability Goals of Chinese Society

1.1 Chinese Government in Pursuit of Sustainability Goals

The interaction between nature and social governance has long been a theme in Chinese culture, rooted in its agricultural civilization. The concept of ecological ethics, which seeks to balance human beings and nature, has been constantly advocated by great philosophers. Addressing climate change and sustainable development has become a global issue, with ESG emerging as a response to various societal problems. Chinese regulators have incorporated sustainability concepts into policymaking for a long time, marked by the issuance of the "Guiding Opinions on Fulfilling Corporate Social Responsibility of Central SOEs" in 2008, encouraging central regulated SOEs to regularly publish corporate social responsibility/sustainable development reports.

In 2020, China announced its Carbon Peak and Carbon Neutrality Goals, aiming for carbon dioxide emissions to peak by 2030 and achieve carbon neutrality by 2060. ESG has become buzzword and is increasingly used as a toolkit by various Chinese departments to evaluate the sustainability level of enterprises, supplementing the single metric of financial success.

1.2 China's Path Towards Sustainability

(1) Sustainability Standard Incorporated into the Amended Company Law

On December 29, 2023, the amendment to the China Company Law was adopted, taking effect on July 1, 2024. The Amended Company Law specifies that in business operations, a company shall consider the interests of its employees, consumers, and other stakeholders, as well as the protection of the ecological environment and other public interests, to shoulder its social responsibilities. It also encourages all companies to publish social responsibility reports, which essentially include ESG responsibilities.

(2) China Securities Regulatory Commission (CSRC)-Requirements

In 2018, the CSRC issued the "Code of Corporate Governance for Listed Companies", setting out framework guidelines on sustainability disclosure requirements for listed companies. It specifies that "listed companies shall actively practice green development concepts and incorporate ecological and environmental protection requirements in development strategies and corporate governance processes." In 2022, the CSRC issued the "Guidelines for Investor Relations Management by Listed Companies," which provides that sustainability information of listed companies should be critical content of investor communication.

(3) Stock Exchange Policies

On April 12, 2024, the Shanghai Stock Exchange (SSE), Shenzhen Stock Exchange (SZSE), and Beijing Stock Exchange (BSE) issued three "Guidelines on Corporate Sustainability Reporting for Listed Companies (Trial)," each a "CSR Guideline," effective May 1, 2024. The CSR Guidelines aim to integrate the concept of sustainable development into public companies' daily operations and unveil a new era of ESG disclosure.

Mandatory ESG disclosure requirements are imposed on listed companies that are part of major indexes of SSE and SZSE, with the first disclosure due by April 30, 2026. BSE-listed companies and other listed companies are encouraged to make voluntary disclosures. These CSR Guidelines take a double-materiality approach to sustainability disclosure, requiring companies–to identify and disclose topics that impact financial performance (Financial Materiality) and ESG (Impact Materiality).

(4) Advocates of Other Chinese Authorities

On May 27, 2024, the Ministry of Finance began soliciting opinions on the "Sustainability Disclosure Standards for Business Enterprises – Basic Standard" (SDS), aiming to unify corporate sustainability disclosures and establish a nationwide standard by 2030.

With policy support and regulatory pressure, sustainability development, especially ESG, is rapidly progressing in China. More companies are disclosing ESG-related information

to stakeholders, and corporate managements are incorporating ESG factors into their decision-making processes.

2. Sustainability Consideration from the PRC Anti-monopoly Law

2.1 Sustainability Exemption of Monopoly Agreements

The Anti-monopoly Law of the People's Republic of China ("PRC AML") prohibits business operators from reaching and implementing monopolistic agreements. However, Article 20 of the PRC AML allows for individual exemptions if a suspected monopoly agreement would realize public interests such as energy conservation and environmental protection.

Monopoly agreements are per se illegal, but exemptions can be granted under specific circumstances.

According to Article 20, a limited scope of monopolistic agreements could be exempted where: a) The agreement is for improving technologies, researching, and developing new products; b) The agreement is for improving product quality, reducing costs, improving efficiency, unifying specifications or standards, or carrying out professional labor division; c) The agreement is for improving operational efficiency and enhancing the competitiveness of small- and medium-sized undertakings; d) The agreement is for realizing public interests such as energy conservation, environmental protection, and disaster relief and aid; e) The agreement is for mitigating serious decreases in sales amount or obviously excessive production during economic recessions; and f) The agreement is for safeguarding legitimate interests in foreign trade or foreign economic cooperation.

Monopoly agreements for energy conservation and environmental might be exempted from penalties under the PRC AML, subject to case-by-case scrutiny. The undertakings involved need to prove that such agreements will not substantially restrict competition in the relevant market and that consumers share the benefits arising therefrom, in addition to passing necessity and efficiency tests.

2.2 Sustainability Factors in Merger Control Review

On June 17, 2024, the State Administration for Market Regulation ("SAMR") released its "Draft Guidelines for the Review of Horizontal Mergers" to solicit public opinions. Article 81 of the Draft Horizontal Merger Guidelines explicitly sets out how sustainability factors will impact SAMR's assessment of a horizontal merger.
If an undertaking can prove that a horizontal merger has a positive impact on public interests, such as promoting employment, protecting the rights and interests of small and

medium-sized undertakings, energy conservation, environmental protection, and disaster relief, SAMR may not prohibit it even if the merger may eliminate or restrict competition. SAMR will focus on whether the following conditions are met: a) Whether the horizontal merger will have a substantial positive impact on public interests; b) Whether there is a causal link between the horizontal merger and the positive impact on public interests; and c) Whether, in the absence of the horizontal merger, there would have been no positive impact on the aforementioned public interests.

Although the Draft Horizontal Merger Guidelines are not final, they are expected to be implemented soon. However, sustainability factors in merger control reviews should only be regarded as a theoretical framework, as SAMR does not disclose detailed assessments of a transaction's positive impact.

3. Potential Antitrust Risk of Sustainability Agreements: ESG Cooperation as an Example

The emerging ESG mandate in corporate governance presents a new challenge for Chinese companies. ESG efforts, particularly the "E" aspect, are emphasized in China, evidenced by government attention and policy focus. While unilateral conduct by a single firm to accomplish ESG compliance rarely leads to antitrust concerns unless the firm possesses significant market power, collaboration between competitors in joint pursuit of ESG goals might raise questions about the compatibility of ESG-related conduct and antitrust rules.

Certain pro-competitive efficiencies are embedded in ESG requirements, such as environmental efficiencies. For example, agreements to voluntarily set common ESG objectives, including reducing greenhouse gas emissions, without binding effects on each party's contribution, are generally pro-competitive. Agreements to improve product quality to phase out polluting products, without joint price increases or choice cutting can also realize both objectives. However, cartel greenwashing, where sustainability ambitions reduce participants' incentives to invest in environmental-protection initiatives, can be anticompetitive.

Despite the underlying interests of antitrust law and ESG compliance not being inherently incompatible, divergences may arise. ESG efforts are usually costly, and the competitive advantage they bring may not be immediately apparent. First-mover disadvantages exist for companies willing to engage in sustainability movements or bring about greener products. Some may perceive that sustainability goals are better achieved through competitors' collaboration, but the societal benefits must outweigh the harm of anticompetitive coordination.

Under the PRC AML framework, competitors are supposed to act on their initiative. However, first-mover disadvantages may lead competitors to collaborate in ESG-related movements, raising potential risks of information exchange and horizontal monopolistic agreements. It is extremely difficult for ESG-related arguments to succeed in fighting for

exemptions. Business operators should avoid agreeing on or exchanging competitively sensitive information, such as price, and production, and refrain from joint boycotting for ESG purposes. For less "hardcore" issues, the effect on competition must be thoroughly considered before any action.

4. Practical Dilemma: Difficulty for Article 20 Exemption to Apply

In practice, there are few cases where Article 20 exemptions have been successfully applied, and parties bear a high burden of proof. One notable case is Shenzhen Huierxun Technology Co., Ltd. v. Shenzhen Pest Control Association, ruled in 2012. In this case, Shenzhen Pest Control Association, entered into a price-fixing scheme with its members, setting restrictions on the price of pest control services. The association claimed its conduct was to prevent unfair competition and protect public interest, applying Article 15(4) of the AML (now Article 20 of the PRC AML). The court accepted the defendant's argument and ruled that the agreement did not violate the PRC AML.

From current antitrust enforcement and court rulings, the judgment of this case could be controversial. The judgment did not detail the positive effects/purposes claimed to be realized by horizontal agreements, the benchmark price mechanism's impact on competition, or consumer benefits from the benchmark price fixing. Other cases have seen applications for exemptions rejected by courts with more discussion on these aspects. No ESG-related arguments have been effectively argued in front of SAMR, though attempts have been made.

5. Conclusion

In the wave of sustainability development, Chinese authorities are imposing more sustainability requirements (e.g., ESG) on corporate governance. With disclosure pressure, Chinese companies will pay more attention to sustainability developments, and ESG cooperation between competitors will likely increase. Unlike other jurisdictions, such as the UK, China has yet to issue specific antitrust guidelines on ESG-related or sustainability agreements. Companies must remember that sustainability considerations are not an excuse or automatic exemption for anticompetitive agreements. Antitrust risks in sustainability agreements need to be prudently evaluated, and close monitoring of antitrust enforcement practices is necessary.

Colombia

Challenges and Strategies for Integrating Sustainability into Colombian Competition Law

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Introduction

In recent years, global requirements to transform production processes to make them environmentally friendly, guarantee sustainable development and promote the adequate use of natural resources have become increasingly demanding.

Although this trend is mainly driven by the most developed countries, it also impacts small and medium-sized economies for which the implementation of these policies and requirements represents a major challenge.

As a rule, legislation and regulation fail to keep pace with global objectives and priorities. Therefore, in recent years there has been debate regarding the relation between competition and sustainability, and as to whether or not countries should encourage companies and individuals to directly implement policies that benefit the development and sustainable production of goods and services, even if this means entering into agreements between competitors or sharing sensitive information between them.

The discussion has not gone unnoticed in Colombia, where it has been approached mainly from an academic, rather than a governmental or regulatory perspective.

This document focuses on the regime applicable to free competition in Colombia, the limits to the exercise of this constitutional right, and the establishment of priorities and policies on environmental and sustainability issues in our country.

With this context, this article seeks to determine if it would be admissible and convenient for the competition authority to take into consideration the environmental benefits of anticompetitive conduct as grounds for not investigating it or not imposing penalties on those who have incurred in it.

Legal Framework

Firstly, it is worth mentioning that the Colombian competition regime is based on Article 333 of the Political Constitution, which states, among others, that: (i) "*Economic activity and private initiative are free, within the limits of the common good*"; (ii) "*Free economic competition is a right for everyone that entails responsibilities*"; (iii) "*businesses, as the basis of development, has a social function that implies obligations*"; and (iv) "*The law*

will delimit the scope of economic freedom when required by social interest, the environment, and the cultural heritage of the Nation."

Article 79 of the Constitution also recognizes the right to enjoy a healthy environment as a collective right and stipulates that it is the duty of the state to protect its diversity and integrity. This highlights the importance that, since the 1991 Constitution, has been given to environmental protection. What must be analyzed is if the antitrust regime should be or could be instrumentalized to achieve environmental protection and sustainability.

Likewise, the relevant legal framework for the discussion of sustainability and antitrust is also comprised in Article 1 of Law 155 of 1959, Articles 47 and 49 of Decree 2153 of 1992, and Article 3 of Law 1340 of 2009.

Although the oldest provision dates to 1959, it is Article 3 of Law 1340 of 2009 that sets out the purposes of the current free competition regime in Colombia: **free participation of companies in the market, consumer welfare, and economic efficiency**. These purposes guide the activities of the Superintendence of Industry and Commerce—the Colombian competition authority—within its competencies, which include investigating and sanctioning restrictive behaviors and agreements

Nonetheless, Article 1 of Law 155 of 1959 **prohibits all kinds of practices** aimed at limiting free competition and maintaining or determining unfair prices, known in the Colombian competition regime as the general prohibition.

Accordingly, Article 47 of Decree 2153 of 1992 provides a non-exhaustive list of agreements considered contrary to the free competition, either by their object or their effects on the market (e.g., agreements to determine sales conditions and set prices, but also to limit sources of supply of productive inputs, to refrain from producing goods or services or to affect its production levels, to prevent third parties from accessing markets or commercialization channels, among others).

The Colombian competition regime also includes exceptions outlined in Law 155 of 1959 and Decree 2153 of 1992, which are relevant to the topics of sustainability and competition. Some concerns have been raised about whether, theoretically, these exceptions could allow competitor agreements aimed at achieving environmental benefits.

As set forth in Paragraph 1 of Article 1 of Law 155 of 1959, the Government can authorize agreements that seek to defend a "(…) *basic sector for the production of goods and services that are of interest to the economy in general*", referred to as the block exemption.

Meanwhile, Article 49 of Decree 2153 of 1992, allows: (i) behaviors aimed at cooperation in research and development of new technology; (ii) agreements on compliance with standards, norms, and measures not adopted as mandatory by the competent authority when they do not limit the entry of competitors into the market; and (iii) agreements related to procedures, methods, systems, and ways of using common facilities.

That said, based on the objectives of competition law some have argued that sustainability and environmental goals align with the application of competition policy.

Specifically, they suggest that environmental benefits contribute to consumer welfare (OECD, 2020)[187] and to economic efficiency, if sustainability is considered as a quality and innovation parameter and therefore contained within the objectives of competition law (Nowag, 2022)[188]. This would entail that when assessing whether an agreement or conduct is illegal, the competition authority could consider the potential environmental benefits.

As anticipated, proponents of this view also believe that, eventually, agreements between competitors aimed at environmental sustainability, which would *prima facie* be restrictive of competition by their object or effect, could fall within the exceptions of Article 49 of Decree 2153 of 1992 (Ortiz, Solano, 2016),[189] or could be authorized through the block exemption of article 1 of Law 155 of 1959 (Gutierrez, Solarte, 2023).[190]

The opposing theory, that this article supports, is that the objectives and purposes of competition law does not include sustainability, nor should they (Modrall, n.d.).[191] Expanding the goals of competition law to encompass environmental issues could encourage greenwashing, disincentivize sustainable production, and overload competition authorities (Schinkel, Treuren, 2020).[192]

Moreover, consumer welfare should be analyzed case by case, and it is difficult to understand how an agreement that, by example, results in higher prices for certain products or excludes others from the market, even if it has a positive environmental impact, directly benefits consumers in those markets.

This is not to deny that environmental sustainability is a matter of utmost importance, and the right to free competition cannot be a barrier to achieving higher principles, values and objectives. Therefore, the policy and regime of free competition must not be an obstacle to environmental sustainability. In fact, Article 333 of the Constitution recognizes that the law may establish limits on economic freedom, among other reasons, due to environmental requirements.

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[187] OECD. (2020). *Sustainability and competition*. OECD Publishing. Retrieved from https://www.oecd.org/en/publications/sustainability-and-competition_18e2061c-en.html

[188] Nowag, J. (2022, February 23). *Antitrust and sustainability: An introduction to an ongoing debate*. ProMarket. https://www.promarket.org/2022/02/23/antitrust-sustainability-climate-change-debate-europe/

[189] Ortiz. I, Solano, D. (february 15, 2016). Free Economic Competition and Environmental Protection: An approach to the study of Environmental Compliance voluntary agreements. Universidad Externado de Colombia. https://doi.org/10.18601/16923960.v15n1.01

[190] Gutiérrez, J. D., & Solarte-Caicedo, S. (2023). The complex relationship between competition law and initiatives for halting deforestation in the Amazon. *The Competition Law Review*, *15*(2), 111-137. https://clasf.org/download/competition-law-review/volume_15_issue_2/Vol15Iss2Art1GutierrezSolarteCaicedo.pdf

[191] J, Modrall (n.d.). *Climate change and sustainability disputes: Anti-trust and competition perspective*. https://www.nortonrosefulbright.com/en/knowledge/publications/3633ff51/climate-change-and-sustainability-disputes-anti-trust-and-competition-perspective

[192] Schinkel, M. P., & Treuren, L. (2020). Green antitrust: (More) friendly fire in the fight against climate change. In S. Holmes, D. Middelschulte, & M. Snoep (Eds.), *Competition law, climate change & environmental sustainability*. Amsterdam Law School Research Paper No. 2020-72; Amsterdam Center for Law & Economics Working Paper No. 2020-07. https://ssrn.com/abstract=3749147

Even if Colombian free competition regime does not include sustainability and environmental considerations within its legal framework, that circumstance does not diminish the importance of environmental preservation nor the fact that constitutional rights of free competition and private initiative can be limited by reasons of common interest and general welfare.

Thus, the question to be asked is whether competition policy should be defined by firms or individuals, and if the state should encourage them to determine the limits of competition in the interest of sustainability and the environment. Alternatively, should only the state set such limits, ensuring that no agreement or act that restricts competition is exempt from law enforcement, even if it generates a positive impact on the environment?

In Colombia, according to the Constitution, only the state has the power to establish limits to the exercise of rights, especially if these are of constitutional rank, as is the case of free competition. This is expressly established in Article 333 of the Constitution: *"Economic activity and private initiative are free, within the limits of the common good. For their exercise,* ***no one may demand prior permits or requirements, without authorization by law*** *(...)* ***The law shall delimit the scope of economic freedom*** *when so required by the social interest, the environment and the cultural heritage of the Nation."*

Is it advisable to include sustainability issues in competition policy?

As anticipated in the previous section, including sustainability as a goal of competition policy is a topic that generates both support and opposition.

On the one hand, proponents, including the Organization for Economic Cooperation and Development (OCDE), argue that incorporating sustainability into competition policy could incentivize businesses to adopt sustainable practices.[193]

Specifically, the OECD stated that "competition supports environmental protection goals where consumers preferences lean towards environmentally friendly products or services. This creates an incentive for companies to adjust their supply of sustainable products and align their investments to meet that demand."[194]

Efforts by companies to comply with environmental standards can also help mitigate negative externalities caused by their production processes, such as air and water pollution, as well as the depletion of natural resources.[195] These externalities suppose that the effect of production or consumption of goods and services imposes costs on others which are not reflected in the price charged for the goods and services provided.[196]

[193] (OCDE, 2021, Environmental Considerations in Competition Enforcement. Pg. 10)
[194] (OCDE, 2021, Environmental Considerations in Competition Enforcement. Pg. 10)
[195] OCDE, 2021, Environmental Considerations in Competition Enforcement).
[196] (Helbling, 2020 in OCDE, 2021. Environmental Considerations in Competition Enforcement. Pg. 11).

Giorgio Monti, a law professor at Tilburg University, suggests in his "Handbook on Sustainability and Competition Law" that competition law can penalize behaviors detrimental to the environment, especially when such actions secure competitive advantages at the cost of environmental protection.[197]

The European Commission has highlighted the role of competition law in achieving the Green Deal objectives. In its Competition Policy Brief, the Commission emphasized that competition policy can drive green innovation and facilitate the technological advancements necessary for sustainable growth.[198]

On the other hand, the inclusion of this matter within the purposes of the competition law could generate significant uncertainty, as the parameters under which authorities would evaluate such objectives would lack clarity. As an example, the approval process for mergers and acquisitions might become uncertain, as it would no longer be strictly limited to competition policy concerns but extend into other areas.

On that line, Margrethe Vestager, the Executive Vice-President of the European Commission, in her speech at the conference on "Competition Policy Contributing to the European Green Deal" on February 4, 2021, stated that "competition policy is not the primary tool for achieving green goals".[199]

In Colombia, as previously stated, Law 1340 of 2009, in its Article 3, outlines the objectives of competition law, namely, the protection of economic freedom and enterprise, market efficiency, and consumer welfare. Environmental protection and sustainability are not among its stated purposes; therefore, it should not be made enforceable through competition law, at least not until the legal framework for its enforcement is determined.

So, it is clear that the objectives of competition law in Colombia do not explicitly address sustainability policies. Despite the increasing significance of these issues, there has been no substantial regulatory development in this area. Moreover, the Superintendency of Industry and Commerce, even in its guidelines on business collaboration agreements,[200] does not reference any agreements aimed at achieving environmental objectives. This is partly due to the exceptions outlined in Article 49, which do not specifically cover agreements with sustainability goals. As a result, the current legislation does not directly incorporate environmental objectives into competition policies.

As suggested by the International Chamber of Commerce in their paper "Competition Policy and Environmental Sustainability" (2020), competition authorities should not be overburdened with roles beyond their expertise, they should focus on maintaining free

[197] (Monti, Giorgio. 2024).
[198] (European Commission. 2021. Competition policy brief).
[199] (European Commission. 2021. Competition Policy and the Green Deal).
[200] Superintendecy of Industry and Commerce, "Guidelines for the enforcement of competiton law to collaboration agreements between competitors". Retrieved from https://sic.gov.co/sites/default/files/files/CARTILLA_ACUERDOS%2019-03-2015.pdf

and fair competition. Even though environmental sustainability is important, including it as an objective of competition law could dilute its effectiveness.

Competition authorities specialize in the economic and legal analysis of markets. Including objectives such as environmental sustainability would compel them to assume roles for which they are unprepared, undermining their core purpose.[201] Thus, assigning functions outside the scope of the competition authority can dilute the extent of its responsibilities and ultimately deviate them from the goals of the free competition regime.

The International Chamber of Commerce also suggests that integrating external objectives, such as environmental ones, could lead competition policy to adapt to numerous exceptions linked to other public policies (e.g., health or human rights).

This dilution would not only reduce the focus and efficacy of competition policy but also distort its original purpose. Each specialist area should address its respective concerns—competition law must be coordinated with industrial and sustainability policies, not replaced by them.[202]

Including sustainability as a goal of competition law could also create barriers for market players. Large corporations, with greater resources and adaptability, might disproportionately benefit from the incorporation of sustainability objectives. Meanwhile, smaller businesses could struggle to meet stricter standards, potentially being excluded from the market.[203]

This may represent a major competition issue, particularly in developing countries such as Colombia, whose local industry (i) does not always have sufficient financial leverage to make the investments in the short term that other multinationals have made to implement international sustainability standards, and where (ii) investment priorities may be focused on other more pressing needs.

Moreover, the Organization for Economic Cooperation and Development (OCDE) in their paper on Sustainability and competition (2020) indicated that there is a risk that companies could use sustainability as a pretext to justify anticompetitive practices or enhance their public image artificially, without genuinely meeting environmental standards. This could lead to unfair practices, such as greenwashing.[204]

In addition, it should not be overlooked that not all markets value sustainability in goods and services in the same way and, therefore, from the consumer's perspective, an offer that prioritizes these elements does not necessarily generate a benefit for the consumer, *per se*.

This, in turn, implies that priorities set from a global environmental perspective may not necessarily follow the same agenda in each country, as the consequences of their

[201] Argument supported by William Kovacic, who was a Law professor in Georgetown University and served as a Commissioner and Chair in the Federal trade Commission in the United States, in his book Competition Policy in Times of Recovery explores the responsibilities of competition authorities and the dangers of expanding their mandate beyond.
[202] (ICC, 2020, pg. 2).
[203] (OCDE. 2021. Environmental Considerations in Competition Enforcement. Pg. 38)
[204] (OCDE, 2020, pg. 15)

implementation will be different depending on the economy in question, its priorities and its environmental necessities.

Rather than incorporating environmental sustainability as a direct goal of competition analysis, it would be more convenient to establish institutional coordination mechanisms between competition authorities and environmental policy agencies. Sustainability should be addressed through public policies and specific regulatory frameworks that complement competition law, thereby avoiding a diversion from its core purpose.

Furthermore, public policies must determine the environmental and sustainability requirements according to each jurisdiction, and it should not be up to the competition authority and much less to particulars, to decide which environmental benefits could justify and legitimize potential restrictions on the market.

According to Principle 7 of the Rio Declaration on Environment and Development (1992): "*In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities*."[205] This means that the environmental responsibilities and requirements that could be applicable, for example, in the United States or in the European Union, might not be the same in nature and extent, as those in Latin American countries. Therefore, sustainability priorities should be defined through environmental regulation and public policy.

For example, in Colombia, environmental requirements, rather than focusing on the reduction of greenhouse emissions, should aim at preventing deforestation and protecting biodiversity and ecosystems, that are the country's principle ecological challenges (EAN University, 2023). [206]

Note that in 2023, China and the United States, jointly, generated 45% of the greenhouse gas emissions in the world (Statista, 2024),[207] whereas Colombia´s greenhouse emissions are far from substantial. In contrast, in terms of deforestation and according to the World Resources Institute, between 2001 and 2023, Colombia ranked 7th in loss of hectares of primary tropical forest.[208]

In our view, an agreement in Colombia between competitors that seeks to reduce the country's emissions -or any other sustainability goal that deviates from the specific

[205] United Nations. (1992). *Rio Declaration on Environment and Development* (Principle 7). United Nations Conference on Environment and Development (UNCED). Retrieved from https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

[206] Ean University. (2023). What are Colombia's main environmental challenges in 2023?". https://universidadean.edu.co/noticias/cuales-son-los-principales-retos-ambientales-de-colombia-en-2023

[207] Statista. (2024). "World ranking of the main greenhouse gas emitting countries in 2023". https://es.statista.com/estadisticas/711610/ranking-mundial-de-los-principales-paises-emisores-de-gases-de-efecto-invernadero/#:~:text=Esta%20estad%C3%ADstica%20presenta%20un%20ranking,de%20Estados%20Unidos%20e%20India

[208] United Nations. (1992). *Rio Declaration on Environment and Development* (Principle 7). United Nations Conference on Environment and Development (UNCED). Retrieved from https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

environmental requirements of the country-, and as a result prices of a certain product increase, or a product or competitor is excluded from the market, will have little or no effect in what should be the country´s sustainability priorities and it may come at a great cost to consumers and to the economy.

As previously mentioned, since Colombia contributes only marginally to global CO2 emissions, allowing restrictive agreements in the country to combat or control these emissions would not have a significant positive effect on Colombian consumers or in sustainability purposes, especially while major polluting countries like the United States and China do not make significant efforts to achieve this goal.

Anyhow, if sustainability is left to the criteria of the competition authority, it would be responsible for establishing and measuring the environmental impact of agreements and conducts that allegedly seek sustainability, as well as the actual benefits in comparison with the harm to competition.

In doing so, the competition authority would have to issue a decision on a matter (environmental and sustainability) that is completely beyond its competence and expertise.

In other words, if environmental requirements are not clearly defined through public policy, and it is left to the competition authority to determine which sustainability goals to pursue, there is no guarantee that the relevant environmental concerns will be addressed.

In Colombia, according to Article 1 of Decree Law 3570 of 2011, the Ministry of Environment and Sustainable Development (MADS by its acronym in Spanish) is the authority in charge of *"(...) defining the policies and regulations to which the recovery, conservation, protection, planning, management, use and sustainable exploitation of renewable natural resources and the environment of the Nation shall be subject, in order to ensure sustainable development, without prejudice to the functions assigned to other sectors".*

Thus, MADS has within its powers to (i) design and regulate public policies to, among others, prevent, repress, eliminate or mitigate the impact of polluting, deteriorating or destructive activities on the environment in all economic and productive sectors; and (ii) evaluate the scope and economic effects of environmental factors, their incorporation into the market value of goods and services and their impact on the development of the national economy and its external sector; their cost in medium and large infrastructure projects, as well as the economic cost of the deterioration and conservation of the environment and renewable natural resources.

Within this context, there is nothing to prevent lawmakers (in the first place) and MADS from setting parameters that private parties must abide when developing their activities in the market to reduce their environmental footprint and impact. As previously stated, free competition as a constitutional right can only be limited by law.

Therefore, if one of the State's priorities is to encourage agreements between private parties to promote the adoption of sustainable practices or procedures, MADS is the authority responsible for promoting them and establishing the guidelines under which they must be carried out, ensuring that they are transparent for all market agents and for consumers.

If necessary, MADS may even request the competition authority to give its opinion on the matter under the competition advocacy referred to in Article 7 of Law 1340 of 2009.[209] This figure allows coordination between both authorities (MADS and SIC) and guarantees that public policies on competition, environment and sustainability are aligned.

Hence, the Colombian legal system has clearly defined the competencies of the different state entities. The regulation of matters related to sustainability and the environment is not the responsibility of the competition authority.

Competition law in harmony with environmental sustainability

Environmental sustainability, although a legitimate and desirable objective in the global context, does not constitute an explicit or primary purpose of competition policy. As outlined by the principle of instrumentality within the competition regimen, competition policy serves as a tool to achieve objectives such as economic efficiency and consumer satisfaction, but it is neither designed nor intended to directly address environmental sustainability goals.

Although competition policy should not be seen as the solution to challenges that go beyond its objectives, such as environmental, labor or industrial policy issues, neither should it act as an invincible barrier or obstacle to state policies in these areas, mainly because there are cases in which competition law and instrumental policies must be balanced.

The OCDE in their paper "*Environmental Considerations in Competition Enforcement*" established that competition policies can contribute to sustainability objectives. As a matter of fact, "environmental regulation limits the space within which companies compete and even shape business models, yet competition may still occur within that space".[210]

In a similar line, in 2020 the Economic Commission for Latin America and the Caribbean (CEPAL for its acronym in Spanish) adopted the Andean Environmental Charter, wherein

[209] Ley 1340 de 2009, ARTICLE 7. Competition Advocacy. In addition to the provisions set forth in Article 2 of Decree 2153 of 1992, the Superintendence of Industry and Commerce may give a prior opinion on government regulation projects that may have an impact on free competition in the markets. For such purposes, the regulatory authorities shall inform the Superintendency of Industry and Commerce of the administrative acts they intend to issue. The concept issued by the Superintendence of Industry and Commerce in this sense will not be binding. However, if the respective authority departs from such concept, it must expressly state in the considerations of the administrative act the reasons for which it departs.

[210] (OCDE, 2021, Environmental Considerations in Competition Enforcement. Pg. 9)

member countries expressed their commitment to enhancing environmental protection. Specifically, the Charter emphasized the intention to shift consumption patterns towards more sustainable practices and to pursue economic recovery in a sustainable manner. Principle 2 highlights the importance of promoting sustainable, inclusive and environmentally respectful development to preserve and contribute to the present and the future well-being of the citizens.[211]

Nonetheless, the interplay between sustainability and competition requires appropriate regulations addressed to balance environmental protection and efficiency.[212]

As it was said before, in Colombia certain agreements between competitors are permitted by competition law, precisely because they pursue desirable objectives for the economy, such as encouraging best practices in the market or innovation and technological development, but even in those cases they are limited.

In fact, given that the agreements established under the exceptions provided in Article 49 of Decree 2153 of 1992 do not require prior authorization, particular caution must be exercised to ensure that such agreements do not exceed what is permitted by law.

These agreements must not be more restrictive than necessary to achieve their goals, and they should be considered as a last resort, with less restrictive means prioritized first. Environmental agreements are still agreements between competitors; therefore, they carry the risk of affecting competition, which could potentially lead to the invalidation of the agreement. The legality of the agreement will depend on the parties, whether they justify that their accord is essential to achieve the goal and that it assures market efficiency and benefits the consumer.[213]

It would be advisable to consider the criteria outlined by the European Union Competition Commission and the Autoridade da Concorrência in their Guide of Best Practice on Sustainability Agreements,[214] to be specific:

1. Review whether the agreement negatively impacts competition in terms of price, quantity, quality, choice, and innovation.
2. Assessing whether the agreement involves price fixing, and market or customer allocation.
3. Ensuring that the exchange of information does not exceed what is strictly necessary to achieve sustainability objectives.
4. Confirming that the agreement can benefit from one of the legal exceptions.
5. Evaluating the benefits of the agreement, including whether it generates efficiencies, consumer benefits, or eliminates competition.
6. Determining the agreement's duration, ensuring it is limited to a specific timeframe.

[211] (Andean Community, 2020.Environmental Charter).
[212] (Kahl. S, Luyo, M. 2023. Pg. 59)
[213] (Moncayo, 2022).
[214] (Autoridade da Concorrência, 2024. Best Practice on Sustainability Agreements Guide).

Competition law cannot extend beyond the scope permitted by its primary purposes. This means that competition authorities do not have the mandate to prioritize environmental considerations over their core objectives. However, they may support sustainability goals as long as they operate within legal boundaries.

Any interpretation that allows for environmental objectives must be based on a clear legal framework and aligned with constitutional principles such as the social function of property (Article 333 of the Political Constitution).

In exceptional cases, it may be legitimate to limit free competition to protect fundamental social goods such as health or sustainable development.[215] However, such limitations must be justified within the regulatory framework issued by the competent authority (MADS) and demonstrate that the social benefits outweigh the restrictions imposed on the market.

In other words, competition policy should serve as a tool to facilitate the achievement of objectives like environmental sustainability without undermining its primary purpose. It is not the responsibility of competition authorities to prioritize environmental sustainability over traditional goals. However, competition policy can support such goals complementarily, provided it does so within established legal limits and in harmony with public policies.

Ultimately, sustainability should primarily be addressed through specific and specialized public policies, while competition policy must ensure that these are implemented with minimal impact on competitive dynamics.

The absence of an environmental policy leads to the problem of the "first mover disadvantage", where the first producer to switch to a sustainable production process will be affected if other competitors do not adopt the same model, as their costs will be higher. This first producer might eventually withdraw from the market if others do not adopt similar practices.

In this context, and to guarantee competitive neutrality of environmentally sustainable agents, what needs to happen is for the legislative and government to issue laws and regulations that encourage or discourage certain behaviors, according to a well-defined environmental policy, instead of allowing anticompetitive conducts.

Solutions through adequate regulation could:

1. Compensate for the competitive disadvantage by providing support to competitors who produce sustainable products.
2. Impose taxes on those who do not produce sustainable products.
3. Require all producers to adopt sustainable practices.

Addressing the disadvantages created by business decisions belongs to the regulator, not to the competitors themselves.

[215] (Kahl. S, Luyo, M. 2023. Pg. 64)

As indicated by the OECD, environmental standardization can help overcome the first-mover disadvantage, as without it, competitors may not adjust their activities or production processes to higher environmental standards.[216]

[216] (OCDE. 2021. Environmental Considerations in Competition Enforcement. Pg. 25).

European Union

Bridging the Green Divide: Reassessing Green (Killer) Acquisitions in EU Merger Control

By Inês F. Neves of Morais Leitão[217]

Key Points:

- The relationship between competition policy and the requirements of the green transition has been the subject of some controversy. The statements and commitments of the European Union and its Member States appear to be at odds with the inherent limitations of a competition policy that relies on tests and traditional concepts such as the SIEC test and consumer welfare.
- In light of the climate emergency, the pursuit of sustainability objectives and the protection of the environment have become specific and binding commitments for competition authorities as well. This entails a balancing exercise and, when necessary, a retreat from a strictly economistic approach to competition rules.
- Green M&A encompasses a wide variety of mergers, some of which may be beneficial for competition and sustainable, while others may be restrictive of competition and detrimental to the objectives of the green transition. This latter category is exemplified by so-called 'green killer acquisitions'.
- The EU merger control regime has the potential to adapt to the demands of the green transition in a number of different and significant ways. These include, for example, the definition of the relevant market, the updating of theories of harm in the context of green innovation, and the valuation of environmental efficiencies (to the advantage of society as a whole, and verified over a longer time span).
- The necessity for particular reforms whether through soft law or hard law, in view of the requisites of legality, transparency, and legal certainty, will be contingent upon the commitment of the competition authorities. Prior to reforming hard law, it is possible to capitalize on the potential of a green impact assessment, an open-door policy, cooperation between competition authorities and sectorial regulators, and guidelines.

1. Introduction

The role of competition law in the pursuit of the Sustainable Development Goals and the European Green Deal[218] is a topic that is still open to debate and is surrounded by a

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[218] According to legal scholarship, the Green Deal makes the green transition a strategic priority for the European Union, see Ellwanger, C., Kianičková, T., Schiffer, T., & Usai, A. (2023). EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future. Competition Merger Brief 2/2023 – Article 1. doi 10.2763/705949, p. 1.

number of doubts, questions and controversies. However, it is an issue that cannot be ignored in the current context. In a statement on its website, the European Commission asserts that "The time is right for DG Competition to green competition policy"[219]. As early as September 2021, a policy brief was published that explored the ways in which competition rules can complement environmental and climate policies, with concrete examples of reform[220]. In a more recent development, the European Commission has explicitly articulated its stance on the definition of the relevant market in its Notice on the matter: "competition policy can contribute to preventing excessive dependency and increasing the resilience of the Union economy by enabling strong and diversified supply chains, and can complement the Union's regulatory framework on environmental sustainability by taking into account sustainability factors to the extent relevant to the competition assessment, including as part of market definition."[221] A panel at the European Business Summit 2024, held in Brussels on November 20 and 21, 2024, saw the Directorate-General for Competition acknowledge that the future of European competitiveness hinges on decarbonization and a just transition. In order to achieve this, a modern approach to competition law is required, with adaptability to the evolving global landscape being of paramount importance.

Despite the commitments and the lack of evident skepticism, the actions of the European Commission and the national competition authorities in the field of green have been reserved for alignment scenarios. These are cases in which the traditional tests of competition law indicate a potential issue for competition in the market that also represents a threat to sustainability and the environment. The case of 'green killer acquisitions' serves to illustrate this point. Indeed, these transactions have the potential to impede competition within the internal market while simultaneously impeding the entry and/or expansion of the market for green products, services, and technologies (in greater quantity and at lower prices), thus hindering the objectives of the green transition.

In contrast, cases that present a conflict between the legal and competitive analysis and the objectives of the green transition give rise to greater controversy and even skepticism. In a statement released by Lina Khan, the chair of the Federal Trade Commission, the current state of affairs is portrayed in a clear and concise manner: "ESG Won't Stop the FTC. Our job is to prevent illegal mergers, not to make the world a better place."[222]

The demands of the green transition necessitate a more nuanced approach than a mere appeal to how the rules of competition, as conservatively applied, complement the objectives of sustainability. In particular, they require a more comprehensive analysis that

[219] European Commission. Green Gazette. Competition policy's contribution. In: https://competition-policy.ec.europa.eu/about/green-gazette/competition-policy_en.
[220] See Badea, A. et al. (2021). Competition Policy in Support of Europe's Green Ambition. Competition policy brief 1/2021. ISBN: 978-92-76-41099-7, ISSN: 2315-3113.
[221] Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law C/2023/6789, OJ C, C/2024/1645, 22.2.2024, ELI: http://data.europa.eu/eli/C/2024/1645/oj, para 3.
[222] Khan, L. (Dec. 21, 2022). ESG Won't Stop the FTC. The Wall Street Journal (WSJ) Opinion. https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135.

accounts for instances of tension that may warrant a different interpretation or a necessary reform.

It is argued that there is little value in calling for the role of companies in the green transition, namely through due diligence duties including the mandatory adoption of transition plans and the commitment to a set of climate targets[223], if in their concrete actions, businesses are then faced with a scenario of uncertainty as to how these objectives can, in a present that is still characterized by significant risks and costs, be pursued in collaboration with other companies[224].

The priority setting of political agendas; the commitment of states, companies,[225] and the European Union itself to increasingly specific environmental targets[226]; and the transformation of sustainability into a parameter of (non-price) competition between companies (which are now competing on the basis of their energy efficiency, their green credentials, or the intensity of their green innovation)[227], as well as the growing significance of ESG factors in corporate actions and investment strategies[228] warrant a reassessment of the efficacy of the current *status quo*, extending beyond mere formal commitments.

In addition to other substantive blocks of European competition policy, the merger control regime also has a role to play in pursuing the Sustainable Agenda and the European Green Deal[229]. The objectives of the merger control regime have been in the spotlight, not only

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[223] On 25 July 2024, the Directive on corporate sustainability due diligence ('CSDDD') entered into force, with the aim to foster sustainable and responsible corporate behaviour in companies' operations and across their global value chains. The core elements of the corporate due diligence duty are identifying and addressing potential and actual adverse human rights and environmental impacts in the company's own operations, their subsidiaries and, where related to their value chain(s), those of their business partners. In addition, the Directive sets out an obligation for large companies to adopt and put into effect, through best efforts, a transition plan for climate change mitigation aligned with the 2050 climate neutrality objective of the Paris Agreement as well as intermediate targets under the European Climate Law.

[224] Referring to the need for greater legal certainty, Malinauskaite, J. (2022). Competition law and sustainability: EU and national perspectives. *Journal of European Competition Law & Practice, 13*(5). https://doi.org/10.1093/jeclap/lpac003, p. 348.

[225] In the sense that the Green Deal has brought new impetus to the pursuit of sustainable initiatives by companies, see Malinauskaite, J. (2022). Competition law and sustainability: EU and national perspectives. *Journal of European Competition Law & Practice, 13*(5). https://doi.org/10.1093/jeclap/lpac003, p. 336 et seq.

[226] The European Green Deal sets the principles for transformational change. Such a transformation will yield advantages including new avenues for innovation, investment, and green jobs, as well as improvements in public health. The EU aims to be the first climate-neutral continent by 2050. To achieve this, the parties committed to reducing emissions by 55% by 2030 compared to 1990 levels. The EU has set legally binding climate targets for all major economic sectors. The package includes emissions reduction targets, a natural carbon sink target, an updated emissions trading system, and social support.

[227] See, among others, Holmes, S., Kar, N., & Cunningham, L. (2024). Sustainability and Competition Law in the United Kingdom. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 203-244) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 235.

[228] In the sense that investors are increasingly focusing on funds with strong ESG credentials, leading to a potential increase in transactions "with an explicitly sustainability-related rationale", see Kelly, E., & Neilson, M. (2023). Merger Control and Sustainability: A New Dawn or Nothing New Under the Sun? *Competition Policy International*. https://www.pymnts.com/wp-content/uploads/2023/11/4-MERGER-CONTROL-AND-SUSTAINABILITY-A-NEW-DAWN-OR-NOTHING-NEW-UNDER-THE-SUN-Esther-Kelly-and-Marc-Neilson.pdf, p. 3. Also, Holmes, S., Kar, N., & Cunningham, L. (2024). Sustainability and Competition Law in the United Kingdom. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 203-244) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 235.

[229] See, among others, Holmes, S. (2024). Sustainability and competition policy in Europe: Recent developments. *Journal of European Competition Law & Practice*, lpae063. 8. https://doi.org/10.1093/jeclap/lpae063, p. 8.

since the Franco-German Manifesto[230], but above all following the Dragui Report[231]. As industrial policy is not the sole means by which humanity operates, the debate surrounding the necessity of reforming or reinterpreting the merger control regime may also apply to the field of green. It is believed that the European merger control regime offers a potential avenue for advancing green objectives. Indeed, there are multiple potential avenues and moments at which sustainability concerns can be incorporated into the merger control regime. The definition of the relevant market is the starting point for analysis. In the context of consumer preference for more sustainable products or the existence of regulatory requirements and environmental protection laws, additional segmentation or differentiation of the relevant markets (product and geographic) may be identified[232]. Subsequently, the assessment of operations entails the emergence of (novel) theories of harm, including the loss of green innovation, as well as the examination of social and environmental efficiencies and advantages for innovation. This assessment may result in the prohibition of mergers that may give rise to problems, risks, and potential damage related to the environment and green innovation (in the case of so-called 'green killer acquisitions'). Commitments may also be imposed to mitigate these risks. Conversely, mergers may be approved that may result in environmental benefits and efficiencies[233]. Finally, the potential of Article 21(4) of the European Union Merger Regulation ('EUMR')[234] may be harnessed[235].

The European Commission has already acknowledged this positive impact, as evidenced by its assertion in the 2023 Report on Competition Policy that: "EU merger control is making a significant contribution to achieving the European Green Deal's sustainability policies, including carbon neutrality in Europe. In 2023, sustainability issues featured prominently in the Commission's competitive assessment of recent mergers, particularly in the sectors of basic industries and manufacturing."[236] Similarly, legal practitioners have indicated that there is a growing perception that "Competition authorities (mainly the EU Commission, for the time being) are increasingly claiming jurisdiction (outside the traditional thresholds) over these acquisitions of (generally small) undertakings involved

[230] On this issue, see Bułakowski, K. (2022). Public Interest in Merger Control as a Potential Instrument of Realization of Socio-Environmental Goals. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24506/21640, p. 173 et seq.

[231] On this issue, see Morton, F. M. S. (2024, 11 September). The Draghi report and competition policy. Bruegel. In: https://www.bruegel.org/first-glance/draghi-report-and-competition-policy.

[232] Lecchi, E. (April 28, 2023). Sustainability and EU Merger Control. *E.C.L.R., 44*(2). SSRN. https://ssrn.com/abstract=4431831, pp. 8-9. See also United Nations Conference on Trade and Development (2023). Competition and Consumer Protection Policies for Sustainability (UNCTAD/DITC/CLP/2023/1). https://unctad.org/system/files/official-document/ditcclp2023d1_en.pdf, p. 4 et seq.

[233] See, among others, Holmes, S., Kar, N., & Cunningham, L. (2024). Sustainability and Competition Law in the United Kingdom. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 203-244) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, pp. 234-235.

[234] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the 'EUMR') OJ L 24, 29.1.2004, p. 1-22. ELI: http://data.europa.eu/eli/reg/2004/139/oj.

[235] Hellenic Competition Commission (2020). Draft Staff Discussion Paper on sustainability issues and Competition law. https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf, p. 39.

[236] European Commission Staff Working Document Accompanying the Document: Report From the Commission - Report on Competition Policy 2023 {COM(2024) 115 final} SWD (2024) 53 final. Brussels, 06.03.2024.

in sustainability-related innovations. The players active in green innovation are usually small entities and start-ups."[237]

Nevertheless, the assertive and unconditional manner in which this claim is presented fails to acknowledge the inherent complexities and conflicts associated with green mergers[238]. Indeed, while an assessment based on traditional competition criteria may yield results aligned with the objectives of green sustainability, it is not these relatively straightforward cases that necessitate a more assertive approach from competition policy. Conversely, it is in cases where a purely competitive assessment yields conclusions (approval, approval with conditions, or non-approval of the merger) that diverge from those demanded by socio-economic considerations that a more nuanced debate is required.

The rise in international and European commitments mandating the substitution of polluting technologies with green alternatives, the anticipation of new market entrants and the emergence of innovative companies, as was the case with technological disruption[239], and the intensification of regulations imposing sustainability objectives on companies, will undoubtedly impact the European merger control regime[240], both '*as it is*' and '*as it can and should be*'. Ultimately, an agnostic approach to competition law may be at odds with the state's public policies. To illustrate, some doctrine indicates that "treating green and polluting innovation in the same way may be counterproductive if the state is investing heavily in subsidies in green tech and then allows mergers that would foster brown tech."[241]. The initial concern is that if a merger is blocked, the wider societal benefits may be overlooked because of the authority's position hindering access to a market that the state is supporting through public incentives. This is exemplified by the market for the construction and management of electric vehicle charging infrastructure in public spaces[242].

In this text, we will begin by providing an overview of the current *status quo*. We will then attempt to identify and map the challenges that have been raised by the reality of green mergers and acquisitions. In order to do so, we will distinguish between green or

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[237] Lopes Martins, M., & Pajares de Dios Tarancón, I. (2024). Are competition authorities planning to rule the world? New and expanded approaches to merger control. *Actualidad Jurídica Uría Menéndez, 64* (May), 23–50, 38. https://www.uria.com/documentos/publicaciones/8862/documento/AJUM_64-art.pdf?id=13608&forceDownload=true, p. 38.

[238] See, among others, He, S., Wei, Y., & Li, W. (2024). Research on the impact of green mergers and acquisitions of heavily polluting enterprises on the quality of environmental information disclosure: Empirical evidence from listed companies in China. *Environmental Development and Sustainability*. https://doi.org/10.1007/s10668-024-04525-5, p. 2 et seq.

[239] Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 176.

[240] See Badea, A. et al. (2021). Competition Policy in Support of Europe's Green Ambition. Competition policy brief 1/2021. ISBN: 978-92-76-41099-7, ISSN: 2315-3113, p. 7.

[241] Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 189.

[242] For an example of how this can happen, see Teti, E. (2024). Sustainability and Competition Law in Italy. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 163-178) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, pp. 176-177.

sustainable mergers and 'green killer acquisitions', which we will define as a sub-type of non-sustainable operations. Ultimately, it can be concluded that, despite the prototypical openness of competition law rules to change - namely due to their open rules and indeterminate concepts, potentially compatible with different tests and criteria - the resistance of decision-making practice and the restrictive nature of some tests and criteria may necessitate reform or intervention, either through soft law or legal reforms. In light of the various proposals that have already been put forth, we propose a solution that is not in conflict with EU competition law principles and rules. Instead, it seeks to introduce an impact assessment and institutionalize regulatory dialogue between competition authorities and other relevant agencies (e.g., environmental agencies) in cases of conflict.

In light of the ongoing climate crisis, it is imperative that competition policy and the merger control regime adapt to address the urgent challenges we face. The demands for legal certainty, transparency, legitimacy, legality, and the separation of powers require that the potential 'conflict' between a more conservative and more progressive approach to competition law be addressed. This can be done either by internalizing or broadening the objectives of competition law or by stepping back in line with the need to harmonize those objectives with other public policies. Ultimately, competition law is merely one component of a larger system that encompasses the development and implementation of a social market economy. And the consumer is but one member of a global society.

2. Sustainability and Competition Policy in the EU: Exploring Synergies and Tensions

The relationship between competition law and the Sustainable Development Goals is ambivalent. On the one hand, competition law may impede the attainment of the objectives of the green transition, given its emphasis on allocative efficiency, consumer welfare, and the constraints it places on the efficiencies it deems acceptable (arising from an agreement or concentration). In short, a traditional interpretation of competition rules may result in the neglect, silencing, or even harm to other public interests and society as a whole.

Conversely, however, competition law can facilitate the pursuit of the Sustainable Agenda and, in particular, the transition to a greener economy. It can do so in two different ways.

Firstly, through the process of 'preventive integration', competition rules, when applied in accordance with existing frameworks, can prevent actions by companies that would otherwise jeopardize sustainable development objectives[243]. Such alignment is exemplified by certain suspicious mergers, including so-called 'green killer acquisitions', which eliminate or reduce the supply of green products and/or technologies, or delay their entry into the market. Additionally, there are instances where mergers are approved but subsequently require commitments due to the presence of specific market characteristics,

[243] On these concepts, see Nowag, J. (2022). Competition Law's Sustainability Gap?: Tools For an Examination and a Brief Overview. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24504/21638, pp. 151-152 and Persch, J. (2024). Chapter 14: Pro-enforcement perspectives on competition law and sustainability. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 235–248). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00022, p. 235 et seq.

underscoring the need for intervention For instance, the market for sustainable products may exhibit distinctive competition and environmental concerns, necessitating tailored regulatory measures[244].

Secondly, although more challenging, there is the possibility of considering 'supportive integration', which would entail a more flexible interpretation of competition rules. This could include a more lenient approach to the prohibition of restrictive practices or the *ex ante* control of mergers. This lenient interpretation will be justified by the pursuit of sustainability objectives, necessitating a retreat from a purely economistic interpretation of competition rules in light of a judgment of practical concordance (balancing exercise), whereby the disparate policies of the European Union are harmonized. This retreat could entail, among other things, giving due consideration to a 'sustainability defense' and 'environmental efficiencies' as a means of justifying an agreement that restricts competition or a concentration that may be problematic in and of itself but is nevertheless necessary for the pursuit of the objectives of the green transition.

While the potential impact of sustainability on competition law has been primarily discussed in the context of agreements between competing companies, the merger control regime has also prompted the possible need for reform or adaptation to accommodate the demands of the Green Agenda. For example, as early as 2019, the European Parliament, in its Resolution of January 31, on the Annual Report on Competition Policy, requested the Commission to "come forward with a review of the EC Merger Regulation, and to analyse to what extent it should be vested with the powers, much as a number of Member States are at present, to adopt measures to protect the European public order and the rights and principles of the TFEU and EU Charter of Fundamental Rights, including environmental protection"[245].

This debate is not as novel as is often claimed. Indeed, it is closely related to the broader discussion on the role of public interest issues in merger control. As such, it is not a new or foreign body in at least some Member States[246]. Nevertheless, the relationship between sustainability and competition, and the role of EU merger rules in the context of the green transition, remains unclear at both the European Union and Member State levels. The issue can be attributed, at least in part, to the manner in which competition rules have been applied over time, and the limited scope for integrating sustainability considerations.

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[244] Nowag, J. (2024). Sustainability and competition law: An international report. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 3-26) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, pp. 17-18. See also Cousin, M., Marescaux, A., Mechri, L., & Melot, G. (2024). Sustainability and Competition Law: A French Perspective. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 73-82) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 79.

[245] European Parliament resolution of 31 January 2019 on the Annual Report on Competition Policy (2018/2102(INI)) OJ C 411, 27.11.2020, p. 187-198, para 47.

[246] Bułakowski, K. (2022). Public Interest in Merger Control as a Potential Instrument of Realization of Socio-Environmental Goals. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24506/21640, p. 174.

3. Unpacking the Monsters of EU Merger Control: The SIEC Test, Consumer Welfare, and Blurred National Public Interest Exemptions

Despite the European Commission's previous acknowledgment of a "clear trend towards the sustainability-related aspects of the Commission's merger review becoming increasingly important"[247], the rules of the EUMR, as applied by the European Commission, appear to lack the flexibility to consider issues and factors of public interest that do not align with the traditional pillars of allocative efficiency and consumer welfare[248].

Conversely, the objective is to guarantee that competition is not distorted and that the internal market is preserved[249]. It thus follows from Article 2(2) and (3) of the EUMR that concentrations "which would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market". Conversely, those mergers "which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market." The SIEC test, or 'Significant Impediment to Effective Competition', is thus adopted.

Upon examination of the list of factors to be considered when analyzing mergers, it becomes evident that Article 2(1) of the EUMR does not make a direct reference to public interest factors, despite the assertion by some that economic progress can encompass environmental dimensions[250]. In particular, with regard to the relevant efficiencies, paragraph 78 of the European Commission Guidelines[251] provides for a threefold condition, according to which "the efficiencies have to benefit consumers, be merger-specific and be verifiable".

In contrast, mergers without a community dimension are assessed in the light of national legislation, which may allow public interest objectives to be valued as relevant efficiencies in the assessment of mergers. In addition, national laws may enshrine exemptions based on the public interest; may allow government intervention that is potentially misaligned with the analysis of the merger's pro- and anti-competitive effects;

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[247] European Commission Staff Working Document Accompanying the Document: Report From the Commission - Report on Competition Policy 2023 {COM(2024) 115 final} SWD (2024) 53 final. Brussels, 06.03.2024.

[248] For an overview of the status quo, see Organisation for Economic Co-operation and Development (OECD) - Directorate for Financial and Enterprise Affairs Competition Committee (2017). Executive Summary of discussion of the Roundtable on public interest considerations in merger control. DAF/COMP/WP3/M(2016)1/ANN5/FINAL. https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf.

[249] In this sense, Organisation for Economic Co-operation and Development (OECD) - Directorate for Financial and Enterprise Affairs Competition Committee (2017). Summary of discussion of the Roundtable on public interest considerations in merger control. DAF/COMP/WP3/M(2016)1/ANN4/FINAL. https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf.

[250] Hellenic Competition Commission (2020). Draft Staff Discussion Paper on sustainability issues and Competition law. https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf, p. 39.

[251] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C 31, 5.2.2004, p. 5-18.

and may make the approval or non-approval of a merger dependent on the opinion (binding or not) of a regulatory authority with sectoral competence.

It is important to note that, even in the context of concentrations with a community dimension, Article 21(4) of the EUMR permits Member States to implement measures for the protection of other interests - beyond those related to competition - provided that they are necessary and proportionate. In addition to the interests recognized in the aforementioned precept ("public security, plurality of the media and prudential rules"), which, at least in the case of "public security" may, according to some, already include sustainability objectives[252], it is possible to comprise other public interests, including socio-environmental interests, such as the promotion of public health, the protection of employment, and the protection of the environment[253]. However, this is subject to the need for communication and *ex ante* recognition by the European Commission[254].

While this flexibility has clear advantages, the leeway allowed to Member States has resulted in a highly heterogeneous regulatory landscape, both in terms of the public interest considerations taken into account and the institutional models employed. In particular, it is possible to identify two distinct models. The 'dual responsibility model' or the 'two-tiered system' is based on a division of competencies between the competition authorities, which are responsible for conducting the standard competitive analysis, and a government body, which is responsible for (re)analyzing the operation in light of public interest considerations. The latter may prohibit or approve a concentration that has been approved or prohibited by the competition authority. In contrast, the 'single authority model' designates the national competition authority as the entity responsible for conducting the 'public interest test' in the concentration appraisal process[255]. In addition, a mixed model may be identified, in which the competition authority is required to liaise with other entities, despite having competence to conduct the assessment[256]. The heterogeneity of national regulatory frameworks could result in fragmentation. Furthermore, the specific models adopted are often associated with shortcomings. These include the vagueness of a general reference to the public interest, as well as concerns about the potential for political usurpation and violation of the principle of separation of

[252] Hellenic Competition Commission (2020). Draft Staff Discussion Paper on sustainability issues and Competition law. https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf, p. 40.
[253] For an overview, see Budzinski O., & Stohr A. (2019). Public interest considerations in European merger control regimes. *Ilmenau Economics Discussion Papers*, *25*(130). SSRN. https://doi.org/10.2139/ssrn.3439933, p. 6 et seq.
[254] See also, Organisation for Economic Co-operation and Development (OECD) - Directorate for Financial and Enterprise Affairs Competition Committee (2017). Summary of discussion of the Roundtable on public interest considerations in merger control. DAF/COMP/WP3/M(2016)1/ANN4/FINAL. https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf.
[255] On the advantages and risks of each model, see, among others, Organisation for Economic Co-operation and Development (OECD) - Directorate for Financial and Enterprise Affairs Competition Committee (2017). Executive Summary of discussion of the Roundtable on public interest considerations in merger control. DAF/COMP/WP3/M(2016)1/ANN5/FINAL. https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf.
[256] See Bułakowski, K. (2022). Public Interest in Merger Control as a Potential Instrument of Realization of Socio-Environmental Goals. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24506/21640, p 175.

powers. It is possible that both fragmentation and these shortcomings could potentially compromise the effectiveness of the mechanism.

For disparate reasons at the European and national levels, there is scope for further action, particularly with regard to rethinking the interpretation and application of competition rules in order to meet the challenges of the green transition. For this to occur, it is essential to be mindful of the inherent variability associated with green M&A.

4. Green (Killer) Acquisitions: Balancing Competition Concerns and Socio-Environmental Benefits

The concept of 'green M&A' is an umbrella term that encompasses a wide range of potential scenarios, each of which could be subsumed under the overarching concept of concentration as defined in Article 3 of the EUMR. Such transactions include mergers, acquisitions, and the establishment of joint ventures. In addition to this objective heterogeneity, the motivations of the parties to the transactions and their potential effects may also vary. These variations may be observed with regard to both competition and, in particular, the potential for significant impediments to it, as well as with respect to the objectives and goals of the green transition. In such instances, the effects may be aligned, whereby an *anticompetitive* merger would also be *unsustainable*.

Alternatively, a potential conflict could arise in two distinct scenarios. On the one hand, there are mergers that may impede competition significantly in the market but are nonetheless associated with green efficiencies, thereby promoting and contributing to sustainability objectives. Conversely, there are concentrations that do not meet the SIEC criterion but may prove detrimental to the objectives of the green transition[257].

Despite these differences, it is possible to simplify the picture by distinguishing between *sustainable or green mergers* and *non-sustainable mergers*, which include green killer acquisitions as a subcategory.

4.1. Decoding Green Mergers: Exploring the Role of Sustainability in Corporate Consolidations

Green mergers can be defined as operations through which companies active in a particular market seek to acquire companies with more sustainable and green assets and technologies (for example, in terms of environmental impact, energy efficiency, and pollutant emissions). Alternatively, they may merge with others in order to combine their structures, capacity, know-how, and technology. This is done with the goal of achieving the scale necessary to pursue green objectives and avoid risks, such as the first-mover disadvantage and free-riding[258]. A subset of the doctrine posits that the level of investment

[257] In particular, it is understood that negative environmental externalities are rarely enough to block a merger - see Hellenic Competition Commission (2020). Draft Staff Discussion Paper on sustainability issues and Competition law. https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf, p. 40.

[258] See, among others, Salvi, A., Petruzzella, F., and Giakoumelou, A. (2018). Green M&A deals and bidders' value creation: The role of sustainability in post-acquisition performance. International Business Research, *11*(7). https://doi.org/10.5539/ibr.v11n7p96, p. 96 et seq. Also, Loukianou, D. (2023, May 15). The interplay between environmental sustainability and EU merger control: Where do we stand and where can we go? SSRN. https://ssrn.com/abstract=4632995, p. 27.

necessitated by research and development, when considered alongside the associated risks, can frequently render it a more rational decision to directly acquire targets with green technologies. This approach can enhance operational efficiency[259] and ensure that the incumbent has access to specialized (green) innovation from smaller companies[260]. This provides a rationale that combines innovation objectives with performance considerations.

The objective of supporting future green innovation and replacing or eliminating more polluting technologies may also be a rationale for a green merger. In short, the goal of transforming industries into low-pollution and low-energy ones may also be a potential justification for a green merger[261]. Green mergers enable one or more companies with a history of significant pollution to enter the green market. This allows them to satisfy the growing demand for greener products[262], reduce their pollution and compliance costs in line with an increasingly demanding environmental regulatory framework[263], and ensure more efficient, sustainable, and green production. Furthermore, green M&A could facilitate the reconstruction of industrial chains, for instance through vertical integration strategies that diminish reliance on upstream and downstream operators[264]. Ultimately, the company's M&A practice may serve to communicate its commitment to the green transition. This intention is particularly well achieved through the transparency and visibility of mergers, especially those subject to prior control. While such actions could have a positive impact on the company's market performance[265], this rationale must be reconciled with the green claims' regime[266] and the prohibition of deceptive practices[267].

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[259] Han, Z., Wang, Y., & Pang, J. (2022). Does environmental regulation promote green merger and acquisition? Evidence from the implementation of China's newly revised Environmental Protection Law. *Frontiers in Environmental Science, 10*. https://doi.org/10.3389/fenvs.2022.1042260, p. 4.

[260] Barnett, J. M. (2024). Killer Acquisitions" Reexamined: Economic Hyperbole in the Age of Populist Antitrust. *The University of Chicago Business Law Review*, *3*(1) https://chicagounbound.uchicago.edu/ucblr/vol3/iss1/2P., p. 48.

[261] He, S., Wei, Y., & Li, W. (2024). Research on the impact of green mergers and acquisitions of heavily polluting enterprises on the quality of environmental information disclosure: Empirical evidence from listed companies in China. *Environmental Development and Sustainability*. https://doi.org/10.1007/s10668-024-04525-5, p. 3 et seq. See, also, Han, Z., Wang, Y., & Pang, J. (2022). Does environmental regulation promote green merger and acquisition? Evidence from the implementation of China's newly revised Environmental Protection Law. *Frontiers in Environmental Science, 10*. https://doi.org/10.3389/fenvs.2022.1042260, p. 4.

[262] See, among others, Steeves, S. (2023). Fostering sustainability using the existing toolbox: Environmental effects in Canadian competition law. *Canadian Competition Law Review, 36*(3). https://cclr.cba.org/index.php/cclr/issue/view/120/3, p. 36.

[263] See, among others, Han, Z., Wang, Y., & Pang, J. (2022). Does environmental regulation promote green merger and acquisition? Evidence from the implementation of China's newly revised Environmental Protection Law. *Frontiers in Environmental Science, 10*. https://doi.org/10.3389/fenvs.2022.1042260, pp. 8-9.

[264] Han, Z., Wang, Y., & Pang, J. (2022). Does environmental regulation promote green merger and acquisition? Evidence from the implementation of China's newly revised Environmental Protection Law. *Frontiers in Environmental Science, 10*. https://doi.org/10.3389/fenvs.2022.1042260, p. 3.

[265] Han, Z., Wang, Y., & Pang, J. (2022). Does environmental regulation promote green merger and acquisition? Evidence from the implementation of China's newly revised Environmental Protection Law. *Frontiers in Environmental Science, 10*. https://doi.org/10.3389/fenvs.2022.1042260, p. 4.

[266] On March 22, 2023, the European Commission proposed a Directive on green claims. The proposed directive would require companies to substantiate voluntary green claims made in business-to-consumer commercial practices by complying with a number of requirements regarding their assessment, including the consideration of a life-cycle perspective.

[267] In this sense, Teti, E. (2024). Sustainability and Competition Law in Italy. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 163-178) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 177.

In the case of a concentration involving the acquisition of a start-up, it is also important to consider the advantages for the start-up itself. Beyond the motivation of the incumbent, the start-up can benefit from the experience and capacities of a company already established in the market, as well as access to an important source of funding. Indeed, according to legal scholarship, the "large majority of successful startups achieve monetization through a sale to a larger company, rather than an IPO"[268]. In other words, the acquisition of start-ups serves as a monetization mechanism that, in addition to promoting investment in newcomers and ensuring their market entry, also benefits them through access to capital and the potential to leverage the synergies, complementarities, and resources of a company with a market presence[269].

4.2. The Dark Side of Green Acquisitions: Unpacking the Risks of Sustainability Killer Deals

Green or sustainability killer acquisitions are mergers that involve the acquisition of a nascent company with sustainable practices or a start-up that is still in the early stages of developing a green product, service, or technology (the 'green' company) by an incumbent company (the so-called 'brown' or polluting company). These acquisitions are conducted with the sole aim of eliminating a growing rival. In particular, the objective of the incumbent is to eliminate green competition at its inception by removing it from the market. This ensures the cessation of green market development and the continuation of dirty production. Another potential rationale may be to control the expansion and importance of green products in the market. This is meant to ensure that green products remain in a 'controlled' niche[270]. Alternatively, the incumbent may (only) seek to secure its market position in a green product, service, or technology against an innovative entrant.

Green killer acquisitions are associated with various theories of harm, including the loss of potential or nascent competition due to the discontinuation of the development and use of greener products, services, and technologies, as well as the disincentive to invest in start-ups due to the creation of a 'kill zone'[271]. This phenomenon can be attributed to the fact that repeated acquisitions by incumbent firms in a specific market segment can effectively deter other companies from entering that particular segment[272]. Indeed, the prospect of future acquisition by incumbent entities may act as a deterrent for investors,

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[268] Barnett, J. M. (2024). Killer Acquisitions" Reexamined: Economic Hyperbole in the Age of Populist Antitrust. *The University of Chicago Business Law Review*, *3*(1) https://chicagounbound.uchicago.edu/ucblr/vol3/iss1/2P., p. 98.

[269] See, inter alia, Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 181.

[270] In this sense, Holmes, S., Kar, N., & Cunningham, L. (2024). Sustainability and Competition Law in the United Kingdom. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 203-244) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 236. See also Loukianou, D. (2023, May 15). The interplay between environmental sustainability and EU merger control: Where do we stand and where can we go? SSRN. https://ssrn.com/abstract=4632995, pp. 25-26. Also, Franck, J.-U. (2024, July 15). *EU merger control and climate action: The struggle for the proper framework*. SSRN. https://ssrn.com/abstract=4907803, pp. 11-12.

[271] See, among others, Loukianou, D. (2023, May 15). The interplay between environmental sustainability and EU merger control: Where do we stand and where can we go? SSRN. https://ssrn.com/abstract=4632995, pp. 25-26.

[272] On this effect, Kamepalli, S. K., Rajan, R. G., & Zingales, L. (February 15, 2021). Kill Zone. SSRN. https://ssrn.com/abstract=3555915 or http://dx.doi.org/10.2139/ssrn.3555915.

dissuading them from allocating capital to startup ventures. Similarly, the threat of incumbent acquisitions may also discourage startups from investing in green products, services, and technologies.

In order to qualify a deal as a 'killer acquisition', it is necessary to consider only those scenarios in which the acquiring company has the actual intention of eliminating the green market and its green competitors. The distinction is of great importance for the purpose of identifying the relevant theory of harm. Indeed, when the company's intention is to achieve efficiencies, continue the development and/or internal use of the green product, service, or technology, or adopt the target's sustainable practices, it is inaccurate to conclude that green innovation efforts have been discontinued or that an unsustainable good or practice exists, with potential negative consequences for competition, consumers and citizens, and the environment[273]. Economic literature indicates that when the objective is to achieve synergies and when the elimination of one of two parallel paths of innovation (that of the target or even that of the incumbent, in the case of 'reverse green acquisitions'[274]) is motivated by the need for specialization and associated economies and efficiencies, it is not appropriate to invoke the idea of 'prevention' or 'elimination' of future or potential competition[275]. As a result, even in scenarios where the acquisition is followed by the discontinuation of one of the lines of R&D previously being carried out in parallel (by the incumbent and the target), the discontinuation may be due to a 'hedging strategy' justified for reasons of efficiency arising from specialization, and reducing costs associated with the duplication of processes.[276]. Such actions are not intended to impede or eliminate green innovation or the expansion of green markets.

In essence, the nature of 'killer acquisitions' is such that it is not always clear[277] whether they are being used as an exclusionary strategy or as a means of fostering innovation, competition, and access to finance for start-ups[278]. It is thus deemed that, in comparison to other scenarios, the intention of the incumbent company will be of particular significance in determining the boundaries of this distinction[279]. It is therefore important to ascertain whether the objective is the straightforward elimination of the target, and in particular the competitive pressure exerted by the green alternative, or, conversely, the

[273] Loukianou, D. (2023, May 15). The interplay between environmental sustainability and EU merger control: Where do we stand and where can we go? SSRN. https://ssrn.com/abstract=4632995, p. 25.
[274] On 'green killer reverse acquisitions', see OECD. (2023). *Competition in the circular economy* (OECD Roundtables on Competition Policy Papers, No. 298). OECD Publishing. https://www.oecd-ilibrary.org/docserver/4b829cf6-en.pdf?expires=1732443437&id=id&accname=guest&checksum=71AD88F986E95CC33344A35CDBA33CBD, p. 30.
[275] Steeves, S. (2023). Fostering sustainability using the existing toolbox: Environmental effects in Canadian competition law. *Canadian Competition Law Review, 36*(3) (pp.31-73). https://cclr.cba.org/index.php/cclr/issue/view/120/3, p. 42.
[276] In this sense, Barnett, J. M. (2024). Killer Acquisitions" Reexamined: Economic Hyperbole in the Age of Populist Antitrust. *The University of Chicago Business Law Review*, *3*(1) https://chicagounbound.uchicago.edu/ucblr/vol3/iss1/2P., pp. 57-58.
[277] Sonderegger, G. (2024). Killer Acquisitions in Digital Markets: An Analysis of the EU Merger Control. PhD Thesis. https://eizpublishing.ch/wp-content/uploads/2024/06/Killer-Acquisitions-in-Digital-Markets-An-Analysis-of-the-EU-Merger-Control-Regime-Digital-V1_01-20240425.pdf, p. 290.
[278] Pitrez, L. (2024). Killer aquisitions: o problema e as possíveis soluções. Master dissertation (Faculty of Law, University of Porto). Forthcoming, p. 29.
[279] See, among others, Holmes, S. (2024). Sustainability and competition policy in Europe: Recent developments. *Journal of European Competition Law & Practice*, lpae063. 8. https://doi.org/10.1093/jeclap/lpae063, p. 8.

entry and development of green markets. This is a challenging analysis that, in our view, should not lead to any assumption of harm, particularly given that the promotion of 'brown' technologies and processes compared to green ones will ultimately not be economically rational given the applicable regulatory framework. It is crucial to conduct a comprehensive and rigorous analysis, which, akin to offenses by object, scrutinizes the purpose and the legal and economic context of the transaction. In addition to the transaction's value, this analysis should consider the company's pattern of acquisitions and the market(s) and competitive proximity of the parties involved[280].

In any case, it seems reasonable to posit that, in contrast to other green mergers, there may be a convergence between competition policy and sustainability objectives in the context of green killer acquisitions. This would be particularly the case if, in addition to the potential loss to sustainability, there is also a substantial or significant loss of competition (if not total, at least in terms of sustainability as a non-price competitive parameter).

4.3.Tackling the Complexity of Green (Killer) Deals under EU Merger Rules

The advent of green killer acquisitions and green mergers has introduced a series of challenges to the conventional framework and application of the European merger control regime. Firstly, there are the common challenges related to the theories of harm and their future suitability (depending on the question of what stage the market would be in the future). The loss of current, effective, or dynamic competition in the markets, accompanied by a reduction in incentives and investments in R&D, will be regarded as the most relevant theory of anticompetitive harm. This holds particularly true in instances where the operation involves (potential) competitors with close investments and a focus on (green) innovation, and especially when it involves the main players with operations or potential in the relevant (green) market. In such cases, there is a reduction in diversification and the chances of successful innovation, which is uncertain and therefore justifies the continuation of different paths. Additionally, there is a risk of losing potential competition that the target could have represented for the incumbent[281].

Subsequently, specific challenges emerge within each of the categories.

With regard to green mergers, the most significant challenge will be to resolve conflict scenarios regarding operations that, in the context of a purely competitive analysis, should or should not be granted permission, but which, in view of their potential benefits and/or drawbacks for sustainability, necessitate a differentiated assessment. It bears reiterating that green mergers can be associated with various efficiencies resulting from circular models and the improvement in quality and use of resources. Such efficiencies include, for instance, a reduction in energy costs and gas emissions or the carbon footprint[282], a

[280] Pitrez, L. (2024). Killer aquisitions: o problema e as possíveis soluções. Master dissertation (Faculty of Law, University of Porto). Forthcoming, p. 38 et seq.
[281] For an overview, see Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 183.
[282] These benefits are accepted by the CMA in Competition & Markets Authority (2021). Merger Assessment Guidelines.

reduction in the costs of materials, transport, or storage (for instance, through a reduction in plastics and the size of packaging)[283], or an increase in the potential for innovation and the know-how needed to achieve the goals of the energy and sustainable transition[284]. These efficiencies extend beyond a purely economic perspective and may present a challenge in scenarios where prices are elevated or production and supply are constrained, particularly in the context of browner products and alternatives.

Examples of this conflict can be observed in the re-examination of previously analyzed mergers by competition authorities in light of the underlying public interest[285]. Although the decision-making practice in question is not entirely clear, it is possible to derive two key elements from it. Firstly, mere compliance with applicable environmental protection legislation will not, in and of itself, constitute a relevant efficiency[286]. Secondly, the pursuit of a sustainability objective cannot be used as a rationale for anti-competitive behavior in a strategy of greenwashing, as this would be in contravention of the principles of competition law[287].

Green (killer) acquisitions give rise to a further type of concern, namely that they may not be within the remit of national competition authorities, thus evading *ex ante* control. Indeed, green innovation and related efforts tend to focus on smaller companies, whose acquisitions are unlikely to meet the notification thresholds established at the European or national levels[288]. In addition to this initial challenge, there are specific difficulties associated with classifying the concentration as a 'killer acquisition' or analyzing the company's incentives to innovate and the impact of the operation on the incentives of third parties. In particular, the nascent nature of the target's activity and/or presence in the reference markets could render it challenging for the national competition authority to assess the prospective competitive pressure it may exert on the incumbent company. This

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf.

[283] See, among others, Malinauskaite, J. (2022). Competition law and sustainability: EU and national perspectives. *Journal of European Competition Law & Practice, 13*(5). https://doi.org/10.1093/jeclap/lpac003, p. 341.

[284] Nowag, J. (2024). Sustainability and competition law: An international report. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 3-26) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1. The author illustrates this point with the case of Miba/Zollern, in p. 14.

[285] On this issue, see Holmes, S. (2024). Sustainability and competition policy in Europe: Recent developments. *Journal of European Competition Law & Practice*, lpae063. 8. https://doi.org/10.1093/jeclap/lpae063, p. 8. Also, Lopes Martins, M., & Pajares de Dios Tarancón, I. (2024). Are competition authorities planning to rule the world? New and expanded approaches to merger control. *Actualidad Jurídica Uría Menéndez, 64* (May), 23–50. https://www.uria.com/documentos/publicaciones/8862/documento/AJUM_64-art.pdf?id=13608&forceDownload=true, p. 37 et seq. Also, Bułakowski, K. (2022). Public Interest in Merger Control as a Potential Instrument of Realization of Socio-Environmental Goals. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24506/21640, p. 175 et seq.

[286] Cousin, M., Marescaux, A., Mechri, L., & Melot, G. (2024). Sustainability and Competition Law: A French Perspective. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 73-82) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 81.

[287] See, among others, Cousin, M., Marescaux, A., Mechri, L., & Melot, G. (2024). Sustainability and Competition Law: A French Perspective. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 73-82) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 82.

[288] Badea, A. et al. (2021). Competition Policy in Support of Europe's Green Ambition. Competition policy brief 1/2021. ISBN: 978-92-76-41099-7, ISSN: 2315-3113, p. 3. Also, Steeves, S. (2023). Fostering sustainability using the existing toolbox: Environmental effects in Canadian competition law. *Canadian Competition Law Review, 36*(3) (pp.31-73). https://cclr.cba.org/index.php/cclr/issue/view/120/3, pp. 43-44.

is a pivotal consideration in evaluating the competitive implications of the acquisition[289]. Additionally, some legal scholars argue that the prohibition of a merger motivated solely by the loss of green innovation may be unnecessary when, despite the reduction of competition in the sustainability parameter, there is no reduction or elimination of competition due to the existence of cleaner rivals capable of persuading consumers to opt for greener choices[290].

In addition to the inherent complexity and difficulties associated with the various forms of green M&A, there are also broader challenges related to integrating sustainability considerations into the European merger control framework.

5. Navigating the Green Conundrum: Challenges and Pathways for Reforming Merger Control Rules

The implementation of green M&A is confronted with a number of challenges and ambiguities that originate from a historically cautious and conventional interpretation of the regulations governing European competition law. The initial challenge persists due to an enduring debate and divergence of opinion regarding the fundamental objectives of competition law[291]. One of the arguments against valuing objectives and efficiencies that are not strictly competitive when analyzing mergers is based on a *separatist view* that is no longer tenable in the current context. This separatist view holds that it is not within the purview of competition law or the jurisdiction of competition authorities to assess matters of public interest, which give rise to uncertainty, questions of legitimacy, and a potential for conflict between the branches of government. It is argued that issues of public interest must either arise from the efficiency of the market itself[292] or from the intervention of the legislator through specific public policies. In particular, it is argued that competition law should be concerned solely with maintaining an undistorted competitive structure and ensuring efficiency in the allocation of resources, as well as consumer welfare.

While we do not dispute the potential risks associated with a more expansive interpretation of competition rules, we do take issue with the extent to which that separatist and agnostic reading has been embraced. Firstly, it should be noted that competition policy is just one European and/or national policy among many others. Given

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[289] See, among others, Steeves, S. (2023). Fostering sustainability using the existing toolbox: Environmental effects in Canadian competition law. *Canadian Competition Law Review, 36*(3) (pp.31-73). https://cclr.cba.org/index.php/cclr/issue/view/120/3, pp. 43-44.

[290] Holmes, S., Kar, N., & Cunningham, L. (2024). Sustainability and Competition Law in the United Kingdom. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 203-244) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 236.

[291] For a recent reappraisal, see, among others, Iacovides, M., & Stylianou, K. (September 23, 2024). The New Goals of EU Competition Law: Sustainability, Labour Rights, Privacy. European Law Open. SSRN. https://ssrn.com/abstract=4647058 or http://dx.doi.org/10.2139/ssrn.4647058; Schwartz, O. (2024). Modern challenges in competition enforcement and the need for clearer goals of competition law. *Journal of Antitrust Enforcement, 12*(1). https://doi.org/10.1093/jaenfo/jnae001; and Hovenkamp, H. (August 18, 2024). Charting Antitrust's Future. *U of Penn, Inst for Law & Econ Research Paper No. 24-16*. SSRN. https://ssrn.com/abstract=4784733 or http://dx.doi.org/10.2139/ssrn.4784733.

[292] Organisation for Economic Co-operation and Development (OECD) - Directorate for Financial and Enterprise Affairs Competition Committee (2017). Executive Summary of discussion of the Roundtable on public interest considerations in merger control. DAF/COMP/WP3/M(2016)1/ANN5/FINAL. https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf.

its intrinsic nature, competition policy must be subject to considerations and relationships of practical agreement with the objectives of other policies. Consequently, even if we adopt a narrow interpretation of the objectives of competition, it is not feasible to assert that competition is '*primus inter pares*', capable of addressing all issues without consideration of its impact on the efficacy of other priorities. The EU Treaties themselves call for a principle of harmonization, without any hierarchical or prioritized structure[293]. This implies that even if the objectives of competition law are maintained, they cannot remain insulated from certain relationships of tension, justifying temporary or permanent exemptions, or at least corrective readings capable of ensuring harmonization between conflicting interests.

Secondly, it is crucial to underscore that competition policy is not an end in itself; rather, it is an instrument designed to achieve specific objectives. These objectives must be contextualized within the framework of a social market economy, which is an economic model that is not exclusively liberal and incorporates socio-environmental considerations. This suggests that the conventional tools of competition are not intrinsically valuable in themselves, but rather possess merit based on the outcomes they can facilitate with respect to market efficiency, within a broader political and legal framework that prioritizes considerations beyond economic concerns.

Thirdly, the primacy given to the consumer, which is not justified by any legal precedent, must acknowledge that the consumer is, like any other citizen, a member of a global community facing an existential threat in the form of climate change. The protection of consumer rights does not take precedence over other fundamental rights and diffuse interests on the basis of an inherent value hierarchy. Prior to engaging as consumers within a specific market, we are all citizens with both rights and fundamental obligations within a broader society. This society, which is founded upon shared European values - including freedom, equality, justice, and solidarity - does not permit a self-serving perspective of markets that prioritizes immediate and minimalist necessities, while disregarding the requirements of intergenerational fairness.

Ultimately, at a time when states and, in particular, private companies are increasingly bound by specific obligations and targets to guarantee the fight against climate change and the realization of the green transition, it would be somewhat contradictory for the European Commission and national competition authorities to send out the opposite message, claiming to have 'nothing to do with it', and therefore shirking a responsibility that belongs to everyone, not just the legislator or other executives with specialized competence in the matter.

None of the aforementioned considerations are unaware of the challenges posed by the integration of sustainability and environmental concerns into the legal-competitive analysis. Conversely, we are cognizant of these issues and recognize that some require legislative intervention to ensure the legitimacy of executive actions and the guarantees

[293] See Articles 7 and 9-13 of the Treaty on the Functioning of the European Union. In the same vein, Lecchi, E. (April 28, 2023). Sustainability and EU Merger Control. *E.C.L.R., 44*(2). SSRN. https://ssrn.com/abstract=4431831, p. 5.

of the rule of law. However, it is also important to acknowledge that, particularly in the context of competition law, these reforms are often driven by the competition authorities themselves. This is due to their qualified knowledge and unique strategic positioning, which affords them a greater capacity to identify gaps and potential responses. Consequently, the success of such an endeavour will depend on the degree of commitment demonstrated by the relevant authorities. And the degree of willingness to incorporate sustainability objectives into the analysis varies considerably between national competition authorities[294].

In light of these considerations, it is proposed that, prior to implementing any hasty and contentious reform proposals, there is an opportunity to re-examine whether the existing rules of competition law, and in particular the rules governing merger control, already provide sufficient scope for flexibility. It is believed that, with the additional support of European Commission guidelines and the soft law of national authorities, some of the shortcomings of traditional tests and instruments can be resolved. This is particularly the case in light of the need to rethink the relevant theories of harm and the valuation of environmental efficiencies or a green defense.

As was the case in previous periods of crisis, there is a renewed interest in the valuation of public interest objectives in legal-competitive analysis. The environmental crisis provides an opportunity to revisit this issue and to leverage the full potential of competition law, particularly in scenarios of alignment between competition and green. As has already been discussed, the merger control regime can be used to prevent green killer acquisitions[295].

As we will attempt to demonstrate, the monopoly of consumer welfare as the pertinent standard of analysis, coupled with an unduly narrow perspective on the relevance of non-economic efficiencies (dependent on their valuation by consumers in the relevant market and subject to a strict necessity test), may prove inadequate in addressing the expectations towards public authorities in a context where they are expected to serve as a model, not a disincentive for companies[296].

5.1. Mapping the Challenges: Integrating Environmental Considerations into EU Merger Control

The internalization of environmental issues in legal-competitive analysis, and in particular in merger control, is subject to a number of challenges. These range from the inherent complexity of the analysis, particularly in the context of *ex ante* assessments that

[294] Distinguishing between a 'positive action approach', a 'cautious approach', a 'reserved approach' and an 'undecided approach', see Malinauskaite, J., & Erdem, F. B. (2023). Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities. *Journal of Common Market Studies*, *61*(5). https://doi.org/10.1111/jcms.13458, p. 1218 et seq.

[295] See, among others, Persch, J. (2024). Chapter 14: Pro-enforcement perspectives on competition law and sustainability. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 235–248). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00022, p. 247.

[296] In the sense that public companies (state-owned businesses) should be pioneers in the green stakes, see He, S., Wei, Y., & Li, W. (2024). Research on the impact of green mergers and acquisitions of heavily polluting enterprises on the quality of environmental information disclosure: Empirical evidence from listed companies in China. *Environmental Development and Sustainability*. https://doi.org/10.1007/s10668-024-04525-5, p. 25.

become increasingly speculative with the accumulation of information[297], to the potential risks to legal certainty and the separation of powers, both between formal and institutionalized powers and in the face of interest groups[298].

To illustrate the nature of these challenges, we can begin by examining the process of market delineation, which, in the context of merger control, presents a significant challenge from the outset. In the majority of cases, there are new or innovative products and services for which an appropriate market may not yet exist[299]. Furthermore, certain markets that are potentially linked to concentration may potentially become obsolete in the future (for example, fossil energy), and the impact of market concentration resulting from a transaction between companies on the pursuit of a green transition must also be considered[300]. Ultimately, it is important to bear in mind that the green sector has witnessed considerable evolution in terms of both consumer preferences and the costs associated with development and deployment. Initially perceived as significant barriers to entry, these costs are now followed by a period of reduction, either in specific areas such as solar and wind energy[301] or across the board in markets, due to learning-by-doing[302].

The focus on the consumer represents an additional and significant challenge, particularly in light of the question of consumer awareness regarding the importance of consuming greener products and services. Firstly, consumers face particular difficulties in assessing future costs (hyperbolic discounting), as well as reluctance to new products (*status quo* biases), or the idea that their choices won't make a difference[303]. Without a sufficient understanding of the benefits associated with sustainable products, there is a risk of a lack of willingness to pay for more sustainable options. An analysis of consumer willingness to pay thus appears inadequate, as there may be no viable means of absorbing an increase in costs and, consequently, final prices. In particular, consumers may be unwilling to bear the burden of this new price or the withdrawal of a less environmentally-friendly product from the market. In any case, limiting the beneficiaries of efficiencies to the consumer in

[297] Lecchi, E. (April 28, 2023). Sustainability and EU Merger Control. *E.C.L.R., 44*(2). SSRN. https://ssrn.com/abstract=4431831, p. 2.
[298] Lecchi, E. (April 28, 2023). Sustainability and EU Merger Control. *E.C.L.R., 44*(2). SSRN. https://ssrn.com/abstract=4431831, p. 2.
[299] According to Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 190, "Contrary to what happens in a static context, where the consumer gets the same product but at a lower price as a result of the likely efficiency (lower average costs), in an innovation setting the consumer may get a more advanced or new product as a result of the transaction and any higher prices that may result may or may not compensate for the different product characteristics."
[300] Persch, J. (2024). Chapter 14: Pro-enforcement perspectives on competition law and sustainability. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 235–248). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00022, p. 247.
[301] In this sense, Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 177.
[302] Referring to learning-by-doing in green processes or products, see Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, pp. 177, 182 and 186.
[303] See, among others, Holmes, S., Kar, N., & Cunningham, L. (2024). Sustainability and Competition Law in the United Kingdom. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 203-244) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 236.

the relevant market is an inadequate approach, as it fails to consider the broader societal benefits of green concentrations. These benefits extend beyond the relevant market and often manifest over extended periods[304].

A particular challenge in terms of efficiencies pertains to questions of verifiability, given the time required for materialization and the inherent difficulty in quantification[305]. It is important to consider the long-term effects of sustainability initiatives, as these could potentially outweigh any short-term negative impacts on prices[306].

Furthermore, the green transition gives rise to questions regarding dynamic competition. It is well established that the competition-innovation relationship, typically described according to the inverted U model, necessitates an understanding of the specific point in the U at which we find ourselves. This understanding is crucial for determining whether a potential decrease in competition will ultimately impede future innovation[307].

The criterion of specificity (in terms of the efficiencies that can be considered) also presents a unique set of challenges. Under the traditional framework of analysis, the efficiencies deemed valuable in the context of merger control, and which are intended to benefit consumers, must be specific to the particular merger in question and verifiable. Moreover, they should manifest, at least in principle, in the relevant markets where competition concerns arise. This restrictive approach, and in particular the criterion of strict necessity, tends towards insufficient responses, not only because of the pervasive nature of the environmental issue, but also because it is always possible to posit a less restrictive route to competition. This could take the form of isolated or singular innovations by each of the companies, or the conclusion of research agreements, rather than mergers. Nevertheless, these approaches may prove to be less effective in the context of the pressing environmental crisis.

5.2. Solving the Dilemma: A Balanced Approach Between Conservative Openness and a Cautious Reform

Notwithstanding the aforementioned challenges, it is erroneous to assume that legislative reform is the sole means of addressing the environmental challenges we face. With Emanuela Lecchi, it could be argued that, prior to discussing "what should be done", it is possible to discuss "what could be done, taking into account the wording of the EUMR,

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[304] See, among others, Marini Balestra, F., Antonazzi, L., & Beetstra, T. (2022, September 20). What about sustainability aspects in merger control? *Bird & Bird*. Retrieved from: https://www.twobirds.com/en/insights/2022/italy/what-about-sustainability-aspects-in-merger-control.

[305] See, among others, Horváth, A. M. (2024). Sustainability and Competition Law in Hungary. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 127-161) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 147.

[306] According to Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 191, "Successful innovations that may eventually result from the development of green technologies, processes and products will often take more than the usual two to three years' timeframe that is considered in most merger cases, for instance."

[307] See, among others, Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 178.

and the other factors considered"[308]. Indeed, even at the European level, the fact that the European Commission does not have the power to intervene or base the control of mergers on exclusively environmental issues does not preclude the possibility of incorporating sustainability aspects into its analysis[309].

As previously stated, European competition law is regarded as sufficiently flexible to accommodate changes in economic and social reality, and it is therefore untenable for it to remain indifferent to such developments. In particular with regard to merger control, recital 23 of the EUMR states, "the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union." These objectives point to sustainable development[310] and include public interest considerations, which have already been legitimized by the case law of the Court of Justice of the European Union[311].

Some illustrative examples demonstrate this openness and the capacity of competition law to accommodate novel challenges.

With regard to market definition, consumer preferences for green or sustainable products, services, and/or technologies, in addition to certain environmental legislation and regulations, have already made it possible to identify relevant competitive pressures and justify and support a particular product or geographic market definition[312]. In its revised Communication on the definition of the relevant market, the European Commission explicitly acknowledges the necessity of considering a multitude of competitive parameters, which may encompass diverse dimensions of innovation and quality. These include, for instance, "sustainability, resource efficiency, durability, the value and variety of uses offered by the product, the possibility to integrate the product with other products, the image conveyed or the security and privacy protection afforded, as well as its availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs. The relative importance of these parameters for customers may change over time."[313] Furthermore, the concept of sustainability can be employed as

[308] Lecchi, E. (April 28, 2023). Sustainability and EU Merger Control. *E.C.L.R., 44*(2). SSRN. https://ssrn.com/abstract=4431831, p. 1.
[309] Ellwanger, C., Kianičková, T., Schiffer, T., & Usai, A. (2023). EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future. Competition Merger Brief 2/2023 – Article 1. doi 10.2763/705949, pp. 1-2.
[310] Kelly, E., & Neilson, M. (2023). Merger Control and Sustainability: A New Dawn or Nothing New Under the Sun? *Competition Policy International*. https://www.pymnts.com/wp-content/uploads/2023/11/4-MERGER-CONTROL-AND-SUSTAINABILITY-A-NEW-DAWN-OR-NOTHING-NEW-UNDER-THE-SUN-Esther-Kelly-and-Marc-Neilson.pdf, p. 3.
[311] See, among others, Heinemann, A. (2018). Social considerations in EU competition law: the protection of competition as a cornerstone of the social market economy. In D. Ferri, & F. Cortese (Eds.), *The EU Social Market Economy and the Law. Theoretical Perspectives and Practical Challenges for the EU*. Routledge. https://doi.org/10.4324/9781351068529.
[312] Ellwanger, C., Kianičková, T., Schiffer, T., & Usai, A. (2023). EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future. Competition Merger Brief 2/2023 – Article 1. doi 10.2763/705949, p. 2.
[313] Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law C/2023/6789, OJ C, C/2024/1645, 22.2.2024, ELI: http://data.europa.eu/eli/C/2024/1645/oj, para 15. See also paras 50 and 72.

a parameter of competition between the parties, thus enabling an assessment of the degree of proximity between the parties in the transaction, as well as in relation to competitors[314].

In terms of theories of harm, the European Commission and national competition authorities may consider innovation and loss of (green) innovation. This is particularly relevant in situations where there is a risk of discontinuing different lines of research or reducing incentives and the ability to innovate[315].

In addition to the potential for valuing non-price efficiencies related to product quality (such as reduced toxicity or decreased use of water or raw materials[316]), environmental economics offers a range of methodologies for assessing the environmental costs of specific behaviors or transactions. These include the costs of pollution and the monetization of greenhouse gases[317].

In turn, potential risks in terms of innovation or concentration can, as in other cases, be mitigated by accepting structural commitments, such as the sale of business units and the possible imposition of specific criteria on the buyer to ensure the continuity of innovation in the green field[318], or behavioral ones, related, for example, to the preservation of natural resources[319].

The absence of a legal basis for evaluating the public interest is a significant concern. However, in those Member States that permit the minister responsible for the matter to approve or block mergers, in light of the public interest exemption or exception, the issue can be addressed in a manner that mitigates skepticism and doubts about the potential dangers of the national competition authority acting beyond the traditional legal test[320].

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[314] Ellwanger, C., Kianičková, T., Schiffer, T., & Usai, A. (2023). EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future. Competition Merger Brief 2/2023 – Article 1. doi 10.2763/705949, p. 3.

[315] See Badea, A. et al. (2021). Competition Policy in Support of Europe's Green Ambition. Competition policy brief 1/2021. ISBN: 978-92-76-41099-7, ISSN: 2315-3113, p. 7. Also, Ellwanger, C., Kianičková, T., Schiffer, T., & Usai, A. (2023). EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future. Competition Merger Brief 2/2023 – Article 1. doi 10.2763/705949, p. 4: "For instance, this framework could be used to preserve innovation efforts on environmentally friendly technologies or capabilities when there is a risk of discontinuation of overlapping lines of research, or when there is a risk of a reduction of incentives and ability to achieve the same level or type of innovation."

[316] Ellwanger, C., Kianičková, T., Schiffer, T., & Usai, A. (2023). EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future. Competition Merger Brief 2/2023 – Article 1. doi 10.2763/705949, p. 4.

[317] See, among others, Claici, A., & Lutz, J. (2021). Beyond the Policy Debate: How to Quantify Sustainability Benefits in Competition Cases − Lessons Learned from Environmental Economics. https://copenhageneconomics.com/wp-content/uploads/2021/12/claici-lutz.-beyond-the-policy-debate-how-to-quantify-sustainability-benefits-in-competition-cases-revised-version.pdf. Nevertheless, there appears to be no precedent for valuing efficiencies outside the pertinent market and over a longer time horizon - see Ellwanger, C., Kianičková, T., Schiffer, T., & Usai, A. (2023). EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future. Competition Merger Brief 2/2023 – Article 1. doi 10.2763/705949, p. 5.

[318] Ellwanger, C., Kianičková, T., Schiffer, T., & Usai, A. (2023). EU Green Mergers & Acquisitions Deals – How Merger Control Contributes to a Sustainable Future. Competition Merger Brief 2/2023 – Article 1. doi 10.2763/705949, p. 6.

[319] See, among others, Horváth, A. M. (2024). Sustainability and Competition Law in Hungary. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual property law* (pp. 127-161) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 147.

[320] In the sense that the discretion of national competition authorities cannot be mobilized to value sustainability benefits out of line with the results of the traditional test, see Bueren, E., & Crowder, J. (2024). Sustainability and Competition Law in Germany. In P. Këllezi, P. Kobel, & B. Kilpatrick (Eds.), *Sustainability objectives in competition and intellectual*

Even in other instances and national contexts, it is possible to mitigate the potential for discretion or unpreparedness on the part of the national competition authorities to assess whether competition objectives are aligned with other general interest objectives. This can be achieved, initially, through the adoption of transparent and publicly accessible guidelines that delineate the methodology employed by the authority to quantify benefits. By setting out the form, procedure, and criteria to be followed in valuing non-economic efficiencies in cases of alignment, as well as in scenarios of conflict, these guidelines would ensure legal certainty.

The lack of preparation of national competition authorities may be addressed by hiring experts in environmental economics and staff with expertise in development (environmental scientists)[321]. Additionally, collaboration with specialized entities, such as environmental agencies and those working in sustainability and in the context of agri-food[322], could add some value in several ways. This could entail providing input on an *ad hoc* basis in specific cases where their opinion is requested, conducting joint market studies to anticipate some of the challenges, or participating in cooperation forums involving different public authorities, thereby reflecting the necessity for a joint effort to respond to what is a global challenge.

Two particular challenges of green M&A warrant further discussion: the importance of the intention of the parties involved and the potential for evasion of the applicable notification thresholds. In terms of proof, it will be important and possible to consider a number of elements, including the company's innovation track record (which may indicate a lack of performance), its investment plans, its participation in environmental protection or solution projects, and the resources (financial, human, and know-how) it has at its disposal for this purpose. In addition to internal documents[323], the reporting obligations arising from European legislation[324] will facilitate compliance for companies, enabling them to provide sufficiently detailed proof and to demonstrate their compliance

property law (pp. 83-125) (LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition). Springer, Cham. https://doi.org/10.1007/978-3-031-44869-0_1, p. 98.

[321] Malinauskaite, J., & Erdem, F. B. (2023). Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities. *Journal of Common Market Studies*, *61*(5). https://doi.org/10.1111/jcms.13458, p. 1220.

[322] See, among others, Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 189. Also, Lecchi, E. (April 28, 2023). Sustainability and EU Merger Control. *E.C.L.R., 44*(2). SSRN. https://ssrn.com/abstract=4431831, p. 15.

[323] Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, p. 187.

[324] Among others, the Corporate Sustainability Reporting Directive ('CSRD') came into force on January 5, 2023. The directive modernizes and strengthens the regulations regarding social and environmental data that corporations must disclose. More enterprises, including those publicly traded, must report on sustainability. Non-EU companies with over EUR 150 million in EU revenue must also report. The new rules will guarantee access to information on companies' impact on people and the environment. Investors will be able to assess financial risks and opportunities associated with climate change. The first group of companies must implement the revised regulations in 2024 and publish reports in 2025. CSRD requires companies to report according to the European Sustainability Reporting Standards ('ESRS'), developed by the EFRAG (formerly the European Financial Reporting Advisory Group). The initial set of ESRS was published in the Official Journal on December 22, 2023. These standards are applicable to companies subject to the CSRD. They align with EU policies and contribute to international standardization.

with the requisite standards. Furthermore, the legislation will assist competition authorities in monitoring compliance through requests for information.

With regard to green killer acquisitions that may evade *ex ante* merger control, it can be argued that they may still be subject to *ex post* assessment under the prohibition of abuse of a dominant position, particularly in light of the clarification made in the Court of Justice's judgment in the *Towercast* case[325]. In particular, the Court of Justice provided clarification that the EUMR does not preclude *ex post* control of transactions that could potentially constitute an abuse of a dominant position and be subject to such analysis. The Court underscored the following point: "It thus follows from the scheme of Regulation No 139/2004 that, although that regulation introduces an ex ante control for concentration operations with a Community dimension, it does not preclude an ex post control of concentration operations that do not meet that threshold. While it is true that Article 3 of that regulation sets out a substantive definition of a concentration of undertakings without reference to the thresholds mentioned in that regulation, the regulation must be read in the light of its context, and in particular of Article 1 and recitals 7 and 9 thereof. It follows from this, first, that that regulation applies only to concentrations with a Community dimension and, second, that it is accepted that certain concentrations may both escape an ex ante control and be subject to an ex post control. […] It follows that a concentration operation which does not meet the respective thresholds for prior control laid down by Regulation No 139/2004 and by the applicable national law may be subject to Article 102 TFEU where the conditions laid down in that article for establishing the existence of an abuse of a dominant position are satisfied. In particular, it is for the authority in question to verify that a purchaser who is in a dominant position on a given market and who has acquired control of another undertaking on that market has, by that conduct, substantially impeded competition on that market. In that regard, the mere finding that an undertaking's position has been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market"[326].

It is evident that the aforementioned considerations are contingent upon the stance adopted with respect to the objectives and scope of competition law. Nonetheless, even among proponents of a shared vision, doubts and obstacles may emerge that can only be addressed through legislative intervention, reform or adjustments, whether in the form of soft or hard law.

Among those who advocate legislative reform, there is support towards the introduction of a duty of notification in mergers involving companies active in the development of green technologies[327]. Moreover, there are those who support the exploration, realization, and extension of the possibility of government intervention, namely by providing for

[325] Judgment of 16 March 2023, *Towercast* (C-449/21, ECLI:EU:C:2023:207).
[326] Judgment of 16 March 2023, *Towercast* (C-449/21, ECLI:EU:C:2023:207, paras 41 and 52).
[327] See, among others, Loukianou, D. (2023, May 15). The interplay between environmental sustainability and EU merger control: Where do we stand and where can we go? SSRN. https://ssrn.com/abstract=4632995, p. 41.

sustainability as a relevant public interest in either national legislation[328], or in the EUMR (as a recognized interest that dispenses with the Commission's intervention)[329]. The legal provision would legitimize the need for an in-depth analysis, potentially resulting in the approval or non-approval of a concentration based on its environmental footprint.

The legal concretization of sustainability and environmental protection as specific public interest issues is not due to the indeterminate nature of the concept or the difficulty of subsuming sustainability and environmental protection under a relevant public interest. Indeed, in contrast to other matters of public interest, which can be interpreted in varying ways across different jurisdictions, eras, and social, cultural, and political contexts[330], the environment is currently a topic of universal concern and a matter of global urgency. Nevertheless, despite the absence of doubt on this point, it seems pertinent and important to ensure legal certainty and to avoid a chilling effect potentially arising from the absence of a clear legal basis that can support the actions of the competition authority[331]. In conclusion, the necessity for certainty and a legal basis, whether for the actions of the national competition authorities or the government body (depending on the model followed by the Member State), justifies the enshrinement and specification of this in law. This should be complemented by the adoption of soft law documents and guidelines setting out the form and procedure for assessing mergers, always, of course, with the possibility of judicial review, and accompanied by other procedural guarantees.

With regard to the potential for extending this same possibility to the European level, certain doubts are raised. In such a scenario, a preliminary analysis of the concentration by the European Commission or a newly established European competition authority (focused exclusively on competition) would be followed by a subsequent analysis by a political body[332]. Notwithstanding the inherent challenges, we concur with the view that this codification of the rules at the supranational level offers the advantage of 'leading by example', thereby circumventing the fragmentation that would otherwise result from a significant divergence of positions at the national level[333].

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[328] Como em Espanha. Bułakowski, K. (2022). Public Interest in Merger Control as a Potential Instrument of Realization of Socio-Environmental Goals. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24506/21640, pp. 176-177.

[329] Hellenic Competition Commission (2020). Draft Staff Discussion Paper on sustainability issues and Competition law. https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf, p. 41.

[330] Organisation for Economic Co-operation and Development (OECD) - Directorate for Financial and Enterprise Affairs Competition Committee (2017). Executive Summary of discussion of the Roundtable on public interest considerations in merger control. DAF/COMP/WP3/M(2016)1/ANN5/FINAL. https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf On the evolution of the public interest clause in the UK, see Kokkoris, I. (2023). Media plurality assessment as a public interest concern in UK merger control. *Competition and Regulation in Network Industries*, *24*(4). https://doi.org/10.1177/17835917231213031.

[331] Bułakowski, K. (2022). Public Interest in Merger Control as a Potential Instrument of Realization of Socio-Environmental Goals. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24506/21640, p. 179.

[332] On the issue, Heinemann, A. (2018). Social considerations in EU competition law: the protection of competition as a cornerstone of the social market economy. In D. Ferri, & F. Cortese (Eds.), *The EU Social Market Economy and the Law. Theoretical Perspectives and Practical Challenges for the EU*. Routledge. https://doi.org/10.4324/9781351068529.

[333] See, among others, Bułakowski, K. (2022). Public Interest in Merger Control as a Potential Instrument of Realization of Socio-Environmental Goals. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24506/21640, p. 179.

In addition to this legal enactment, legal scholarship also suggests that a clause be included in the legislation expressly authorizing the imposition of behavioral commitments related to the achievement of socio-environmental objectives, as opposed to mere passive acceptance[334]. The question of whether, when faced with different commitments, the competition authority should be obliged to opt for the 'greenest remedy' is a separate and more complex issue that currently lacks a specific basis[335].

The final point to be considered is that of the acquisition of start-up companies. As has been the case in the digital field, the discussion is essentially the same, and it has been proposed that there is a need to complement and/or correct the *ex ante* control regime, based on turnover and/or market share thresholds. The fact that green killer acquisitions are typically characterized by the involvement of a nascent, small, and innovative company as a target also gives rise to the necessity of considering the extent of notifiable operations. In light of the prevailing theory of harm, namely the detrimental impact on competition resulting from the removal of companies from the market that could have a substantial influence on green innovation[336], a number of potential solutions have been proposed. One such proposal is the introduction of supplementary communication or notification obligations for companies with a strategic *status* that intend to "merge with or acquire target companies active in the development of innovative green products and services, when the notification thresholds (national or European) are not met"[337]. In order for the solution to be successful, Despoina Loukianou asserts that it "would require amendments at two levels: firstly, an amendment of the national merger control regime of all Member States to make the notification of concentrations involving green target companies compulsory, and secondly the amendment of the European Commission's Guidance on the application of the referral mechanism set out in Article 22 EUMR to render the referral mechanism for such cases compulsory."[338]

The recent clarification of the scope of the referral regime in Article 22 of the EUMR by the Court of Justice's ruling of September 3, 2024, in the *Illumina v. Commission* case[339] demands particular attention. Indeed, the Court of Justice has clarified that Article 22(1) of the EUMR cannot be interpreted as allowing the European Commission to assess and accept the referral of a concentration in a situation where the Member State requesting the referral is not entitled, under its national merger control legislation, to examine the concentration. This is typically the case when the proposed concentration does not meet the thresholds set by national legislation, thereby precluding the national authority from

[334] See, among others, Bułakowski, K. (2022). Public Interest in Merger Control as a Potential Instrument of Realization of Socio-Environmental Goals. *Nordic Journal of European Law, 5*(1). https://journals.lub.lu.se/njel/article/view/24506/21640, p. 179.
[335] Badea, A. et al. (2021). Competition Policy in Support of Europe's Green Ambition. Competition policy brief 1/2021. ISBN: 978-92-76-41099-7, ISSN: 2315-3113, p. 3.
[336] See, among others, Lopes Martins, M., & Pajares de Dios Tarancón, I. (2024). Are competition authorities planning to rule the world? New and expanded approaches to merger control. *Actualidad Jurídica Uría Menéndez, 64* (May), 23–50. https://www.uria.com/documentos/publicaciones/8862/documento/AJUM_64-art.pdf?id=13608&forceDownload=true, pp. 38-39.
[337] Loukianou, D. (2023, May 15). The interplay between environmental sustainability and EU merger control: Where do we stand and where can we go? SSRN. https://ssrn.com/abstract=4632995, p. 41.
[338] Loukianou, D. (2023, May 15). The interplay between environmental sustainability and EU merger control: Where do we stand and where can we go? SSRN. https://ssrn.com/abstract=4632995, p. 41.
[339] Judgment of 3 September 2024, *Illumina v Commission* (C-611/22 P and C-625/22 P, ECLI:EU:C:2024:677).

exercising control over that concentration. In particular, the Court of Justice has determined that "both the historical interpretation and the contextual interpretation of Regulation No 139/2004 reveal that the referral mechanism now set out in Article 22 of that regulation pursues only two primary objectives. The first objective which prompted the introduction of the referral mechanism in Regulation No 4064/89, referred to at the time as the 'Dutch clause', was to permit the scrutiny of concentrations that could distort competition locally, where the Member State in question does not have any national merger control rules. The second objective, introduced when Regulation No 4064/89 was amended by Regulation No 1310/97 and then reinforced by the adoption of Regulation No 139/2004, is, as has been pointed out in paragraphs 192 and 193 above, to extend the 'one-stop shop' principle so as to enable the Commission to examine a concentration that is notified or notifiable in several Member States, in order to avoid multiple notifications at national level and thereby to enhance legal certainty for undertakings. By contrast, it has not been established that that mechanism was intended to remedy deficiencies in the control system inherent in a scheme based principally on turnover thresholds, which is, by definition, incapable of covering all potentially problematic concentrations."[340]

This ruling calls for alternative avenues to be considered, including a reform of the EUMR, perhaps to include the value of the transaction as a relevant notification threshold, as has been done in other Member States. Nevertheless, these proposed changes have been met with some skepticism, particularly in light of the findings of the Dragui Report[341].

The potential for damage and its magnitude have also motivated other proposals that challenge various aspects of the European merger control regime. Examples of such suggestions include an appeal to a 'balance of harms'[342]; the reversal of the burden of proof in cases where the European Commission or national competition authorities can demonstrate a realistic prospect of damage[343]; and the use of abuse of a dominant position (either as an alternative to or in conjunction with the merger control regime). This is particularly relevant in cases where there are a number of acquisitions of the same type over a period of time, thereby enabling the identification of an exclusionary strategy pursued by a dominant company[344]. The introduction of an *ex post* evaluation regime, with the potential modification of commitments in the event of a change in circumstances

[340] See Judgment of 3 September 2024, *Illumina v Commission* (C-611/22 P and C-625/22 P, ECLI:EU:C:2024:677, paras 199-200).
[341] See, among others, Riley, A. (October 15, 2024). Illumina/Grail: What is the Solution for Killer Acquisitions Now? Kluwer Competition Law Blog. https://competitionlawblog.kluwercompetitionlaw.com/2024/10/15/illumina-grail-what-is-the-solution-for-killer-acquisitions-now/.
[342] See, among others, Maximiano, R., & Volpin, C. (2024). Chapter 11: Merger control for green innovation. In J. Nowag (Ed.), *Research handbook on sustainability and competition law* (pp. 176–193). Edward Elgar Publishing. https://doi.org/10.4337/9781802204667.00019, pp. 192-193.
[343] Sonderegger, G. (2024). Killer Acquisitions in Digital Markets: An Analysis of the EU Merger Control. PhD Thesis. https://eizpublishing.ch/wp-content/uploads/2024/06/Killer-Acquisitions-in-Digital-Markets-An-Analysis-of-the-EU-Merger-Control-Regime-Digital-V1_01-20240425.pdf, p. 219 et seq.
[344] See, among others, Steeves, S. (2023). Fostering sustainability using the existing toolbox: Environmental effects in Canadian competition law. *Canadian Competition Law Review, 36*(3) (pp.31-73). https://cclr.cba.org/index.php/cclr/issue/view/120/3, p. 44. See also, Sonderegger, G. (2024). Killer Acquisitions in Digital Markets: An Analysis of the EU Merger Control. PhD Thesis. https://eizpublishing.ch/wp-content/uploads/2024/06/Killer-Acquisitions-in-Digital-Markets-An-Analysis-of-the-EU-Merger-Control-Regime-Digital-V1_01-20240425.pdf, p. 210 et seq.

and intentions as signed by the parties when the concentration was assessed, is also considered[345]. Alternatively, the introduction of 'call-in powers' could be contemplated once there are anti-competitive risks resulting from a concentration not subject to prior notification[346].

6. Concluding remarks

The multitude of proposals presented illustrates that, from the perspective of the doctrine, there are indeed potential avenues for resolution that challenge the assertion that solutions are unfeasible. It is, however, important to maintain focus on the fact that the majority of issues could be addressed through a practical alignment between the traditional objectives of competition and the evolving demands of a changing society. We would therefore like to make a modest contribution to the discussion.

In our view, the internalization of sustainability and environmental protection issues in the merger control regime (at the European or national level) is feasible on the basis of a set of assumptions (of legitimacy) and procedures (of legitimation).

Firstly, as the Green Agenda is a shared commitment between the Union and the Member States, as well as between public and private entities, it can be argued that the competition authorities have the legitimacy to assess the positive and negative impact of a merger on the environment and on the pursuit of green sustainability objectives. It could be posited that, rather than being driven by a sense of legitimacy, there is a clear obligation for them to do so (not as an obligation of results, but at the very least, as an obligation of means).

With regard to the legal basis, it is crucial to acknowledge that both secondary legislation and national legislation and regulations are subject to the rule of law and thus subordinate to higher parameters, namely fundamental rights and related diffuse interests enshrined in primary law (Treaties and the Charter of Fundamental Rights of the European Union) and in national constitutions. These are sufficient grounds for action.

It must be acknowledged that this credential is devoid of the requisite specificity and proceduralization. In this regard, a number of proposals may be considered, including those previously mentioned. In our view, it seems that there is a way to introduce sustainability issues into competition proceedings while maintaining the traditional tests.

In particular, whenever mergers are involved which, due to their subject matter (product and/or service markets) and/or the companies involved, may have an impact on aspects of the green transition, it is our recommendation that the competition authorities implement an impact assessment procedure. Such a procedure should also be mandatory when companies put forth arguments pertaining to the environmental benefits of the transaction. In such a procedure, the competition authority should evaluate whether the

[345] Sonderegger, G. (2024). Killer Acquisitions in Digital Markets: An Analysis of the EU Merger Control. PhD Thesis. https://eizpublishing.ch/wp-content/uploads/2024/06/Killer-Acquisitions-in-Digital-Markets-An-Analysis-of-the-EU-Merger-Control-Regime-Digital-V1_01-20240425.pdf, p. 270 et seq.
[346] Riley, A. (October 15, 2024). Illumina/Grail: What is the Solution for Killer Acquisitions Now? Kluwer Competition Law Blog. https://competitionlawblog.kluwercompetitionlaw.com/2024/10/15/illumina-grail-what-is-the-solution-for-killer-acquisitions-now/.

application of the SIEC test and the consumer-welfare approach may result in a potentially conflicting analysis or outcome with that which may be necessary to accommodate the challenges of the green transition. In the event of a conflict, the authority should endeavour to ascertain whether it is feasible to accommodate the aforementioned requirements through a more flexible interpretation of the tests. This may be achieved, for instance, when there is an overlap between the consumers in the relevant market and the beneficiaries of the efficiencies, which will undoubtedly be the case in the context of environmental efficiencies. Furthermore, it is feasible to integrate green efficiencies into quality dimensions. In the event that the authority is uncertain as to the appropriate course of action, and particularly when considering the prioritization of the legal-competitive analysis of the environmental issue, it is recommended that the competition authority seek input from authorities with specialized competence. At the national level, this may include environmental agencies, while at the EU level, the European Environment Agency ('EEA') could provide a reasoned opinion regarding the potential negative or positive effects of the concentration on the pursuit of environmental and other green goals, with reference to the applicable legislation. This opinion will thus serve to guide the competition authority in order to legitimize its analysis.

In the event that the conflict cannot be overcome, it is believed that the competition authority will still be required to provide a substantiated assessment in order to ensure that the addressees understand it and can, in the event of insufficiency, have the decision reviewed by a Court.

In the absence of material and/or procedural defects, it is not within the purview of the Court to substitute the authority's assessment for its own in instances where it is unclear what other decision would be required. It is thought that this is an area of technical discretion.

Nevertheless, the Court is duly authorized to rely on expert testimony and to render a judgment as a judicial body duly qualified to do so. This is particularly the case in instances of conflict and in matters of fundamental rights adjudication, where the Court's legitimacy is especially important[347].

The procedure as a whole is consistent with the fundamental principles of competition law. Conversely, while maintaining its own area of expertise, the necessity for regulatory coordination is acknowledged. In order to guarantee legal certainty and transparency, it would be prudent to provide for this procedure in guidelines, whether those of the European Commission or national competition authorities, depending on the jurisdictional plans.

Ultimately, to guarantee the efficacy of the proposal, it is recommended that the relevant authorities investigate the potential for an open-door policy, whereby companies can, particularly at the outset of the proposed balancing exercise, substantive analysis, and

[347] In such cases, the Court may annul the authority's decision and instruct it to repeat the analysis. In Member States where government intervention for reasons of public interest is a possibility, the solution is not likely to be perceived as a significant departure from established practice. Furthermore, in such a case, recourse to the judicial route may be avoided on account of this possibility.

'green impact assessment', engage in dialogue with the competition authorities to ascertain how they might substantiate a possible claim of green efficiencies. This would enable the competition authority to engage with the companies at an earlier stage, thereby facilitating the procedure.

The imperative to address the climate crisis, safeguard the environment, and guarantee the rights of future generations are core objectives that competition authorities are duty-bound to uphold. They cannot claim to be without a mandate in this regard. In light of the foregoing, there is no impediment to amending the conventional decision-making criteria and procedures to accommodate the necessity of evaluating corporate consolidation strategies not only in terms of their impact on competition within the pertinent market and on consumer welfare, but also in terms of their effects - both positive and negative - on society as a whole and on citizens and companies as active agents of change. This openness does not present a conflict.

It is possible that further clarification and transparency may be required, both of which are fundamental principles of the rule of law. However, it is time to align abstract promises and fine and pompous statements with the material reality of applying competition law. For that to happen, an open-door policy and an enforcement structure that can address the challenges of the green transition, including those related to merger control, must be implemented. It is not feasible for competition authorities to maintain a defensive stance. Instead, a collaborative and close approach, involving both companies and other sectoral authorities, is essential to address this joint challenge.

According to Commission President Ursula von der Leyen, "The European Green Deal is, and always has been, Europe's growth strategy. Clean growth brings real benefits to our industry, and they have embraced it. Because in the European economy of the future, competitiveness and sustainability will go hand in hand. Now that a predictable regulatory framework is in place, the Clean Transition Dialogues are an important way to work together with industry and social partners to implement it in the most effective way. The Dialogues showed that our partners are committed to getting the job done and delivering on our ambitious and essential targets. Based on their insights, Europe will continue to support industry in building a business model fit for a decarbonised economy."[348] Competition law rules must play their part.

[348] European Commission Press Release (April 10, 2024). Commission takes stock of the Clean Transition Dialogues with EU industry and social partners. https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1884.

European Union

EU Encourages Competitor Collaboration For Sustainability: Key Considerations For Businesses

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INTRODUCTION

In June 2023, the European Commission adopted long-awaited revised guidelines on horizontal cooperation between competitors (the 'Horizontal Guidelines'), including a brand-new chapter (Chapter 9) dedicated to sustainability agreements (the 'Sustainability Guidelines')[349]. The Sustainability Guidelines clarify how EU competition rules apply to sustainability agreements, addressing longstanding uncertainties about whether and how competitors can collaborate in the EU to achieve sustainability objectives without infringing the antitrust rules. The new Guidelines present significant opportunities for industry players to jointly tackle major sustainability challenges which are not feasible to overcome at all, or as quickly or affordably, acting alone.

This article examines key features of the EU regime and why market adoption may be slower than the Commission hoped. We also highlight considerations for international businesses collaborating on sustainability initiatives that could impact markets outside of the EU (notably the USA) to ensure appropriate structuring and risk management.

BACKGROUND TO THE EU'S SUSTAINABILITY GUIDELINES

The new Sustainability Guidelines emerge against the backdrop of growing global challenges, including climate change, natural resource depletion, biodiversity loss, and social inequality. The European Union has reaffirmed its commitment to addressing these issues through the European Green Deal introduced in 2019,[350] with the aim of being the world's first climate-neutral continent by 2050, as well as the pursuit of the United Nations Sustainable Development Goals (SDGs).

Acknowledging that these urgent and ambitious goals may require collective action – but that businesses may be reluctant to work together for fear of breaching competition laws – the new Chapter reflects the Commission's commitment that EU law should not stand in the way of legitimate collaborations that aim to achieve sustainability objectives.

The Guidelines recognize that horizontal cooperation can be a means of overcoming market failures not adequately addressed by public policies and regulation. They also acknowledge that cooperation can help to address inertia resulting from "first-mover

[349] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements
[350] The European Green Deal

disadvantage" fears, where early sustainability adopters bear higher costs and risk free-riding by their competitors.

WHAT AGREEMENTS ARE COVERED BY THE SUSTAINABILITY GUIDELINES?

The Sustainability Guidelines define a 'sustainability agreement' as any horizontal cooperation agreement (i.e. agreement between competitors) that pursues a "sustainability objective", irrespective of the form of the cooperation.

With sustainable development a core principle of the Treaty on European Union and a priority objective for the EU's policies, the Sustainability Guidelines provide a broad and inclusive definition of "sustainability objectives" which aligns with the SDGs. These include a wide range of environmental, social and economic objectives such as, among others, addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, promoting circular economy models, upholding human rights, ensuring a living income and better working conditions, fostering resilient infrastructure and innovation (e.g. measures to adapt to climate-related risks), public health and consumer welfare objectives (such as reducing food waste and facilitating a shift to healthy eating), ensuring animal welfare, and so on.

The breadth of these examples, beyond traditional environmental goals, reflects the European Commission's intention to encourage businesses to consider diverse impacts and contributions toward sustainable development holistically and the positive role that industry collaboration can play in meeting the EU's policy targets in these areas.

HOW IS ANTITRUST COMPATIBILITY OF A SUSTAINABILITY AGREEMENT TO BE ASSESSED?

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between competitors that restrict competition, either "by object" or "by effect", unless they qualify for exemption under Article 101(3).

The Sustainability Guidelines provide detailed guidance for companies to self-assess how to structure and implement sustainability agreements to avoid falling foul of this prohibition.

1. Sustainability agreements that are unlikely to raise competition concerns

The Sustainability Guidelines recognize that not all sustainability agreements between competitors fall within the scope of the Article 101 prohibition. Where such agreements do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation, the Commission takes the view that they are not capable of raising competition law concerns.

The following non-exhaustive illustrative examples are provided of agreements that will be regarded as falling outside the outside the scope of Article 101:

- ***Agreements imposing restrictions solely aimed at ensuring compliance with legally binding international treaties, agreements, or conventions*** that impose mandatory obligations on the parties (for example, compliance with fundamental social rights or prohibitions on the use of child labor, deforestation, use of certain pollutants, and production or importation into the EU of products contrary to legal requirements). The Guidelines note that such agreements may be an appropriate measure to enable companies to implement their sustainability due diligence obligations under national or EU law and can also form part of wider industry cooperation schemes or multi-stakeholder initiatives to identify, mitigate and prevent adverse sustainability impacts in their value chains or their sector.

  With companies coming under increasing obligations in the EU, such as the Corporate Sustainability Reporting Directive (CSRD) adopted in November 2022 and the Corporate Sustainability Due Diligence Directive (CSDDD) adopted in May 2024 (among others), the Guidelines present a significant opportunity for industry players to seek to meet their legal obligations more quickly and affordably than is possible alone.

- ***Agreements that do not concern the economic activity of competitors but only their internal conduct***. For example, competitors may seek to improve their industry's environmental reputation by agreeing to eliminate single-use plastics or reduce energy usage at their business premises.

- ***Agreements to set up a database containing general information about suppliers that have (un)sustainable value chains, provided the agreement does not forbid or oblige the parties to deal/not deal with such suppliers/distributors***. For example, a database can be set up identifying suppliers that respect labor rights or pay living wages, use (un)sustainable production processes, or supply (un)sustainable inputs, or naming distributors that market products in a(n) (un)sustainable manner. The Commission recognizes that such limited forms of exchange of information may again help undertakings to fulfil their sustainability due diligence obligations under national or EU law.

- ***Agreements between competitors relating to the organization of industry-wide awareness campaigns***, or campaigns raising customers' awareness of the environmental impact or other negative externalities of their consumption. These will not trigger Article 101 provided they do not amount to joint advertising of specific products.

The Sustainability Guidelines thus provide substantial opportunity for companies to collaborate with their competitors in many was with low legal risk to address common sustainability challenges. To avail themselves of these opportunities

without triggering antitrust risk, parties to a potential sustainability agreement should ensure that appropriate protocols are put in place to prevent the exchange of competitively sensitive information between the parties, which would remove the collaboration from this low-risk category. These can include training members in competition law compliance, ensuring data collection and aggregation by an independent third party, document creation and meeting protocols, review of meeting agendas and supervision by competition counsel, and so forth.

2. Assessment of sustainability agreements that do fall within Article 101(1)

Where sustainability agreements negatively affect one or more parameters of competition, they have to be assessed under Article 101(1) TFEU. Specifically, it needs to be assessed whether they might amount to a restriction of competition "by object" or "by effect".

a. Sustainability agreements restricting competition by object

Certain agreements and practices between competitors (such as price fixing, market or customer allocation, limitations of output, limitations of quality or innovation, group boycotts or competitive information exchanges) are generally considered "by object" restrictions under EU competition law. These kinds of restrictions are typically, by their very nature, considered inherently harmful to competition, such that the harm is presumed and it is not necessary for the Commission to prove their anti-competitive effects to find an infringement of Article 101(1) TFEU.

The Sustainability Guidelines warn that agreements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective, and that a "sustainability agreement" used to disguise anti-competitive restrictions of the above nature will amount to a by object restriction attracting high antitrust risk. Examples include agreements with the object of:

- fixing, raising, or stabilizing prices for eco-friendly products or products meeting a sustainability standard, claiming this offsets the higher costs of production;
- restricting sales of certain environmentally harmful or sustainable products to specific regions or consumer segments;
- agreeing how to pass increased costs resulting from the adoption of a sustainability standard onto customers;
- limiting technological development to the minimum sustainability standards required by law, instead of cooperating to achieve more ambitious environmental goals;
- intentionally foreclosing firms from the market (e.g. agreeing not to deal with suppliers not using specific sustainability processes); and
- exchanging competitively sensitive information which is not necessary for the achievement of the sustainability objective.

However, the Sustainability Guidelines provide that where the parties to an agreement substantiate that the main object of the agreement is the pursuit of a sustainability objective, and where this casts reasonable doubt on whether the agreement reveals by its

very nature (having regard to the content of its provisions, its objectives, and the economic and legal context) a sufficient degree of harm to competition to be considered a by object restriction, the agreement's *effects* on competition will have to be assessed. In other words, whereas in a non- sustainability context an object restriction might automatically be presumed in the presence of an agreement on pricing (etc.), the Commission is obliged to dig deeper and demonstrate sufficiently adverse effects where an agreement on its face pursues a legitimate sustainability goal.

b. **Agreements Restricting Competition by Effect**

Agreements that do not inherently restrict competition (i.e., not by object) may still infringe Article 101(1) TFEU if they produce significant restrictive effects on competition. The assessment focuses on whether the agreement negatively impacts competitive dynamics to an appreciable extent, such as reducing consumer choice, increasing prices, or stifling innovation. However, in such cases, the restriction is not presumed; a detailed effects-based analysis is required considering factors such as:

- The nature and structure of the market (e.g. number of competitors, concentration, market shares, barriers to entry, and market dynamics) - agreements in highly concentrated markets are more likely to have appreciable anti-competitive effects;
- Whether the parties have market power;
- Market coverage of the agreement; and
- The extent of any commercially sensitive information exchange; and
- The agreement's effect on key competitive parameters, such as prices for consumers, output (quantity or variety), quality, or innovation.

Examples from the Guidelines illustrate how agreements can restrict competition by effect:

- Where an agreement between competitors on sustainability standards results in higher production costs and thus leads to an appreciably higher price for consumers;
- Where an agreement appreciably limits competitors from introducing alternative solutions or technologies that meet sustainability goals differently;
- Where competitors agree to phase out certain non-sustainable products (e.g., single-use plastics) but this leads to reduced consumer choice and increase prices if alternatives are limited or costly; and
- If such an agreement involves major market players, it could create significant entry barriers for new competitors who might offer sustainable solutions differently.

To illustrate: An agreement among small firms to adopt eco-friendly practices is unlikely to restrict competition in a meaningful way. Conversely, an agreement among major firms in a concentrated market may have far-reaching effects, including foreclosure of smaller competitors or new entrants.

Soft "safe harbor" for standardization agreements

The Sustainability Guidelines lay down specific guidance for the assessment of sustainability standardization agreements, namely agreements between competitors to develop and adopt standards relating to the sustainability of products or processes (including certification labels and marks). These may include, for instance, standards relating to the phasing out, withdrawing, or replacement of non-sustainable products and processes or the purchase of sustainably produced or less environmentally harmful inputs; harmonizing packaging materials in order to facilitate recycling; adopting zero emission production processes; committing to better working standards; and so on.

As noted above, certain restrictive agreements between the parties to a sustainability standard can amount to serious infringements. However, the Commission recognizes that sustainability standardization agreements can generate highly positive effects for competition, such as enabling the development of new products or markets, increasing product quality, improving conditions of supply or distribution, leveling the playing field (e.g. between producers that are subject to different regulatory requirements), and empowering consumers to make informed decisions (e.g. via sustainability information on labels), thus amplifying the role they play in the development of markets for sustainable products.

Accordingly, the Sustainability Guidelines lay down a "*soft safe harbor*" (effectively an informal legal exemption) for sustainability standardization agreements meeting the following six cumulative conditions:

i. First, the procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard.
ii. Second, the sustainability standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply with the standard.
iii. Third, in order to ensure compliance with the standard, binding requirements can be imposed on the participating undertakings, but they must remain free to apply higher sustainability standards.
iv. Fourth, the parties to the sustainability standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard.
v. Fifth, effective and non-discriminatory access to the outcome of the standard-setting process must be ensured (including for using the agreed label, logo or brand name, and allowing undertakings that have not participated in the process of developing the standard to adopt it at a later stage); and
vi. Sixth, the sustainability standard must satisfy at least one of the following two conditions:
    a. It must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned (though notably no guidance is provided on what constitutes "significant"); or

b. The combined market share of the participating undertakings must not exceed 20 % on any relevant market affected by the standard.

An agreement meeting these requirements will be deemed not to have adverse effects on competition within the scope of Art. 101(1). Whilst failure to comply with one or more of the conditions does not automatically create a presumption of non-compliance, the effects of the agreement will then need to be assessed in the usual way.

3. Exemption under Article 101(3) due to overriding benefits

Where a sustainability agreement restricts competition within the meaning of Article 101(1), it may still be compatible with Article 101 if the parties prove the four conditions of the exception provided by Article 101(3) are met:

i. First, the agreement must contribute to **"*objective, concrete and verifiable*" efficiency gains**, i.e. well-substantiated improvements in the production or distribution of goods or technical or economic progress. The Guidelines state that a broad range of sustainability benefits may qualify (for instance, the use of less polluting or more efficient production or distribution technologies, improved production or distribution conditions, better quality products, shorter lead times to bring sustainable products to market, and so on).

ii. Second, the restriction of competition must be **indispensable** to the attainment of the purported benefits – i.e. the agreement and the restrictions are reasonably necessary for the claimed sustainability benefits to materialize, and there are no other economically practicable and less restrictive means of achieving those benefits.

iii. Third, **consumers must receive a fair share** of the purported benefits. This condition is framed more broadly in the Sustainability Guidelines than in the traditional context (which typically requires efficiency gains to be passed on in some tangible form). The Sustainability Guidelines identify three types of potential benefits for consumers, any one of which, or a combination, may satisfy this third condition. They are:

   a. "Individual use value benefits": direct advantages for the individual consumer resulting from use of the product (e.g. improved food quality due to organic ingredients);
   b. "Individual non-use value benefits": indirect advantages for the individual consumer where the consumer does not directly benefit but may be prepared to accept higher prices or fewer options (for instance) because of their appreciation of the impact of their sustainable consumption on others (e.g. future generations or the community). Examples may include choosing products produced using more sustainable methods or that are less polluting, not because of their better performance but because of their

impact on the local environment or society. The Guidelines require that these benefits of appreciation must accrue to the consumers within the *relevant market affected by the restriction (even if the positive impact they appreciate is felt by non-users outside the relevant market)* – e.g. a consumer in an EU country buys a toy produced with recycled material because that *individual consumer* values the impact of the reduction of waste on others, including non-users outside the relevant market.

c. "Collective benefits: advantages to society regardless of consumers' individual appreciation, experienced outside the relevant market (e.g. use of greener energy sources which reduce climate change or air pollution impacts, or of products using fewer natural resources). However, to rely on collective benefits to exempt an otherwise restrictive sustainability agreement, the Guidelines require the parties to clearly demonstrate an overlap between (i) the individuals in the market affected by the reduction in competition (e.g. purchasers of the more sustainable product that pays more for it) and (ii) the beneficiaries of the sustainability agreement in the other market (i.e. that benefit from cleaner air, less resource depletion etc.) – so that the benefits directly "compensate" the harm suffered.

Reflections on the fair share test – defeating the point of the Guidelines?

The "collective benefits" test in the Sustainability Guidelines is surprising and has been heavily criticized, as it seems to ignore that consumers are very often not located in the same area that a product is produced (i.e. where the beneficiaries of the sustainability benefits are located). This test could therefore be very difficult for parties to rely on to exempt agreements that could deliver enormous positive impacts addressing challenges considered as major priorities under the EU's own Green Deal, such as sustainable supply chains, responsibly produced inputs, product circularity, climate neutrality, water preservation, biodiversity preservation, labor rights, and so on.

It contrasts with the broader approaches of certain national competition regimes, which have committed to more readily taking account of (certain) out of market benefits, recognizing the shared global responsibility and value in addressing challenges that transcend national borders. Examples include Austria's prominent "consumer welfare" framework[351] and (outside the EU) the UK's Competition Markets Authority (CMA) guidance for climate change agreements which takes into consideration the totality of climate change benefits to all UK consumers instead of only those affected by the competition restriction.[352] (Notably in its second draft guidelines on sustainability agreements[353], the Dutch Authority for Consumers and Markets (ACM) developed an

[351] Austrian Federal Competition Authority's Guidelines on the Application of Section 2 (1) Austrian Cartel Act to Sustainability Cooperation Agreements (Sustainable Guidelines) (2022)
[352] Competition and Markets Authority's Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (2023)
[353] Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, available at https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf

assessment framework incorporating collective benefits, but it has since aligned itself with the Commission's more narrow approach being the prevailing EU regime.

The authors therefore hope and are cautiously optimistic that the Commission will not apply the benefits tests overly rigidly and formalistically, or demand prohibitive volumes of benefits evidence, which could end up putting parties off pursuing highly beneficial sustainability agreements for fear they will not overcome the high thresholds for competition compliance – a quelling effect the new Sustainability Guidelines were specifically intended to avoid.

We might also see additional reliance on the "individual non-use value benefits" test (i.e. "consumers feel good" about buying/using a more sustainable or cleaner product). However, the law should not be indirectly forcing companies to have to advertise the sustainability credentials of their initiatives to ensure and prove that consumers are always aware of these and furthermore sufficiently appreciative of them. Indeed, the policy objective of the Green Deal would seem to be that sustainable business practices and products should ultimately be the rule and not the exception, irrespective of consumer demand. To the extent that companies do promote the sustainability benefits, they would also need to be mindful of the strict new rules for green claims under the EU's new Greenwashing Directive and proposed Green Claims Directive.

European Commission's Open-Door Policy – Slow uptake to start

In addition to the general guidance in the Sustainability Guidelines, the Commission has committed to providing informal guidance regarding novel or unresolved questions on individual sustainability agreements through its Informal Guidance Notice. This mirrors the "open-door policies" or "regulatory sandboxes" established by some national regulators.

The Commission has expressed disappointment at the lack of requests for informal guidance from industry, with no letters issued thus far and "not for a lack of trying" on the Commission's part.[354]

There may be several reasons for the slow uptake of the Commission's open-door policy.

In the authors' experience, many collaborations are likely already underway, as certain sustainability goals or requirements are too challenging to achieve individually.

However, many industries still lack awareness of the new Guidelines, often because sustainability officers and staff are less familiar with competition law — and its associated risks — than their counterparts in commercial roles.

Second, when there is awareness of the Guidelines, the lack of outreach may indicate that companies are using them as intended – with collaborations being self-assessed as

[354] EU Director-General for Competition Oliver Guersent presenting at the ICN 2024 Workshop on Sustainability, reported in Global Competition Review, *Guersent: EU prepared to grant sustainability collaborations, wider fears slowing take-up* (2 July 2024)

compatible (or not compatible) – since most collaborations should not require further direction from regulators.

Third, building a substantial sustainability collaboration takes time, involving steps such as securing stakeholder buy-in, assigning responsibilities, engaging third-party advisors (legal counsel, economists, or consultants), planning, reaching agreement on key terms, and conducting a thorough competition law assessment under the Sustainability Guidelines (including gathering sufficient evidence if relying on Article 101(3)). A potential agreement needs to be sufficiently thought through before the Commission is likely to feel informed enough to issue public guidance. That being said, the regulators have stressed they do not want to make approaches overly burdensome for companies or to force companies to incur excessive costs before they engage informally. Therefore, as experience in the new Guidelines matures, we expect considerable flexibility from the Commission and other European competition authorities in their review processes, as well as a willingness to engage in constructive informal dialogue with parties early on.

It is noted that there is some trepidation that the EU's policy focus on sustainability could decelerate under the new Commission administration, considering the region's pressing demands in defense and economic development. However, whilst a collaboration may fall further back in the Commission's queue, it is the authors' expectation that testing its new Sustainability Guidelines will remain high on the Commission's agenda.

Considerations for international collaborations

In practice many sustainability collaborations will involve parties with international activities, with potential spillover effects into other markets. Thus, whilst a collaboration might be deemed to comply with the EU rules, the parties should take steps to also assess the antitrust risk in regimes that apply divergent tests or are less accommodating of sustainability cooperations.

US laws provide no exemption or additional latitude for sustainability agreements. Thus sustainability agreements with potential impacts on the USA or involving US parties should be carefully assessed, particularly as the risk of heightened scrutiny and investigations for alleged "sustainability cartels" is generally expected to increase under the new Trump administration. In practice, some international collaborations may require adopting more conservative structures or measures to ensure that the agreement complies with the "black letter" of traditional US antitrust rules that would apply in a non-sustainability (i.e. purely commercial) context.

Additionally, even in new regimes that are welcoming of sustainability cooperations, key differences should be taken into account when assessing risk and developing the agreement and implementation protocols (to illustrate, whilst the UK is expected to broaden its regime when it has more decisional experience, for now the UK guidance is limited to environment and climate agreements, and does not extend to broader sustainability objectives such as social initiatives).

Finally, parties may also need to consider whether it is advisable to approach multiple authorities for guidance. This would involve weighing up the value of additional legal certainty against potential downsides, such as different evidential thresholds, the risk of inviting conflicting public statements, and the additional costs and timing impacts of such a strategy. In practice, applying a "highest common denominator" approach to agreement structuring and application may mitigate this risk in multi-region agreements.

Conclusion

The new Sustainability Guidelines represent a paradigm shift in EU competition law, reflecting an encouraging integration of long-term sustainability considerations. By providing a clearer legal framework, the Guidelines should facilitate responsible collaboration while maintaining robust competition in the EU. For businesses, this presents an opportunity to contribute to shared environmental and social goals with greater confidence and compliance.

Germany

Sustainability collaborations – Observations from Germany

By Tilman Kuhn of White&Case

International conferences such as COP27 deliver bold commitments to tackle climate change. International institutions like the EU set up programs like the "Green Deal". However, it is largely up to national governments and international authorities to put in place the policies to achieve them. This opens the door to divergence, harming the chances of collective success. Competition policy across Europe provides robust evidence for this.

On the one hand, corporations must take their own steps towards climate change to avoid facing the wrath of their stakeholders. On the other, individualized action is not the answer to minimizing environmental damage. Ambitious sustainability goals require fundamental paradigm shifts; countless facets of business patterns across whole industries need to be adapted or reinvented. It would take decades to regulate every one of these changes through lengthy, bureaucratic legislative procedures. Legislative action cannot be the ultimate solution, and certainly not the only one. Therefore, cooperation between corporations is key, and the impact of such cooperation rarely stops at national borders.

Regulators can – and should – play a role in these exercises. They have the power to put in place frameworks which allow corporations to work together towards beneficial societal goals, whilst continuing to have the best interests of consumers in mind.

However, competition authorities across the European Union (**EU**) are at odds as to the appropriate course of action. Whilst some have been pushing for more leeway to let companies cooperate to meet targets, others are more reluctant to "open pandora's box" and consider public policy considerations in their assessment of competitor collaborations – such as the German competition authority, the Bundeskartellamt (Federal Cartel Office – "**FCO**"). This is where the European Commission ("**EC**") should step in and create a proper EU-wide framework.

EU legal framework

In the EU, the legal framework for assessing sustainability initiatives has evolved. In June 2023, the EC revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements ("**Horizontal Guidelines**"). These now also include a chapter on how to deal with sustainability initiatives.

The Horizontal Guidelines use a broad definition of "sustainability" so as to include social objectives (*e.g.* labor and human rights), as well as environmental initiatives. The EC also takes a broad view of the "benefits" that are relevant to the competitive analysis, including: (i) individual use value (*e.g.*, improved product quality or variety); (ii) individual non-use value (where the consumers' use experience with the product is not

directly improved, but consumers value the impact of their sustainable consumption on others); and (iii) collective benefits (where, irrespective of the consumers' individual appreciation of the product, objective benefits accrue to a larger group of which the consumer is part). The Horizontal Guidelines provide examples of four type of agreements that are unlikely to raise competition concerns. These examples are merely illustrative and non-exhaustive: (i) agreements that aim to comply with legally binding international agreements whether they have been implemented by national law; (ii) agreements that do not concern the economic activity of undertakings but their internal corporate conduct; (iii) agreements to set up a database containing general information about suppliers that have (un) sustainable values chains; and (iv) agreements between competitors relating to the organization of industry-wide awareness campaigns raising customers 'awareness of the environmental impact or other negative externalities of their consumption.

The Horizontal Guidelines also introduce a "soft safe harbor" for sustainability standards. A sustainability standardization agreement is unlikely to raise concerns where it secures transparency, open and non-discriminatory access, voluntary participation, freedom to adopt a higher standard and does not involve exchange of commercially sensitive information. At the same time, at least one of the following conditions should be satisfied: (i) the sustainability standard must not lead to a "significant" increase in price or "significant" reduction in quality of the products; or (ii) combined market share of the participants must not exceed 20% on any relevant market. Sustainability standardization agreements will raise competition concerns if they restrict competition by object or lead to "appreciable actual or likely negative effects on competition".

The Horizontal Guidelines encourage companies to rely on the EC's Informal Guidance to provide clarity on "novel or unresolved questions on individual sustainability agreements".

Overall, compared to the expectations and approach taken by other (national) competition authorities, the guidelines are slightly underwhelming with their strong focus on standards, but they do open the door a little bit to a novel approach to recognizing out of market efficiencies. Only case-law practice will tell how far the EC will be willing to go to move into new territory and show flexibility.

In addition, Article 210a of the Regulation on the Common Organization of the Markets in Agricultural Products (CMO) came into force on December 7, 2021. This provides for an antitrust exemption for sustainability agreements between agricultural producers under certain conditions, which the Federal Cartel Office takes into account in its cases. The EU Commission published guidelines on the application of Article 210a CMO in December 2023.

Sustainability considerations in vertical agreements

In May 2022, the EC adopted its revised guidelines on vertical restraints ("**Vertical Guidelines**"), which provide guidance on how to self-assess vertical agreements under EU competition law. When assessing the qualitative criteria for distributors to be part of

a selective distribution system, the Vertical Guidelines specify that sustainable objectives may be taken into account, including (i) climate change; (ii) environmental protection; and (iii) limiting the use of natural resources. Finally, the Vertical Guidelines make reference to the fact that non-compete clauses of a longer duration may be justified in order to offset the investment risk in a project aiming to produce sustainable products or services.

No specific rules in Germany

Germany currently does not have any specific legislative rules or exemptions for sustainability collaborations, and the FCO – contrary to the EC and other national competition authorities in the EU - has also not issued its own guidelines. The German Federal Ministry for Economic Affairs and Climate Action announced in September 2022 that a 12th amendment of the German Act against Restraints of Competition ("**GWB**") shall be expected in this legislative period that will focus on sustainability initiatives. The Ministry conducted a public consultation in that regard which ended in December 2023 and also commissioned a study on Competition and Sustainability in Germany and the EU, which was published in March 2023. The study assesses how antitrust law affects achieving sustainability goals and what options for developments there are. In November 2023, the Ministry also highlighted its role in the adoption of the European Commission's new horizontal guidelines. Repeatedly pointing out the problem, the Ministry reaffirmed its commitment to greater legal certainty and appreciation of sustainability cooperations and the increased consideration of "out of market efficiencies". In March 2024, representatives of the Ministry announced a first draft of the revised legislation with specific proposals regarding sustainability cooperations by approximately the end of April 2024, but such draft has not been presented and given the recent collapse of the governing coalition, any such proposal will be subject to the position of the new government following elections in 2025, so we do not expect any legislative changes in the short term.

By contrast, in Austria, the Austrian Cartel and Competition Law Amendment Act 2021 ("**KaWeRÄG 2021**") includes the aim of increasing sustainability initiatives. Austria was amongst the first countries to formally address sustainability considerations in its legislation. In particular, the KaWeRÄG 2021 introduces the so called "sustainability exception" (Section 2, paragraph 1 KaWeRÄG 2021, reflecting Article 101(3) TFEU): "*Consumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress contributes to an ecologically sustainable or climate-neutral economy*".

Moreover, in September 2022, the Federal Competition Authority ("**BWB**") published its sustainability cooperation guidelines. The guidelines aim to provide more legal certainty for companies that envisage entering into cooperations and cover, *inter alia*, guidance on (i) the scope for application of the sustainability exception, (ii) the parameters companies have to demonstrate and prove with regard to the efficiencies brought about by the cooperation and the indispensability of the restriction of competition, and (iii) the

relevance to demonstrate that the efficiencies brought about are substantial (including in certain cases to quantify qualitative efficiencies).

The BWB acknowledges that it is currently a challenge to provide practical examples regarding the various aspects of the newly incorporated sustainability exception and plans to make the guidelines a "living document" that will be updated in the future. The BWB explicitly encourages companies to reach out early on to discuss potential competition law implications of an envisaged initiative.

FCO practice

The FCO published a note for the OECD Paper on Sustainability and Competition Law, acknowledging that there may be times when competition law and sustainability come into conflict, although this should not generally be the case. The FCO stated that "*it is primarily the task of the democratically elected lawmaker to strike a balance between the opposing interests*". The president of the FCO, Andreas Mundt, positioned himself quite clearly publicly in 2021 – he was "not very happy" about the debate to implement more public interest considerations (including sustainability) in competition law, because public and political interests may change quite quickly. He reiterated his concerns during an interview in May 2023, emphasising that competition law becomes "very politicised", where sustainability is interpreted too broadly, i.e., not only relating to environmental issues, but also broader topics like social and governance issues. In the published FCO annual reports of 2021/2022 and 2022/2023, president Mundt emphasised, however, that antitrust law did not stand in the way of cooperations to achieve sustainability goals – sustainability and competition law rather go "hand in hand".

Public interest objectives in competition law

In the FCO's background paper on public interest objectives in competition law, the regulator acknowledged the work completed by other competition authorities and recognised that "*the issue of a more sustainable use of the resources available to us is moving to the centre of the debate on competition policy*". The contribution of the Dutch competition authority was brought into particular focus in the FCO's background paper.

Assessment of sustainability considerations in cooperation agreements and merger control

The FCO has so far largely given only specific individual guidance to businesses related to cooperation between competitors, rather than issuing more general overarching guidance. The 2021/2022 annual report provided some limited guidance regarding the factors that the FCO has taken into account in its previous decisions, such as the question whether the sustainability criteria have been developed in an open process, whether there is sufficient transparency for consumers, or whether access to the cooperation is non-discriminatory. In the 2022/2023 report, the FCO briefly summarises key points it pays attention to when assessing sustainability initiatives. The FCO focuses on *inter alia*: (i) the severity of the competition restriction; (ii) the initiatives' effects on sales prices; (iii) if the access to the initiative is non-discriminatory; (iv) if the sustainability criteria were

developed in an open process; and (v) if the initiative is sufficiently transparent for consumers ("labelling"); it repeated these in its most recent 2023/2024 report.[355]

In 2019, the German Federal Minister of Economic Affairs overruled the FCO's prohibition of a joint venture between Miba AG and Zollern GmbH & Co KG concerning the market of plain bearings by way of a ministerial authorisation. The minister found that public interests, such as safeguarding know-how and innovation, outweighed competitive concerns, and that the deal contributed to energy transition and thus the achievement of environmental policy goals. In January 2022, the FCO assessed an initiative to introduce fair wages in the banana sector and, separately, plans to expand the animal welfare initiative, "Initiative Tierwohl", finding that these were compatible with competition law, in particular their proposed pricing and financing models. At that time, the FCO encouraged "Initiative Tierwohl" to gradually introduce more competitive elements going forward, upon concern by the FCO, the initiative indeed decided in May 2023 to replace the standard premium with a recommended premium. The FCO emphasised that the initiative was then well-established and thus "*a standard premium for animal welfare does not appear indispensable for implementing the initiative and observing animal welfare criteria*". In respect of the banana sector initiative, there are plans to agree to voluntary common standards and strategic goals in order to introduce responsible procurement practices and develop processes to monitor transparent wages. Importantly, no competitively sensitive information will be exchanged, nor are compulsory minimum prices or surcharges to be introduced. In March 2022, the FCO assessed and did not have any material competition concerns related to an initiative to increase animal welfare in the milk sector (the "**QM+ program**"). The initiative aims to introduce a label for products that meet certain animal welfare criteria and finance the additional costs via an "animal welfare surcharge" to be paid by food retailers. Participating in QM+ program is voluntary.

By contrast, in January 2022, the FCO found that another sustainability initiative in the milk sector amounted to a price fixing agreement that did not ultimately pursue sustainability goals and infringed competition law.

In June 2023, the FCO did not see any reason for detailed examination of the German Initiative on Sustainable Cocoa ("Kakaoforum") – a joint initiative of public authorities, companies of the cocoa and chocolate industry, retail grocery companies, and NGOs. One of the initiative's main objectives is to help cocoa farmers in Ghana and Côte d'Ivoire earn living wages by encouraging its members to voluntarily commit to individualized minimum prices, quotas, and premium systems to achieve better farm gate prices for the producers. The voluntary nature of the commitment (i.e. lack of a sanctioning mechanism) was particularly important for the FCO. The FCO also took into account that members' commitments were published on an anonymized basis and that the producers' shares account for only a small percentage in price formation along the value chain.

[355] Translation from German original; p. 57 of the Report.

In summary, the FCO is more on the orthodox side of the spectrum, but pragmatic and willing to give informal advice. There are no indications that sustainability collaborations will become a real enforcement priority of the FCO, and we do not expect it to issue specific guidelines on the issues.

Greece
Sustainability and Antitrust in Greece

By Stamatis Drakakakis, Maria Lampadaki, Violetta Meli, and Fenia Grammatikaki, of Zepos & Yannopoulos

I. Introduction

The urgency of addressing environmental challenges has led to a growing focus on the intersection of sustainability and competition law in legal discourse. The achievement of sustainability targets often requires cooperation between undertakings, through agreements or concerted practices. However, such initiatives may potentially lead to antitrust risks and concerns that are not always obvious to the undertakings involved. The crucial question is when such agreements should be exempted or excluded, even, from antitrust scrutiny according to the European Union and Greek competition law.

At European Union level, the European Green Deal[356] has been constituted as a fundamental element of the sustainability agenda of the Union, as it aims at making Europe the first climate – neutral continent by 2050. The EU has also signed the Paris Agreement which was adopted at the UN Climate Change Conference (COP21) in Paris, France, on 12 December 2015 and the UN Sustainable Development Agenda ("Agenda 2030")[357]. Greece is also bound to execute the European Green Deal. The Green Deal promising goal has led the EU executive to reassess its competition policy perception, especially by updating recently the Guidelines on Horizontal Cooperation Agreements ("Horizontal Guidelines")[358] and on Vertical Restraints, as well as the Vertical Block Exemption Regulation[359]. Under these guidelines, it is now clearer how to assess sustainability agreements and how they interrelate with the maintenance of effective competition in the market.

At national level, the Greek legislation, and especially Law 3959/2011 as in force ("Greek Competition Act"), in alignment with EU legislation, prohibits: agreements and practices which restrict competition (Article 1 Greek Competition Act), the invitation to conclude a prohibited collusion and the announcement of future pricing intent with regard to products and services between competitors (Article 1A Greek Competition Act) and the abuse of a dominant position (Article 2 Greek Competition Act). Nonetheless, exemptions can be made for agreements or practices which align with overall public policy objectives, such as the protection of the environment on the basis of Article 1 (3) Greek Competition Act [equivalent to Article 101 (3) of the Treaty on the Functioning of

[356] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021, establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[357] See A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development.
[358] See EC Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), 21.07.2023.
[359] See Commission Notice on Vertical Restraints (2022/C 248/01), 30.06.2022; Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (C/2022/3015), 11.05.2022.

the European Union ("TFEU")]. In this context, it appears that the Hellenic Competition Commission ("HCC") is driving towards an innovative path in depicting ways to assess sustainability initiatives. The Staff Discussion Paper on Sustainability and Competition[360] ("Staff Discussion Paper") made in July 2020 by the HCC, describes the embodiment of sustainable objectives into the objective of competition laws. This paper makes a clear statement towards the recognition of the significance of sustainability into market practices.

In order to present the interaction between sustainability and antitrust legislation in Greece, the present article, first, analyses the legal framework that governs the exemption/ exclusion of sustainability agreements from antitrust law, with an emphasis on exemptions which relate to public policy objectives, the doctrine of objective necessity and the role of standardization agreements in promoting sustainable practices (see below under "Section II"); the second part of the present article provides an overview of the innovative tools which have been adopted by the HCC for the assessment of the compatibility of sustainability agreements with competition law practices (see below under "Section III"); finally, the third part presents the ex-ante and ex post evaluation of sustainability agreements through a presentation of its relevant cases practices (see below under "Section IV").

The analysis of the relevant legal provisions, case – studies and regulatory developments, highlights that antitrust law in Greece (with the appropriate tools) can support businesses in their efforts to pursue sustainable development, while not compromising the preservation of free competition.

II. Exclusion of sustainability agreements/practices from the scope of antitrust legislation

The following sections present all possible exceptions from antitrust scrutiny, deriving from the regulatory context that is in place in Greece, in combination with the findings of the Staff Discussion Paper (made by the HCC in July 2020) as well as the EC Horizontal Guidelines. It is preliminary noted that the Staff Discussion Paper makes "suggestions" and presents "possible approaches" to address sustainability concerns; however, its findings are consistent with the EC Horizontal Guidelines, as well as the Guidelines on Vertical Restraints and the Vertical Block Exemption Regulation[361].

Exclusion mandated by regulation and purely environmental protection activities

Under article 101 TFEU/Article 1 of the Greek Competition Act, certain agreements can be excluded from antitrust scrutiny. National or European regulations can require the

[360] HCC, July 2020, Staff Discussion Paper on "Sustainability Issues and Competition Law", available at https://www.epant.gr/en/information/publications/research-publications/item/2706-staff-discussion-paper-on-sustainability-issues-and-competition-law.html

[361] See Commission Notice on Vertical Restraints (2022/C 248/01), 30.06.2022; Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (C/2022/3015), 11.05.2022.

execution of sustainability agreements for the purposes of achieving environmental and climate goals. For instance, the European Green Deal sets binding environmental goals to be achieved by businesses and in this respect, requires that the said businesses proceed to collaboration agreements to achieve the said goals. The Staff Discussion Paper made by the HCC, highlights and encourages the above. According to the HCC, when sustainability agreements are necessary for the accomplishment of public interest goals relating to climate change, such agreements can be justified under competition law. Specifically, the HCC emphasizes that sustainability measures imposed by regulatory frameworks should be viewed in the context of broader public policy goals, potentially excusing their impact on competition[362]. The same is depicted in the EC's Guidelines[363].

Further, as regards purely environmental protection activities, the HCC notes that sustainability agreements which focus exclusively on environmental protection may be exempted from competition law enforcement if the cooperation is necessary for the achievement of such environmental goals. According to the HCC[364], such agreements should be evaluated on the basis of their environmental benefits and they should not exceed what is necessary for the execution of the intended environmental goals. This is reinforced by the European Commission[365], which accepts a less strict assessment of such agreements where they aim at environmental protection and align with the overall policy objectives of the Union.

Exclusion of ancillary restraints or of objectively necessary practices

Another key reason for exclusion both for EU competition law as well as Greek competition law, is when sustainability agreements are considered as ancillary restraints, necessary for the effectiveness of a broader regulatory framework[366].

Ancillary restraints usually constitute agreements that corollate directly with the main objective of a legitimate contract. This objective could include, for example, the sale of sustainable technologies or products. In particular, according to the HCC[367], agreements which are ancillary to the main aim of meeting regulatory obligations, or meeting sustainability objectives, may fall outside the scope of Article 101 TFEU/Article 1 of the Greek Competition Act.

Further, according to the objective necessity doctrine, certain practices may be excluded from competition law assessment, when they are considered objectively necessary for the achievement of one specific goal[368]. According to the HCC, this is particularly important when individual action would not be sufficient for the accomplishment of public sustainability goals, such as reduction of carbon emissions or the development of

[362] Staff Discussion Paper, Section 2.3.
[363] See EC Guidelines (no.4), paras 528-529.
[364] Staff discussion paper (no.3), paras. 2.2.
[365] See EC Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), 21.07.2023.
[366] Staff discussion paper (no.3), paras 2.1 and 2.3
[367] Staff discussion paper (no.3), para 2.1.3.
[368] The HCC included **this** doctrine in its Staff Discussion Paper as a reason for exclusion from competition law assessment.

technologies which are friendly to the environment[369]. Similarly, the EC Horizontal Guidelines emphasize that undertakings can justify their cooperation under the objective necessity doctrine, on the condition that such cooperation is proportionate and necessary for the achievement of public policy goals.

Standardization agreements

In the context of sustainability, standardization can play an important role[370]. For instance, agreements between companies for setting common standards for products or manufacturing methods which are friendly to the environment, may be seen as contributing to technical evolution, which in turn benefits its consumers, the society and the environment. If such agreements aim at securing quality, security and/or environmental sustainability of a product, they can be considered as contributing to public policy objectives long-term.

According to the HCC[371] standardization agreements can play a significant part in sustainable development, especially when contributing to the adoption of more sustainable practices, such as energy efficiency or waste reduction. Despite that, the HCC rings a bell to companies that intend to implement such practices. Such agreements should not be excessively restrictive and must adhere to proportionality when it comes to achieving the environmental benefits that they aim to achieve[372].

III. Exception of sustainability agreements

The granting of an exception to a sustainability agreement under Article 101(3) TFEU/Article 1(3) of the Greek Competition Act would follow the usual analysis, slightly specialized (see below sections under "3.2" and "3.3"), while special procedural tools have been proposed to respond to sustainability considerations (see below under "3.4").

Substantive tools: specialization of exception conditions under Article 101(3) TFEU/Article 1(3) Greek Competition Act

Under Article 101(3) TFEU/Article 1(3) of the Greek Competition Act an agreement/ practice that falls within the scope of Article 101(1)/Article 1(1) of the Greek Competition Act is exempted from the prohibition if it (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress, (ii) allows consumers a fair share of the resulting benefit, (iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[369] Staff discussion paper (no.3), paras 2.5 and 3.3.
[370] Staff Discussion Paper (no.3) para 2.1.4.
[371] Staff Discussion Paper (no.3) para 2.1.4
[372] Staff discussion paper (no.3) para 2.4.

As national case law has not yet contributed to the interpretation of these conditions with regard to sustainability, they are considered in relation to the case law of the EU courts and the Staff Discussion Paper. As these sources indicate, the aforementioned conditions may be slightly shaped in a different manner when sustainability elements are taken into consideration, as follows:

(i) Regarding the first condition, it should be noted that the European Commission in the past has taken into consideration environmental concerns[373]. This broader approach has also been endorsed by EU courts[374]. As is applicable during the examination of this condition, there should be a causal link between the agreement and the efficiencies that sustainability generates. Also, the benefits that the efficiencies offer should be considered for all users. Therefore, it is essential to find the proper tools that will allow to assess sustainability benefits.

(ii) One issue that arises under the condition of "fair share of resulting benefits to consumers" is how to define the scope of consumers. From the EC Horizontal Guidelines and the EU case law[375] it appears that the emphasis is on consumers of the products in the relevant market and not on the individuals of the particular consumer group. Moreover, the notion of "fair share" for users is interpreted widely, therefore sustainability concerns can be taken into consideration, without being limited to financial benefits only[376].

As per the first two conditions, apart from the Staff Discussion Paper, the HCC jointly commissioned with the Netherlands Authority for Consumers and Markets ("ACM") a technical report ("Technical Report")[377]. The aim was to use tools derived from environmental economics, in order to understand the type of quantitative assessment that could allow the identification of broader social benefits, including environmental sustainability elements.

Specifically, the Technical Report presented various methods that could be used for valuation[378]. Such methods include:

- Methods for environmental valuation using case-specific data, based on market choices (e.g. analysis of preferences based on actual purchases of environmentally friendly products) or hypothetical choices/stated preferences;
- Valuation methods for the estimation and aggregation of case-specific impact (e.g. estimate welfare through the impact on life expectancy);

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[373] See *indicatively* Commission Decision 94/ 986/ EC [1994] OJ L 378/ 37 *Philips/ Osram (Case IV/ 34.252*), para 27; Commission Decision 2000/ 475/ EC [1999] OJ L 187/ 47, *CECED (Case IV.F.1/ 36.718)* paras 55– 7; Commission Decision 2001/ 837/ EC [2001] L 319/ 1, *DSD (Cases COMP/ 34493 etc*), para 148.

[374] *See indicatively decision* CJEU, case C- 26/ 76, *Metro v Commission [1977] ECR 1875*, para 21; joined cases General Court of the EU T- 538, 542, 543 & 546/ 93, *MétropoleTélévision v Commission*, para 118.

[375] (2004) Commission 101(3) Guidelines, para. 87; Case CJEU, C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito SL v Asociación de Usuarios de ServiciosBancarios (Ausbanc) [2006] E.C.R. I-11125*, para. 70.

[376] (2004) Commission 101(3) Guidelines, paras 94, 103-104.

[377] Technical Report on Sustainability and Competition, issued jointly by the Hellenic Competition Commission and the Netherlands Authority for Consumers and Markets, January 2021.

[378] Technical Report on Sustainability and Competition, issued jointly by the Hellenic Competition Commission and the Netherlands Authority for Consumers and Markets, Table 11, p. 54.

- Valuation using data from existing studies and databases (e.g. adjusting willingness to pay to various demographics or using environmental prices concerning all health-related costs from the emission of a substance in a country);
- Valuation derived from stated policy objectives (e.g. use of CO2 prices from the EU Emissions Trading System).

Finally, as the Technical Report notes[379], any effects of restrictions of competition that lead to reduction of consumer surplus should be taken into account during the measurement of sustainability benefits.

(iii) Thirdly, the agreement shall not be more restrictive than necessary. The indispensability requirement is not affected significantly during the assessment of a sustainability agreement. The company is obliged to demonstrate that the sustainability agreement is necessary to achieve the proposed benefits, i.e. that the envisaged goals would not be achieved sufficiently without the agreement.

(iv) the last condition, of not eliminating the competition in the relevant market, is also not affected significantly. Sustainability benefits should not lead to elimination of competition regardless of the extent of the efficiencies that are generated. However, as the HCC points out in its Staff Discussion Paper[380], problematic cases could arise, e.g. a binding inter-company agreement implementing the United Nations Sustainable Development Goals[381] and covering the whole industry could pose a problem, if the companies are not allowed to compete on other parameters of competition.

Regarding vertical agreements, an indicative example where sustainability may appear and be considered for an exception is, in the context of single branding, when a supplier may employ non-compete obligations in order to address a hold-up problem for investments that pursue sustainability objectives. For example, an energy supplier wishes to proceed to a long-term investment for a renewable energy plant, on the condition that sufficient buyers will commit to purchase energy for a longer period. The Commission finds such vertical agreements to be pro-competitive and thus they may benefit from the Article 101(3) TFEU exception, if the supplier's investment has a long depreciation period that exceeds the 5 years[382].

In the past, the HCC has not granted exceptions under Article 1(3) of the Greek Competition Act based on sustainability criteria[383]. The HCC had adopted a restrictive interpretation of the conditions for the granting of an exception, such as in the case of Decision 512/VI/2010[384] with regard to quality-related efficiency gains that would justify the imposition of minimum fees by the Technical Chamber of Greece. However, in these cases the HCC has considered positively broader elements, such as granting an exception for an exclusive supply agreement of the Public Company of Electricity, based on the direct benefits that consumers would enjoy from security in energy supply

[379] Technical Report (no 13), p. 54.
[380] Staff Discussion Paper (no.3), para. 83.
[381] See: https://sdgs.un.org/goals.
[382] Commission Notice on Vertical Restraints (2022/C 248/01), para.316.
[383] Staff Discussion Paper (no.3), Section 2.2.2.
[384] HCC Decision, 512/VI/2010 of 22.11.2010.

(Decision 457/V/2009)[385]. Additionally, in another instance the HCC cleared with commitments the acquisition of Piraeus Port Authority SA by COSCO on the basis of the benefit for the public sector that arises from economic benefits (Decision 627/V/2016)[386]. Taking into consideration the above-mentioned developments this is now expected the HCC practice to be further developed.

Procedural tools: comfort letter and HCC Sandbox

Apart from the aforementioned substantive tools that may assist undertakings in quantifying sustainability benefits, the HCC has introduced procedural tools as well, to facilitate the assessment of the permissibility of an intended activity prior to its implementation.

First, following in the footsteps of the European Commission[387], the Greek legislator has also introduced the provision of "comfort letters" in January 2022 (Law 4886/2022)[388]. Comfort letters may be issued either because the conditions of 101(1) TFEU/Article 1(1) of the Greek Competition Act are not met, or because the conditions of 101(3) TFEU/Article 1(3) of the Greek Competition Act are met. Comfort letters are considered as a useful tool for the assessment of business plans by undertakings that wish to achieve sustainable development targets. This initiative again takes into consideration the small size of most Greek undertakings and their need to acquire financial resources, while maintaining compliance with competition law[389].

The conditions for the granting of a comfort letter are as follows: (i) overriding public interest, (ii) actual uncertainty due to a novel or difficult to solve problem of competition law (e.g. practices that have not previously been examined by the HCC, the European Commission and EU or national courts), and (iii) the agreement/practice is of significant importance for the companies and the national economy[390].

The procedure is considered quite simplified, as it consists of an opinion issued by the General Directorate of Competition and the subsequent issue of a letter of the HCC President within 20 days from the submission of the opinion[391]. However, the comfort letter is not binding for the HCC, which may reexamine in the future the previous comfort letter[392]. In addition, the comfort letter is valid as long as the factual background on the basis of which the letter was issued has not changed[393].

In this context, it is useful to note that the notion of public interest covers goals of sustainable development dealing with the needs of current generations without

[385] HCC Decision, 457/V/2009 of 23.07.2009.
[386] HCC Decision, 627/V/2016 of 26.02.2016.
[387] Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), (2022/C 381/07).
[388] This law introduced new article 37A in L. 3959/2011.
[389] HCC Decision 789/2022, paras 1 and 2.
[390] HCC Decision 789/2022, para 11.
[391] HCC Decision 789/2022 paras 5 and 24.
[392] HCC Decision 789/202, para 29.
[393] HCC Decision 789/202, para 7.

endangering the future ones, the environment, society and economy. The United Nations Sustainable Development Goals are also taken into account. The HCC has also stated that it would be willing to examine the following as sustainable development goals: (i) protection of the environment and limiting climate change through reduction of CO2 emissions; (ii) achieving technological innovation by targeting sustainable development goals (e.g. smart cities); and (iii) defending and reinforcing the green transition of SMEs[394].

Second, the HCC has introduced the Sandbox[395], i.e. a platform that allows undertakings to send to the HCC initiatives that contribute to sustainable development. The HCC can assess the effects of these initiatives on competition and sustainable development. In case of a positive opinion, the HCC can issue comfort letter and allow the implementation of the initiative for a specific period of time and under the HCC's surveillance, if concerns still arise. The HCC may also request market testing or impose further obligations, similarly to a commitments process.

The aim of the HCC is to allow small and medium companies ("SMEs"), which are often found in the Greek market, to implement ideas that they otherwise would not be able to, but may lead to their economic development and the green growth of the economy. Moreover, the HCC acknowledges that the cost of an ex post intervention would be higher and could hinder further development.

The Sandbox covers both multilateral and unilateral conducts across horizontal or vertical levels. It will target initially specific sectors, such as energy, recycling/waste administration, industrial production of consumer goods, production and/or distribution of food, pharmaceutical products, healthcare etc. The assessment will be based on the applicable legal framework, as well as various Key Performance Indicators that concern sustainable development.

The HCC provides with indicative examples, such as a practice where the six biggest super-markets decide to set standards for food producers that will adopt measures regarding the management and avoidance of food waste may be considered positively.

IV. When sustainability agreements fall under the scope of antitrust and merger control provisions

Following the overview of the applicable competition law rules, this Section will focus on the enforcement side and particularly on specific cases where the HCC has taken into consideration sustainability.

When the HCC acts ex post: concerted agreements/practices, merger control and sustainability

[394] HCC Decision 789/2022 paras 17-21.
[395] HCC Decision, 789/2022 – 11 July 2022, for further information: https://www.epant.gr/enimerosi/sandbox.html.

Sustainability agreements clearly shall not constitute a vehicle for anti-competitive agreements/practices; sustainability agreements may still fall under the scope of application of Article 101(1) TFEU/Article 1 of the Greek Competition Act. In this context, the HCC under its inquiry and sanctioning powers (incl. requests for the provision of information and initiation of investigations, as well as the imposition of fines or remedies/commitments on a subsequent level, if an infringement is found) may tackle any doubts that arise ex post from a problematic sustainability agreement or practice[396].

Indicatively, in Decision No. 741/2021[397] the HCC found that ELTEPE, a company holding the sole license, as provided by the Greek State, for the management of waste lubricant oils, had foreclosed its competitors in the market for the operation of alternative systems of administration of waste lubricant oils. The HCC found that ELTEPE abused its dominant position (and de facto monopoly) through the inclusion of exclusivity clauses in contracts with companies of its own group, which hindered third companies from having access to oil supply resources, which they could use as raw material in the operation of their own facilities.

In this decision the HCC highlighted that, sustainability arguments can be brought forth as a defense for an Article 102 TFEU/Article 2 of the Greek Competition Act infringement; however, sustainability benefits should be analyzed as efficiencies that could set off the social cost of any anticompetitive effects[398]. Moreover, the HCC stated that a sustainability defense could be justified in cases (i) where a dominant undertaking's conduct can improve any sustainability issues and (ii) if there are no other less restrictive alternative solutions. In any event, this would be in line with the Greek Constitution and the State's obligation to protect the environment or the State's obligation to plan the country's financial activities with the aim to secure the financial development of all sectors[399].

Nevertheless, ELTEPE's argument that the clauses in question aimed at protecting the environment and ensuring the environmental targets of the country, was rejected. Specifically, the HCC found that ELTEPE did not provide sufficient evidence regarding the benefits for consumers and the increase of the efficiency in the administration of such oils[400]. Eventually the HCC imposed a fine amounting to €111,600 on ELTEPE with regard to said infringement of Article 102 TFEU/Article 2 of the Greek Competition Act[401].

[396] Articles 38, 39, 40, 25B, 25C of L. 3959/2011, as amended by 4886/2022.
[397] HCC Decision 741/2021, 05.05.2021.
[398] HCC Decision 741/2021, para. 227.
[399] HCC Decision 741/2021, para 230.
[400] HCC Decision 741/2021, para 231.
[401] It should also be noted that, although the complaining parties did bring forth the argument of potential infringement of Article 101 TFEU/Article 1 of the Greek Competition Act, the HCC found that the infringing parties were part of the same undertaking and thus did not examine the sustainability argument with regard to the existence of a cartel or collective dominance, see HCC decision No. 741/2021, para. 181.

Finally, although the HCC does not seem to have substantially considered sustainability in the context of merger control, there has been a brief reference in a recent case (Decision No. 861/2024)[402]. However, the publication of the HCC's decision is still pending.

Prevention of potential restrictions: the HCC Sector Inquiry regarding waste collection/recycling

The HCC can also prevent ex ante problematic behavior by identifying it early on, when proceeding to sector inquiries in sectors of the economy (article 40 of the Greek Competition Act).

In July 2021 the HCC launched a Sector Inquiry into the Waste Management and Recycling Sectors in specific categories of waste. The HCC acknowledged this sector inquiry was made inter alia with regard to the protection of the environment, tackling climate change, as well as the introduction of a production model in a circular economy and sustainable development[403].

The HCC aimed to clarify the following competition issues in the relevant sector: (i) bargaining power in each ecosystem of alternative management; (ii) structural links between players on a vertical and horizontal level; (iii) regulatory inconsistencies and barriers; (iv) other barriers to entry; (v) the development of coordinated or non-coordinated effects; (vi) the justification of certain practices based on effectiveness and public interest objectives, such as sustainable development; and (vii) the contribution of the existing market structure to the respective markets.

The HCC published on 23.07.2024 the Interim Report of said sector inquiry, that includes inter alia the following findings:

(a) the identification of several recycling channels, which included end-of-life vehicles, secondhand vehicle tyres, waste of lubricant oils, battery and related waste, packaging waste, electrical/electronic equipment waste and waste from various construction sites. Each of these channels requires a license, to allow the creation of a System of Alternative Management. In this context, the HCC found that there are: (i) barriers to entry, e.g. difficulties to obtain and maintain the license, know-how requirements and ambiguous legislation; (ii) market power and concentration level, e.g. in some channels only one provider is active, contrary to other channels; (iii) potential effects on competition, e.g. in cases where only one provider is found, the substantial market power may lead to non-price abuse of dominance (refusal to cooperate with another provider or imposition of exclusive supply terms), or may lead to providers gaining unfair advantages due to the insufficient monitoring of the main providers.

(b) Another sector where the HCC found issues was waste recycling for ships. The provider that is responsible for the management of a port's waste may impose exclusive

[402] HCC, Press Release, *See here*: Press Release – Examination of the notified concentration concerning the creation of a joint venture by the companies HELLENIC TRAIN and DAMCO ENERGY.
[403] HCC, Press Release, *See here:* Sector inquiry into Waste Management and Recycling

cooperation terms on other providers for several years (average 7-10 years). Although the applicable legislation allows for a limitation of the number of providers that are active per port, the HCC is suspicious that this right is being exploited in Greece, in order to reinforce exclusive cooperations with specific providers, thus excluding competitors from this market. This exclusivity may also have a subsequent effect on price, quality of services, less investments in new technologies, insufficient provision of services to ships and difficulty to control the providers' activities[404].

V. Closing remarks

The introduction of the updated EC Horizontal Guidelines has further shown the need for national competition authorities to consider sustainability as part of their competition law assessments. The HCC has been one of most active authorities that undertook related actions, in order to encourage and facilitate the adaptation and practical implementation of sustainability, such as with the Sandbox, while also the Greek legislator quickly introduced the possibility of issuance of comfort letter.

However, on an enforcement level, as shown above, the HCC has only started to take into consideration sustainability as a way to justify a potentially anticompetitive conduct, in contrast to its previous narrower position. Nevertheless, even in these few cases there can be found positive elements that indicate the HCC's intention to truly consider goals of sustainable development. This is definitely a space to watch, as the HCC will be expected to increase its activities in this area.

[404] For the Interim Report, *see:* HCC, Press Release, July 2024, Interim Report of the Sector Inquiry into the sector of Administration of Waste and Recycling, available here.

India
Can the CCI give a push to India's ESG Story?

By Naval Chopra, Rohan Arora, Raveena Kumari Sethia, Shivek Sahai Endlaw and Aryan Uppal[405] of Shardul Amarchand Mangaldas & Co.

India's unique growth story pivots at the juncture between traditional economic growth and socio-environmental impact as a result of that growth. On the one hand, the Indian economy is growing across industries and services, but on the other, there remain significant challenges in harmonious and unanimous adoption of core ESG[406] principles.

Various sectoral regulators in India have made a push to incorporate ESG measures into their existing regulations and policies. For instance, the Securities and Exchange Board of India (***SEBI***) has introduced its guidance note on Business Responsibility and Sustainability Reporting, which requires the top 1,000 Indian listed companies to disclose information relating to ESG measures and generally calls on businesses to provide sustainable goods and services.[407]

Separately, the Indian government has also introduced the Sovereign Green Bond scheme which aims at integrating India's financial markets with global green finance initiatives.[408] Under the Companies Act, 2013, entities are already required to integrate social welfare into their business operations and benefit stakeholders of the community as part of their business operations, through "corporate social responsibility" spending.[409]

Despite these regulatory initiatives, the implementation of ESG policies in India largely continues to be underwhelming and highly dependent on individual company commitments as opposed to industry-wise. Stakeholders have also expressed reservations in collaborating with their peers to form harmonious ESG-specific policies that could be followed on an industry-wide scale, citing concerns of potential scrutiny by antitrust authorities.

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[406] Environmental, social and governance (***ESG***) can best be understood to be a notion relating to sustainability, specifically regarding a community's utilisation of available resources while ensuring that the availability of these resources for future generations is not compromised or diminished. As such, this concept of sustainability envelopes various kinds of activities which fall under the broad pillars of economic, environmental and social development. Some examples of these activities include reducing food wastage, reducing pollution, limiting the use of natural resources, addressing climate change and so forth.
See: European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (paragraph 517, page 146)<available here>

[407] Securities and Exchange Board of India, Guidance Note for Business Responsibility & Sustainability Reporting Format <available here>.

[408] Government of India, Framework for Sovereign Green Bonds <available here>.

[409] CS Rajiv Jha, 'ESG Board's Responsibility – India and Globally' (Chartered Secretary, October 2023) <available here>.

To remedy this scenario, several competition and antitrust authorities have issued guidance or protocols in terms of assessing 'agreements' involving ESG measures. The Competition Commission of India (***CCI***) is yet to follow suit. There are no guidelines or regulations published by the CCI which address the needs of businesses who wish to collaborate to achieve ESG goals.

In this background, this paper explores whether the CCI can give a push to India's ESG story, and if so, how.

Where is India Inc. in the race for ESG and where are the road bumps?

India Inc. has been adopting a bullish approach to integrating ESG policies within sourcing, governance, manufacture and impact frameworks. This goes above and beyond mandatory reporting requirements and extends to viewing ESG as a crucial consideration in company management.

For example, a recent study where over 85 percent of respondents were from companies with annual revenue of over $1 billion, found that 65 percent of Indian businesses are engaged in ESG reporting compared to 62 percent in Singapore, 53 percent in Hong Kong, and 41 percent in China.[410] For a comparatively developing economy, these numbers indicate that ESG reporting is proactively being integrated into the corporate DNA.

In another study,[411] a survey was rolled out to 150 organisations across the country (of which, more than 70 percent were listed, 67 were multi-national corporations, and 7 percent were public sector undertakings) and responded to by top management. The study found that 88 percent believed sustainability regulations will directly impact their businesses. More than 75 percent agreed that ESG is a boardroom discussion and nearly 90 percent believed ESG reporting will improve brand reputation. Interestingly, it was also reported that only 15% of organisations' suppliers are ESG ready.

In fact, even amongst startups, focusing on ESG strategy is gaining momentum. Investors no long look solely at financial viability of the startup, but also consider long-term returns based on ESG parameters.[412] India's ESG investments have grown from $330 million in 2019 to $1.3 billion in 2023, and consumers are increasingly favouring socially conscious brands.[413]

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410 DBS Bank, 'Pivotal – How treasury and finance enable the new era of globalization' (2024)<available here>

411 Deloitte, 'ESG preparedness survey report' (May 2023)<available here>

412 Alka Jain, 'VCs shift focus on ESG norms, not just 'financial parameters' for startup funding' (Mint, 4 April 2024)<available here>

413 Shariq Khan, 'India among the world's first to standardise ESG disclosures; new SEBI measures to improve transparency: ESGDS' Ramnath Iyer' (Economic Times, 2 April 2024)<available here>

Yet, India ranks 176 in the Environmental Performance Index and 133 in the Climate Change Index.[414] India generates 5.5 million tonnes of single-use plastic waste despite banning the use of certain types of single use plastic.[415] It also lags behind the global average of 23.3% women directors in the boardroom, in terms of governance.[416] Further, in FY 2023, companies corporate social responsibility budgets grew slower than their annual profits.[417]

These statistics display an opportunity for India to grow into an ESG powerhouse. However, for industries to come together and take collective action, there needs to be a roadmap and initiative from associations and key firms to alleviate concerns for businesses who fear falling prey to a 'first mover disadvantage'. These issues may be better tackled through industry-wide initiatives, rather than simply waiting for regulatory mandates to trickle down to the supply chain.

Can the CCI intervene?

Several competition / antitrust authorities have taken stock of ESG collaborations and issued guidance or protocols for private firms. This includes the European Commission (***EC***), and national authorities in the UK, France, The Netherlands, Australia, and Greece.[418]

Despite India Inc. implementing ESG initiatives, the CCI has not issued any such guidance or protocols as yet. We believe that such guidance and protocols from the CCI and possible amendments to the Indian Competition Act, 2002 (***Competition Act***) may help encourage initiatives to collaborate on ESG policies at an industry-wide scale.

Interpreting the Competition Act: Section 3 of the Competition Act *presumes* agreements or arrangements between competitors to be anti-competitive. The burden of proof is on the defendant to prove otherwise, and is rarely met in practice. A limited exception to anti-competitive horizontal agreements is entering into an efficiency enhancing joint venture.

Although the Competition Act itself does not provide guidance on what may qualify as an "efficiency enhancing joint venture", certain provisions may be read expansively to include a consideration of ESG policies. For example, Section 18 of the Competition Act iterates one of the duties of the CCI to protect the interests of consumers. Further, Section

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414 'Environmental Performance Index' (Yale Centre for Environmental Law and Policy, 2024)<available here>

415 Siddharth Ghanshyam Singh and Minakshi Solanki, 'How bad is India's single-use plastic crisis?' (Down to Earth, 26 February 2024)<available here>

416 Deloitte, 'Women in the boardroom: A global perspective' (March 2024)<available here>

417 Manju Paul and Niti Kiran, 'India Inc.'s spending on CSR hit a speed bump in FY 23' (Mint, 17 May 2024) <available here>

418 While the German antitrust authority has not issued any guidelines regarding requirements for sustainability cooperation, it continues to assess matters on a case-by-case basis and where it feels that the collaboration does not raise concern, their it does not initiate proceedings against the parties.
See, Hogan Lovells, 'ESG and Antitrust law: Sustainability in the focus of antitrust authorities - and legislators?' (Lexology, 23 July 2024) <available here>.

19(3) of the Competition Act outlines factors to consider whether agreements cause an appreciable adverse effect on competition – some of these factors include improvements in production and distribution of goods and promotion of technical, scientific and economic development. Even Section 20(4) of the Competition Act sets out certain positive factors such as innovation, economic development, and benefits of a combination to consumers and society as a whole which can be taken into account while assessing ESG-enabling combinations.

One may argue that incorporating ESG guidelines into the Indian antitrust regime would lead to the promotion of technical development by encouraging adherence to 'cleaner' industry standards, and eventually consumer interest by accounting for beneficial environmental / social practices. Such initiatives could also be in the larger interest of the State.

Having said that, it would be interesting to observe how a competition authority such as the CCI (which is cognizant of ever-changing landscapes) would account for collaboration on account of ESG initiatives and weigh that against the statutory test for cartelization.

Consideration of non-statutory factors by the CCI in its decisional practice: While integrating ESG principles into the existing framework is untested, the CCI has previously accounted for non-statutory factors in several cases, especially while assessing penalties.[419] The CCI has been cognizant of the economic impact faced by the industry, costs of raw materials, profile of employees, low margins, etc. while assessing conduct. For example, in various decisions:

- the CCI noted that the MSME[420] sector was already under stress, which had worsened due to the COVID-19 pandemic, and thus in the interest of justice, refrained from imposing any monetary penalty. [421]
- interestingly, in a case concerning cartelization in the paper industry, the CCI adopted a sympathetic approach and imposed a nominal penalty on firms, noting that during the COVID-19 pandemic most of their customers moved to virtual modes, reducing the need for paper and thereby affecting the paper business significantly.[422]
- the CCI refrained from imposing penalties on film associations for alleged cartelisation since they were formed by daily-wage earners and craftsmen.[423]

[419] Pallavi Shroff, 'Sustainability and Competition Global Practice Guide' (LexMundi, 6 September 2022) <available here>.
[420] Micro, small and medium enterprises.
[421] Competition Commission of India, In Re: *Federation of Corrugated Box Manufacturers of India* v. *Gujarat Paper Mills Association,* Case No. 24 of 2017.
[422] Competition Commission of India, In Re: *Anti-competitive conduct in the paper manufacturing industry,* Suo Motu Case No. 05 of 2016.
[423] Competition Commission of India, In Re:*Vipul Shah v. AIFEC and Ors*., Case No. 19 of 2024

- the CCI has also considered factors such as lessening per capita demand, rising input costs, low value of products, low margin/ profit in sale of the product, and competition from cheap imports, as mitigating factors when determining penalty amounts.[424]

Even the National Company Law Appellate Tribunal has considered the economic hardships faced by the domestic tyre industry in the face of rising input costs, while remanding a matter to the CCI to re-consider penalties.[425]

These examples outline how the CCI has continuously been cognizant of on-ground circumstances. While the CCI may not consider such factors sufficient to condone a legal violation, the CCI has recognized their impact and their commercial viability. While the CCI has not explicitly discussed the impact of ESG policies in assessing enforcement matters, while considering mergers and acquisitions, the CCI has taken account of how ESG policies may impact the market. For example, while approving the proposed acquisition of NFCL Assets and 100% shareholding of ZeroC by AMG India, the CCI accepted submissions that an ESG mandate may impact whether green and non-green ammonia may be substitutable.[426]

Despite its consideration of non-competition parameters, the CCI remains bound by the Competition Act. While one may argue that efficiency defences may be invoked for implementation of ESG-related collaborations, there are several challenges which plague such an approach.[427] To encourage industry-wide collaboration for ESG initiatives, simply expecting a reduction in penalty upon scrutiny by the CCI is not enough.

COVID-19 guidance: During the COVID-19 pandemic, the CCI was cognizant of the need for competitors to collaborate to deal with the ongoing crisis. Therefore, to alleviate concerns, for the first time, the CCI issued a notice[428] stating that competitors may collaborate to address the ongoing crisis.

However, it also clarified that businesses looking to make collaborative arrangements should not exploit the crisis situation for violating any provisions of the Competition Act. The advisory further stated: "*These provisions will inform the decisions of the Commission. However, only such conduct of businesses which is necessary and proportionate to address concerns arising from COVID-19 will be considered*."

Therefore, the CCI has, in fact, considered the need for competitor collaboration to enhance efficiency, albeit in an exceptional circumstance. It could be argued that there is precedent to extend that logic to ongoing ESG concerns and similarly consider the need

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[424] Competition Commission of India, In Re: *Cartelisation in respect of zinc carbon dry cell batteries market in India,* Suo Motu Case No. 02 of 2016.

[425] National Company Law Appellate Tribunal, *Ceat Ltd v. CCI & Ors*, Competition Appeal (AT) 05 of 2022.

[426] Competition Commission of India, Combination No. C-2024/02/1111.

[427] Rohan Arora and Shivek Sahai Endlaw, 'Is Indian Competition Law ESG-ready?' (Bar and Bench, 13 March 2023) <available here>

[428] 'CCI eases rules on competitor collaborations to deal with COVID-19 crisis' (MoneyControl, 21 April 2020). <available here>

for such collaboration to alleviate environmental, sociological and governance issues that may eventually result in better industry practices and consumer welfare.

Concerns around green lighting potential collusive practices

The CCI has been cognizant of changing environmental policies, social landscapes and governance initiatives. In fact, the current Chairperson of the CCI has also previously remarked on the importance of ESG by stating that the CCI must keep its eyes open to ensure that enterprises build green businesses without facing anti-competitive barriers. Additionally, the Chairperson also highlighted the importance of having a clear framework for assessing agreements that have a sustainability dimension to them and iterated that the regulatory response to trends such as ESG must be deliberated to encapsulate a blend of soft law mechanisms and binding orders.[429]

However, a concern weighing on the CCI, is perhaps the fear of 'green lighting' potentially collusive antitrust practices, under the garb of such initiatives. For example, a set of manufacturers could collude to boycott a particular supplier or set of suppliers citing sustainability concerns, in which case they would technically be limiting supply and access to the market for such upstream firms. Or in another instance, the industry may decide to use only a particular solution for a product for environmental reasons, reducing access to the market to all other developers / suppliers of competing solutions, and resulting in a consequent monopoly as a result of this collective action.

In 2011, in a case involving the airline industry,[430] the CCI found that the top three travel agents had entered into an anti-competitive agreement to collectively boycott an airline due to its commission policies, resulting in a dip in the airline's sales. Today, if the CCI were to consider a collective boycott on account of the emissions generated by the airline, it would be difficult to attribute the conduct to ESG considerations without overwhelming evidence, especially if the undercurrent of division in commissions (or other such commercial considerations) was still ongoing.

Further, cases involving firms coming together to understand how to tackle regulatory and government dynamics under the garb of ESG could also be seen to pressurize such bodies to pass resolutions / directions in their favour. Should the CCI find such arrangements kosher, it may send an indirect yet strong message to such governmental and regulatory departments / authorities.

In addition, finding such practices to be legal would also be a partial divergence from precedent. For example, the Beer Cartel case[431] involved industry firms often coming together through the industry association to lobby against various state governments and

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[430] Competition Commission of India, *Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Federation of India & Ors.,* Case No. 03 of 2009.

[431] Competition Commission of India, In *Re: Alleged anti-competitive conduct in the Beer Market in India,* Suo Moto Case. No. 06 of 2017.

excise authorities regarding tariffs. The CCI, based on leniency applications filed and evidence on record, found such practices anti-competitive. Should the CCI now take a view that such collective lobbying for industry-wide initiatives such as ESG is justified, it may lead to a slight divergence from precedent, subject to other facts involved in the case.

Separately, the general risks surrounding industry association meetings (and potential ground for anti-competitive discussions) continue to be at play. There is always a risk that members may discuss their supply strategies, profit margins, granular details regarding their products etc. during such meetings, which may lead to exchange of commercially sensitive information. Accordingly, a competition authority may not want to presume such meetings to be competitive simply because they are being held under the banner of ESG. It is important to remember that these meetings take place between key representatives of competing companies, who have the knowledge and the power to make decisions impacting competitive dynamics.

Approaches available for the CCI to consider

As a result, substantive guidance or a protocol may be helpful to encourage firms across industries to consider collaborative initiatives to further a common ESG goal.

Publishing guidelines: One approach for the CCI to consider would be to publish a guidance note on collaboration for ESG initiatives. This could act as a blueprint for industries to self-assess whether any discussions on ESG initiatives at an industry-wide scale could be viewed as anti-competitive. This is similar to guidelines published by the competition authorities in the UK or The Netherlands.

The CCI itself is no stranger to such a process and has previously published a guidance note on non-compete agreements[432] which parties considered while self-assessing such arrangements. The note contained broad yet comprehensive guidance on the duration of such agreements, scope, territory, products, and parties covered, that the CCI would not consider worthy of additional scrutiny.

The guidance note for ESG could be similar, and may include broad parameters under which such discussions *may* take place. It could include a broad scope of discussions, guidance on items that should not be discussed (for example, granular price / supply / vendor details), term of such arrangements, parties that be covered, etc.

Such guidelines are likely to have several benefits. For starters, they will provide much needed clarity regarding the CCI's position to stakeholders across industries and are likely to facilitate a boom of collaborative ESG initiatives.[433]

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[432] Issued in 2017 but withdrawn in 2020.

[433] Rohan Arora and Shivek Sahai Endlaw, 'Is Indian Competition Law ESG-ready?' (Bar and Bench, 13 March 2023) <available here>.

An advantage of issuing guidelines or a guidance note is that it need not necessarily be brought about by way of an amendment and can even be introduced as standalone regulations, making it speedier to execute.

Consultation mechanism: A second option is that the CCI can open channels of communications that enable industries to approach it with their proposals and seek clarifications on a case-by-case basis. This is similar to the pre-filing consultation process introduced for combinations, where parties can approach the CCI and seek guidance on their proposed transactions.[434]

The EC has also committed to providing informal guidance on measures / issues which raise novel questions. Moreover, the EC has also clarified that sustainability agreements should be subjected to an effects assessment rather than being considered anti-competitive 'by object'.[435] Similarly, the French competition authority invites companies wishing to collaborate on sustainability initiatives to submit their proposals for informal guidance within four months. Through this mechanism, an 'open door' has been created for companies who can easily consult with the authority and seek guidance on their endeavours.[436]

Such a consultation process will allow the CCI to examine each arrangement on a case-by-case basis and provide guidance to parties within the specific contours of the arrangement. It will also help the authority in terms of not being bound by parameters set-in-stone and provide comprehensive advice that is not necessarily curtailed by precedent.

The key disadvantage of such a mechanism is that it will require additional capacity training at the CCI to holistically understand and appreciate the benefits of such collaborative arrangements, while equally being mindful of the principles governing anti-competitive agreements and the limitations of the statute. It will also mean that the CCI will have to consider each arrangement on a standalone basis, which may result in being a burdensome process.

Amendment to the Competition Act: Finally, an amendment to the Competition Act itself can be recommended, to create a statutory foundation for ESG collaborations and to open the door for ESG collaborations to align India's competition regime with international best practices. However, any such amendment would have to be flexible to account for the innovative collations that firms may enter into, and not hamper potentially creative collaborations.

Conclusion and Way Forward

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434 CCI, 'Pre Filing Consultation'<available here>

435 Freshfields, 'Antitrust & ESG: European Commission publishes its final guidelines for businesses collaborating to meet sustainability goals' <available here>.

436 Autorité de la concurrence, Sustainable development and competition, a growing combination <available here>.

Though many firms have benefited from the CCI's holistic and considerate approach highlighted above, it is undoubted that there may be countless benefits from the implementation of: (i) ESG – competition guidelines, or issuance of a guidance note; (ii) a case-by-case consultation process; or (iii) formal amendments to the Competition Act. Implementation of these practices would help bring much needed clarity on how collaborative agreements with ESG / sustainability dimensions are to be assessed.

Having the above stated measures in place would enable certain industries switch to more sustainable practices, which currently cannot be implemented for fear of antitrust action being taken against firms. For example, the use of plastic straws was banned eventually only through government direction in 2022.[437] However, had industry firms had the opportunity to consider more sustainable measures through consultations under the Competition Act, such changes could have been brought about sooner. Authorities such as the CCI may be able to nudge changes through their guidance mechanisms, that at least allows firms to consider collaboration without assuming that such arrangements may be in violation of the Competition Act.

A key industry that could benefit from such initiatives is airlines.[438] Several measures are being taken but on an individual basis. Should the industry collaborate on ESG initiatives, we could expect more fuel efficiency, better flight routes, less weight, and efficient flying techniques.[439] Another industry which stands to benefit from ESG-competition guidance is health care. Having ESG collaborative measures in place could help firms collaborate on measures to reduce medical waste by reducing usage of single use products, at an industry wide level.[440]

Having ESG-friendly measures / guidance on how to interpret collaborative agreements with ESG dimensions would enable firms in any industry switch from current wasteful practices to more sustainable measures. The CCI may potentially be the pivot in India's ESG story by providing guidance or consultation mechanisms to encourage such collaboration.

[437] Ministry of Environment, Forest and Climate Change, 'Ban on Single Use Plastics' (PIB, 12 December 2022) <available here>

[438] World Aviation Festival, 'ESG in the world of airlines' (8 March 2024) <available here>.

[439] Anamika Sinha, 'How airlines can foster environmentally responsible practices: Lessons from major Indian airlines' (Financial Express, 10 June 2024) <available here>

[440] Michelle Williams and Clifford Chance, 'ESG Issues for Medical Equipment & Supplies Companies' (Bloomberg Law, 2022) <available here>.

Mexico

Competition and Sustainability in Mexico: The Legal Landscape

By Carlos Mena-Labarthe[441] of Creel, García-Cuéllar, Aiza y Enríquez

Introduction

In recent years, the intersection of competition law and sustainability has become a focal point for competition authorities and thus for legal professionals and businesses alike all around the world. Mexico is no exception.

In Mexico, the concept of sustainability tends to include environmental protection, social equity, and economic development but the uses of the concept also tend to be erratic. Sustainability goals are often aligned with international commitments such as the United Nations Sustainable Development Goals (SDGs) and others but have their particularities depending on the context of discussion.

As global awareness of environmental, social and governance issues grows, companies are increasingly seeking ways to integrate sustainable practices into their operations. Even when consumers in the country are still not aware of the issues, the trend is currently driven by companies and organizations. In Mexico, this trend is particularly significant given the country's unique social, economic and environmental challenges but in some respects, competition regulation could be considered as an obstacle or a risk for sustainability projects. Of course, competition authorities do not want to be perceived as obstacles to these very important social objectives, and new trends are emerging where competition agencies try to complement or even try to promote sustainability objectives.

The legal risks with some sustainability initiatives are varied and complex. Ranging from the risk of incurring in some reportable joint ventures or standard setting to the risk of incurring in criminal activity for price fixing, the issue is becoming more and more relevant in the country.

This article aims to provide a brief analysis of how competition law in Mexico interacts with sustainability initiatives, mainly environmental sustainability and focus on green agreements, including the analysis of the main risks, and will try to offer specific insights for lawyers and in-house counsel in how to deal with new initiatives.

The Legal Framework

On the competition side, the primary legislation governing competition in Mexico is the Federal Economic Competition Law (Ley Federal de Competencia Economica or LFCE), enforced to date by the Federal Economic Competition Commission (Comisión Federal de Competencia Economica, COFECE)[442]. The LFCE strictly aims to promote free

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[442] The Telecommunications Federal Institute (IFT) is also the competition regulator for telecommunications and broadcasting markets but has no initiatives relevant to this article. A constitutional reform to transform COFECE and

market competition, prevent monopolistic practices, and ensure consumer welfare. There are no other mandates for COFECE.

On the environmental side, Mexico's environmental regulations are primarily governed by the General Law of Ecological Balance and Environmental Protection (Ley General del Equilibrio Ecológico y la Protección al Ambiente, LGEEPA). This law sets the framework for sustainable development, environmental protection, and the use of natural resources. Of course, many other laws and regulations apply to environmental and sustainable development but will not be referred to in this work for lack of space and relevance.

In Mexico, there are other sustainability Incentives for sustainable practices, such as some subsidies for renewable energies, regulations for electric cars, real estate regulations, etc, that can impact competition.

Intersection of Competition and Sustainability

We can identify various points of contact where the intersection becomes relevant, and we can classify them in the following categories:

a. Market Behavior and conduct cases:

One of the key areas where competition law and sustainability intersect is through "green agreements." These are collaborations between companies aimed at achieving environmental goals, such as reducing carbon emissions or promoting recycling. While such agreements can lead to significant environmental benefits, they may also raise competition concerns, particularly if they involve price-fixing, market allocation, or other anti-competitive practices. Mexico has a especially strict regulation of exchanges of information, so the risk is higher than in most other countries.

There is discussion about the important risk of greenwashing where companies falsely advertise their products as environmentally friendly. In Mexico, many schemes of greenwashing have been discovered by the press, consumers or regulators. This can mislead consumers and also distort competition. COFECE can play a role in monitoring and addressing such practices and coordinating with other consumer protection regulators, help in preventing or sanctioning this problematic behavior.

COFECE has analyzed very few cases that touch on the relationship between competition and sustainability. Some of the most interesting are:

Investigation in the Electricity Market: COFECE has investigated anticompetitive practices in the electricity market, which includes the generation of energy from renewable sources. Promoting competition in this sector can facilitate the adoption of cleaner and more sustainable technologies.

IFT and merge them into a new body with more direct relation to the executive branch has already been approved by Congress by the end of 2024. A legal change should follow in the coming months.

This investigation has prevented practices that affect innovation and new technologies and could be considered as indirectly promoting new technologies.

Investigation in the Transport Market: COFECE has conducted investigations in the transport sector, including public and private transport. Competition in this sector can incentivize the adoption of more efficient and less polluting technologies. In the investigation, COFECE analyzed, among others, issues related to old versus new technologies and the impact on sustainability as an effect on consumers.

Investigations in the Agricultural Inputs Market: COFECE has investigated anticompetitive practices in the market for agricultural inputs, such as fertilizers and seeds. Competition in this sector can promote more sustainable agricultural practices and COFECE has identified the issue when analyzing the lack of innovation in specific markets. In an investigation on barley, COFECE identified that companies had not invested in more sustainable processes due to the lack of competition and beer companies agreed and remedied the situation in their supply chain, for example.

Investigations into the Construction Materials Market: COFECE has investigated anticompetitive practices in the construction materials market. Competition in this sector can incentivize the use of more sustainable and efficient materials.

b. Mergers and Acquisitions:

When reviewing mergers and acquisitions, COFECE may consider the sustainability impact of the transaction. For example, a merger that leads to greater efficiency and reduced environmental impact could be viewed favorably. It is an area of discussion to understand if the regulators can introduce such an analysis by expanding the concept of effects on competition and efficiencies as their mandate is very narrow.

Also, high market concentration can stifle innovation, including in sustainable technologies. COFECE must analyze this balance of scale with the need for markets that foster innovation.

COFECE has analyzed various mergers and acquisitions that have a sustainability component, especially in sectors such as renewable energy, waste management, agriculture, and construction. These transactions not only seek to strengthen the companies' market positions but also promote more sustainable and environmentally responsible practices.

Some examples are in the energy sector and renewable energies with the acquisition of Zuma Energía by Actis: Zuma Energía is a Mexican company dedicated to the generation of renewable energy. Actis, an investment fund, acquired Zuma Energía with the aim of expanding its clean energy portfolio in Mexico. Other example in this sector is the merger of Enel Green Power and EF Solare Italia: Enel Green Power, a company dedicated to the generation of renewable energy, merged with EF Solare Italia to strengthen its presence in the renewable energy market in Mexico.

In the waste management and recycling Sector the acquisition of Veolia Mexico by Grupo Rotoplas is an example of assessment of new possibilities to enhance capabilities in sustainable water resource and waste management as the basis for the analysis.

In the agriculture sector, the merger of Bayer and Monsanto, well known for its implications in the agricultural sector, also has a sustainability component. Bayer emphasized to COFECE its commitment to more sustainable agricultural practices and reducing the environmental impact of its operations as an argument for the merger, for example.

c. Consumer Protection:

Ensuring that consumers have accurate information about the sustainability of products is crucial. COFECE can work with other regulatory bodies to enforce transparency and prevent deceptive practices. Knowledge of specific markets can help understand better the issues at hand for consumers and help other regulators to enforce their own laws.

Promoting competition can lead to more sustainable choices for consumers, as companies innovate to meet the demand for environmentally friendly products.

COFECE's Stance on Sustainability

COFECE has recognized the importance of sustainability and has issued guidelines to ensure that environmental initiatives do not infringe upon competition laws. The commission supports collaborations that promote sustainability, provided they do not restrict competition or harm consumer welfare. For instance, COFECE may allow "green agreements" or joint ventures for research and development of green technologies, if they do not lead to anti-competitive behavior.

As there have not been many real-life cases for COFECE to analyze or for the agency to send clear messages on this matter, the agency has decided to use more of its advocacy tools to take a position. COFECE has organized seminars and public forums to openly discuss issues of sustainability and competition. Its most recent publication is the public presentation named "Green Competition Strategy" published on September 25, 2024[443].

The document expressly recognizes the need for a more profound dialogue between society and COFECE on the matter to transition to a new phase of competition policy that addresses the challenges and opportunities of the current social and economic context.

In this document, COFECE has identified future actions that will become part of new policy positions, namely: 1. preparing a report addressing the relationship between competition and sustainability from both the supply and demand perspectives, examining how the sustainability approach affects market structures, entry barriers, and the behavior of economic agents. 2. promote international cooperation with countries that have analyzed the intersection between sustainability and competition. 3. Organize forums for various sectors of society and sign collaboration agreements with environmental

[443] The Spanish Version of the document is available at https://www.cofece.mx/wp-content/uploads/2024/09/EstrategiaCompetenciaVerdeVF.pdf. Consulted on December 6, 2024.

authorities at different levels of the public administration. 4. Analyze the possible incorporation of sustainable considerations in its actions as a competition authority, whether in the development of guidelines and market studies in specific sectors or in the functioning of the institution itself.

COFECE's definition of this strategy constitutes a significant milestone for COFECE in aligning with an important international trend through its advocacy tools.

Conclusion

The intersection of competition law and sustainability in Mexico presents both challenges and opportunities for legal professionals and their clients. Ultimately, the goal is to promote sustainable business practices while ensuring a competitive market that benefits consumers and the environment alike, but the challenge of aligning policies is clear.

With a new president in both Mexico and the United States and a new competition agency in Mexico which still is unclear, the issue of the relation between sustainability and competition may become less relevant in the short term from an agency perspective but could also be relevant in the context of stricter environmental regulations on the long run. The risk could become more important.

The idea of creating dialogue and understanding between actors of both policy initiatives is very relevant. COFECE´s actions on that front will be key if they continue. Cross sectoral engagement and stakeholder engagement becomes more relevant every day. This includes the effort to promote international dialogue and cooperation, even beyond traditional competition fora such as ICN or OECD. The International Chamber of Commerce already has a devoted group working on the issues that can certainly benefit an expansion of its work which needs to participate more in dialogues at national and local levels.

A second stage of determining if sustainability can become part of the competition policy frameworks is interesting to explore, although I worry of an ever expansion of competition policy goals and the deviation of the agencies in their consumer welfare standards.

New Zealand

Competition Law and Sustainability Considerations in New Zealand:

Collaborations for Sustainability Purposes

By Lydia Christensen, Troy Pilkington, Petra Carey and Bradley Aburn of Russell McVeagh

New Zealand prides itself on its environmental credentials, with many New Zealand businesses actively trading on this "clean and green" image. Maintaining this image has been critical to the success of many of New Zealand's leading export industries particularly for the tourism, horticultural, and agricultural sectors. In addition, despite being a small and somewhat isolated country, New Zealand recognises that it must do its part as a global citizen to prevent, and mitigate the effects of, climate change. On 2 December 2020, the New Zealand government declared a climate emergency, signalling to New Zealand businesses its expectations of adopting more sustainable practices. Sustainability is now front and centre for New Zealand businesses not just because it is the right thing to do, but also because of the increasing environmental demands of both overseas consumers purchasing New Zealand goods, and overseas investors who New Zealand businesses often rely on for capital to grow their businesses.

The current "cost of living" crisis following the global pandemic has, however, presented challenges for New Zealand businesses to progress transitioning to more sustainable practices while still producing goods and services that are cost competitive. There is often a real, or at least perceived, "first mover cost disadvantage" for any competitor who individually seeks to transition to more sustainable business practices. Any competitor who embarks on this journey alone risks being unable to recover the necessary investments in an economy where consumers are increasingly cost conscious.

In practical terms, this first mover disadvantage can be overcome by giving competitors the confidence to work together for the greater good. Based on many climate science predictions, time is running out to make a meaningful difference to climate change. The normal market mechanism of firms competing to innovate and introduce products/services that meet the desires of consumers (e.g. products that are produced through lower emission processes) is arguably too slow to see meaningful results, especially in tight economic times.

However, competitors who do seek to work together are exposing themselves to the risk of significant criminal and civil liability under the cartel prohibition in New Zealand's Commerce Act 1986 ("**Commerce Act**"). The combination of the strict application of New Zealand's cartel prohibition, the limited exceptions to the prohibition, the lack of case law on those exceptions, and the lack of clear and binding guidance from the New Zealand Commerce Commission ("**NZCC**") has resulted in a chilling effect on the willingness of the New Zealand business community to work collaboratively with their competitors on sustainability initiatives. This article explores how the New Zealand

competition law legislative and enforcement framework is chilling greater collaboration on sustainability initiatives and outlines the need for the NZCC to show leadership and provide greater comfort to businesses who are seeking to do the right thing. It then concludes by briefly evaluating the Commerce Act law reforms proposed by the New Zealand government in December 2024 to further facilitate beneficial collaboration between New Zealand businesses.

The legislative framework

The cartel prohibition

The Commerce Act's cartel prohibition prohibits competitors from entering into or giving effect to contracts, arrangements or understandings that contain a provision that:[444]

- fixes the price of goods or services that two or more parties to the agreement supply or acquire in competition with each other;[445]
- restricts output by preventing, restricting or limiting the production, capacity, supply or acquisition of goods or services that two or more parties to the agreement supply or acquire in competition with each other;[446] or
- allocates markets by allocating between two or more parties to the agreement:
    - the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other; or
    - the geographic areas in which the parties supply or acquire goods or services in competition with each other.[447]

An arrangement can breach the cartel prohibition even if it has no impact on competition in the overall market – i.e. it is a *per se* offence.

The "collaborative activities" exception

However, New Zealand competition law recognises that there are some limited circumstances under which the inclusion of a cartel provision may in fact be pro-competitive. In recognition of this, there are three key exceptions to the cartel prohibition. Where those exceptions apply, any contract, arrangement or understanding is instead subject only to an assessment of whether it has the purpose, effect or likely effect of

[444] Commerce Act, s 30.
[445] Commerce Act, s 30A(2).
[446] Commerce Act, s 30A(3).
[447] Commerce Act, s 30A(4).

substantially lessening competition in a market – in other words, where the exceptions apply, a rule of reason test is used to assess the legality of the arrangement.

The most relevant exception to the cartel prohibition when considering the ability of competitors to work together in relation to sustainability initiatives is the collaborative activities exception. In order to satisfy the collaborative activities exception, the parties must show that they are cooperating in an ongoing enterprise or venture in trade (i.e. that they are in some form of ongoing collaboration), that the "dominant purpose" of that collaboration is not to lessen competition between them, and that any cartel provision is reasonably necessary for achieving the purpose of that collaboration.[448]

Given it is intended to allow competitors to work together for legitimate (not anti-competitive) reasons, ideally there would be sufficient scope within such an exception to allow competitors to collaborate on sustainability initiatives without exposing them to competition law risk. However, this has not been the experience of many New Zealand businesses. The NZCC has indicated that it will take a technical approach to the collaborative activities exception, including requiring more substantive integration between the competitors to amount to a "collaborative activity" (i.e. competitors each agreeing standards in relation to their separate businesses would not be sufficient), and indicating that it will apply a strict approach to what is "reasonably necessary".[449] The collaborative activities exception was introduced in 2017. Since that time, there have not been any cases decided by the courts on what the collaborative activities exception requires, and so the only guidance available is the NZCC's Competitor Collaboration Guidelines and one collaborative activities "clearance" decision by the NZCC. [450] In many areas of competition law in New Zealand, the lack of local case law can often be overcome, or at least mitigated, by drawing on overseas cases applying similar legal concepts. Unfortunately, however, the New Zealand exceptions to the cartel prohibition, including the collaborative activities exception, are unique and so overseas cases are of limited assistance.

The options available for parties considering a collaboration

When parties are concerned that a collaboration they are considering with a competitor may breach the Commerce Act, they have three options:

(i) seek "authorisation" from the NZCC;

(ii) seek a collaborative activities "clearance" from the NZCC; or

(iii) self-assess the legality of their proposed collaboration.

[448] Commerce Act, s 31; Note that there is a difference between the standard here of "lessening competition" and the standard elsewhere in the Act of "substantially lessening competition" – only a dominant purpose of "lessening competition" is required for the collaborative activities exception to apply.
[449] NZCC. Anytime NZ Limited [2022] NZCC 22.
[450] NZCC. Anytime NZ Limited [2022] NZCC 22.

An "authorisation" and a "clearance" are different in nature. The NZCC may grant an authorisation even where a collaboration is otherwise considered to breach the Commerce Act if the NZCC is satisfied that the public benefits of the collaboration outweigh the detriments to competition.[451] By contrast, the NZCC may grant a collaborative activities clearance where it is satisfied that the collaborative activities exception applies (i.e. that the collaboration does not breach the Commerce Act).[452]

As the regime currently stands, there is a risk that sustainability initiatives are being chilled due to businesses having concerns that the cartel prohibition may apply, and the impractical nature of the authorisation and clearance regimes described above (the challenges and limitations of these options are further discussed below). That is obviously a concern for New Zealand's sustainability initiatives, and is arguably an outcome that is inconsistent with the broader purpose of the Commerce Act, which is to "promote competition in markets for the long-term benefit of consumers within New Zealand".[453] In particular, the fact that the Commerce Act's purpose refers to the long-term benefit of consumers has been interpreted as recognition that the Commerce Act is intended to apply a "total welfare standard"[454] – i.e. to consider the overall economic welfare of New Zealanders, and not just to promote short-term competition between businesses at the expense of longer term economic welfare of both consumers and producers. This means that there should be scope for sustainability to be relevant to decisions made under the Commerce Act where the goals of sustainability initiatives can be demonstrated to be for the long-term benefit of consumers within New Zealand. New Zealand's competition regime recognises that, at times, the specific prohibitions may not consider the overall benefits to the public. The authorisation regime arguably fills that gap, as discussed further below.

The authorisation regime

As noted above, parties can apply to the NZCC for it to authorise conduct, agreements or mergers that would be likely to substantially lessen competition where the public benefit test is satisfied. This requires the NZCC to determine that despite the breach of the Commerce Act, the conduct will result, or will be likely to result, in such a benefit to the public that the detriment is outweighed and there is a net benefit.

The question that follows is how "public benefit" should be interpreted. The key debate in this area in New Zealand has been whether "public benefit" should be confined to economic benefits or whether this could and should be interpreted more broadly to included other societal benefits. Were the purpose of the Commerce Act to solely promote economic efficiency, it would be difficult to argue that the public benefit could be interpreted broadly to include non-economic factors, such as sustainability.

[451] Commerce Act, ss 58, 67.
[452] Commerce Act, ss 65A, 66.
[453] Commerce Act, s 1A.
[454] Or, at least, a "modified total welfare standard". *NZME Ltd v Commerce Commission* [2018] NZCA 389.

However, given the purpose of the Commerce Act, New Zealand courts have determined that "public benefit" is *not* limited to economic considerations. The leading case on this is *NZME v Commerce Commission* ("***NZME***").[455] This case considered the proposed merger of media publishers where an authorisation application was declined on the basis that media quality and plurality would be harmed by the merger.[456] The parties appealed that decision but were unsuccessful on appeal. The Court of Appeal found that, in practice, public benefit has never been limited to purely economic or market considerations,[457] and that "Parliament cannot have intended to exclude [non-economic] considerations where a proposed transaction is likely to cause them".[458] Accordingly, this decision recognises that other non-economic factors may also be relevant, and it is likely that this reasoning would also extend to considering sustainability factors.

While this case law provides helpful flexibility for the authorisation regime to consider sustainability factors, from a practical perspective (in terms of timeliness and confidentiality), the authorisation regime, unfortunately, does not provide a solution to most businesses considering sustainability initiatives with their competitors. This is because the authorisation process is a public process that requires a formal application to the NZCC, a filing fee of 36,800NZD, public submissions, economic evidence, and an average timeframe of around 180 working days.[459]

The "collaborative activities" clearance regime

As noted above, parties to a collaboration could (instead of seeking authorisation) apply to the NZCC for a collaborative activities "clearance" – in effect, seeking confirmation from the NZCC that the NZCC agrees that the collaborative activities exception applies to their proposed initiative.

However, again unfortunately, the clearance regime does not provide a practical solution to most businesses considering sustainability initiatives with their competitors. Reflecting that, despite having been in force for seven years, to date only one business has sought a collaborative activities clearance, and that application was declined by the NZCC. The reasons that the clearance process is not seen as a practical solution for businesses is because it is also a public process that requires a formal application to the NZCC, a filing fee of 3,680NZD, public submissions, economic evidence, and the only clearance process to date took approximately eight months.

NZCC collaboration and sustainability guidelines

The NZCC has identified that there is a risk that the Commerce Act is chilling sustainability collaboration and, therefore, it has released guidelines that attempt to give

[455] *NZME Ltd v Commerce Commission* [2018] NZCA 389.
[456] *NZME* above n 12, at [133]-[134]. The merger was also declined on competition grounds, on the basis that the merger was likely to substantially lessen competition.
[457] At [54]-[68].
[458] At [69]; Chris Noonan "The Future of Public Benefit Test Under the Commerce Act: Part 1" (2020) 27 CCLJ 167, at 168.
[459] Q&A: merger notification and clearance in New Zealand - Lexology.

businesses guidance when considering sustainability collaborations with competitors ("**Sustainability Guidelines**"). In the Sustainability Guidelines, the NZCC acknowledges that collaborations between competitors for the purpose of achieving sustainability objectives may raise issues under both the cartel prohibition (s 30) and the anti-competitive agreement prohibition (s 27).[460]

The Sustainability Guidelines attempt to offer guidance on two things:

1. When collaborations with a purpose of achieving sustainability goals will bring about competition concerns and when they will not. The Sustainability Guidelines clarify (unsurprisingly) that, "Collaboration between businesses in unlikely to breach the Commerce Act if the collaboration does not affect competition between businesses".[461] One of the examples given for this is a transparently developed, non-binding and publicly accessible industry-wide framework for reporting climate-related information. Although this is helpful confirmation, this is not the type of case where guidance is needed. To provide useful guidance and comfort to businesses, the NZCC's guidelines need to provide views on more difficult or "edge" case scenarios. The Sustainability Guidelines also consider the kinds of sustainability collaborations that may raise competition concerns (for example, competitors agreeing on a list of suppliers of sustainable packaging could cause issues if there was an agreement that only suppliers on the list would be used, as this would be market allocation). The Sustainability Guidelines make it clear that the NZCC cannot consider sustainability collaborations any differently to other kinds of collaborations; and

2. When the cartel exceptions may or may not apply in the context of these sustainability collaborations. However, the Sustainability Guidelines do not go far enough to give any real legal comfort as to when the collaborative activities exception will be considered to apply, instead offering various factors which will make the collaborative activities exception more or less likely to apply.

While the NZCC publishing the Sustainability Guidelines was a well-intended initiative, feedback from the business community is that they do not go far enough to give any meaningful comfort to businesses considering sustainability collaborations with competitors. That is particularly the case given that the cartel prohibition is subject to significant civil and criminal penalties (including possible imprisonment), and the NZCC has demonstrated that it applies a very technical approach to the cartel prohibition (taking cartel proceedings even where businesses considered they were acting ethically or for proper reasons). We consider that the NZCC could play a greater role by providing better certainty on which types of collaborations will be an enforcement priority, and which

[460] At [17].
[461] NZCC. Collaboration and Sustainability Guidelines at [23].

types of collaborations it would not consider to be problematic (although we acknowledge that it is limited in its ability to do so).

The NZCC may argue that there are already processes in place which are intended to deliver this type of certainty – i.e. the authorisation process and the collaborative activities clearance process. However, that view fails to recognise that collaborations need to occur on a regular basis and often it is not practical to engage with the NZCC, or a public process, in order to make business decisions. While a collaborative activities clearance or authorisation may be appropriate for a few large scale and long-term arrangements which can justify the time and cost of the clearance process, this is not the case for most collaborations.

Compounding these concerns, while the NZCC can and has published guidelines (as noted above), the Commerce Act does not empower the NZCC to make binding guidance, and the courts have expressly said that the NZCC can depart from its own guidance.[462] Accordingly, NZCC guidelines are not confidently relied upon by businesses. We see merit in express legislative changes that would allow the NZCC to publish binding guidance (or at the very least to require the NZCC to apply its own guidelines in making enforcement decisions). This would allow the NZCC to meaningfully counteract the chilling effects on collaborations between businesses that the Commerce Act currently gives rise to.

Recommendations to better support sustainability collaborations

It appears that the New Zealand Government has recognised the limitations described above. On 5 December 2024, the New Zealand Ministry of Business, Innovation and Employment ("**MBIE**") launched a targeted review of the Commerce Act to promote competition in New Zealand.[463] One of the areas of the Commerce Act that MBIE is specifically seeking feedback on is anti-competitive conduct and how the Commerce Act could facilitate beneficial collaboration. The MBIE discussion document ("**Discussion Document**") specifically refers to industry arrangements to meet net zero targets as one of the ways that competitor collaboration can be beneficial.[464] The Discussion Document sets out a variety of options that could be used to address the issue of competition law chilling sustainable collaborations. These options include:[465]

1. The Commerce Act explicitly giving the NZCC a role in issuing guidance;

2. Empowering the NZCC, on its own initiative, to issue binding rules that create a safe harbour from the prohibitions;

[462] See for example *NZME,* above n 12.
[463] Promoting competition in New Zealand – A targeted review of the Commerce Act 1986 | Ministry of Business, Innovation & Employment.
[464] MBIE Discussion document: promoting competition in New Zealand, a targeted review of the Commerce Act 1986, at 25.
[465] At 26.

3. Introducing a statutory notification regime for specified classes of arrangements;

4. Empowering the NZCC, on its own initiative, to make class exemptions; and

5. Providing an exception for small businesses so they do not have to pay the application fee to the NZCC for an authorisation.

Ultimately a combination of these options may be desirable, but the problem would not, for example, be solved only by seeking to waive the application fee for authorisations for small businesses, as the legal costs and substantial time delays may still act as a disincentive for business. Similarly, legislating the NZCC's role in issuing guidance is unlikely to be significant enough to provide businesses the comfort they need to embark on sustainability collaborations without material Commerce Act risk.

In terms of what we consider would be the better options, we look to the EU as an example of where binding safe harbours can offer businesses increased legal certainty. In particular, the EU's "block exemptions" regime (which allow the European Commission, via regulation, to define particular types of arrangements to be exempt) provides, in our view, better legal certainty for commercial actors on how competition law will apply to them and guidance on the circumstances in which the European Commission will consider that the benefits of the agreement are likely to outweigh the costs.

In the New Zealand context, binding safe harbours could be set up as specific kinds of collaborations that would be deemed to satisfy the collaborative activities exception. This would provide greater commercial certainty by enabling firms to structure their collaborations with confidence in the sustainability space without fear of falling foul of the cartel prohibition, while leaving room for the NZCC to consider whether there is a substantial lessening of competition, if necessary. Giving the NZCC the ability to determine these safe harbours through secondary legislation would also provide the necessary flexibility to amend or introduce safe harbours over time (although it would be important that there are processes in place that do not undermine the objective of legal certainty, such as consultation, both when safe harbours are introduced and before they are removed).

We consider such a binding safe harbours regime would provide the appropriate balance between the promoting competition and promoting sustainability and would better reflect the long-term and total welfare purpose of the Commerce Act. In that regard, the MBIE review of the New Zealand competition law regime is timely and provides a significant opportunity to develop competition law in a manner that acknowledges modern-day issues, like climate change, which are expected to benefit from greater competitor collaboration.

Portugal

Portugal's Green Compass: Sustainability Agreements in the Portuguese Competition Authority's Guide

By Inês F. Neves and Joana Fraga Nunes[466] *of Morais Leitão*

1. Introduction

Between 28 May and 20 June 2024, the Portuguese Competition Authority ('PCA') conducted a public consultation on a draft Best Practices Guide on Sustainability Agreements ('PCA's Guide')[467], accompanied by a summary sheet of the Guide (both in draft form). The final version of the Guide (and the Summary Sheet) was published in August 2024, incorporating contributions from stakeholders made during the public consultation[468].

The PCA's Guide demonstrates the Portuguese authority's commitment to the United Nations' 2030 Agenda for Sustainable Development[469]. Furthermore, it contributes to the wider debate surrounding the role of competition law in the broader context of the European Union's ('EU') and Member States' commitments to the 17 Sustainable Development Goals ('SDGs') and the Paris Agreement.

The Guide, which is not limited to the domain of "green sustainability", but rather adopts a comprehensive notion of sustainability, contributes to the mitigation of the prolonged silence that separated the PCA from other national competition authorities. While it helps to mitigate this distance, it does not eliminate it. As will be demonstrated, the substantial divergence between the Portuguese Guide and the more progressive and environmentally focused stance of some of its European counterparts is evident.

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[467] The full documentation of the public consultation, including the initial and final versions of the Guide and the Summary Sheet, the report of the national competition authority, and the contributions from interested parties, can be accessed here: ‹https://www.concorrencia.pt/pt/consultas-publicas/consulta-publica-sobre-guia-de-boas-praticas-sobre-acordos-de-sustentabilidade›, last accessed 05.12.2024.

[468] The public consultation procedure serves to reinforce the legitimacy of the Guide. According to Matthias Uffer, "Competition Law", *Brill | Nijhoff eBooks* (2023) <https://doi.org/10.1163/9789004509382_011>, "Economic participation aside, democratic participation in its broadest sense is of similar importance: participation helps reaffirm the legitimacy of an (evolving) competition law enforcement, not just through democratic legislation (which is the exception), but for instance also through public discourse, reports by competition authorities, detailed consultation procedures, informal exchanges of authorities with undertakings (rather than a command-approach), assessment of social support for certain measures", p. 284.

[469] See Resolution adopted by the General Assembly on 25 September 2015, 70/1, Transforming our world: the 2030 Agenda for Sustainable Development. It can be accessed here: ‹https://sdgs.un.org/2030agenda›, last accessed 05.12.2024.

In this Guide, the PCA has adopted a cautious approach[470], similar to that adopted by the European Commission, and different from the more positive stance of other national competition authorities[471]. The fact that the Guide merely summarizes the legal framework applicable to agreements between competing companies, without any particular or special treatment of sustainability agreements introduces uncertainty and is also at odds with the mission of national competition authorities in guaranteeing the green transition.

In short, the PCA's Guide lacks certainty and deepness in the analysis of sustainability agreements. It is notable that despite the limited amendments made to the final version of the Guide, several recommendations put forth by the various participating stakeholders during the public consultation process were ultimately disregarded.

Notwithstanding the criticisms that can be levelled at the Guide, and which are detailed here, the PCA's initiative is to be commended, first and foremost, because of the immediate necessity of a framework that can, at least, provide some guidance for companies aiming to engage in pursuing sustainability purposes. Furthermore, the PCA had the opportunity to clarify in the Report on the Public Consultation that its intention is not to discourage sustainability agreements. Rather, it recognizes that, at an early stage, significant investment is required in the production and subsequent marketing of a sustainable product in order to ensure that consumers are aware of the quality of the new product[472]. This acknowledgement, while not eliminating all potential concerns, is crucial for establishing a fundamental foundation.

It is important to recognise that competition law cannot prohibit any and all agreements that restrict competition. The pursuit of a sustainability objective, particularly at an early stage when there may not yet be sufficient "consumer willingness to pay" and when companies may lack the necessary incentives to innovate independently, may require a collaborative approach. It is not within the purview of competition law to impede the realization of sustainability objectives.

In light of this, this article will analyze the PCA's approach to sustainability agreements put forward in its recently adopted Guide. As such, it will commence with a concise examination of the European Union's approach to sustainability agreements, followed by

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[470] For an overview of the National Competition Authorities' Approaches to Sustainability, see, among others, Jurgita Malinauskaite and Fatih Buğra Erdem, "Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities" (2023) 61 JCMS Journal of Common Market Studies 1211 <https://doi.org/10.1111/jcms.13458>.

[471] In the technical report on sustainability and competition jointly commissioned by the Netherlands Authority for Consumers and Markets and the Hellenic Competition Commission – the competition authorities of the Netherlands and Greece -, it is acknowledged that greater societal benefits fall within the purview of a competition authority and can be quantified through established practice in environmental economics. See Hellenic Competition Commission and Netherlands Authority for Consumers and Markets, "Technical Report on Sustainability and Competition" (2021) <https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf>. The Netherlands Authority for Consumers and Markets has adopted a national policy rule on its oversight of sustainability agreements, which, according to legal scholarship, "compared to the Horizontal Guidelines, […] provides more opportunities for businesses to conclude sustainability agreements." See, among others, Helen Gornall, Agnieszka Bartlomiejczyk and Shubhanyu Singh Aujla, "Oversight of Sustainability Agreements in the Netherlands: New Policy Rule Issued by the ACM" (2024) 15 Journal of European Competition Law & Practice 33 <https://doi.org/10.1093/jeclap/lpae001>.

[472] See Report on the Public Consultation, p. 6.

an analysis of the Portuguese Guide and some of its shortcomings. For that purpose, the main criticisms, and suggestions of the participating stakeholders in the public consultation will be analyzed and reflected upon. Finally, it will be argued how the identified shortcomings may be addressed or mitigated through a dialogical approach to enforcement by the PCA.

2. Competition Law and Sustainability in a European Union with Uncertain (Green) Agendas

While the relationship between competition law and sustainability (in particular, environmental sustainability) has been a topic of discussion for some time[473], the advent of ESG (Environmental, Social and Governance) considerations in corporate practice and discourse, alongside the growing perception of sustainability as a core value, driver of demand and competitive advantage, or as a principle that transcends national and European actions and policies, has inevitably prompted a reexamination of the fundamental principles underpinning competition law.

It is well established that competition rules prohibit agreements and concerted practices that restrict competition. Such practices may have a negative impact on parameters such as price, quantity, quality, or innovation. Nevertheless, it is not within the purview of competition law to impose sanctions on every agreement, commitment, or limitation of contractual freedom. Consequently, sustainability agreements pertaining to internal social responsibility factors (such as the reduction of printing or lighting hours) or aimed at ensuring compliance with binding human rights standards will not be subject to the jurisdiction of competition rules. There is no conflict.

The framework becomes more complex when the pursuit of sustainability objectives is (potentially) associated with some restriction of competition or when it could have a negative impact on consumers in the relevant market for the product or service. To illustrate this, the pursuit of a goal of reducing the fat or sugar levels of a given product may entail limiting production. Furthermore, adherence to food welfare standards may result in a reduction in supply, thereby limiting consumer choice. Additionally, the implementation of more sustainable processes may result in an increase in final prices.

It is precisely in scenarios where competition can or is even restricted, and where its potential scope of application is triggered, that the debate over its role in the pursuit of the SDGs becomes more urgent.

Two opposing viewpoints tend to be espoused in this regard[474].

[473] Giorgio Monti, "Implementing a Sustainability Agenda in Competition Law and Policy", *Edward Elgar Publishing eBooks* (2024) <https://doi.org/10.4337/9781802204667.00023>, p. 249. For a state of the art, see, among others, Julian Nowag, "State of the Art in Sustainability and Competition Matters: An Introduction", *Edward Elgar Publishing eBooks* (2024) <https://doi.org/10.4337/9781802204667.00006>.

[474] For a more detailed overview, see Johannes Persch, "Pro-Enforcement Perspectives on Competition Law and Sustainability", *Edward Elgar Publishing eBooks* (2024) <https://doi.org/10.4337/9781802204667.00022>.

The first perspective posits that strict competition enforcement is the "way forward to promote welfare"[475]. In essence, rivalry is regarded as a pivotal driver of higher levels of sustainability, with competition serving as a catalyst for sustainable development in its capacity as a regulatory mechanism for agreements and concerted practices among corporations. It is argued that competition should play a role in inhibiting cooperation, thereby ensuring the potential for sustainability. In this sense, it would not be within the purview of competition policy to relax the framework for agreements that restrict competition, or even to adopt a more permissive stance in this regard. Conversely, individual action would represent the optimal approach towards sustainability objectives. This interpretation of competition objectives and policy is characterized by a conservative, traditional, economistic, and potentially reductive or restrictive approach.

In contrast, a second interpretation gives competition rules and authorities a more active and broader role in the pursuit of sustainability objectives, albeit with varying degrees of intensity or following different paths. This alternative reading considers that the current competition law rules offer possibilities for due consideration of sustainability concerns[476]. This is because competition is read in light of its fundamental principles, which may entail interpreting its rules in accordance with other objectives[477], resolving conflict scenarios, and striving to facilitate regulatory convergence. Under this reading, legal scholarship recognizes that cooperation between companies may be a necessary (or even indispensable) means of addressing negative externalities and responding to market failures. Furthermore, it may serve to bridge the gaps in public policies and regulatory frameworks, and to complement the shortcomings of individualism[478].

The aforementioned duality of positions represents not merely a doctrinal delight, but also a divergence of perspectives among national competition authorities. These authorities have adopted varying approaches to sustainability agreements, exhibiting a spectrum of attitudes, from more progressive to more conservative or skeptical[479].

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[475] Edith Loozen, "Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability" (2019) 56 Common Market Law Review 1265 <https://doi.org/10.54648/cola2019102>.

[476] See, among others, Sarah Legner, "Climate Change and Competition: How Can European Competition Law Promote Sustainability?", *European yearbook of international economic law* (2023) <https://doi.org/10.1007/8165_2023_107>.

[477] According to María Campo Comba, EU competition law provisions must be interpreted "in a manner consistent with the sustainability objectives that the EU is committed to – the sustainable development goals (SDGs), and the EU Green Deal and derived policies" - see María Campo Comba, "EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements" (2022) Erasmus Law Review and SSRN <https://ssrn.com/abstract=4288657>.

[478] See, among others, Kevin Coates and Dirk Middelschulte, "Getting Consumer Welfare Right : The Competition Law Implications of Market-Driven Sustainability Initiatives" (2019) 15 European Competition Journal 318 <https://doi.org/10.1080/17441056.2019.1665940>, who consider that "international cooperation among industry peers can significantly contribute to, and be an absolutely fundamental precondition for, the attainment of the United Nations Sustainable Development Goals" as a result of which Article 101(3) TFUE should be applied in the light of the overall EU Treaty structure and the fundamental objectives of the EU. For an overview of how the European Commission guidelines on the application of Article 101(3) TFEU "could be improved to allow undertakings to assess their agreements in a way that is quantifiable but that goes beyond an economic approach focusing solely on monetary well-being", see Eva Van Der Zee, "Quantifying Benefits of Sustainability Agreements under Article 101 TFEU" (2020) 43 World Competition 189 <https://doi.org/10.54648/woco2020010>. Also, Eva Van Der Zee, "European Competition Law: Measuring Sustainability Benefits under Article 101(3) TFEU", *Edward Elgar Publishing eBooks* (2024) <https://doi.org/10.4337/9781802204667.00033>.

[479] The national competition authorities in the Netherlands, Greece and Austria have adopted a more progressive stance. In Austria, the actions taken have not been limited to the adoption of soft law. For an overview of the sustainability exemption introduced into Austria's national antitrust laws, see Robertson VHSE, "Sustainability: A World-First Green

Despite the advantages of discussion and dissent, which precisely make it possible to reach a more democratic result, the current *status quo* is one of undeniable uncertainty for companies and, by extension, for the future of sustainability.

The contemporary business environment presents companies with a series of contradictory messages. On the one hand, companies are required to demonstrate that they are sustainable, thereby making sustainability the primary objective of their mission and the defining feature of their offering. On the other hand, they are precluding from invoking sustainability as a justification for any sustainability-related decision that would otherwise be deemed unacceptable on the grounds of its adverse impact on economic efficiency or the consumer in the relevant market.

This uncertainty is particularly prevalent in the context of competition law, where the responsibility for assessing the legitimacy of agreements and practices lies with the companies themselves.

2.1. The European Commission's Perspective: Guidelines on Horizontal Cooperation Agreements

The European Commission sought to participate in this discussion through the adoption of specific Guidelines. These Guidelines can be attributed to a number of different factors and developments[480]. On the one hand, the Commission is aware of the pioneering action of some national competition authorities in this area and is therefore keen to avoid being left behind. Furthermore, it seeks to prevent fragmentation by trying to harmonize the level playing field of enforcement across the Member States. On the other hand, the Commission is conscious of its own pledge to facilitate the green transition as set out in the European Green Deal.

The concept of sustainable development as one of the EU's objectives and the standard of a high level of environmental protection are referenced in several articles of the Treaty on the European Union ('TEU'), including Articles 3(3), 3(5), and 21(2)(f), as well as in Article 11 of the Treaty on the Functioning of the European Union ('TFEU')[481].

Furthermore, sustainability constitutes a priority objective of the Union's general policies in particular in the light of the SDGs. In accordance with this commitment, the European Green Deal sets out a growth strategy to transform the Union into a fairer and more

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Exemption in Austrian Competition Law" (2021) Journal of European Competition Law & Practice <https://doi.org/10.1093/jeclap/lpab092>. See also Adrian Kubat and Adnan Tokić, "Sustainability and Competition Law in Austria", *LIDC contributions on antitrust law, intellectual property and unfair competition* (2024) <https://doi.org/10.1007/978-3-031-44869-0_2>. In the United Kingdom, the Competition and Markets Authority is also "increasingly active in exploring sustainability issues both in its publications and in its wider ambitions for global thought leadership" - Simon Holmes, Nicole Kar and Lucinda Cunningham, "Sustainability and Competition Law in the United Kingdom", *LIDC contributions on antitrust law, intellectual property and unfair competition* (2024) <https://doi.org/10.1007/978-3-031-44869-0_12>, p. 204.

[480] For an overview of the factors behind the reinvigoration of an "old debate" on competition and sustainability in EU law, see Suzanne Kingston, "Competition and Sustainability in EU Law: Nearer Resolution of the Old Debate?", *Edward Elgar Publishing eBooks* (2024) <https://doi.org/10.4337/9781802204667.00017>.

[481] With regard to the different forms of ensuring compliance of competition law with Article 11 TFUE see, among others, Julian Nowag and Alexandra Teorell "Beyond Balancing: Sustainability and Competition Law" (2020) 4 Concurrences 34 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4030470>.

prosperous society, with a modern, resource-efficient, and competitive economy. This strategy aims to achieve net emissions of greenhouse gases from 2050 onwards and to decouple economic growth from resource use[482]. In this regard, it is also incumbent upon the Commission to anticipate the emergence of questions and doubts surrounding sustainability agreements and to be at the vanguard of developments in this area.

Irrespective of the motivation, it is evident that the Commission has endeavored to facilitate progress, as proven by the adoption of Guidelines on sustainability agreements[483]. Without detracting from the work that preceded it, 2023 can be described as the year of the Sustainability Guidelines in the European Union. Firstly, the Commission's new Horizontal Guidelines, published on 1 June 2023, include a ninth chapter dedicated to sustainability agreements alone, with a particular focus on sustainability standardization agreements. Subsequently, on 7 December 2023, Guidelines on sustainability agreements of agricultural producers[484] were adopted with the specific aim of elucidating the conditions for applying Article 210a of Regulation (EU) No 1308/2013 of the European Parliament and of the Council establishing a common organization of the markets in agricultural products ('CMO Regulation')[485].

As it might have been anticipated, the Guidelines in question are of a disparate nature, encompassing a distinct scope and, consequently, a varying degree of detail. In the first case (Horizontal Guidelines), no exclusion is applicable to sustainability agreements. The situation is characterized by a greater degree of uncertainty and a paucity of illustrative examples. In contrast, the Guidelines for sustainability agreements in agriculture, due to their stricter personal and material scope, are more developed, including references to a system of opinions that allows producers and producer associations to request an assessment from the Commission regarding the compatibility of their sustainability agreements with Article 210a of the CMO Regulation.

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[482] See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions – The European Green Deal (COM(2019) 640 final), in ‹https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN›. For an overview of the Green Deal's impact on the application of Article 101 TFEU, see Martin Gassler, "Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go" (2021) 12 Journal of European Competition Law & Practice 430 <https://doi.org/10.1093/jeclap/lpab001>.

[483] See Chapter 9 of the Horizontal Guidelines – Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), OJ C 259, 21.7.2023, p. 1–125, in ‹https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023XC0721(01)›. For an overview, see, among others, Margherita Colangelo, "Sustainability Agreements and Competition Law: A Comparative Perspective" [2024] European Competition Journal 1 <https://doi.org/10.1080/17441056.2024.2379139>.

[484] Communication from the Commission – Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013, C/2023/8306, OJ C, C/2023/1446, 8.12.2023, ELI: http://data.europa.eu/eli/C/2023/1446/oj.

[485] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organization of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 OJ L 347, 20.12.2013, p. 671–854, in ‹ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1308›. Article 210a creates an exclusion from Article 101(1) TFEU. It was adopted by the European Parliament and the Council pursuant to Article 42 TFEU. It covers agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a higher sustainability standard than mandated by Union or national law. Such agreements may be either between producers ('horizontal agreements') or between producers and other operators at different levels of the agri-food supply chain ('vertical agreements').

In light of the comprehensive nature of the Horizontal Guidelines and the Portuguese Guide, it is beneficial to delineate the fundamental principles that define the recently introduced chapter on sustainability agreements. In terms of structure, the ninth chapter of the Commission's Horizontal Guidelines is divided into six sections. These comprise (i) an introduction, (ii) a list of sustainability agreements that are unlikely to give rise to competition concerns, (iii) the principles for the assessment of sustainability agreements under Article 101(1) TFEU, including the conditions of a soft safe harbor applicable to sustainability standards, and (iv) the assessment of a sustainability agreement restrictive of competition under Article 101(3) TFEU and its four conditions (efficiency gains, indispensability, pass-on to consumers and no elimination of competition). The chapter concludes with a discussion of the involvement of public authorities and a selection of illustrative examples.

The European Commission begins by acknowledging that there are instances where sustainability agreements are not inherently concerning from a competitive standpoint[486]. Sustainability agreements are not deemed to restrict competition, either (i) when they are designed to ensure compliance with and respect for legally binding national or international regulatory frameworks on sustainability and human rights; (ii) when they pertain to internal business conduct; (iii) when they are intended to guarantee transparency of the value chain without affecting the freedom of action of the parties (for example, the creation of a database containing information on operators with sustainable behaviours and practices); or (iv) when they are aimed at organizing awareness campaigns (distinct from a joint advertising scenario).

The simplicity of the list contrasts with the considerable diversity of contexts in which it is applied. Indeed, while all the scenarios in their purest form do not give rise to doubt, it is possible to envisage sub-hypotheses in which the absence of a restriction on competition is no longer evident. One illustrative example is the agreement to create a database containing information on sustainable companies. While such information may be pooled, it cannot, for the purposes of this safe harbor, be associated with a prohibition or obligation for the parties to source or purchase from operator *x* or *y*, depending on their adherence to sustainability standards.

Having established that none of the pure scenarios of non-application of competition law rules applies, it is then necessary to refer to the dialogue between paragraphs 1 and 3 of Article 101 TFEU. Paragraph 1 prohibits agreements and practices that restrict competition by object (more serious) or by effect (lacking substantial proof of inherent harmfulness). Paragraph 3, in turn, contains the famous economic balance test, which allows certain agreements restricting competition to be justified in light of their (i) efficiency gains, (ii) indispensability, (iii) positive impact on consumers and (iv) non-elimination of competition.

[486] See also, David Wouters, "Which Sustainability Agreements Are Not Caught by Article 101 (1) TFEU?" (2021) 12 Journal of European Competition Law & Practice 257 <https://doi.org/10.1093/jeclap/lpab013>.

The pursuit of sustainability objectives is pertinent at both levels. Firstly, it will justify a retreat from the application of Article 101 TFEU in favour of pursuing an overriding public interest[487]. Secondly, it will frame the distinction between restriction by object and restriction by effect(s), thereby softening the harmfulness associated with the restriction. Such a softening, however, must be applied to the specific case in question, as the Commission rightly notes, given that restrictions on competition by object can also be found in sustainability agreements[488].

The analysis becomes particularly problematic at the second level, namely the justification of a sustainability agreement that restricts competition, under Article 101(3) TFEU. It is evident that certain assumptions are irrefutable. Examples include the assertion that sustainability agreements can contribute to a very wide range of objective efficiency gains; the proposition that efficiency and speed in achieving the Sustainable Development Goals may make it possible to qualify a particular agreement as "indispensable"; and the hypothesis that consumers may perceive the impact of their choices (more or less sustainable) on other citizens. Furthermore, it is important to consider the potential for collective benefits to be enjoyed by consumers in the relevant market, even if they are affected by an increase in prices or a reduction in supply.

Nevertheless, there are reservations and concerns regarding the manner in which the Commission's Guidelines delineate the various requirements of Article 101(3) TFEU, which are essential for the justification of an agreement, and which may be perceived as being inimical to legal certainty[489].

Firstly, the Commission stipulates that the efficiency gains must be objective, concrete and verifiable. This places the burden of proof on the parties to demonstrate a certainty or truth that, with regard to sustainability objectives, may not be within their reach. Given the associated costs of the endeavor, such an approach carries the risk of discouraging any attempt at measurement. Furthermore, there is the question of whether intergenerational justice can even be quantified.

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[487] This interpretation is supported by the *Wouters* case law. See judgement of the Court of Justice of 19 February 2002, *Wouters* (C-309/99, ECLI:EU:C:2002:98, §97). *Wouters* has been described as a landmark judgement, since which "there is a strand in the case law where non-economic considerations were taken account of already at the level of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) itself." – see, among others, Bernadette Zelger, "Environmental and Sustainability Aspects in EU Competition Law: Towards a 'More Economic &Amp;Amp; Ecological Approach' Under Article 101 TFEU?," *European yearbook of international economic law* (2022) <https://doi.org/10.1007/8165_2022_97>.

[488] This is exemplified by agreements that directly pressure competing third-party companies to adhere to a sustainability standard, or, as evidenced by the AdBlue case, agreements between competitors to limit technological development to the minimum sustainability standards required by law. See Summary of Commission Decision of 8 July 2021 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40178 – Car Emissions) (Notified under document number C(2021) 4955 final) 2021/C 458/11, C/2021/4955, OJ C 458, 12.11.2021, p. 16–19, in ‹https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021AT40178%2802%29›.

[489] We concur with Max Hjärtström, "Addressing Sustainability Failures in Economics and Competition Law: Environmental Externalities, Consumers and Quantification", *Edward Elgar Publishing eBooks* (2024) <https://doi.org/10.4337/9781802204667.00018>, stressing that "the market-centric nature of EU competition law, coupled with the fair share criterion presents significant obstacles that may prove insurmountable in practice. Only through further guidance can the true potential of competition law to effectively address sustainability failures be accurately ascertained."

Secondly, the Guidelines stipulate that, irrespective of the circumstances, consumers in the relevant market should be entitled to a fair share of the benefits accruing from the agreement. The limiting WTP ('willingness to pay') test then becomes relevant. It implies that collective benefits (i.e. those that are experienced outside the relevant market, in the interest of society at large) will only be considered if there is a significant overlap with consumers in the relevant market and if they are adequately compensated for the harm incurred[490]. Furthermore, the overlap and compensation must be demonstrated by the parties in question. It is possible that both conditions may become highly restrictive and problematic.

It would be inaccurate to suggest that the Guidelines are entirely without merit. While it could be argued that the Guidelines' cautious stance may result in a continuation of the current state of uncertainty, they are to be welcomed with an open and receptive attitude as a significant step in acknowledging the distinct nature of sustainability agreements.

First and foremost, the non-binding safeguard for standardization agreements pertaining to sustainability is delineated in relatively clear terms[491]. It is believed that this soft safe harbor will undoubtedly facilitate the dissemination of labels or brands associated with compliance with minimum sustainability requirements, thus contributing to the creation of new products or markets for sustainable products, empowering consumers to make informed (and sustainable) purchasing decisions, and promoting a level playing field between producers subject to different regulatory requirements.

Continuing with a more positive vein, it should also be noted that although an opinion system akin to that outlined in Article 210a(6) of the CMO Regulation[492] is not included in the Horizontal Guidelines, this does not preclude companies from seeking the Commission's input in the event of uncertainty. Indeed, the Commission may provide informal guidance through a guidance letter in accordance with its Notice on informal guidance[493]. The procedure applies to novel or unresolved questions, meaning, those where the substantive assessment of an agreement poses a question of the application of the law, where there is insufficient clarity in the existing Union legal framework, as well as a lack of sufficient publicly available general guidance at Union level in decision-making practice or previous guidance letters. It is therefore within the Commission's prerogative to deliver such guidance, provided that it would offer added value with respect to legal certainty[494]. An open-door policy by the European Commission will be

[490] In this sense, see Ronny Gjendemsjø, "Sustainability Agreements and Article 101(3) TFEU", *Edward Elgar Publishing eBooks* (2024) <https://doi.org/10.4337/9781803922591.00014>.
[491] On an optimist vein, see, among others, Roman Inderst and Stefan Thomas, "Sustainability Agreements in the European Commission's Draft Horizontal Guidelines" (2022) 13 Journal of European Competition Law & Practice 571 <https://doi.org/10.1093/jeclap/lpac020>.
[492] The opinion system allows companies to require assistance from the Commission on the compatibility of their sustainability agreements with Article 210a of the CMO Regulation.
[493] Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) C/2022/6925 final, in ‹https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM%3AC%282022%296925›.
[494] This should be considered in light of the actual or potential economic importance of the goods or services concerned by the agreement, as well as the relevance of the agreement's objectives for the achievement of the Commission's priorities. Furthermore, the Commission may intervene if the magnitude of the investments made or to be made by the

key to "provide the answers to all the questions that businesses and others will have on what they can, and cannot, do in this area." We concur with Simon Holmes, emphasizing the necessity of "practical cooperation between the private sector and the Commission to define and develop what the guidelines mean in practice. This will improve both legal certainty for businesses and help the Commission develop its decisional practice."[495]

The comprehension of the Commission's Guidelines and their inherent limitations is crucial for an understanding of the content of the Portuguese Guide. As will be shown, the Portuguese Guide relies heavily on the Commission's Guidelines and therefore suffers from the same and even more serious shortcomings.

3. The Portuguese Competition Authority's Best Practices Guide on Sustainability Agreements

The Portuguese Best Practices Guide on Sustainability Agreements was designed by the PCA to provide companies with information regarding the exemptions, safeguards, and compatibilities afforded by competition rules (both existing and as they have been interpreted) for agreements between competing companies seeking to achieve economic, social, or environmental sustainability objectives[496]. According to the PCA, the Guide, which must be understood in the context of the PCA's advocacy mission, is designed to ensure that *competition and sustainability are reconciled*. According to legal scholarship, "[i]t is undeniable that there is a tension between European competition law and sustainability-focused agreements between undertakings. Whether it should, and how it could, be resolved is less clear."[497]

In accordance with the criticisms that can also be directed at the European Commission, the PCA's Guide is constrained to initiatives and agreements between competing companies and does not delineate the framework and position of the PCA with regard to vertical agreements. This is a cause for concern, given the significance of the value chain in the context of sustainability, and thus the anticipated proliferation of issues pertaining to this category of agreements.

Additionally, the Guide does not address the conduct of business associations (or associations of undertakings), despite their presumed inclusion within the scope of horizontal agreements. In light of the pivotal role of sectoral associations, particularly in the context of mounting regulatory uncertainty and heightened scrutiny, it would be

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relevant undertakings is significant, and if the agreement or practice corresponds or is liable to correspond to more widely spread usage in the Union.

[495] Simon Holmes, "Sustainability and Competition Policy in Europe: Recent Developments" (2023) 14 Journal of European Competition Law & Practice 448 <https://doi.org/10.1093/jeclap/lpad032>, p. 455.

[496] For an overview of the Portuguese Guide, see, among others, SRS Legal Newsletter, 'Sustainability and Competition', in ‹https://www.srslegal.pt/xms/files/Comunicacao/Newsletters/2024/Newsletter_Sustainability_and_Competition_ENG-_.pdf›; Cuatrecasas Legal Developments, 'Reconciling sustainability and competition agreements, in ‹https://www.cuatrecasas.com/en/portugal/art/reconciling-sustainability-and-competition-agreements›; and Ius Omnibus, 'Ius Omnibus responds to the Portuguese Competition Authority's Public Consultation – Good Practice Guide on Sustainability Agreements', in ‹ https://iusomnibus.eu/ius-omnibus-responds-to-the-portuguese-competition-authoritys-public-consultation-good-practice-guide-on-sustainability-agreements/›, all accessed 05.12.2024.

[497] Anna Gerbrandy, "Solving a Sustainability-Deficit in European Competition Law" (2017) 40 World Competition 539 <https://doi.org/10.54648/woco2017035>.

invaluable to delve deeper into the regulatory framework governing the decisions of business associations in the realm of sustainability requirements.

In its Report on the Public Consultation, the PCA justifies this delimitation of the Guide on the grounds of the greater importance and degree of harmfulness of horizontal agreements, as well as the confusion and complexity potentially generated by the introduction of vertical agreements. According to the PCA, vertical agreements should be evaluated in accordance with the European Commission's overarching Guidelines[498]. This response is not satisfactory. Regrettably, the PCA has failed to seize the opportunity to enhance the existing legal framework and genuinely contribute to the legal certainty inherent in its mandate.

In terms of form, the PCA has elected to present its findings and approach to sustainability agreements in the format of a Best Practices Guide, rather than Guidelines. Through the use of a Guide, the PCA demonstrates its specific position on sustainability agreements and a reluctance to introduce novel elements to the existing legal framework that governs horizontal agreements in general. In particular, the PCA does not propose the introduction of an open-door policy, nor does it suggest amending national competition law to provide a legal basis for a specific form of regulatory dialogue[499]. It is also important to note that the PCA does not offer any concrete examples to substantiate its claims, relying instead on examples drawn from existing decision-making practice. In short, the Guide appears to be a synthesis of the recommended practices that, in the context of existing instruments, or perhaps more accurately, in the context of the PCA's restrictive interpretation of competition rules, companies should consider.

While the Guide is not structured into formal chapters, five main divisions are readily discernible. In an introductory section, the PCA provides a brief overview of the relationship between competition and sustainability, delineating the scope of the Guide and the sustainability objectives covered. In a second division, it presents a self-assessment scheme comprising a set of screening questions that companies should take into account. These questions include references to exclusions, safe harbors, and potentially applicable exemptions. Subsequently, the PCA elucidates the implications of the involvement of public authorities in the conclusion of sustainability agreements and finishes the section with a checklist of considerations to be considered by companies when designing and implementing a sustainability agreement. A fourth section is devoted to public procurement. The Guide concludes with a summary of the consequences of non-compliance with competition law rules, as well as a reference to the possibility of filing complaints and requests for leniency.

In consideration of the public consultation process, during which a number of comments were proffered regarding the draft Guide, it is necessary to provide a concise overview of these comments before undertaking an in-depth examination of the Guide's particulars.

[498] For further details, please see the Report on the Public Consultation, p. 17.
[499] This regulatory dialogue would allow companies to discuss the legal and procedural aspects of the collaboration in question with the competent services of the competition authority, in an informal and confidential manner.

3.1. From Draft to Final: an Overview of the Public Consultation Behind the PCA's Best Practices Guide

The PCA's Guide, which was submitted for public consultation, received 12 contributions from a wide range of stakeholders[500]. These included the Office of the Secretary of State for Economic Affairs, the Portuguese Development Bank (*Banco de Fomento*), four business associations, three law firms, two consumer associations and an economic consultancy[501]. The response to the public consultation reflects stakeholders' commitment to sustainability and their call for enhanced legal certainty and security. A successful green transition requires the establishment of a well-defined framework that provides companies with clear guidance on how to integrate sustainability into their business models.

The public consultation brought together various criticisms, reflections, and suggestions. The majority of respondents highlighted three key recommendations: (i) the need for an "open-door" policy of the PCA; (ii) the need for greater clarity and detailed explanation of relevant legal concepts, including through more examples; and (iii) the adoption of a clear methodology for the substantive legal analysis of sustainability agreements. Stakeholders also identified areas where the Guide lack guidance, in particular with regard to associations of undertakings and vertical agreements.

First, the overwhelming majority of stakeholders responding to the public consultation stressed the need for the PCA to adopt an "open-door" policy to help companies navigate sustainability initiatives with competitors. Such a policy would address the uncertainties surrounding the analysis of sustainability agreements by allowing companies to request informal guidance and to submit questions and substantiated concerns to the PCA. The PCA would provide a case-by-case assessment of potential anti-competitive risk, which would then be useful to other companies in the process of self-assessing their sustainability agreements. This recommendation is in line with the practices already implemented in other jurisdictions, namely Greece, the United Kingdom, and the Netherlands[502], as well with the European Commission's approach to sustainability agreements of agricultural producers in light of the powers established by the recently revised OCM Regulation[503].

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[500] Portuguese Competition Authority. (2024). Invitation to the public consultation on May 28, 2024. *Consulta pública sobre Guia de Boas Práticas sobre Acordos de Sustentabilidade*, available in ‹https://www.concorrencia.pt/pt/consultas-publicas/consulta-publica-sobre-guia-de-boas-praticas-sobre-acordos-de-sustentabilidade›, last accessed 05.12.2024.

[501] The associations of undertakings that contributed to the public consultation were AASO, ICC Portugal, GRACE and BCSD Portugal, while the three law firms were Morais Leitão, Cruz Vilaça and Telles. Finally, the two consumer associations were DECO Proteste and IUS Omnibus, and the economic consultancy – Frontier Economics.

[502] For more detail see 'ACM's oversight of sustainability agreements – Competition and Sustainability' (The Netherlands Authority for Consumers and Markets, October 2023) paras 28 ff <https://www.acm.nl/system/files/documents/ Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf> accessed 05.12.2024; HCC – Hellenic Competition Authority, 'Discussion Paper' <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html> accessed 05.12.2024.

[503] Producers or association of producers may request an opinion from the Commission on the compatibility of their sustainability agreements with Article 210a of Regulation No 1308/2013.

Stakeholders expressed different perspectives on the scope of the PCA's powers and competence to review or assess sustainability agreements under the "open-door" policy, though. BCSD Portugal stressed that this mechanism should not replace the responsibility of companies to self-assess the compatibility of an agreement with competition law. GRACE suggested that the PCA's review should be reserved for particularly complex agreements. Similarly, ICC Portugal suggested that the PCA establish a specific contact point within its services and ensure that the review process is streamlined, requiring only essential information from companies. In addition, ICC Portugal recommended that the PCA prioritize assessments, publish results in an accessible manner, and protect commercially sensitive information. The Morais Leitão law firm recommended that the "open-door" policy include safeguards against penalties for companies that seek the PCA's guidance and act in good faith based on its advice. It also advocated for the publication of the PCA assessments, while ensuring the confidentiality of sensitive business information. Ultimately, these reflections highlight the need for a well-structured, transparent and supportive framework to facilitate and promote the continuous improvement of sustainable practices through the establishment of sustainability agreements that are compatible with competition law.

Secondly, stakeholders identified the need for greater clarity in the Guide, as the language used was considered to be overly complex and inaccessible, which posed a significant barrier, in particular for certain sectors (such as agriculture and industry) and small and medium-sized enterprises ('SMEs'). This recommendation covered three main areas for improvement: (i) adopting more positive language, (ii) simplifying technical terminology and (iii) providing additional illustrative examples.

Firstly, stakeholders underscored the importance of framing sustainability agreements in a more encouraging and optimistic tone. ICC Portugal highlighted that explicitly recognizing the benefits to the wider community of companies' involvement in sustainability initiatives could motivate businesses and reduce apprehension about entering into such agreements. Similarly, Morais Leitão and Telles law firms suggested that collaboration and multilateral initiatives to achieve sustainability goals should not be framed in negative or skeptical terms. In this context, they also criticized the inclusion of references to the whistleblowing channel at the end of the Guide, arguing that this was counterproductive and discouraged engagement in sustainability efforts, which is the very purpose of the Guide.

Many stakeholders noted that the Guide uses to much legal and technical language, limiting its accessibility and usefulness to companies and their employees. They argued that the complexity of the language, or rather the lack of simplification of the terminology used, made the document difficult for non-experts to understand, thereby limiting its potential reach and impact on the target companies. To address this issue, DECO proposed the inclusion of a glossary to clarify technical terms and improve the Guide's accessibility to businesses of different sizes. In addition, the Office of the Secretary of State for Economic Affairs requested clarification of certain terms such as "significant price increase" and suggested that metrics or criteria should be provided to define such terms.

It also recommended clearer definitions of key concepts such as the delimitation of markets affected by sustainability standards. Other stakeholders, including ICC Portugal and Cruz Vilaça law firm, highlighted additional legal concepts requiring clarification, such as "horizontal agreements", "concerted practices", "relevant markets", or "indispensability".

Finally, stakeholders also emphasized the need for more practical examples to enhance clarity and to educate companies and their employees. In particular, while the *Guide* provides examples, they lack sufficient variety and depth and most of them are copies of the examples provided by the European Commission in its *Horizontal Guidelines*. In this respect, ICC Portugal and AASO suggested the inclusion of examples from decisions of other national competition authorities, accompanied by brief explanations of the reasoning behind their assessments. This would provide businesses with a broader understanding of the practical application of the provisions of the Guide.

Stakeholders also requested examples of agreements that are unlikely to be considered anti-competitive, as well as examples relating to Research and Development (R&D) and specialization agreements, which are exempted under the Block Exemption Regulations. In this context, the Morais Leitão law firm, together with the Office of the Secretary of State for Economic Affairs, highlighted the need for additional examples in these areas. Furthermore, the Office of the Secretary of State for Economic Affairs recommended the inclusion of examples of agreements that (i) fall outside the scope of competition law, (ii) qualify for exemptions, (iii) are safeguarded from the application of competition rules, and (iv) are compatible with competition law, as well as the inclusion of further examples of standardization agreements that benefit from the soft safe harbor and are therefore exempt from being considered as restrictive of competition. By addressing these recommendations, the Guide could become a more practical, comprehensive, and effective resource for companies of all sizes and sectors.

Finally, stakeholders made a number of recommendations to address substantive legal challenges in the assessment of sustainability agreements and the conditions under which they may qualify for exemptions from the prohibition of entering into restrictive agreements between competitors.

The law firms Cruz Vilaça and Morais Leitão criticized the *Guide* for adopting an overly simplistic methodology, noting that the complexity of sustainability agreements is incompatible with a document structured in bullet points and checklists. They emphasized that the *Guide* fails to clarify the PCA's position or policy on these agreements, or to adapt the legal framework to the specific challenges posed by sustainability initiatives. Morais Leitão further argued that the methodology does not address many practical issues that arise in business contexts and are not sufficiently covered by the European Commission's *Horizontal Guidelines on Cooperation Agreements.*

Ius Omnibus, for its part, proposed the inclusion of two specific sub-categories of sustainability agreements, namely: (i) agreements aimed at mitigating or eliminating climate change and (ii) "mixed agreements". These sub-categories would help to raise

awareness among companies on the distinct economic challenges posed by climate change and inadequate environmental protection, and to promote the elimination of negative externalities.

With regard to the valuation of collective benefits, ICC Portugal recommended that the PCA adopt a less conservative approach than the European Commission when assessing the economic balance of sustainability agreements. This would involve giving greater weight to collective benefits that extend beyond the immediate market or markets directly affected by the agreement. Similarly, the Morais Leitão law firm pointed out that the Guide does not clarify critical aspects of efficiency gains, such as their scope, the type of evidence required to demonstrate them, the definition of indispensability for the agreement, or how to assess the impact of efficiency gains on consumers. For its part, Frontier Economics suggested that the Guide should outline methodologies for quantifying efficiencies and clarify the relationship between consumers and citizens not directly involved in the relevant market of the agreement, as this affects the analysis of collective benefits to be taken into account in the legal competition analysis of such agreements. It also suggested that the PCA should provide more precise guidance on the scope of collective benefits that it will take into account in its assessments.

With regard to the scope of the Guide, stakeholders identified a lack of guidance on the role of business associations and vertical agreements, as well as a lack of guidance on specific sectors that are particularly exposed to sustainability risks. Firstly, stakeholders highlighted the significant impact that associations of undertakings can have in promoting sustainability objectives through initiatives such as codes of conduct, ethical guidelines, and by pooling sustainability initiatives of their members. In addition, associations of undertakings can have a major impact on their members through awareness-raising and/or training activities for entrepreneurs, workers or public contractors. In this respect, it is essential that the Guide includes examples and guidelines for initiatives developed by associations of undertakings to promote sustainability objectives. Secondly, it was also pointed out that the Guide does not cover vertical agreements, despite the growing importance of collaboration between business partners across the value chain (which has become a legal obligation under the recently adopted Directive on Corporate Sustainability Due Diligence). In this context, there were calls for the inclusion of guidance on vertical agreements and their role in sustainability initiatives, in particular in view of the increasing cooperation between direct and indirect business partners and the related due diligence obligations, which require a comprehensive competition law response, which the Guide does not provide. Finally, some stakeholders, namely the Secretary of State for Economic Affairs, DECO and the Telles law firm, highlighted the importance of addressing specific sectors – such as industry and energy, agriculture, textiles, and sustainable mobility – which are particularly prone to collaboration in order to achieve sustainability goals. It was argued that the Guide should provide more detailed analysis and examples tailored to these sectors.

Lastly, the Secretary of State for Economic Affairs emphasized the need for the Guide to contextualize Portugal's approach to the European Commission's new Horizontal

Guidelines. It called for an understanding of how flexible the PCA's position is compared to other EU Member States, particularly those with a more favorable stance on sustainability-focused competition policy. Accordingly, the Morais Leitão law firm proposed the inclusion of a final chapter dedicated to the PCA's role in promoting sustainable competition, going beyond the European Commission's Horizontal Guidelines.

Overall, stakeholders argued for a more nuanced and comprehensive approach, addressing methodological shortcomings, clarifying key legal and economic concepts and providing more detailed guidance on associations of undertakings, vertical agreements and sector-specific considerations. A strong alignment with international best practice is necessary, especially in view of the fact that mechanisms already exist, such as the open-door policy, which is of paramount importance and essential to ensure compliance with competition law while striving for sustainable practices.

In the light of the contributions received during the public consultation period, the PCA has prepared a Report that addresses the criticisms and suggestions put forth by the various parties involved. This Report is analysed in the following section.

3.2. Core Principles of the PCA's Cautionary Approach: Practical and Legal Challenges

The PCA's approach, as reflected in the Guide, evinces a markedly cautious, conservative, and somewhat skeptical disposition toward sustainability agreements. While the PCA's openness to the positive valuation of sustainability agreements is to be commended, it is important to highlight certain shortcomings that, despite the public consultation process, have not been adequately addressed and have the potential to negatively impact legal certainty.

For the sake of clarity, the principal points of contention will be enumerated in the order in which they are presented in the Guide.

With regard to the relationship between competition and sustainability, the PCA relegates sustainability agreements and their legitimacy to a subsidiary or exceptional scenario, reserved for cases in which individual production and consumption decisions have negative effects that are not covered by regulation. The opaque manner in which the PCA addresses this matter renders it challenging to ascertain its stance in the context of contentious arguments, including those pertaining to free riding, the necessity for economies of scale and scope to achieve sustainability objectives, and the dearth of information for consumers in the relevant market.

As has been demonstrated, the structure of the Good Practices Guide incorporates a self-assessment scheme and a checklist, through which the PCA endeavors to assist companies in determining whether their agreement, whether planned or in practice, restricts competition in the market and, if so, in what manner.

In accordance with the stipulations of this scheme, the preliminary phase of the self-assessment entails an evaluation of whether the agreement falls within the purview of competition law rules, specifically insofar as it restricts any pertinent competitive parameter. In this regard, the Guide is limited in scope, confining itself to listing examples resulting from the European Commission's Horizontal Guidelines. As a result, it is constrained by the same shortcomings. To illustrate this, in accordance with the European Commission's Horizontal Guidelines, only those agreements which comply with binding requirements or prohibitions set forth in international law are deemed not to affect competition law. This raises the question of whether the same logic of exclusion should apply to compliance with binding impositions or prohibitions contained in European Union or national law. Furthermore, the permeable nature of international law, which is typically presented in the form of programmatic rules rather than as enforceable provisions, may present challenges in determining whether there is a binding requirement or prohibition, and to what extent or what the potential scope of a sustainability agreement aimed at such compliance may be. Since the imposition of appropriate measures, for instance in the context of due diligence requirements, is not unconditionally applied, but rather contingent upon an assessment of the circumstances of the specific case, there will undoubtedly be uncertainty as to what is or is not excluded and covered by the prohibition of restrictive agreements.

In the second stage of the assessment, which is focused on understanding the nature of the restriction in question, the Guide limits itself to providing an overview of the types of restrictions that may be encountered. It is notable that the *Wouters* case law is not referenced at any point in the analysis, despite its potential to shed light on the relationship between the pursuit of sustainability objectives and the classification of an anticompetitive restraint[504]. Furthermore, the PCA does not elucidate the extent to which the pursuit of a sustainability objective is pertinent for excluding the category of "restriction by object". Rather, it stresses that sustainability agreements cannot disguise a cartel.

In the absence of clarity on the specifics of the approach to be taken in classifying a sustainability agreement as restrictive of competition, by object of by effects, companies are uncertain as to how the PCA will respond, for instance, to an agreement to achieve a

[504] The *Wouters* judgement was the result of a preliminary ruling which raised the question of the application of Community competition law to the professions. It concerned a regulation adopted by the Netherlands Bar Association prohibiting lawyers practicing in the Netherlands from entering into multidisciplinary partnerships with members of the professional category of accountants. The Court was asked to decide whether the Treaty rules on competition were applicable and, if so, whether they precluded such a prohibition on cooperation. In its ruling, the Court held that "not 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" – see § 97 of the judgement, cit. We agree with Giorgio Monti and Jotte Mulder, "Escaping the Clutches of EU Competition Law :Pathways to Assess Private Sustainability Initiatives" (2017) 42 European Law Review 635 <https://cadmus.eui.eu/handle/1814/50265>. According to the authors, "in light of the NCA's unwillingness to apply art.101(3) in a broad manner, it may make sense for the ECJ to develop the Wouters case law incrementally to secure such convergence", p. 656.

sustainability objective through the voluntary discontinuation of a less sustainable product (limiting production and supply) where there is no legal obligation to do so. Will the objective in question be regarded by the PCA as a quality dimension that must be considered alongside the restrictive potential?

The issue of 'ancillary restraints' also remains open to doubts. To give an example, in view of the fact that any collaboration will entail the exchange of potentially sensitive information at the initiative and implementation stages, it would be beneficial to gain insight into the extent to which the precautions adopted by the companies will be adequate to address the PCA's concerns.

As anticipated, the PCA recalls in its Guide the existence of a set of exclusions, safeguards, and safe harbors potentially applicable to sustainability agreements (as, indeed, to any agreement that meets their criteria). In this context, the PCA makes reference to four specific types of safeguards: (i) the safe harbor applicable to *de minimis* agreements; (ii) the soft safe harbor introduced by the European Commission in its Horizontal Guidelines and relating to sustainability standardization agreements; (iii) the Block exemptions applicable to Research and Development (R&D) and Specialization agreements; and (iv) the exclusion under Article 210a of the CMO Regulation.

As is the case elsewhere in the Guide, the PCA merely recalls the assumptions for the application of the safeguards, without providing concrete examples or aligning them with the reality of sustainability agreements, as it was highlighted by the stakeholders as a necessary development in the Guide. For instance, the PCA does not delineate what should be considered a "significant increase in price" or a "significant reduction in quality". Both of these are pertinent criteria for evaluating the applicability of the soft safe harbor pertaining to sustainability standardization agreements. The Report on the Public Consultation attempts to justify the indeterminacy by appealing to the non-measurable nature of the condition[505], which is seen as dependent on the characteristics of the product and the relevant market in question. However, it should be noted that the PCA does not provide a single example of a price increase for a product whose characteristics and market allow it to fall under the advanced requirement.

The fourth point of consideration in the self-assessment process pertains to the justification of an agreement that restricts competition, in light of the economic balance enshrined in Article 101(3) TFUE and similarly supported by Article 10 of the Portuguese Competition Act. In this context, the PCA begins by exemplifying the type of efficiency gains associated with a sustainability agreement. These include the reduction of CO_2 or water pollution, as well as the introduction of more sustainable products[506]. The PCA stipulates that the gains in question must be proven, objective, concrete, and verifiable and outweigh the damage to competition. With regard to the type and means of proof that companies may present, the PCA introduced, in the final version of the Guide, a reference to the possibility of using various methodologies to substantiate the demonstration of

[505] For further details, please refer to the Report on the Public Consultation, p. 10.
[506] By valuing these outputs solely in the context of the justification of a restrictive agreement, the PCA does not appear to consider them relevant when classifying the agreement as restrictive of competition.

benefits. These include methodologies that incorporate the results of consumer surveys on "willingness to pay", and reports from public authorities or recognized academic organizations. Nonetheless, it is thought that the Guide would benefit from greater clarity on the mobilization of environmental economic instruments, which have the potential to convert environmental efficiencies into monetizable values. In addition, the Guide would gain from a more concrete articulation of the concept of "willingness to pay" and its relationship with the shortcomings and negative externalities of individual decision-making.

With regard to the second requirement, namely the indispensability criterion, the PCA offers the example of the need to overcome a first mover disadvantage[507]. According to the PCA, however, if the benefits can be achieved without the agreement, the indispensability requirement will not be met. In light of the challenges associated with establishing an "absolute impossibility" and given that, in the majority of instances, individual pursuits are, in fact, conceivable, even if not equally effective, the Guide leaves a number of questions unanswered. To what extent can economic considerations, such as the inability to reach sufficient scale, justify collaboration between companies? What about the absence of particular expertise within a specific market sector? What factors should companies consider in order to assess the necessity of collaboration in comparison to the pursuit of unilateral action?

While the "non-elimination of competition" may not give rise to similar concerns and doubts, the impact of efficiency gains on consumers is another contentious issue that the Guide does not address. The initial uncertainty arises from the question of how to assess and value the sustainability benefits perceived by the consumer in the relevant market. This is followed by the question of how open the PCA is or will be to the valuation of collective benefits. Furthermore, the time horizon that the PCA will take into account remains unclear. Indeed, while the PCA does make an allusion to the admissibility of "duly discounted future benefits", the actual time horizon that it will accept is not specified.

In contrast with the approach taken by the Dutch competition authority (*Autoriteit Consument & Markt*, 'ACM') in its Guidelines on Sustainability Agreements[508], the PCA does not dedicate any attention to the specific topic of green sustainability agreements (or environmental-damage agreements). Despite the assertion in the PCA's Public Consultation Report[509] that agreements aimed at mitigating climate change (e.g., the

[507] The first mover disadvantage from going green "may potentially be overcome by a sustainability agreement serving as a device for equilibrium selection in a coordination game with multiple equilibria." – see, among others, Johannes Paha, "Sustainability Agreements and First Mover Disadvantages" (2023) 19 Journal of Competition Law & Economics 357 <https://doi.org/10.1093/joclec/nhad007>. Other authors posit a feedback-effect on the willingness-to-pay for more sustainable products when a horizontal agreement leads other consumers to change their behavior. In such scenarios, they believe there can be a first-mover disadvantage for a firm who would unilaterally introduce a more sustainable product, which may justify horizontal cooperation – see Roman Inderst, Felix Rhiel and Stefan Thomas, "Sustainability Agreements and Social Norms" (2022) 20 Zeitschrift Für Wettbewerbsrecht 225 <https://doi.org/10.15375/zwer-2022-0303>.

[508] See ACM - Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, in ‹https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf›, last accessed 05.12.2024.

[509] For further details, please refer to the Report on the Public Consultation, p. 8.

progressive elimination of a production process associated with higher carbon dioxide emissions) or environmental protection (e.g., the mitigation of deforestation in production chains) should not be singled out, it is believed that this differentiation would align the Guide with the specialty of those agreements (also in terms of relevant efficiencies) and particular importance for the purposes of the green transition. As a matter of fact, these are agreements that address environmental objectives and, as such, are of interest to all members of a given community. As a result, they should be associated with a different interpretation with regard to the requirement that consumers in the relevant market are allowed a fair share of the benefits of the agreement.

Another aspect that deserves special criticism is the scope of the term "affected consumer(s)" in the relevant market. In particular, it is uncertain whether the PCA will extend its analysis to indirect and future consumers, in addition to direct (and current) consumers.

The Guidelines' approach to the relevant efficiencies in justifying a restrictive sustainability agreement is particularly illustrative of the PCA's adherence to a traditional and conservative interpretation of competition law. As the Report on the Public Consultation makes evident, the PCA deems it appropriate that affected consumers in the relevant market should receive a fair share of the benefits so that the overall effect is at least neutral. According to the PCA, efficiency gains in related markets can only be accepted if the group of consumers affected and the group of consumers benefiting from the efficiency gains are substantially the same. Furthermore, the efficiency gains must be substantial enough to compensate the affected consumers, and the share of the collective benefits accruing to the affected consumers must be greater than the loss suffered by those consumers[510]. The traditional answer by the PCA contrasts with new approaches which suggest including benefits to non-consumers who suffer from the negative external effects caused by consumption[511].

Prior to finalizing the successive steps of the self-assessment scheme presented to companies, and in accordance with its cautious and skeptical stance on sustainability agreements, the PCA takes the opportunity to recall the restrictive interpretation of the 'state action defense', emphasizing that the liability of companies is not waived in instances where public authorities merely encourage or facilitate the conclusion of agreements that restrict competition. Conversely, this defense is applicable solely when public authorities impose or compel the parties to engage in anti-competitive conduct. As elucidated in the PCA's Report on the Public Consultation, this interpretation is a consequence of established decision-making practice and a body of consistent national

[510] For further details, please refer to the Report on the Public Consultation, p. 12.
[511] According to Theon Van Dijk, "Consumers obtain a fair share if the total benefits to consumers and affected non-consumers are larger than the price increase due to restricted competition." Theon Van Dijk, "A New Approach to Assess Certain Sustainability Agreements under Competition Law", in Simon Holmes, Dirk Middelschulte, and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental* (Concurrences 2021) ‹https://www.acm.nl/sites/default/files/documents/competition-law-climate-change-and-environmental-sustainability.pdf›, accessed 05.12.2024, p. 67.

and European case law. While the PCA reiterates this interpretation, it acknowledges that the nuances of a specific case may warrant judicial assessment[512].

In particular, while maintaining this strict position with regard to the state action defence, the context of uncertainty as to what is required of companies in terms of due diligence and what is forbidden in a legal-competitive context, justifies a dialogical approach on the part of the PCA, which clearly falls short of what would be expected. Conversely, the PCA maintains its stance on the application of competition rules to undertakings where the anti-competitive conduct is not imposed or required by national legislation and where such legislation does not establish a legal framework that precludes competitive conduct by undertakings. In other words, the PCA will continue to apply competition law rules if the law of a Member State only authorizes, encourages or facilitates anti-competitive collaborations[513]. In the words of the PCA, "the importance of sustainable development does not change this paradigm."[514] Which is to say that the importance of sustainable development has no effect on the application of competition policy.

With regard to the chapter on public procurement, which includes a further specific checklist, the PCA makes reference to the National Strategy for Green Public Procurement 2030[515]. The reference is not arbitrary; rather, it seeks to establish the premise from which the PCA begins: *the internalization of sustainability issues already results from the framework applicable to public procurement*. Consequently, for the PCA it seems that competition law should limit itself to punishing collusion in public procurement and remain skeptical about the opportunities of consortia, also in terms of pursuing sustainability objectives.

The approach adopted by the PCA is not without its limitations. Firstly, it is unclear what factors justify the necessity for joint participation in a particular tender. Secondly, the principle of strict necessity that the PCA considers should guide the exchange of information, as well as the efficiency gains that it imposes as a result of the consortium, are not subject to any further elaboration, even through the use of illustrative examples. Moreover, the ultimate evaluation item on the checklist, which is *to assess the consortium's alignment with competition law at the national and EU levels*, appears to

[512] For further details, please refer to the Report on the Public Consultation, p. 15. While it is accurate to conclude that the specifics of individual cases will invariably hinge on a bespoke assessment, this particular context would appear to warrant further elucidation from the PCA. Indeed, as evidenced by the Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence (the 'CSDDD'), among the obligations of due diligence imposed on companies is the identification, prevention and mitigation of potential or actual risks. In many cases, the necessity for collaboration with other entities is established through a case-by-case assessment. The increasing significance attributed to corporate due diligence, coupled with the fact that the regulatory framework is predicated on a logic of obligations of means, does not align neatly with the two extremes or opposite poles that the PCA identifies: (i) the knowledge or mere encouragement of public authorities on the one hand, and (ii) the specific obligation to act in a particular manner on the other - for further details, please refer to the Report on the Public Consultation, p. 15. See, also, Lois Elshof, "Corporate Sustainability Due Diligence and EU Competition Law" (2024) 15 Journal of European Competition Law & Practice 168 <https://doi.org/10.1093/jeclap/lpae025>.

[513] For further details, please refer to the Report on the Public Consultation, p. 15.

[514] For further details, please refer to the Report on the Public Consultation, p. 15.

[515] This strategy has been developed with the objective of promoting public procurement practices that are aligned with environmental sustainability by the year 2030. In order to achieve this goal, the strategy encourages the integration of green criteria into public sector procurement processes and the adoption of procurement planning systems that are designed to reduce environmental impact.

lack a clear rationale in relation to the overarching objective of the self-assessment, which is to ascertain such compatibility.

The PCA concludes its Guide with a reference to fines and civil liability, which companies, associations of companies and members of the governing and supervisory bodies should be aware of. Furthermore, the Guide notes the possibility of submitting anonymous complaints through a whistleblowing channel and makes reference to the special regime of leniency, for waiving or reducing fines. As stated in the PCA's Report on the Public Consultation, this reference is intended to guarantee legal certainty for companies[516].

Nevertheless, the result is an overarching message to businesses that sustainability is a potential threat rather than a core objective. In other words, the message conveyed by the PCA is one of intolerance towards sustainability agreements, or best, the assertion that these agreements have no particular justification for the need for adjustments or a more dialogue-based policy. With regard to the existence of complaint channels, it must be noted that, in a domain where companies are already expected to be subject to extensive scrutiny[517], the reference to this complaint channel introduces an additional factor of uncertainty.

3.3. Final Remarks on the PCA's Guide

The adoption of a Guide summarizing the good practices expected of companies is of course commendable and while the Guide has shortcomings, these do not detract from its importance.

However, while the adoption of a Best Practices Guide may be seen as an indication of the PCA's intention to align with European Union law and the European Commission's Guidelines in this regard, and while alignment with the European Commission's position is desirable in a context where legal fragmentation is to be avoided, the expectations of companies and society in general would be better served by the availability of more detailed and practical guidelines on the design of sustainability initiatives in line with the requirements of competition law. Furthermore, the Horizontal Guidelines themselves do not provide responses to numerous questions that may arise in business practice. In this context, it is believed that, even if the PCA had intended to align with the European Commission's position, it could have used the flexibility and ambiguity of the Guidelines to address specific concerns and doubts. In particular, it could have used this opportunity to elucidate the extent to which the *de minimis* safeguards and the Block Exemption Regulations on R&D and specialization apply, particularly to sustainability agreements.

The core tenet upon which the PCA is predicated is the necessity for a harmonious coexistence between competition and sustainability. As evidenced by the title of its Press

[516] For further details, please refer to the Report on the Public Consultation, p. 6.
[517] See, for example, the obligations set forth in Articles 13 and 14 of the CSDDD which require constructive collaboration with interested parties and the establishment of a notification mechanism and a complaints procedure by companies.

Release 12/2024, dated May 29, 2024[518], the PCA's intervention is predicated on the imperative to reconcile sustainability and competition. In other words, competition and sustainability are seen by the PCA as mutually exclusive. As a result, the Guide is imbued with a restrictive emphasis on the scope for action by companies, rather than allowing or enabling action in line with the requirements of the 2030 Agenda.

The authors challenge this perspective, which they view as a narrow and conservative interpretation of competition policy. It is argued that this approach is inadequate in that it fails to acknowledge the subordination of competition policy to the principle of harmonization and integration with other European Union policies, as set forth in Article 7 TFEU. Without prejudice to the importance of competition as a process of allocative efficiency that generates consumer welfare, and without ignoring the potential of unilateral action by companies in the pursuit of the SDGs, collaboration and multilateral initiatives aimed at achieving sustainability objectives should be framed in a more positive and constructive manner. In other words, the objective of the Guide should be to clarify that, although competition law is skeptical of certain collaborative practices and strategies between companies, it nevertheless favors and is open to the pursuit of sustainability goals in collaboration.

In terms of content, while the Guide is acknowledged to be a valuable resource, it is nevertheless considered to have shortcomings. In particular, it does not address pivotal issues that may emerge, such as the assessment and classification of a restriction of competition in a sustainability agreement, whether based on its objective or its effects. It is true that in scenarios of indifference (in which a sustainability agreement does not give rise to anti-competitive concerns) or alignment (in which an anti-competitive agreement is equally detrimental to sustainability objectives), no significant concerns will arise. However, in instances of conflict - that is, when an agreement that appears to be anti-competitive is nevertheless useful or necessary for the pursuit of sustainability objectives - the situation is different. In such instances, what stance will the PCA adopt? What is the impact of pursuing a sustainability objective on the classification of an agreement as restrictive of competition, particularly in terms of whether it constitutes a restriction by object or effects? What types of benefits, defense, and/or justification can the parties claim? What criteria will the PCA utilize to assess the efficiency gains associated with a given action?

4. The Road Ahead: Recommendations to Minimize Uncertainty in the Green Transition

The increasing significance of ESG considerations in business operations, coupled with the legal obligation to uphold human rights and protect the environment, particularly through the implementation of the European Union Directive on Corporate Sustainability Due Diligence, underscores the necessity for a comprehensive approach to sustainability. It is imperative that safe and non-contradictory frameworks are adopted as to what is

[518] PCA's Press Release 12/2024, 'AdC alerts companies to reconcile sustainability and competition', in ‹https://www.concorrencia.pt/en/articles/adc-alerts-companies-reconcile-sustainability-and-competition›, last accessed 05.12.2024.

expected, required and prohibited of companies, particularly in the context of collaboration with other entities with a view to achieving sustainability objectives. Recalling Jurgita Malinauskaite, "Although sector-specific regulations, taxation and investment (including State aid, due to 'first mover disadvantages' associated with high investment costs) are the main tools to facilitate the transition to a green economy, it seems that an 'all hands-on deck' approach is needed to tackle the climate emergency and isolated ad hoc sustainability related exceptions are no longer an option. Sustainability related matters should be conceptualised in competition practice providing legal certainty to industry, defining a clear set of rules to follow"[519].

It is our conviction that the field of competition law cannot remain indifferent to the broader macro(socioeconomic) context in which it is applied, particularly in view of the divergent expectations and demands placed upon companies in the context of the green transition. While maintaining a purely conservative and economistic interpretation of competition rules – which the authors do not even deem appropriate to the present circumstances – competition law cannot be applied in a manner that is inconsistent with other general, protected and relevant interests, such as sustainability in its various dimensions.

As has been previously observed, the PCA's Best Practices Guide on Sustainability Agreements is conspicuously deficient in light of the expectations typically placed upon a national competition authority in this context. Despite the limited scope of its competence, the PCA is a public authority that is bound by duties to respect and enforce fundamental rights. These fundamental rights, enshrined in the national constitution and also in the Charter of Fundamental Rights of the European Union, serve to legitimize the interpretation of competition rules in accordance with these higher parameters. Therefore, the assertion that the mandate of national competition authorities does not permit the evaluation of sustainability arguments is erroneous. Conversely, it is incumbent upon the relevant authorities to give due consideration to sustainability issues when applying competition rules, in collaboration with the companies concerned and on a basis of mutual cooperation rather than unilateral action.

In order to achieve a comprehensive and coherent approach to the regulation of competition within the European Union, it is essential that competition law is applied in a manner that avoids potential conflicts with other EU policies. Furthermore, it should be applied by the relevant authorities in an open-door spirit, which is particularly justified in areas where there is a greater degree of legal uncertainty.

In light of the aforementioned considerations, shortcomings and critical overview, it is deemed that the PCA's Guide would undoubtedly benefit from a concluding chapter that is specifically devoted to the actions of the PCA and its approach to sustainability agreements. In particular, it was proposed that the PCA adopted an open-door policy, as has been done by other national competition authorities, including the Dutch, the Greek

[519] Jurgita Malinauskaite, "Competition Law and Sustainability: EU and National Perspectives" (2022) 13 Journal of European Competition Law & Practice 336 <https://doi.org/10.1093/jeclap/lpac003>, p. 348.

(Hellenic Competition Commission), and the British (Competition and Markets Authority).

Such an approach would mitigate the uncertainty inherent to the analysis of sustainability agreements, as it would enable the submission of substantiated questions and doubts to the PCA. Based on the information provided by the companies, the PCA would be in a position to (i) propose a more specific framework of assessment, and (ii) assist the parties in identifying ways to reconcile their objectives while ensuring compliance with competition rules. Such a policy, if accompanied by a guarantee that no fines will be imposed on companies that have sought the PCA's help and followed its guidelines in good faith, would enable companies to achieve their sustainability goals in a context of greater legal certainty. Furthermore, it would allow the PCA itself to gather relevant experience for the future drafting of genuine guidelines on this matter. In the meanwhile, the results of these *ad hoc* assessments could be made public on the PCA's website in the form of non-confidential versions, thus ensuring transparency and guaranteeing a level playing field for other companies with similar doubts.

In its Report on the Public Consultation, the PCA states that it does not have a procedural mechanism allowing companies or associations of companies to request letters of recommendation[520]. The PCA considers this absence to be inconsequential, given that its actions are informed by an openness to engagement with companies and other interested parties. Furthermore, it believes that companies can resort to the informal guidance mechanism provided by the European Commission.

This position is not justified.

To begin with, if the PCA's assertion pertains to a lack of legal basis, this is inconsistent with its purported openness to receiving companies informally. Indeed, if the issue is the absence of a legal foundation, a formalized open-door policy would be equally invalid as an informal open-door policy, and the latter will even encounter additional challenges pertaining to the potential risks to legal certainty, transparency, and equality. In any case, the legal basis for such an open-door policy is a false issue. We concur with Giorgio Monti, stressing that "competition agencies' legitimacy depends on their being seen to contribute to the public interest. Simply enforcing competition law to make markets work may not suffice in an era where the market economy is under challenge and where environmental sustainability is such an important consideration"[521]. As a public authority, the PCA is bound by a set of principles common to the national and European legal systems, including the principles of good administration, good faith, collaboration with private individuals and participation. In essence, these principles give rise to a duty of guarantee through the procedure, whereby the authority is required to design procedures, channels for dialogue and openness that are capable of realizing these rights. In particular,

[520] For further details, please refer to the Report on the Public Consultation, p. 4.
[521] Giorgio Monti, "Four Options for a Greener Competition Law" (2020) 11 Journal of European Competition Law & Practice 124 <https://doi.org/10.1093/jeclap/lpaa007>, p. 131.

such principles require the PCA to adopt a structure that is closely aligned with the entities it administers, namely companies and other interested parties.

In short, in addition to being both legitimate and based on valid axiological considerations, an institutionalized procedure of regulatory dialogue would also offer practical advantages to both companies and the PCA itself, which would be able to gather relevant elements for reformulating the Guide through "regulatory learning". The PCA's negative stance towards an institutionalized open-door policy fails to offer legal certainty to companies, which could potentially undermine the principle of transparency and result in unjust and discriminatory situations for companies. Ultimately, the procedure before the European Commission cannot solve these shortcomings, as it is not only inconsistent with the requirements of the principle of subsidiarity and good administration[522], but also fails to resolve doubts which may arise from purely internal issues. In such cases, the PCA is the most appropriate body to address the concerns.

Nonetheless, the PCA remains in a position to address the limitations of its skeptical stance towards sustainability agreements. As it has done in other areas related to the digital transition, the PCA could adopt short papers and issue other publications that would provide companies with enhanced legal certainty in this regard. While it has been reluctant to "open its doors" to companies, it is believed that this would add value to such publications, inform the PCA's decision-making practice, and allow for the anticipation of doubts and problems that both competition policy and the sustainability agenda would want to be anticipated and solved.

The aforementioned considerations do not diminish the responsibility of companies to conduct a self-assessment of their own agreements. Furthermore, they do not neglect the paramount importance and role of legal counsel in advising companies on the risks and optimal design of sustainability agreements. For this to happen, however, it is essential that companies and their legal advisers have a clear understanding of the precise legal framework they need to consider, and the role of the PCA is invaluable in this regard.

Ultimately, the message to convey to companies should be that "we are all in this together". For such a joint effort to yield results, it must extend beyond the gates of competition authorities. With Simon Holmes, "Climate Change is an existential threat. Competition law must be part of the solution and not part of the problem"[523].

[522] These principles presuppose that the competent decision-making bodies are those which are closer to the companies.
[523] Simon Holmes, "Climate Change, Sustainability, and Competition Law" (2020) 8 Journal of Antitrust Enforcement 354 <https://doi.org/10.1093/jaenfo/jnaa006>, p. 354.

Singapore

The Interface Between Competition Law and Environmental Sustainability in Singapore

By Kala Anandarajah and Ian Wong of Rajah & Tann Asia

I. INTRODUCTION

Climate change, the world over, continues to be a pressing threat to humanity. The Kyoto Protocol was entered into force in 2005, with the intent of reducing the onset of global warming (then at 0.58°C above normal).[524] Despite this, the year 2024 is on track to be the warmest year on record at 1.54°C above normal.[525] Much more must be done to abate carbon emissions to avert catastrophic warming within the next decade. In line with the Paris Agreement, countries have made varying commitments to reducing their respective countries' greenhouse gas emissions as part of climate change mitigation. Singapore, for its part, has pledged to achieve net zero emissions by 2050 and reduce emissions to around 60 metric tons of carbon dioxide equivalent (MTCO2e) in 2030.[526]

The ability to meet commitments stipulated, whether by international organisations or local governments, are contingent on environmental sustainability initiatives (such as circular economy and recycling initiatives) being undertaken. Such initiatives cannot be undertaken in isolation and often require collaboration to achieve collective objectives. With collaboration, another critical area of the law hit upon is competition or antitrust laws. Competition law has an important role in ensuring that such collaboration does not stifle the functioning of healthy and competitive markets or operate as a guide for anti-competitive conduct. Without clear guidance, individuals and organisations may mistakenly assume that all forms of collaboration to achieve environmental sustainability objectives are pro-competitive, resulting in violations of competition law (whether inadvertent or otherwise).[527] Conversely, collaboration on environmental sustainability objectives should not be deterred by competition law and result in a chilling effect on the promotion of climate action. Aptly, the International Chamber of Commerce had observed in 2022 that competition law had a chilling effect on environmental sustainability

[524] National Centers for Environmental Information. (2006, January). *Annual 2005 Global Climate Report*. Annual 2005 Global Climate Report | National Centers for Environmental Information (NCEI). https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/200513

[525] World Meteorological Organization. (2024, November 8). *2024 is on track to be hottest year on record as warming temporarily hits 1.5°C*. https://wmo.int/news/media-centre/2024-track-be-hottest-year-record-warming-temporarily-hits-15degc

[526] National Climate Change Secretariat Singapore. (2022). *Singapore's Climate Targets – Overview*. National Climate Change Secretariat Singapore. https://www.nccs.gov.sg/singapores-climate-action/singapores-climate-targets/overview/

[527] In this article, "environmental sustainability objectives" generally encompass objectives related to reducing negative environmental externalities, including reducing carbon emissions, improving air and water quality and other climate change mitigation measures.

objectives, with businesses citing the "lack of sufficient clarity and comfort" around competition law as the primary reason.[528]

This article explores the developments in how competition law in Singapore has evolved to allow in finding the optimum balance between preserving healthy competition and encouraging progress towards environmental sustainability objectives.

II. COLLABORATIONS UNDER COMPETITION LAW IN SINGAPORE

In Singapore, the Competition Act 2004 ("**Competition Act**") governs the application of competition law and regulates the conduct of market players. The Competition and Consumer Commission of Singapore ("**CCCS**") administers and enforces the Competition Act. In particular, Section 34 of the Competition Act prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within Singapore, unless exempted pursuant to (amongst others) a net economic benefit exclusion ("**Net Economic Benefit**").[529] The Net Economic Benefit exclusion exempts an agreement which restricts competition appreciably from Section 34 of the Competition Act if the agreement generates economic benefits (e.g. lower costs, wider distribution or increased innovation), the economic benefits cannot be achieved without the agreement and its concomitant restrictions and competition is not eliminated in a substantial part of the relevant market.

Collaborations between undertakings on environmental sustainability objectives are, at their core, agreements which fall within the ambit of Section 34 of the Competition Act. It is not uncommon for undertakings, especially competitors in the same industry, to collaborate where none of the undertakings has the scale or resources to independently carry out the activity in question, where collaboration is necessary to achieve results quickly and at scale, or to overcome a first mover disadvantage. Such collaboration may entail information sharing, joint activities (such as joint production or joint research and development ("**R&D**")) and standards setting or development. If done correctly, collaboration can promote competition by improving consumer choice and product interchangeability, ultimately generating positive externalities for the environment.

Drawing from decisions in the European Union,[530] the European Commission approved voluntary commitments made in 1999 by the Association of Japanese Automobile Manufacturers and the Association of Korean Automobile Manufacturers to achieve an average target of 140 grams of carbon dioxide (CO2) per kilometre for cars sold in the EU by 2009. Importantly, these commitments did not require individual manufacturers to

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[528] International Chamber of Commerce. (2022, November). *When Chilling Contributes to Warming*. https://iccwbo.org/wp-content/uploads/sites/3/2022/11/when-chilling-contributes-to-warming-2.pdf \

[529] See paragraph 9 of the Third Schedule to the Competition Act.

[530] CCCS often references competition law principles and decisions by the European Commission as the Competition Act is largely based on the competition law provisions of the Treaty on the Functioning of the European Union ("**TFEU**"). For instance, Section 34 of the Competition Act is based on Article 101 of the TFEU.

meet specific targets. Manufacturers could choose whether to apply stricter or more relaxed CO2 emission standards to their cars and were free to independently develop and introduce new CO2-efficient technologies, as long as the average target was met.[531] A review of the effectiveness of the voluntary commitments in 2007 indicated that emissions from the average new car fell from approximately 190 CO2 per kilometre in 1999 to 170 CO2 per kilometre in 2004, which was primarily due to improvements in car technology.[532]

It follows that undertakings which seek to collaborate to achieve environmental sustainability objectives must ensure that the collaboration can withstand competition law scrutiny. As with all forms of collaboration, it is important that the collaboration does not become a conduit for cartelistic conduct, which can have deleterious consequences on progress towards environmental sustainability. For instance:

(a) A prominent 2021 decision in the EU involved Daimler, BMW and the Volkswagen group, which colluded for more than five years to limit the harmful nitrogen oxide emissions cleaning capabilities of their cars to the minimum required under EU law despite possessing the technology to clean better.[533] As a result, consumers were unable to purchase less polluting vehicles, bringing the EU no closer to achieving its Green Deal objectives.[534]

(b) In another decision in 2017, the European Commission fined three recycling companies, Campine, Eco-Bat Technologies and Recylex, for colluding to lower the prices that they paid to scrap dealers to purchase used automotive batteries. The used automotive batteries would then be processed by the recycling companies into recycled lead, which would then be sold to battery manufacturers to produce new car batteries. The collusion disrupted the efficient and competitive functioning of the circular economy of automotive batteries in the EU.[535]

In both decisions, the European Commission found that the undertakings involved had infringed Article 101 of the Treaty on the Functioning of the European Union. The

[531] *Commitments by Japanese and Korean car manufacturers to reduce CO2 emissions comply with EC Competition rules*. European Commission - European Commission. (1999, December 1). https://ec.europa.eu/commission/presscorner/detail/en/ip_99_922

[532] Commission of the European Communities. (2007). Results of the review of the Community Strategy to reduce CO2 emissions from passenger cars and light-commercial vehicles. *Communication from the Commission to the Council and the European Parliament*, 6.

[533] *Case M.8744 – Daimler / BMW / Car Sharing JV*

[534] *The European Green Deal*. European Commission. (2019). https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en

[535] *Case AT.40018 – Car battery recycling*

European Commissioner for Competition, Margrethe Vestager, unequivocally stated that "Competition and innovation… are essential for Europe to meet our ambitious Green Deal objectives… we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal".[536]

While there have not been any infringement decisions issued by CCCS in relation to collaborations between undertakings on environmental sustainability objectives, CCCS adopts a similar strict stance towards collaborations which are collusive or cartelistic and would clearly violate Section 34 of the Competition Act.

Apart from wielding competition law as a sword to ensure that collaborations which are contrary to Singapore's environmental sustainability objectives are prohibited, CCCS arguably uses competition law as a shield to advance Singapore's environmental sustainability objectives. The former entails the traditional application of competition law principles and the formulation of theories of harm to prohibit collaborations which are anti-competitive, while the latter explores how collaborations can be "shielded" from competition law prohibitions where they support sustainability.[537] This is most evident from CCCS' issuance of the Environmental Sustainability Collaboration Guidance Note ("**Guidance Note**") in March 2024, which is discussed in the next section.[538]

III. THE ENVIRONMENTAL SUSTAINABILITY COLLABORATION GUIDANCE NOTE: ENCOURAGING COLLABORATION

The Guidance Note, which "aims to afford greater clarity to businesses on how CCCS will assess collaborations pursuing environmental sustainability objectives", is therefore a welcome development in markets relating to environmental sustainability in Singapore.[539] In fact, there have already been collaborations relating to environmental sustainability objectives – for instance, a consortium of beverage producers comprising Coca-Cola Singapore Beverages, F&N Foods and Pokka have jointly incorporated a not-for-profit company to operate a beverage container return scheme in Singapore pursuant to a request for proposals from the government.[540]

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[536] *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars*. European Commission - European Commission. (2021). https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581

[537] Nowag, J. (2020). Sustainability & Competition Law and Policy – Background Note. *Organisation for Economic Co-Operation and Development*, 12. https://one.oecd.org/document/DAF/COMP(2020)3/En/pdf

[538] *Environmental Sustainability Collaboration Guidance Note*. Competition & Consumer Commission of Singapore. (2024, March 1). https://www.cccs.gov.sg/legislation/competition-act/environmental-sustainability-collaboration-guidance-note

[539] *Supra* note 14, page 2

[540] *NEA Licenses Scheme Operator To Design And Operate The Beverage Container Return Scheme*. National Environment Agency. (2024, July 31). https://www.nea.gov.sg/media/news/news/index/nea-licenses-scheme-operator-to-design-and-operate-the-beverage-container-return-scheme

The Guidance Note focuses on seven common types of business collaborations, namely: (i) information sharing, (ii) joint production, (iii) joint commercialisation, (iv) joint purchasing, (v) joint R&D, (vi) standards development and (vii) standard terms and conditions in contracts. CCCS makes clear that the Guidance Note applies only to collaborations which have as their crux the pursuit of environmental sustainability objectives. This is necessarily fact-specific, and the determining elements are the "starting point and main focus of the collaboration, and the degree of integration of the different functions required in order to pursue the stated environmental sustainability objective".[541] Consequently, such collaborations can benefit from the "shield" and potentially fall outside of the scope of Section 34 of the Competition Act.

It is important to note that the Guidance Note does not provide undertakings with a safe harbour. Rather, CCCS adopts a light touch approach in allowing undertakings to assess their collaborations with reference to the Guidance Note and decide whether the collaborations comply with the Competition Act. There is also no statutory requirement for undertakings to notify their collaborations to CCCS. Undertakings may nevertheless apply to CCCS for guidance under Section 45 of the Competition Act or for a formal decision under Section 46 of the Competition Act that their collaborations are compliant with the Competition Act. Indeed, given the scale of the collaboration between Coca-Cola Singapore Beverages, F&N Foods and Pokka, the collaboration was voluntarily notified to CCCS, marking the first collaboration to be assessed under the Guidance Note.

A. Collaborations which will not or are unlikely to raise competition concerns

To aid undertakings in the self-assessment process, the Guidance Note sets out the following categories of collaborations which are "unlikely to raise competition concerns or are indeed excluded" from Section 34 of the Competition Act:[542]

(a) Agreements that do not affect factors of competition, such as collaborations which do not involve factors of competition, including price, quantity, quality, choice of innovation of goods or services supplied;

(b) Agreements which none of the undertakings involved in could do independently, for instance, in circumstances where the undertakings involved do not have all the necessary technical capabilities or lack the necessary scale to individually undertake the activity[543];

[541] *Supra* note 14, page 4

[542] *Supra* note 14, pages 6-7

[543] In such collaborations, there is no restriction of actual or potential competition between the collaborating undertakings, therefore mitigating any competition concerns.

(c) Vertical agreements, which are statutorily excluded from the application of the Competition Act;[544] and

(d) Agreements to comply with law or in acting on behalf of the government.

B. Collaborations in which competition concerns are less likely to arise if conditions are fulfilled

The Guidance Note also sets out various forms of collaboration in which competition concerns are less likely to arise if certain conditions are fulfilled. In relation to standards development and information sharing in the form of a joint industry database or resource of environmentally sustainable suppliers, the Guidance Note recognises that both forms of collaboration can help to reduce information asymmetry, build consumer trust and improve consumer choices, which in turn lead to a shift in consumption patterns towards more environmentally sustainable goods and services.[545]

In line with the European Commission[546], collaborations on standards development and a joint industry database in Singapore would typically fall outside the scope of competition law if the collaborations are not used for exclusionary purposes.[547] The Guidance Note states the following:

(a) For standards development, competition concerns are less likely to arise if (i) the standards are established objectively, (ii) the development process is transparent and inclusive, (iii) no commercially sensitive information that is unnecessary for the collaboration is exchanged, (iv) participation in the development and adoption of the standards is voluntary and non-discriminatory and (v) businesses are not prevented from exceeding the standards or developing alternative standards.[548]

(b) For joint industry databases or resources, competition concerns are less likely to arise if (i) access to the database is open and non-discriminatory for both users and suppliers of the database, (ii) the database is compiled based on transparent, non-discriminatory and objective evidence-based criteria, (iii) no commercially sensitive information is exchanged via the database, (iv) participants in the collaboration are not obliged to purchase from, or prevented from dealing with, suppliers listed in the database and

[544] See paragraph 8 of the Third Schedule to the Competition Act.

[545] *Supra* note 14, pages 7-8

[546] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraphs 443-444*

[547] *Supra* note 13 at page 16

[548] *Supra* note 14, page 8

(v) other suppliers are not unjustifiably excluded from being listed on the database.[549]

In addition to the above, the Guidance Note also considers the circumstances where competition concerns are less likely to arise in relation to joint production, joint commercialisation and joint R&D. Here, two cumulative conditions must be fulfilled[550]: the collaboration must not facilitate cartelistic conduct[551] and the collaborating undertakings have aggregate market shares of less than 20% in the relevant market.[552] The following circumstances also apply depending on the type of collaboration:

(a) For joint production of a common input, the collaboration is less likely to give rise to competition concerns if it (i) does not result in the collaborating undertakings having a significant proportion of common costs for the production of the competing product downstream and (ii) does not involve the exchange of commercially sensitive information.[553]

(b) For joint commercialisation, such as joint distribution through sharing logistical capacities or joint advertisement, the collaboration is less likely to give rise to competition concerns if it (i) does not involve joint determination of the prices or quantity of the product that each undertaking will sell, (ii) does not result in the collaborating undertakings having a significant proportion of common costs and (iii) does not involve the exchange of commercially sensitive information.[554]

(c) For joint R&D, the collaboration is less likely to give rise to competition concerns if (i) the collaborating undertakings are not already engaged in independent R&D on the same or competing products and do not have the capabilities to conduct the full R&D process independently, (ii) the collaboration does not involve an agreement to restrict the pace of R&D, innovation and new product development, (iii) the collaboration does not remove a maverick competitor or innovator from the relevant market or (iv) there are multiple viable ongoing alternative R&D projects undertaken

[549] *Supra* note 14, page 8

[550] *Supra* note 14, page 8

[551] This refers to price fixing, bid-rigging, output limitation and market sharing, all of which are restrictions of competition by object.

[552] Given that Singapore is a small and open economy, CCCS considers that an agreement would generally have no appreciable adverse effect on competition if the aggregate market share of the parties to the agreement do not exceed 20% on any of the relevant markets affected by the agreement, where the agreement is made between competing undertakings.

[553] *Supra* note 14, page 9

[554] *Supra* note 14, page 9

by competing innovators which can produce close substitutes to the collaborating undertakings' resulting product or technology.[555]

In all, the Guidance Note acknowledges the positive externalities brought about by collaborations on environmental sustainability objectives. Importantly, in operating as a shield, the Guidance Note recognises that such collaborations may be necessary to achieve Singapore's environmental sustainability objectives and supports these collaborations to the maximum extent possible by setting out the circumstances under which the collaborations would likely not be deemed as anti-competitive. Businesses which intend to engage in such collaborations are afforded greater clarity and certainty as they are able to assess whether a particular collaboration would raise competition concerns.

C. Collaborations which give rise to competition concerns but can benefit from the Net Economic Benefit exclusion

Even if a collaboration relating to environmental sustainability objectives gives rise to competition concerns under Section 34 of the Competition Act, undertakings may avail themselves of the Net Economic Benefit exclusion.

The application of the Net Economic Benefit exclusion to agreements which infringe Section 34 of the Competition in the first instance is not novel. However, the Guidance Note goes a step further by setting out a list of possible efficiencies and justifications which collaborating undertakings can rely. Notably, this approach differs from CCCS' approach in its *Guidelines on the Section 34 Prohibition* ("**Section 34 Guidelines**"), which leaves undertakings relying on the Net Economic Benefit exclusion to craft their own efficiency arguments.[556]

(i) First limb: Claiming of economic benefits

On the first limb of the Net Economic Benefit exclusion, which requires an agreement to contribute to (i) improving production or distribution, or (ii) promoting technical or economic progress, the Guidance Note illustrates how collaborations relating to environmental sustainability objectives can give rise to economic benefits. For instance, collaborations that adopt cleaner technologies to reduce emissions or enable more efficient production by consuming less energy may be considered as agreements that contribute to improving production or promoting technical progress.[557]

More importantly, under traditional competition law architecture, the assessment of economic benefits flowing from agreements is generally confined to the relevant market in which the agreements relate. Yet, for collaborations relating to environmental

[555] *Supra* note 14, page 9

[556] See Annex C of the *CCCS Guidelines on the Section 34 Prohibition*.

[557] *Supra* note 14, page 12

sustainability objectives, the Guidance Note makes an exception by allowing economic benefits to Singapore *as a whole* to be assessed. Consequently, the overall economic benefits to Singapore from the collaboration may outweigh the harm to competition in a particular relevant market.[558] Arguably, this makes it easier for collaborating undertakings to claim that the collaboration is, on balance, pro-competitive.[559]

In addition, the Guidance Note also allows collaborating undertakings to highlight to CCCS if a detailed assessment of the economic benefits would be "onerous or not possible in the particular circumstances and provide the reasons and basis for this to facilitate CCCS' consideration".[560] The rationale is that certain collaborations relating to environmental sustainability objectives may involve nascent products or technologies and therefore entail uncertainty as to the magnitude and timeframe in which the economic benefits would materialise. The flexibility provided ensures that innovation relating to environmental sustainability is not stifled in exchange for strict adherence to competition law procedures.

Taken together, these are perhaps the strongest indication of how the Guidance Note is intended to operate as a shield for collaborations relating to environmental sustainability objectives and signals the importance of competition law in promoting environmental sustainability objectives in Singapore.

(ii) Second limb: Indispensability

On the second limb of the Net Economic Benefit exclusion, collaborating undertakings must demonstrate that the collaboration and the restrictions within the collaboration are "reasonably necessary to obtain the benefits claimed".[561] In other words, in the absence of these restrictions, the efficiencies which flow from the collaboration would either be eliminated or significantly reduced.

Apart from the assessment of whether the collaboration and its restrictions are indispensable for achieving the economic benefits claimed, the Guidance Note widens the scope of the assessment to include the *additional* benefits that "accrue directly as a result of achieving results more rapidly or on a larger, more efficient scale".[562] This provides collaborating undertakings with a greater runway to qualify for the Net Economic Benefit exclusion.

(iii) Third limb: No elimination of competition

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[558] *Supra* note 14, page 13

[559] This is subject to the collaborating undertakings being able to demonstrate that the benefits are significant enough to outweigh the anti-competitive effects of the agreement. Collaborating undertakings must demonstrate the magnitude and likelihood of achieving such benefits.

[560] *Supra* note 14, page 13

[561] *Supra* note 14, page 14

[562] *Supra* note 14, page 15

On the third limb of the Net Economic Benefit exclusion, competition must not be eliminated in a substantial part of the relevant market. This is a straightforward assessment in which CCCS will consider the degree of competition prior to the collaboration and the reduction of competition that the collaboration brings about.

Importantly, the Guidance Note states that this criterion can still be satisfied as long as post-collaboration, at least one important parameter of competition on which undertakings continue to compete strongly with each other remains. For instance, even if a standardisation agreement results in the discontinuation of all non-environmentally sustainable products (i.e. no competition on product variety), the agreement can still satisfy this criterion if the collaborating undertakings continue to compete on price.

D. Streamlined guidance from CCCS

As stated above, for certainty, undertakings may apply to CCCS for guidance under Section 45 of the Competition Act or for a formal guidance or decision under Section 46 of the Competition Act that their collaborations are compliant.

To facilitate collaborations in support of Singapore's environmental sustainability objectives, CCCS has adopted a streamlined process for the assessment of collaborations relating to environmental sustainability objectives. Under the streamlined process, CCCS will endeavour to complete a Phase 1 review within 30 working days for simple cases, with an additional Phase 2 review (if required) of 120 working days for complex cases.[563] CCCS has in December 2024 issued its first guidance (relating to the joint collaboration between Coca-Cola Singapore Beverages, F&N Foods and Pokka) well within the timelines as set, reflecting the efficiency of the system.[564]

IV. COMPETITION LAW AND SUSTAINABILITY IN SOUTHEAST ASIA

To date, in Southeast Asia, CCCS is the only competition authority which has introduced express competition law guidelines specifically pertaining to collaborations on environmental sustainability objectives. This followed on the heels of various sustainability guidelines published by competition authorities around the world, including the Japan Fair Trade Commission's *Green Guidelines* in March 2023,[565] the European Commission's revised *Horizontal Block Exemption Regulations and Horizontal*

[563] *Supra* note 14, page 16

[564] *CCCS issues positive guidance in first case under streamlined process for collaborations pursuing environmental sustainability objectives*. CCCS. (2025, January 3). https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/cccs-issues-positive-guidance-in-first-case-under-streamlined-process-for-collaborations-pursuing-environmental-sustainability-objectives

[565] *Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act*. Japan Fair Trade Commission. (2023, March). https://www.jftc.go.jp/file/230331EN_GreenGuidelines.pdf

Guidelines in June 2023,[566] and the United Kingdom Competition and Markets Authority's *Green Agreements Guidance* in October 2023.[567]

That said, while other competition authorities in Southeast Asia have yet to publish similar guidelines, environmental sustainability remains a priority and any collaborations relating to environmental sustainability objectives are assessed according to existing competition law architecture. For instance:

(a) The Malaysia Competition Commission's Strategic Plan 2021-2025 indicates that the interplay between competition law and sustainability in Malaysia remains front of mind, stating that "Investment in green technology can be cost-prohibitive and businesses may want to cooperate with their competitors to achieve the ESG agenda. The MyCC may need to study on how Act 712[568] works to encourage the ESG agenda amongst the businesses in Malaysia."[569]

(b) The Indonesia Competition Commission ("**KPPU**") has used existing competition law architecture to address collaborations relating to environmental sustainability objectives. In 2016, major palm oil companies in Indonesia entered into the Indonesia Palm Oil Pledge, a private standard which sought to reduce deforestation. Although the standard was well-intentioned, the KPPU faced pressure to prohibit it and ultimately held that the standard had "the potential to become a cartel that will lead to monopolistic practices and/or unfair business competition amounting to an infringement of Indonesia's competition law."[570]

V. CONCLUSION

The Guidance Note comes at an opportune time where much more needs to be done to mitigate climate change. In fact, its contribution to Singapore's environmental sustainability objectives should not be overlooked. By adopting a light touch approach and using competition law as a shield, the Guidance Note rightly leaves behind the chilling effect of competition law in favour of appropriate business collaborations which

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[566] *Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines*. European Commission. (2023, June 1). https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2990

[567] *Green Agreements Guidance*. Competition and Markets Authority. (2023, October 12). https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf

[568] This refers to the Malaysia Competition Act 2010.

[569] *Strategic Plan 2021-2025*. Malaysia Competition Commission. (2022, January 21). https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MyCC%20Strategic%20Plan%20Eng_Public%20Ver-21012022.pdf

[570] *Tanggapi Keberadaan Indonesia Palm Oil Pledge (IPOP)*. Komisi Pengawas Persaingan Usaha. (2016, April 14). https://kppu.go.id/blog/2016/04/kppu-tanggapi-keberadaan-indonesia-palm-oil-pledge-ipop/

advance environmental sustainability objects. There is cautious optimism that more undertakings in Singapore will come together to collaborate on all things related to environmental sustainability and to make Singapore (and the world) a better place to live in in the years ahead.

South Africa

Sustainability and Antitrust

By Tamara Dini, Nazeera Mia and Victoria Anthony of Bowmans

1. Introduction

As many countries seek to integrate sustainability objectives into their competition law regimes, a range of positions has emerged, from minimal or non-interventionist approaches, such as those limited to the publication of guidelines, to more robust approaches, such as those amending legislation to actively promote sustainability goals. While positions on sustainability may diverge across regimes, a common thread is that competition law continues to evolve beyond the traditional consumer welfare standard, primarily emphasizing short-term price effects, quality and consumer choice, to incorporate broader social and economic considerations, including equality, employment, environmental sustainability and levelling of economic playing fields. In South Africa, the Competition Act, No. 89 of 1998, as amended (**Act**) incorporates both consumer welfare objectives and public interest imperatives, providing a foundation for more expansive outcomes than those of traditional competition law goals to be pursued.

2. Sustainability in the South African context

When sustainability is discussed in international competition law circles, environmental sustainability tends to dominate the debate. This is to be expected, given the acute need for climate-related challenges to be addressed. In the South African context, sustainability specifically incorporates three interconnected pillars: the *environmental*, the *economic*, and the *social*. As a developing country in which inequality and high levels of unemployment persist, a holistic approach towards sustainability is arguably appropriate – since environmental progress, for instance, cannot be achieved in isolation, nor without economic and social change.

South Africa's political history and economic background had significant bearing on the country's current competition policy. The Act was drafted shortly after South Africa's first democratic elections in 1994, and at a time when the newly elected government was tasked with re-shaping the South African economy into one which would address the legacy of economic distortion and be inclusive of persons previously marginalized.[571]

[571] The preamble to the Act provides that "*the people of South Africa recognize:*
That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against ani-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.
That the economy must be open to greater ownership by a greater number of South Africans.
That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.
That an efficient, competitive economic environment, balancing the interest of workers owners and consumers and focused on development, will benefit all South Africans.
In order to –

Although the Act refers to 'public interest' specifically in the provisions relating to merger control, the public interest grounds or factors listed therein, are a feature throughout the Act, inclusive of its preamble, its purpose, and with respect to behavioural practices too.

The purpose of competition law in South Africa is set out in section 2 of Act, and articulates a focus on both pure competition factors, as well as social and economic considerations. More specifically, the purpose of the Act is to promote and maintain competition, in order to:

(a) promote efficiency, adaptability and development of the economy;
(b) provide consumers with competitive prices and product choices;
(c) promote employment and advance social and economic welfare of South Africans;
(d) expand opportunities for South African participation in world markets and recognise the role of foreign competition in the country;
(e) ensure that small- and medium-sized enterprises (**SMEs**) have an equitable opportunity to participate in the economy;
(f) promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (**HDPs**); and
(g) detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within South Africa.

Section 12 of the Act requires the South African competition regulators to consider each merger notified by assessing both the likely competition effects as well as the public interest effects and provides that the public interest assessment is not secondary to the competition analysis but, rather, is a separate and equally important consideration. Mergers that have no effect on consumer welfare may still be prohibited on the basis of the likely or actual adverse impact on the public interest. Section 12A(3) of the Act provides that when determining whether a merger can or cannot be justified on substantial public interest grounds, the South African competition regulators must consider the effect that the merger will have on:

(a) a particular industrial sector or region;
(b) employment;
(c) the ability of SMEs and HDPs to effectively enter into, participate in or expand within the market;

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provide all South Africans equal opportunity to participate fairly in the national economy;
achieve a more effective and efficient economy in South Africa;
provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
create greater capability and an environment for South Africans to compete effectively in international markets;
restrain particular trade practices which undermine a competitive economy;
regulate the transfer of economic ownership in keeping with the public interest;
establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic."

(d) the ability of national industries to compete in international markets; and
(e) the promotion of a greater spread of ownership by HDPs and workers in firms in the market.

Notably, in 2024 the Competition Commission (**Commission**) published *Revised Public Interest Guidelines relating to Merger Control* (**Guidelines**),[572] which express that under public interest ground (a) - when assessing the likely effect of a merger on a particular industrial sector or region - the Commission will consider the effect of a merger on development, environmental sustainability, and employment amongst others. The Commission will consider, *inter alia*, the applicable industrial and environmental policy objectives or practices, and the effect of the merger on the environment (e.g. pollution, increased carbon emissions, etc.). In determining whether the effect of the merger on the industrial sector or region is substantial (impacting the industrial sector or region to a significant degree), the Commission will consider, *inter alia*, the general socio-economic circumstances of the inhabitants of the region, whether the sector in question involves or influences any constitutionally entrenched rights, whether the merger impedes or contributes towards any public policy goals or economic development plans that are relevant to that sector or region, as well as whether the effect of a merger on the region would threaten that region's livelihood and sustainability or would support its continued livelihood and sustainability.

Beyond merger control, and from a behavioural or conduct perspective, the public interest considerations may also be presented to outweigh perceived anti-competitive effects arising from an arrangement between competing firms or firms operating at different levels of the supply chain. The public interest considerations are also available as grounds upon which an exemption may be sought, and granted, for an agreement that would otherwise constitute unlawful arrangements between competitors.

Section 10 of the Act allows firms intending to engage in practices that would be regarded as anti-competitive to apply to the Commission for an exemption from the ordinary provisions of the Act. In terms of this section, the Commission may grant an exemption if the practice concerned is required to attain any of the following objectives:

(a) the maintenance or promotion of exports;
(b) the promotion of effective entry into, participation in or expansion within a market by SMEs or HDPs;
(c) change in productive capacity necessary to stop decline in an industry;
(d) the economic development, growth, transformation or stability of an industry designated by the Minister of Trade, Industry and Competition; or
(e) competitiveness and efficiency gains that promote employment and industrial expansion.

[572] Dated 20 March 2024, and which Guidelines are intended to give businesses and legal practitioners insight into the Commission's approach to the assessment of public interest when it reviews mergers in terms of the Act.

Further, the South African legal system is underpinned by the Constitution of the Republic of South Africa, Act. No. 108 of 1996 (**Constitution**), and section 39(2) of the Constitution guides every court, tribunal or forum interpreting legislation and developing the law, to do so in accordance with the spirit, purport and objects of the Constitution. Most recently, the Constitutional Court (**Court**) in *Mediclinic*[573] provided a significant interpretation of the Act, emphasizing the need to align the Act with the Constitution, which includes the Bill of Rights. The *Mediclinic* case concerned a merger in the private healthcare sector involving hospitals in relatively small towns – Mediclinic Potchefstroom and two multi-disciplinary hospitals in Klerksdorp called Wilmed Park Private Hospital and Sunningdale Hospital. One of the contentious issues raised in the *Mediclinic* case was that of a likely post-merger price increase in the target hospitals, impacting uninsured patients (i.e., private patients not subscribed to a private medical aid fund) in particular. In its ruling, the Court viewed the application of competition law as a constitutional obligation on the part of the state to promote and protect socio-economic rights, including the right to access healthcare. The Court noted that "*maintaining or increasing the scope for choice of essential and much-needed services with particular regard to the plight of the financially under-resourced or the vulnerable, should always be at the back of the decision-makers' minds when dealing with mergers. This is, after all, one of the key demands of the Preamble and purpose of the Act*".[574] The Court thereby reaffirmed the dual purpose of the Act, being to address both competition law and socio-economic objectives, underscoring the constitutional imperative of interpreting legislation in a way that promotes transformative justice and the realization of constitutional rights. Additionally, Chapter 4 of the Constitution provides, and in respect of environmental protections, that:

"*Everyone has the right to:*

- *an environment that is not harmful to their health or wellbeing*
- *to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that:*
    - *prevent pollution and ecological degradation*
    - *promote conservation*
    - *secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development*."

This holistic approach to sustainability, as applied by the South African competition authorities, also aligns with global frameworks such as the United Nations Resolution 70/1, *Transforming our world: the 2030 Agenda for Sustainable Development*' (**Resolution**). The Resolution promotes a balance among the three pillars to achieve long-term well-being for all and creates 17 sustainable development goals (**UN SDGs**) all

[573] *Competition Commission of South Africa v Mediclinic Southern African (Pty) Ltd and Another* [2021] ZACC 35.
[574] *Competition Commission of South Africa v Mediclinic Southern African (Pty) Ltd and Another* [2021] ZACC 35, para 73.

grounded in the economic, social, and environmental dimensions of sustainable development. The 17 SDGs are internationally agreed and are set out in the table below.

TABLE 1: SUSTAINABILITY GOALS SET OUT BY UN RESOLUTION 70/1	
Goal 1	End poverty in all forms everywhere
Goal 2	End hunger, achieve food security and improved nutrition and promote sustainable agriculture
Goal 3	Ensure healthy lives and promote well-being for all at all ages
Goal 4	Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
Goal 5	Achieve gender equality and empower all women and girls
Goal 6	Ensure availability and sustainable management of water and sanitation for all
Goal 7	Ensure access to affordable, reliable, sustainable and modern energy for all
Goal 8	Promote sustained, inclusive, and sustainable economic growth, full and productive employment and decent work for all
Goal 9	Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
Goal 10	Reduce inequality within and among countries
Goal 11	Make cities and human settlements inclusive, safe, resilient, and sustainable
Goal 12	Ensure sustainable consumption and production patterns
Goal 13	Take urgent action to combat climate change and its impacts
Goal 14	Conserve and sustainably use the oceans, seas, and marine resources for sustainable development
Goal 15	Protect, restore, and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
Goal 16	Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels
Goal 17	Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development

3. The connection between environmental sustainability and competition law

From a horizontal and vertical behavioral or conduct perspective, environmental sustainability can intersect with competition law where companies wish to cooperate to achieve sustainable practices. To further their Environmental, Social and Governance (**ESG**) goals, companies in a wide range of sectors are seeking up to operate in more sustainable ways and to explore opportunities to cooperate in achieving sustainable outcomes. It is widely understood that collaboration, whether horizontal or vertical, can lead to substantial economic benefits, in particular where they combine complementary activities, skills or assets. Collaboration can also allow for cost-savings, risk-sharing, increasing investments, pooling know-how, enhancing product quality and variety and the faster launching of innovation. Similarly, collaboration can mitigate the impact of shortages and disruptions in supply chains, as well as reducing dependencies on products, services and technologies. Collaboration is sensible for the attainment of sustainability objectives, including that unilateral initiatives alone cannot achieve the scale of change required to have meaningfully impact on the UN SDGs, systemic change (at least temporarily) triggers extra costs that individual companies may not be able to bear without suffering a 'first-mover disadvantage'. For example, developing sustainable technologies (such as alternative fuels or biodegradable materials), may be prohibitively expensive for individual firms, but by sharing R&D efforts and costs, competitors can accelerate innovation. However, cooperation among competitors, and even suppliers and/or customers, may raise antitrust concerns or cause contraventions, which may deter collaboration, even if the objective is sustainability.

From an abuse of dominance perspective, environmental sustainability interacts with competition law in a number of ways, including for example where, a dominant firm's conduct may result in exclusionary practices (such as restricting access to essential green technologies, or refusing to share eco-friendly innovations), or predatory pricing to drive out smaller sustainable competitors, or greenwashing as a competitive tactic by misleading sustainability claims which may distort consumer choice and disadvantage competitors making genuine investments in sustainable practices.

Merger control is discussed above, but competition regulators will need to balance the promotion of environmentally sustainable practices with the preservation of competitive markets.

4. Environmental sustainability in South Africa and enforcement record of the Commission

The interaction between the competition law provisions relating to cooperation, cartels, abuse of dominance, and mergers on the one hand, and environmental sustainability on the other, can be viewed through the prism of "shield"- type situations, and "sword"- type situations.[575] In a shield situation, companies take action aimed at fostering sustainability and rely on sustainability considerations before the competition regulators to make a finding that their conduct does not offend competition law principles, or that the conduct is justifiable because the sustainability benefits outweigh the anti-competitive harm. A

[575] Pranvera Këllezi et al, *Sustainability Objectives in Competition and Intellectual Property Law*, 2024 (here).

sword situation pertains to instances where competition regulators or courts use the competition rules to protect competition, and which in turn is expected to be beneficial to sustainability. Below are some highlights of the South African Commission's experience with environmental sustainability, but which lean toward a sword-type situation.

4.1 *Sunside*[576]

Sunside concerned the acquisition by the Heineken Group, through Sunside acquisitions, of a controlling interest in NBL Investment Holdings and the flavoured alcoholic beverages, wine and spirits operations of Distell in South Africa, Namibia and select markets across sub-Saharan Africa. The merger was approved subject to competition and public interest-related conditions. This included for companies to continue to accelerate the sustainability efforts of Distell and Heineken South Africa inter alia to protect the environment. As such, Sunside Acquisitions committed to implementing (amongst others) a carbon neutrality initiative, aiming for net zero emissions in production by 2030 and carbon neutrality across the value chain by 2040.

4.2 *Air Liquide*[577]

Air Liquide concerned an acquisition by Air Liquide, a supplier and producer of industrial and specialty gases, of 16 air separation units owned by Sasol South Africa Ltd (**Units**). The Units separate atmospheric air into nitrogen and oxygen and are used to produce industrial and specialty gas. The merger did not give rise to competition law concerns but was approved subject to public interest considerations. The conditions include commitments to substantially reduce the carbon emissions associated with with air separation units within ten years of the merger implementation date. It is required that this should be done by initiating, amongst other reduction strategies, a renewable energy procurement process aimed at procuring an aggregate amount of up to 900 MW of renewable energy Other public interest conditions applied include upskilling of employees, entering into transactions to promote ownership by HDPs, procuring inputs from SMEs and businesses owned by HDPs and making surplus oxygen available to customers in the healthcare sector.

4.3 *Averda*[578]

The Commission prohibited a proposed merger in terms of which Averda, an end-to-end provider of waste management services including hazardous healthcare risk waste sought to acquire three target companies operating an incinerator which can treat all forms of healthcare risk waste and also operating a thermal desorption facility in which waste can be burnt without combustion. The merger would give rise to horizontal overlaps, and the

[576] Sunside Acquisitions Proprietary Limited and NBL Investment Holdings and Distell Group Holdings Limited, Tribunal Case No.: LM136Dec21 (here) (***Sunside***). Reasons for decision in this matter are still pending.
[577] Air Liquide Large Industries South Africa Proprietary Limited and the Business of owning and operating 16 air separation units of Sasol South Africa Limited, Tribunal Case No.: LM127Sep2020 (***Air Liquide***) (here).
[578] Averda South Africa Proprietary Limited and A-Thermal Retort Technologies Proprietary Limited; A-Thermal Resources Proprietary Limited; Cecor Allied Technologies Proprietary Limited. This was an *intermediate* merger, which the Commission prohibited. The merging parties applied to the Tribunal for a reconsideration of the Commission's decision, but later abandoned this request.

Commission found that the merger would result in the merged entity having high market shares in a number of relevant markets assessed. The Commission's investigation revealed that Averda has a history of expanding through acquisitions, many of which fall below the threshold to meet the merger notification obligations. The Commission found that Averda's acquisition of the target firms' additional burn technology capacity enables the merged entity to withhold supply of capacity to competitors, or price it at a level that makes rivals less competitive. The merged entity's acquisition of a portfolio of technologies used in healthcare risk waste treatment places it in a unique position to contest contracts/tenders, and this may hinder the effective operations of the competitors, particularly SME and HDP competitors, that traditionally rely on outsourced capacity to effectively compete in these markets.

5. Conclusion

In South Africa, the Act is already configured to incorporate sustainability as part of competition law assessments. As sustainability continues to gain traction, South Africa may be a jurisdiction in which the principle of sustainability develops from discussions to concrete outcomes with lasting impact on the South African economy and its people and which meaningfully contribute towards the attainment of the UN SDGs.

Spain

Spain's path towards sustainable competition: Developments, Gaps and Opportunities

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Sustainability has become a central pillar of public policy in Europe and Spain, spreading its importance across all regulatory fields. At the heart of these improvements stands the *2030 Agenda for Sustainable Development*, adopted by all United Nations member states in 2015 which outlines 17 Sustainable Development Goals (SDGs) focused on promoting economic growth, environmental protection and social progress, including the respect of human rights. Undoubtably, the goals set in the 2030 agenda commit institutions to adapt their policies to be able to tackle such sustainability global challenges.

In this article we delve into the status of the integration of sustainability into Spanish competition policy, assessing the progress made and the challenges that lie ahead. We refer to the leadership of the European Commission in this field and the developments of the Spanish competition authority. In particular, we look at how the CNMC has incorporated sustainability objectives into its strategy and advocacy efforts and has also considered how to integrate such goals in the analysis of agreements and merger cases. In this article, we also tackle the regional contributions of the Catalan Competition Authority.

1. The leadership of the European Commission

The European Union institutions have led the efforts of integrating sustainability goals into its regulatory frameworks, particularly through initiatives like the European Green Deal, which sets out the intermediate objective of achieving a reduction in greenhouse gas emissions of at least 55% by 2030 compared to 1990 levels, with the final goal of becoming the first climate neutral continent by 2050.

When it comes to competition policy, the EC has recognized the great importance of ensuring the alignment between competition policy and these sustainability goals. Hence, the European Commission made, in 2020, a public call for contributions to be able to assess in detail how competition rules could foster sustainability. The feedback received by the European Commission from stakeholders generally highlighted the pressing need of updating the existing competition frameworks particularly in the context of the agreements between competitors with sustainability objectives. Indeed, lack of legal certainty around their legality was considered as a potential disincentive for companies willing to enter into sustainability agreements. This ultimately led to the decision by the European Commission to include a chapter solely dedicated to agreements between competitors that pursue a sustainability objective (which, according to the Guidelines, include not only environmental benefits but also other benefits such as fair salaries or

human rights protection), in its revised version of the Horizontal Guidelines, which entered into force in July 2023 (the "2023 Horizontal Guidelines").

The 2023 Horizontal Guidelines apply to agreements between competitors captured by article 101 of the Treaty of Functioning of the European Union ("TFEU"), which are those that affect trade between EU member states, including Spain. Particularly, the analysis proposed for sustainability agreements under the 2023 Horizontal Guidelines represent a shift in the paradigm of competition policy for two main reasons. First, for the first time, the sustainability-related benefits of an agreement are explicitly recognized as factors to justify potential restrictions on the competition arena. Moreover, the 2023 Horizontal Guidelines explicitly foresee that the sustainability-related benefits enjoyed by consumers which do not belong to the market affected by a particular agreement can, nevertheless, be considered in the context of the efficiency test under article 101.3 TFEU, as long as such benefits also favor consumers within the relevant market. This is not applicable to other type of agreements between competitors considered in the 2023 Horizontal Guidelines, where only the efficiencies that take place in the relevant market can be taken into account in the efficiency test under article 101.3 TFEU. Hence, under the 2023 Horizontal Guidelines, the number of potential efficiencies derived from sustainability agreements between competitors that the parties can claim under such efficiency test is larger than in other types of agreements.

2. Recognition and advocacy by the Spanish authorities

Spain, as an EU Member State, faces the challenge of incorporating the abovementioned sustainability objectives into its policies and ensuring practical and effective national implementation. In this sense, the actions of the national authority (the National Commission for Markets and Competition, "CNMC") reflect the current state of this process and the challenges involved. A closer look at the activity of the CNMC regarding this topic reveals that, while it has made progress in incorporating sustainability goals into its agenda, clearer and more defined policies would be desirable when it comes to purely national agreements to provide certainty.

The CNMC formally recognized the need to incorporate the SDGs into its decision-making process in its Strategic Plan for the period 2021-2026. This plan outlines the priorities in the context of advocacy, supporting green and digital transitions in line with the 2030 Agenda, and fostering competition as a driver of productivity, which can contribute to sustainable growth.

In practice and as foreseen in the Strategic Plan, the CNMC´s activity regarding sustainability has so far been mainly focused on advocacy. For instance, according to the CNMC´s 2024 Action Plan, the strategic objective of incorporating the SDGs in the CNMC´s processes resulted in advocacy work related to sustainability such as the report on packaging waste (issued in July) and electric vehicles. In this sense, in the packaging waste sector, the CNMC uncovered some inefficiencies that could hinder sustainability, such as market concentration and/or the lack of effective competition in particular areas

and recommended implementing some corrective measures mainly focused on fostering innovation and improving the management of resources. Similarly, the study on the burgeoning electric vehicle market by the CNMC led to the recognition of its potential to drive the green transition. Indeed, by analyzing these sectors the CNMC has demonstrated its commitment to integrating environmental considerations into its work.

Regarding sustainability agreements between competitors, the CNMC expressed its views on the intersection between competition policy and the need to prioritize sustainability objectives in its response to the 2020 European Commission's public call for contributions. In particular, in its submission, the CNMC acknowledged the growing importance of sustainability (including environmental, economic and social goals) in public policy and highlighted the need for competition policy to be aligned with all environmental objectives. However, it also recognized the challenges that competition policy faces in directly addressing these environmental concerns arguing that, including sustainability objectives in the substantive analysis of competition decisions involves many complex issues to be resolved, such as the measurement of efficiencies or the cost-benefit weighing. Moreover, the CNMC highlighted the potential risk of diverging interpretations among the different actors in charge of implementing competition policy. In this sense, the CNMC advocated that an appropriate legal approach to tackle the intersection between competition policy and sustainability goals must, in any case, be given at an EU level since, otherwise, there would be a risk of market fragmentation, which could lead to a situation where the same agreement could be considered anti-competitive in one Member State whilst not in another. In its response to the European Commission´s call for contributions, the CNMC also suggested that, rather than altering the substantive criteria applied in competition assessments, the focus of competition authorities could be directed towards projects that align with the SDGs.

The CNMC has taken into consideration sustainability benefits in the application of the Spanish Market Unity Guarantee Act, as the responsible for overseeing the enforcement of such national law — committed to ensuring businesses can operate across Spain without regional regulatory barriers—. In the context of such proceedings, the CNMC has recognized that some competition restrictions may be justified by public interest considerations, as they refer to environmental protection. For example, the CNMC issued a report regarding the denial by a local City Council of a construction permit for a gas station and car wash, concluding that such a restriction was indeed justified by overriding reasons of public interest, such as protecting public health and the environment. These decisions show the CNMC´s recognition of the need to balance environmental goals and competition law.

3. Assessment of sustainability agreements by the CNMC

Notwithstanding its significant advocacy efforts as described above, the CNMC has not issued specific regulations or detailed guidance on how sustainability agreements between competitors will be treated under national competition law. Unlike other

countries, such as the Netherlands, where authorities have published guidelines and analyzed multiple cases, we are not aware of the existence of public record of the CNMC having reviewed a sustainability agreement or issued specific criteria for their assessment. As a result, companies in Spain are left to navigate the issue with little certainty. However, based on the publicly available information, it is reasonable to anticipate that the CNMC will analyze sustainability agreements relying on the European framework as their primary reference point.

In this sense, according to Spanish regulation, agreements that restrict competition are prohibited under Article 101 of the TFEU and/or Article 1 of the Spanish Competition Act ("LDC"), depending on whether the agreement at stake has, or not, effects on intra-Community trade.

In light of the above, sustainability agreements between competitors that affect trade within the EU will be subject to the prohibition of anticompetitive agreements under Article 101 TFEU and, hence, will be analyzed in accordance with the 2023 Horizontal Guidelines. On the other hand, sustainability agreements between competitors that do not affect intra-Community trade, will be solely subject to national competition law. In those cases, the CNMC can operate with greater discretion when applying the law and may choose whether to apply the framework established in the 2023 Horizontal Guidelines or to deviate from them.

In this sense, while some competition authorities across Europe have issued national policy guidance on the analysis of sustainability agreements that fall entirely in the scope of national law (for example, the Dutch competition authority, "ACM"), the CNMC has not yet published its own guidelines. Hence, while, for instance, there is evidence pointing at the fact that the ACM will take a more flexible approach than the 2023 Horizontal Guidelines (for instance, the ACM seems not to be interested in actively investigating environmental agreements between competitors as long as consumers receive a share of the benefits - even if the competitive restraints of the agreement are not fully compensated), the CNMC has not expressed a stance suggesting a more lenient analysis than that proposed in the 2023 Horizontal Guidelines. Consequently, as things stand, it appears unlikely that the CNMC will deviate from the European framework analysis for purely national cases.

That said, even if the current regime imposes a self-assessment approach where each company should assess the legality of their agreements from a competition law perspective, the CNMC is characterized by its approachability and its openness to informally discuss sustainability agreements, including agreements between competitors. Indeed, in the CNMC´s response to the 2020 European Commission's consultation, it highlighted the potential use of the advisory functions foreseen in Article 5.2 of Law 3/2013 to provide legal certainty in relation with sustainability agreements and underlined the CNMC's willingness to engage with stakeholders.

4. Sustainability goals in Spanish merger control

The CNMC has also expressed its view regarding merger control. In particular, in its response to the European Commission´s public call for contributions, the CNMC acknowledged, consistent with the view expressed by the European Commission in the Bayer/Monsanto case (Case M.8084), that certain mergers can have negative effects on the environment. Specifically, because such mergers may reduce the diversity of environmentally friendly products and technologies available to consumers. Therefore, within the framework of merger control, the CNMC advocated for sustainability criteria to be integrated into the assessment of potential harm to innovation stemming from a merger.

Specifically, the CNMC provided the following examples of mergers that could produce harmful effects for sustainability: (i) transactions that reduce the variety of sustainable products on the market or compromise the long-term viability of such products due to the disappearance of small and sustainable producers from the market (as a consequence of market concentration); and (ii) *killer acquisitions*, where non-renewable energy driven companies acquire startups active in the market of renewable energy creation with the intention of halting the development of these technologies.

In addition, the CNMC also highlighted that, in Spain (as in other Member States), general public interest considerations may also be considered in merger control analysis. Specifically, under Spanish law, the Council of Ministers may review mergers that the CNMC has decided to prohibit or have authorized subject to commitments or conditions following a Phase II investigation. In this sense, the CNMC stated in its reply to the European Commission´s call for contributions, that in this "third phase" of merger control the Government may assess the merger based on general interest criteria beyond competition law, including the protection of public safety, public health, and environmental sustainability.

In this regard, it is reasonable to expect that, the CNMC, having included sustainability objectives as a guiding principle in its Strategic Plan and as a transversal element of its decision-making processes, is prepared to evaluate sustainability criteria in its merger control analyses. Therefore, although there are not known precedents of such an approach, it remains a possibility in the near future.

5. Sustainability goals and the Catalan Competition Authority

The interplay between competition law and sustainability has also been addressed at the regional level. In particular, the Catalan Competition Authority ("ACCO") also replied to the 2020 European Commission´s public call for contributions, where it advocated for using competition policy as a tool to foster sustainability, rather than just adapting it to ensure that competition rules do not obstruct the achievement of these goals. In this sense, the ACCO highlighted the critical importance of transparency regarding the environmental impact of the products and services offered in the market. From this viewpoint, the ACCO understands essential for end consumers to have clear information to be able to consider environmental factors in their purchasing decisions. Moreover, it

argues that a lack of such transparency would lead to a market failure because, if a consumer cannot distinguish between sustainable and non-sustainable products, the supplier would lack incentives to adopt sustainable models. As a result, this information asymmetry could trigger a "race to the bottom," whereby market dynamics exclude higher-quality, sustainable products in favor of those with lower quality or greater negative impact. With all, according to the ACCO, for competition policy to be a real and effective driver towards sustainability, it is important to enhance transparency around the sustainability attributes of products and services because, by doing so, suppliers will be motivated to innovate and achieve greener models, fostering a "race to the top" that, combined with growing public awareness, will lead to a real "Green Competition."

In addition, in the context of competition enforcement, the ACCO supports incorporating sustainability considerations as a key parameter of analysis. These considerations could be applied positively, by recognizing the sustainability benefits in conduct assessments under Article 101.3 TFEU, or negatively, by treating environmental harm as an aggravating factor that justifies higher sanctions given the critical nature of the interests at stake. This perspective reflects the potential direction that the ACCO may adopt in the scope of its regional enforcement actions where, apparently, it strives for integrating sustainability considerations as a relevant component in the application of competition law.

6. The progress made and the challenges that remain

In conclusion, it is clear that the integration of the SDGs into competition policy reflects a growing recognition of the need to balance economic, social, and environmental objectives. To address that need, the European Commission revised the Horizontal Guidelines where a clear framework for assessing sustainability agreements under Article 101 TFEU was established, ensuring consistency and legal certainty for agreements that affect intra-Community trade.

In Spain, the CNMC is bounded to apply such framework when assessing sustainability agreements that fall within the scope of Article 101 TFUE. However, at a purely national level, while the CNMC has incorporated the SDGs into its strategic priorities and decision-making processes, its approach has been primarily advocacy driven. In this sense, although the CNMC’s engagement with stakeholders and its advocacy efforts signal a willingness to support sustainability initiatives within the bounds of competition law, the absence of specific national guidelines or relevant precedents addressing sustainability agreements solely subject to the Spanish Competition Act creates some uncertainty for businesses operating in the Spanish domestic markets.

As such, while it is reasonable to expect alignment of the CNMC with the principles established in the Horizontal Guidelines even when assessing agreements with purely national effects, a more explicit framework or further guidance would be valuable to provide the legal certainty needed to foster collaboration and innovation among competitors pursuing sustainability objectives.

The Netherlands

Sustainability Collaborations: The Dutch Policy Rule In Action

By Helen Gornall, Valentine Szita Marshall, and Shubhanyu Singh Aujla[579] *of De Brauw Blackstone Westbroek*

1 INTRODUCTION

The Netherlands Authority for Consumers and Markets ("**ACM**") has recently informally assessed and supported five sustainability agreements under its nonconformist national policy rule on oversight of sustainability agreements (**"Policy Rule**").[580] Although the ACM makes it clear in its Policy Rule that it will evaluate sustainability agreements in accordance with the approach outlined by the European Commission ("**EC**") in revised EU guidelines for horizontal cooperation agreements between competitors ("**EU Horizontal Guidelines**"),[581] it nevertheless grants businesses more leeway to conclude two types of sustainability agreements: (i) agreements ensuring compliance with binding European or Dutch sustainability rules, and (ii) environmental-damage agreements. The ACM does so by declining to take enforcement action against such sustainability agreements if the relevant criteria of its Policy Rule are met. The ACM's guarantee not to enforce in some situations, including a commitment not to impose fines, notably covers sustainability agreements potentially incompatible with applicable EU rules set out by the EC in the EU Horizontal Guidelines.

Until the end of 2024, only five ACM informal assessments were publicly available online, providing some additional insight into the ACM's application of its Policy Rule. Nevertheless, the ACM's enforcement divergence from the EU Horizontal Guidelines does not exclude the potential for EC intervention, adding complexity and reducing legal certainty for businesses seeking to act upon the ACM's informal assessments. That said, the sustainability agreements informally assessed and supported by the ACM under its Policy Rule to date, generally do not test the boundaries of EU competition law,[582] and would likely have been acceptable to the EC as well. At the same time, and to the best of our knowledge, no proposed sustainability collaboration has yet been brought to the EC for its review, so we cannot comment on the EC's enforcement practice.

The lack of examples at the EU level does, however, cast doubts over the effectiveness of the EC's outreach to businesses to come forward and discuss their sustainability

[579] Respectively partner, associate, and legal adviser at De Brauw Blackstone Westbroek.
[580] Policy Rule on ACM's oversight of sustainability agreements, (4 October 2023) ACM/UIT/596876.
[581] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, (21 July 2023) 2023/C 259/01.
[582] The most likely exception being the ACM's informal assessment of sustainability initiative regarding the recycling of commercial waste, (4 October 2023), ACM/UIT/605715.

dilemmas and the related need to cooperate with competitors. It is possible that businesses are sceptical of the EC's overtures, given it has been prioritising sustainability-related antitrust investigations in recent years.[583] It must, however, now be borne in mind that the recent appointment of Teresa Ribera as the EC's Executive Vice-President for a Clean, Just and Competitive Transition has raised questions about whether the EC's approach to competition and sustainability may change, with the possibility of the EC's approach becoming more radical, potentially even going beyond the bold steps of the ACM.[584]

In this context, our article provides a concise overview of the ACM's Policy Rule, including its background and general construction, and the proposed treatment of environmental damage agreements and agreements ensuring compliance with binding sustainability rules. In addition, we also provide a summary of each of the ACM's five publicly available informal assessments.

2 THE ACM'S POLICY RULE

A. BACKGROUND

Competitors are increasingly considering joining forces to pursue sustainability goals, thereby pre-empting a potential "first mover disadvantage". This is a situation where customers do not reward the choice of an undertaking to adopt higher sustainability standards (e.g. because the product is more expensive) thereby opting for the less sustainable product or service of a competitor instead. As a result, the sustainability efforts of one company lead to sales of products increasing for the more polluting / less sustainable party. By sharing risk and costs, companies are able to avoid this problem, enabling the pursuit of new and, often, costly innovations to achieve greener business practices.

However, if competitors join forces, they may risk flouting the prohibition on anticompetitive agreements. Therefore, companies and their legal advisers need to assess if any proposed pro-sustainability collaboration affects competition parameters (price, quality, choice, innovation, etc.). If competition parameters are likely to be affected, companies must assess if the sustainability objective they seek to pursue can be met individually, i.e., without coordinating with their competitors. In many cases, sustainability efforts may well be rewarded by consumers, allowing the greener product or service to be used as a parameter of competition to the benefit of the innovating party. However, if this is not the case and a first-mover disadvantage exists, a joint initiative with competitors could be the only realistic way to effect change. Firstly, before embarking on any collaboration, it is prudent – under consumer law as

[583] See, among other examples, European Commission, *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars,* (8 July 2021); European Commission, *Antitrust: Commission opens investigation into PPC's behaviour in the Greek wholesale electricity market*, (16 March 2021); and European Commission, *Antitrust: Commission carries out unannounced inspections in the automotive sector*, (15 March 2022).

[584] Please see section 2E, below, for a more detailed discussion of this development.

well as competition law – to ensure all aspects of a proposed sustainability agreement contribute towards achieving a genuine and verifiable sustainability objective. There must be no "greenwashing" risks. Secondly, it must be assessed whether a proposed sustainability agreement that is likely to affect the parameters of competition can benefit from a statutory exemption under Article 101 (3) TFEU

One of the conditions that is critical in this regard, i.e. to avail a statutory exemption, is that the consumers affected by a restriction of competition receive a 'fair share' of the possible benefits stemming from the sustainability agreement in question. As per the EC, consumers only receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral, or in other words, consumers are fully compensated. In addition, another important condition is that the restriction of competition should be indispensable to the attainment of the benefits.

Against this background, both the ACM and the EC have sought to clarify how companies must proceed with such pro-sustainability collaborations without infringing competition rules. To this end, the ACM first published draft sustainability guidelines in July 2020,[585] revising them in January 2021 after a public consultation.[586] The ACM's draft guidelines demonstrated its comparatively progressive approach on several issues, such as diverging from the EC's position that benefits stemming from sustainability agreements that restrict competition must fully compensate affected consumers regardless of the type of sustainability objective pursued.[587] The ACM had argued in its draft guidelines that depending on the sustainability objective driving the collaboration, it should be acceptable if consumers are not always fully compensated for any price increase or decrease in choice as long as there are wider benefits to society. In this regard, the ACM was also more open to accepting out-of-market benefits and unlike the EC, it did not impose a strict condition requiring a substantial overlap between the affected consumers in the relevant market and the beneficiaries outside that market.

Given the ACM recognised the need for a uniform EU approach, it did not finalise its draft guidelines while the EC was working on revising the EU Horizontal Guidelines.[588] The ACM, nonetheless, clarified that it would rely on the draft guidelines as a reference instrument in its review of sustainability agreements. True to its word, the ACM relied on its draft guidelines to assess and support five agreements covering industry sectors as diverse as energy, beverages, and the floricultural

[585] ACM Guidelines on Sustainability agreements — Opportunities within competition law, (9 July 2020), first draft.
[586] ACM Guidelines on Sustainability agreements — Opportunities within competition law, (26 January 2021), second draft. See also Helen Gornall and Shubhanyu Singh Aujla, *Guidelines on Opportunities Within Competition Law for Sustainability Agreements (The Netherlands)*, (2022), Thomson Reuters.
[587] Contrast the EU Horizontal Guidelines (n 3), paras 583–584, in which the EC clarifies consumers only receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral, or in other words, consumers are fully compensated, with the Revised Draft Guidelines (n 8), paras 45–50. See also ACM Legal Memo, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?,* (27 September 2021).
[588] ACM, *Guidelines on sustainability agreements are ready for further European coordination*, (26 January 2021).

market.[589] However, once the EC finalised the EU Horizontal Guidelines, the ACM's approach become contradictory and so it replaced its draft guidelines with the Policy Rule.[590]

B. Policy Rule: General Construction

Unlike ACM guidelines that explain its interpretation of statutory provisions, its policy rules instead explain how the ACM will exercise certain administrative powers.[591] A policy rule of this kind can be categorised as a type of formal decision by a governing body concerning its exercise of an administrative power.[592] The ACM's Policy Rule on its oversight of sustainability agreements accordingly outlines the ACM's enforcement approach regarding sustainability agreements.[593]

Similar to the EU Horizontal Guidelines,[594] the Policy Rule provides a broad definition of a sustainability agreement, which is any agreement (horizontal or vertical[595]) that pursues a sustainability objective, regardless of its specific form.[596] The ACM reiterates the relevant framework for reviewing sustainability agreements, i.e. the prohibition of anticompetitive agreements (Article 101(1) TFEU/Article 6(1) Dutch Competition Act "**DCA**"), and the four cumulative criteria for availing a statutory exemption (Article 101(3) TFEU/Article 6(3) DCA).[597] The ACM also explicitly affirms that it will follow the EU Horizontal Guidelines and relevant national and European case law when applying this framework.[598] This is important given most Dutch sustainability agreements are covered by EU competition rules since they are likely to have a cross-border effect.[599] As such, it is worth noting that according to the EU Horizontal Guidelines, sustainability agreements are not a distinct category of horizontal agreements. If agreements between competitors are one of the forms of cooperation agreements covered elsewhere in the EU Horizontal Guidelines, their assessment will be based on the relevant chapter together with the guidance in the separate chapter on sustainability agreements. For example, an agreement to purchase exclusively from suppliers that respect specific sustainability standards is evaluated according to the chapter on purchasing agreements while taking into consideration the

[589] See also Helen Gornall et al., *Dutch Competition Authority Willing to walk the talk on sustainability agreements,* (21 September 2022), De Brauw Blackstone Westbroek.
[590] Policy Rule (n 2), para. 43. See also Helen Gornall, Agnieszka Bartlomiejczyk and Shubhanyu Singh Aujla, *Oversight of Sustainability Agreements in the Netherlands: New Policy Rule Issued by the ACM,* (2024), Oxford Journal of European Competition Law & Practice.
[591] Dutch General Administrative Law Act, Article 4:81; and Article.1:3(4) of the Dutch General Administrative Law Act: "an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority."
[592] H.E. Broring et. al., *Bestuursrecht 1*, The Hague: Boom Juridisch 2020, p. 207
[593] Policy Rule (n 2), para. 5.
[594] EU Horizontal Guidelines (n 3), para. 521.
[595] In other words, at the same level of the supply chain, or at different levels of the supply chain, respectively.
[596] Policy Rule (n 2), para. 14.
[597] Policy Rule (n 2), para. 15.
[598] Policy Rule (n 2), para. 18.
[599] Policy Rule (n 2), para. 5. See also Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance), (27 April 2004) 2004/C 101/07.

chapter on sustainability agreements. If there is a discrepancy between chapters, the parties may rely on the more favourable guidance.

The ACM has thus largely drafted its Policy Rule around the EU Horizontal Guidelines and clarified that it did so to facilitate a harmonised pan-EU approach. Yet the ACM's Policy Rule differs from the EU Horizontal Guidelines when it comes to two specific types of sustainability agreements.

C. COMPLIANCE AGREEMENTS

Firstly, compared to the EC, the ACM grants a broader ambit to agreements aimed at ensuring compliance with binding sustainability rules (**"Compliance Agreements"**). The EU Horizontal Guidelines only place outside the scope of Article 101 TFEU those agreements which aim to ensure compliance with legally binding and sufficiently precise requirements or prohibitions based on international legal sources (international treaties, agreements, or conventions).[600] The ACM goes beyond the EU Horizontal Guidelines by stating that it will not investigate such agreements that are aimed at ensuring compliance with EU or national rules as well.[601] This deviates from the EC's position that where EU or national law already requires market participants to comply with specific obligations that have a sustainability objective, agreements between competitors and any competitive restrictions they entail are not indispensable to ensure compliance with the obligations imposed. According to the EC, obligations stemming from European or national sources of law do not necessitate Compliance Agreements as the legislator has already decided that each undertaking must individually comply with the obligation in question.[602] The ACM, unlike the EC, instead focuses on the actual compliance with and factual enforcement of sustainability rules,[603] regardless of their source, arguing it would be inexpedient to protect "illicit competition" that would not exist if these binding rules had indeed been properly followed.[604] Even before the ACM issued its Policy Rule, it had endorsed a joint initiative by garden centres to boycott suppliers that use illegal pesticides,[605] thereby ensuring the enforcement of statutory requirements. Such a collective boycott would typically fall foul of the prohibition on anti-competitive agreements. However, according to the ACM, the initiative was not anticompetitive as it targeted the elimination of competition based on illegal production methods, which competition law should not protect.

It is questionable whether the ACM's position is in keeping with the *Slovak Banking* judgement of the Court of Justice of the European Union (**"CJEU"**)'. In this case, the CJEU held that ensuring compliance with statutory requirements is the responsibility

[600] EU Horizontal Guidelines (n 3), para. 528.
[601] Policy Rule (n 2), paras. 20-21.
[602] EU Horizontal Guidelines (n 3), paras. 564-565.
[603] See Helen Gornall et al., (n 12), p.p. 4-5.
[604] Policy Rule (n 2), para. 21.
[605] Informal Guidance regarding Sustainability Initiative of Dutch Garden Retail Sector, (21 September 2022) ACM/UITNZP/001508.

of public authorities, not private entities,[606] also since the application of statutory provisions may require complex assessments. The CJEU's demarcation of the area of responsibility of public authorities may preclude certain Compliance Agreements allowed under the Policy Rule.[607] At the same time, it has also been argued by some that by focussing on the complexity of assessments that the application of statutory provisions may require,[608] the CJEU has left room for those Compliance Agreements which target sufficiently precise sustainability rules that do not require complex assessments, and in particular, the weighing of different public interests.[609]

D. ENVIRONMENTAL-DAMAGE AGREEMENTS

Secondly, unlike the EC, the ACM distinguishes "environmental-damage agreements" from "other sustainability agreements".[610] Compared to the general approach outlined in the EU Horizontal Guidelines, the ACM grants greater leniency to environmental-damage agreements which it defines as "agreements that contribute efficiently to compliance with an international or national standard or to the achievement of a specific policy objective to prevent environmental damage".[611] The ACM states that it will not further investigate environmental-damage agreements, provided that the initial assessment shows that (i) it is plausible that the agreement is necessary for achieving the environmental benefits, and (ii) the environmental benefits *sufficiently* outweigh any potential anti-competitive effects.[612]

However, different from the framework in its previous draft guidelines, the ACM now furthermore expressly requires that affected consumers in the relevant market must receive an "appreciable and objective part" of the benefits.[613] This requirement is not the same as the EC's requirement that in order to be exempted, a sustainability agreement that restricts competition must grant affected consumers full compensation for any harm caused (creating an at least neutral overall effect on consumers in the relevant market).[614] It remains to be seen to what extent the ACM will use this seemingly less demanding threshold to pull away from the EC's twin enforcement standpoints for exempting sustainability agreements, namely, (i) the overall effect on consumers affected by the restriction of competition be at least neutral, and (ii) that

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606 *Protimonopolný úrad Slovenskej republiky v Slovenská sporitelina a.s.,* (7 February 2013) ECLI:EU:C:2013:71, para 20.
607 Namely, agreements aimed at ensuring compliance with binding rules given in national or European legal sources. See Helen Gornall et al., (n 12), p.p. 4-5.
608 *Slovak Banking* (n 28), para. 20.
609 See, Mariska van de Sanden & Wolf Sauter, *De Beleidsregel Toezicht ACM op duurzaamheidsafspraken: toepassing prioriteringsbeleid bij oneigenlijke concurrentie en milieuschade*, (2023), Markt en Mededinging.
610 See Helen Gornall et al., (n 12), p.p. 2-3; The ACM in its draft guidelines had made a distinction between environmental damage agreements and other sustainability agreements that concerned social or other forms of sustainability (working conditions, animal welfare, social sustainability, and human rights) such as establishing minimum animal welfare requirements for meat production. Although it does not explicitly retain this distinction in the Policy Rule, it does single out environmental-damage agreements and its enforcement approach towards these agreements.
611 Policy Rule (n 2), para. 22.
612 Policy Rule (n 2), para. 23.
613 Policy Rule (n 2), para. 23.
614 EU Horizontal Guidelines (n 3), para 569.

out-of-market benefits are only relevant if the consumers affected by the restriction and those benefiting outside the relevant market are substantially the same, and only if the benefits are significant enough to compensate the affected consumers in the relevant market.[615]

In particular, we await in anticipation to see how broadly or narrowly the ACM will, in practice, interpret its requirement of an "*appreciable and objective part"* of the benefits stemming from an environmental-damage agreement being passed on to affected consumers. Although the ACM has clarified that this obviously makes it a prerequisite that affected consumers belong to the group that benefits from the agreement, it has still not imposed a strict condition that affected consumers and ultimate beneficiaries must be substantially the same.

It is also noteworthy that the ACM additionally explicitly states that it will also consider the *polluter pays principle* in the competitive assessment of environmental damage agreements. This enforcement slant, in turn, may provide some additional room to exempt environmental damage agreements that do not fully compensate consumers of the concerned polluting products.[616] In this respect, the ACM has consistently advocated for consumers to be held accountable for their demand, which in turn means they should be accountable (at least to a certain extent) for the environmental damage caused by their demand which is sought to be addressed via an environmental-damage agreement. Thus, the ACM, through its Policy Rule, appears to indicate that it may not require a neutral effect on consumers in all cases,[617] which would deviate from the EU Horizontal Guidelines and – in the views of some – potentially the jurisprudence of the CJEU.[618]

E. IMPACT ON PROSPECTIVE SUSTAINABILITY AGREEMENTS

While the Policy Rule confirms that the ACM will largely follow the EU Horizontal Guidelines, in section 3, it deviates with respect to Compliance Agreements and environmental-damage agreements.[619] Yet neither this enforcement divergence nor the ACM's commitment to refrain from fining informally endorsed agreements or publicly

[615] EU Horizontal Guidelines (n 3), paras 583–584.
[616] See, among others, Maurits Dolmans, *The 'Polluter Pays' Principle as a Basis for Sustainable Competition Policy*, (22 October 2020), Competition Law & Environmental Sustainability, p.p. 18-19; and Helen Gornall et.al. (n 11).
[617] The ACM has also issued numerous public statements disagreeing with the EC's principle of full compensation. See, among others Martijn Snoep, *What is fair and efficient in the face of climate change?,* (31 May 2022); and ACM Legal Memo (n 9). See, also for a contrasting view on why this approach may not always be appropriate, OECD, *Out-of-Market Efficiencies in Competition Enforcement, OECD Competition Policy Roundtable Background Note* (2023), p.p. 30-31.
[618] In *Asnef-Equifax* the Court held that the application of article 101(3) TFEU requires that the overall effect on consumers in the relevant markets be favourable. See *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL/Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, (23 November 2006), ECLI:EU:C:2006:734, para. 72.
The EC cites *Asnef-Equifax* in its reasoning for requiring at least a neutral effect on consumers, see EU Horizontal Guidelines (n 3), para 569. The ACM has publicly disagreed with this reading of the decision. See, among others, ACM Legal Memo (n 9), p. 3.
[619] Though it must be remembered that a certain degree of divergence within the EU's multi-level governance system is more widely present. See, among others, Or Brook, Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities (2019), Common Market Law Review.

announced sustainability agreements that adhere to the Policy rule in good faith,[620] shield prospective participants from potential EC enforcement. This is because, within the EU, both national competition authorities and the EC jointly enforce EU competition rules. EU competition rules apply, inter alia, when there is an effect on trade between EU member states, a condition that is quite easily fulfilled.[621] As many sustainability initiatives in the Netherlands are likely to have an effect on trade between member states, the EC could potentially pursue such agreements even if the ACM chooses not to.

Due to this risk, only participants in purely domestic Dutch sustainability agreements, i.e. those without an effect on trade between EU member states, can take full comfort from the ACM's position. However, even the ACM acknowledges in its Policy Rule[622] that many prospective agreements in the Netherlands are likely to affect trade between member states and thus fall within the scope of EU competition rules.[623] Therefore, the EC may still scrutinise and take enforcement actions against agreements informally supported by the ACM, which can increase legal uncertainty.

That said, one may expect such differences of opinion to happen behind closed doors between the agencies where a proposal is material enough to have a clear EU dimension. Moreover, with Teresa Ribera being appointed as the EC's Executive Vice-President for a Clean, Just and Competitive Transition, there may now be a greater chance of the EC adopting an approach to sustainability agreements which is more closely aligned with the ACM's position. Ribera has a strong track record in the area of sustainability,[624] and President von der Leyen's mission letter to Ribera builds upon this priority topic, calling for a new approach to, and the modernisation of, the EC's competition and sustainability policy, such as through reviewing the EU Horizontal Merger Guidelines and adopting the Clean Industrial Deal.[625] As such, Commissioner Ribera is set to become a major "green" influence on the EC's future competition

[620] See Policy Rule (n 2), para. 40. This commitment is arguably broader than that provided by the EC. See Mariska van de Sanden & Wolf Sauter (n 31).
[621] See, among others, Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance), (27 April 2004) 2004/C 101/07.
[622] Policy Rule (n 2), para. 5.
[623] Even where a prospective participant deems this to be unlikely, the EC's enforcement actions can at times be difficult to predict. See, for an illustration of this unpredictability, the situation concerning bellow threshold referral at issue in *the Illumina/Grail saga*, in which the CJEU disagreed with the EC's broad interpretation of article 22 of the EU Merger Regulation: *Joined Cases C-611/22P and C-625/22P, Illumina Inc. v. European Commission and Grail LLC, and Illumina Inc. v. European Commission,* (3 September 2024) ECLI:EU:C:2024:677.
See, for a critical view of the EC's approach, Alan Riley, *The Illumina Opinion: Article 22, Antitrust and the Rule of Law. The Devastating Critique of Advocate General Emiliou in the Illumina/Grail case*, (12 April 2024), Kluwer Competition Law Blog.
[624] Among other functions, she has served as Executive Director of the Institute for Sustainable Development and International Relations, Spanish Secretary of State for Climate Change, and now Spanish Minister for Ecological Transition. See European Parliament, *Hearing of the Commissioner-designate: Teresa Ribera: CV,* (2024).
[625] Ursula von der Leyen, *Mission letter to Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean, Just and Competitive Transition*, (17 September 2024) p.p. 5-7.

policy, with some voicing concerns that she may even prioritise sustainability gains over competition concerns,[626] though this view is far from universal.[627]

It also has to be considered whether the ACM's Policy Rule is in keeping with the duty of sincere cooperation imposed under EU Law.[628] While Member States and, by extension their competition authorities, are granted a degree of freedom to set their own prioritisation policy,[629] sincere cooperation entails that Member States use their discretion to fulfil EU Law obligations. Thus, in principle, the ACM should guarantee the effective enforcement of EU competition law[630] and not deliberately underenforce.[631] It therefore remains a moot point whether the ACM can prioritise enforcement, based not on resource and capacity constraints, but instead based on specific sustainability policy considerations which some may argue lead it to effectively ignore EU competition rules, reducing legal certainty.[632]

3 THE ACM'S POLICY RULE IN PRACTICE

The ACM has promptly implemented its new Policy Rule through five informal assessments. These assessments provide insights into the ACM's application of its Policy Rule. The ACM chose not to investigate each assessment further, while reserving the right to review if new facts were to arise.[633] While the ACM reached similar conclusions in each assessment, its reasoning differed, making it useful to evaluate each assessment separately.

A. FIRST ASSESSMENT - RECYCLING COMMERCIAL WASTE

On 4 October 2023, the ACM issued informal guidance on an initiative by the Dutch Waste Management Association and several waste collectors regarding the recycling of commercial waste.[634] The participants who are competitors wanted to agree to always offer new corporate clients (waste disposers) a contract for at least two sorted waste streams (such as biodegradable waste, paper, or yard waste). In this way, the

[626] See, among others, Francesca Micheletti and Zia Weise, *Competition poses the toughest test for climate chief Ribera,* (12 November 2024), Politico.
[627] See, among others, Cristina Pricop, *Questions for Ribera — can we really compete our way to decarbonisation?*, (11 November 2024), Politico.
[628] Article 4(3) of the Consolidated version of the Treaty on European Union, (26 October 2012) 2012/C 326/01.
[629] This way, national competition authorities have more control over how to manage their limited resources. See: Directive (EU) 2019/1 to Empower the Competition Authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (11 December 2018), directive (EU) 2019/1, article 4(5). See, on the allocation of competition authorities' resources more generally, William E Kovacic, *Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness* (2018), The Competition Law Review.
[630] It has been argued that this duty extends even further, requiring the maximalisation of European competition law's effectiveness and uniformity. See, among others, Miguel Sousa Ferro*, Institutional Design of National Competition Authorities: EU Requirements,* (30 November 2017), SSRN, p. 9.
[631] Ondrej Blažo, *Proper, Transparent and Just Prioritization Policy as a Challenge for National Competition Authorities and Prioritization of the Slovak NCA,* (18 February 2021), Yearbook of Antitrust and Regulatory Studies, p. 125.
[632] Or Brook, *Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy,* (13 June 2020), Journal of Competition Law & Economics, p.p. 486-487.
[633] In line with the ACM's policy rule. See Policy Rule (n 2), para. 40.
[634] Informal assessment regarding the recycling of commercial waste, (n 4).

participants sought to facilitate compliance with the obligation to separate waste required under the Netherland's National Waste Management Plan, which obliges disposers of 240–660 litres of waste (virtually all the participants' customers) to separate at least one waste category, thereby delivering at least two separate waste streams.[635] This requirement was not being fully enforced by Dutch authorities.

The ACM concluded that the initiative plausibly met the criteria outlined in section 3.1 of the Policy Rule with respect to waste disposers with a statutory obligation to separate waste streams,[636] as it would give effect to Dutch waste separation laws. Additionally, the ACM concluded that it was plausible that the purpose of the initiative was solely to achieve compliance with Dutch waste separation laws, thereby promoting sustainability. In reaching these conclusions, the ACM considered that the initiative was (i) limited to the waste disposer's legal requirements, (ii) contained sufficient safeguards to limit the initiative to that which is necessary and proportionate, as it was voluntary and non-exclusive, and (iii) allowed its participants a degree of freedom to choose which waste streams to separate, as well as to exceptionally deviate from the agreement. While the ACM determined that the agreement could potentially restrict competition for waste disposers who fell below the applicable legal thresholds for requiring separated waste streams (to whom Section 3.1 accordingly did not apply), the ACM concluded that this group was so small that any effect on the Dutch market would be negligible.

B. SECOND ASSESSMENT - E-COMMERCE SUSTAINABILITY STANDARD

On 11 April 2024, the ACM issued informal guidance on the launch of a new sustainability standard for the e-commerce sector by *Thuiswinkel*, an industry association for the e-commerce sector.[637] The proposed certification system aims to help participating webshops reduce their environmental impact in six targeted areas: strategy, product offering, packaging, delivery, returns, and circularity.

Despite stating in its Policy Rule that it would in principle publish all its assessments, [638] the ACM has not (yet) done so in this case. The press release does not explicitly state how the ACM categorised the proposed agreement.[639] However, the ACM appears to have decided that the agreement constituted a sustainability standardisation agreement which posed no appreciable risk of restricting competition. The ACM stated that it found the following considerations important: (i) participation in the initiative would be voluntary, (ii) an independent third party would determine whether a webshop meets the requirements to be certified, (iii) the participants would maintain a degree of freedom over their sustainability visions, goals and choices within the

[635] National Waste Management Plan, LAP3 / NWMP3, Chapter B.3.4.2.3, p.111–112.
[636] Which made up the vast majority of the prospective participants' clients.
[637] ACM, *ACM: duurzaamheidsinitiatief Thuiswinkel past binnen concurrentieregels,* (11 April 2024).
[638] Policy Rule (n 2), para. 38.
[639] Despite the fact that doing so could provide additional clarity, in particular with respect to press releases regarding informal assessments which are not published online.

boundaries of the certification system, (iv) the proposed agreement would leave room for new sustainability innovations, and (v) Thuiswinkel guaranteed it would ensure that no commercially sensitive information would be exchanged. The ACM also favourably considered that the certification system would require participants to communicate about their sustainability efforts in line with the Sustainability Claims Guide,[640] providing consumers with concrete, transparent information about the sustainability benefits of their products and services.

C. THIRD ASSESSMENT - COFFEE CAPSULE RECYCLING

On 4 July 2024, the ACM issued informal guidance on a proposed agreement through which the Royal Dutch Association for Coffee and Tea Companies and nine coffee capsule manufacturers would, through the newly established Association for Coffee Capsules Recycling Netherlands, jointly make arrangements with waste-processing companies to facilitate the sorting and recycling of coffee capsules, including through jointly investing in technologies such as sorting machines.[641] The agreement thus aimed at expanding the percentage of aluminium and plastic coffee capsules recycled.

The ACM concluded that the initiative constituted a sustainability agreement, as amongst other things, its goal was to promote the recycling of plastic and aluminium coffee capsules. The ACM partially based its conclusion that the agreement could be considered a sustainability agreement, on the fact that the most recent EC proposal to amend EU rules on packaging and packaging waste required coffee capsules to be recyclable,[642] as opposed to compostable (as a previous EC proposal had required).[643] The ACM further concluded that the initiative posed no appreciable risk of restricting competition. In reaching this conclusion, the ACM considered that the agreement did not (i) facilitate the sharing of sensitive information, (ii) pose a significant risk of excluding competing producers of coffee capsules or waste processors, or (iii) pose a risk of increased prices. While the ACM also did not find an unacceptable risk of the agreement stifling future innovation, it did advise the participants to actively guard against the initiative precluding innovation in more sustainable alternatives to recycling. Additionally, the ACM clarified that it may request further information about the latest innovation and sustainability developments at a later date.

[640] Guidelines regarding Sustainability claims, (13 June 2023). The ACM also remains vigilant of greenwashing risks from a consumer protection perspective: ACM, *Revised guidelines offer more clarity regarding misleading and vague sustainability claims*, (13 June 2023).
[641] ACM/24/189472 Informal guidance regarding the 'recycling of coffee capsules' initiative, (4 July 2024) ACM/UIT/621991.
[642] European Council, *Packaging: Council and Parliament strike a deal to make packaging more sustainable and reduce packaging waste in the EU,* (4 March 2024).
[643] Proposal for a Regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, (30 November 2022) 2022/0396(COD).

D. FOURTH ASSESSMENT - BANKS' ESG REPORTING

On 14 August 2024, the ACM issued an informal assessment of an initiative by the Dutch Banking Association and several Dutch banks concerning their Environmental, Social, and Governance (ESG) data reporting requirements.[644] In its pilot stage, the initiative aimed to standardize the interpretation and reporting of ESG criteria within the transport, agriculture, and real estate sectors, increasing the coherence and comparability of banks' ESG reporting, as required under, among others, the Corporate Sustainability Reporting Directive (CSRD).[645] The CSRD is a directive that stipulates that from 2024 onwards, (large) businesses are required to report on their impact on environmental, social, and governance issues, including in their supply chains. Banks currently encounter several challenges, including the lack of an unequivocal interpretation of ESG data. As a result, different banks' sustainability reports are not comparable. The initiative therefore entailed the creation of a digital platform for banks to enable consensus on the following: how statutory ESG requirements can be interpreted, what calculation methods and data points can be used, and what data sources are suitable for this.

The ACM concluded that the initiative constituted a sustainability agreement which enhances the comparability of sustainability performances in banks' ESG reporting and posed no appreciable risk of restricting competition. In reaching this conclusion, the ACM considered that the initiative was (i) open to all banks and (ii) voluntary. Additionally, the ACM found that the agreement did not (iii) involve the exchange of competitively sensitive information, (iv) otherwise restrict competition (such as by negatively affecting competition between banks on price, quality, choice, or innovation), or (v) stifle innovation, given the transparency regarding the information and methodology used by banks when reporting their ESG data. The ACM partially based its conclusions on the lack of upcoming European legislation.[646]

E. FIFTH ASSESSMENT - TEMPERATURE REDUCTION IN ASPHALT PRODUCTION

On 6 December 2024, the ACM issued an informal assessment of a collaborative initiative between asphalt producers to make asphalt production more sustainable.[647] The prospective participants were members of the Department on Bituminous Works of Bouwend Nederland, a trade association for the Dutch construction and infrastructure industry. Through the initiative, the prospective participants aimed to phase out asphalt production involving high production temperatures, for asphalt production involving lower temperatures. A lower production temperature would

[644] Informal guidance regarding collaboration on ESG data, (14 August 2024) ACM/UIT/622168.
[645] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, (16 December 2022) 2022/2464.
[646] Namely the lack of sector specific ESG standards to provide additional clarity on ESG reporting, as facilitated by the proposed agreement. See informal Guidance ESG data (n 66), p. 2.
[647] ACM/24/188289 Informal guidance regarding initiative on temperature reduction in asphalt production, (6 December 2024) ACM/UIT/634542.

consume less energy and reduce emissions, lowering asphalt production's impact on the environment.

The ACM concluded that the initiative constituted a sustainability agreement and posed no appreciable risk of restricting competition. In reaching this conclusion, the ACM assessed the initiative through the six cumulative conditions for the soft safe harbour for sustainability standards provided under the EU Horizontal Guidelines.[648] The ACM concluded that the initiative (i) was open and transparent, allowing all interested competitors to join, (ii) did not directly or indirectly impose obligations on non-participating asphalt producers, (iii) allowed participants to apply higher sustainability standards, (iv) did not involve the sharing of sensitive information, (v) allowed interested competitors to join on a non-discriminatory basis, and (vi) had no significant effect on competition, including with respect to competition on the price and quality of asphalt. While the ACM could not rule out that the initiative could lead to a minor price increase, it considered the odds of a significant price increase slim enough to satisfy this condition.

4 CONCLUSION

Through its Policy Rule, the ACM is essentially attempting to be as progressive as it can be within the constraints of the EU Horizontal Guidelines.[649] Nevertheless, it remains too early to determine whether the ACM's approach will provide sufficient legal certainty to businesses considering the number of informal assessments publicly available remain limited. Moreover, neither the ACM's commitment not to impose fines, nor its leniency towards Compliance Agreements and environmental-damage agreements bind the EC. Therefore, risks associated with the Policy Rule's national scope, and divergence from the EU Horizontal Guidelines should be taken into account when considering sustainability agreements in the Netherlands. However, with the recent appointment of Teresa Ribera as the EC's Executive Vice-President for a Clean, Just and Competitive Transition we may see a shift of EU policy in the area of sustainability to align with – and potentially even extend beyond – the progressive Dutch approach.

[648] EU Horizontal Guidelines (n 3), para. 549
[649] Simon Holmes, *Sustainability and competition policy in Europe: recent developments*, (21 October 2024), Journal of European Competition Law & Practice.

United States of America

Sustainable Antitrust Policy in the US and *Texas v Blackrock* – Hot Water or Hot Air?

By Maurits Dolmans, Wanjie Lin and Charity E. Lee[650]

On the day before Thanksgiving 2024, 11 US State Attorneys General teamed up to sue BlackRock, State Street Corporation, and Vanguard Group, alleging that they cooperated as shareholders in US coal companies, to force a reduction in coal production.[651] *Texas v Blackrock* may become a test case for the application of US antitrust law to sustainability cooperation and shareholder stewardship over portfolio companies. This article provides a brief overview of principles of antitrust law as they apply to sustainability cooperation in the EU and UK, and discusses whether analogous principles apply to US antitrust law. We conclude that even if the alleged facts are proven and the allegations survive a motion to dismiss, US antitrust law as it stands leaves ample room for a thoughtful efficiency defense and rule of reason analysis to allow shareholder cooperation to mitigate the damage resulting from climate change, nature loss, and large scale pollution. The Thanksgiving case looks to be a turkey.

1. The need for collective climate action to address market failures

In recent years, antitrust authorities in various jurisdictions outside the US have integrated sustainability economics in antitrust policy. They have issued new guidelines and policies to facilitate cooperation between competitors to mitigate climate change and nature loss. The Directorate General for Competition of the European Commission (DG Comp), for instance, included a sustainability chapter in the new EU Guidelines on Horizontal Agreements,[652] while the UK Competition and Markets Authority (CMA) issued Green Agreements Guidance,[653] as have the authorities from Japan, Singapore, South Korea, Australia, and New Zealand. These policy shifts are not inspired by politics, ethics, or a moral stance, but by objective economics. They recognize that, too often, the price of goods and services fails to account for the cost of unabated greenhouse gas emissions, nature loss, and pollution associated with their production. These costs include the physical, economic, and financial damage consumers suffer as a result of events attributable to climate change, such as extreme weather events, intensified wildfires and storms, increased flooding, heatwaves and droughts. These cause global

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[651] *See* Complaint, *State of Texas et al v Blackrock Inc. et al*, No. 6:24-cv-00437 (E.D. Tex. Nov. 27, 2024), ECF No. 1 ("Complaint"). The Complaint was amended on January 16, 2025, to add two more plaintiff states.

[652] European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, OJ Doc. ID C 259, Ch. 9 (Jul 21, 2023) ("EU Horizontal Guidelines"), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01).

[653] Competition and Markets Authority, Press Release: *CMA launches Green Agreements Guidance to help businesses co-operate on environmental goals*, GOV.UK (Oct. 12, 2023), https://www.gov.uk/government/news/cma-launches-green-agreements-guidance-to-help-businesses-co-operate-on-environmental-goals. For a survey of antitrust agencies globally, *see* Simon Holmes, *Sustainability and competition policy in Europe: recent developments*, JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE (Oct. 21, 2024), https://doi.org/10.1093/jeclap/lpae063.

health loss, nature loss, and economic and societal pressures – ranging from challenges such as water shortages, food insecurity, loss of productivity, and insurance unavailability to mass population displacements.[654] These are "externalities", from an economic perspective. The result is a market price below the "true" price, and market forces that do not provide the right signals for an efficient allocation of resources to prevent these outcomes.

Companies may want to correct the problem, in order to survive and thrive in the long run, but tend to have little incentive to address this market failure alone. Sustainable input or production processes may be more expensive to develop and apply, at least until they become widely used and begin to benefit from economies of scale and scope. Until then, there is a "free rider" concern in markets where consumers have insufficient willingness or ability to pay the cost of developing and introducing sustainable products and services. Businesses that invest in clean or low carbon products worry that those who do not invest will either copy them and free ride on their investment (when enough consumers are eventually sufficiently willing to pay), making the investment unprofitable, or stick to the cheaper unsustainable products and undercut them (if they think that most consumers are unwilling to pay), and deprive their efforts of effect. [655]

A prisoners' dilemma or collective action problem arises. It is in the best interest of each individual consumer and producer, and of society as a whole, to take action to minimize or avoid the physical and economic damage arising from climate change and massive nature loss – but only if everyone does so together, and on a level playing field. If there is inadequate (or no) regulation, carbon taxation, or subsidization, the prospect of a first mover disadvantage discourages efforts to clean up production. The short-term "rational" course of action for each individual producer in such an environment is to continue to exploit nature and emit greenhouse gases with abandon, and forego investments to develop cleaner and cheaper products and to bring them to market at scale. Everyone loses.

Cooperation between market players can be a way to solve this market failure, by reducing or eliminating the free rider problem. Recent economic theory adds further

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[654] *See* Luke Kemp et al., *Climate Endgame: Exploring catastrophic climate change scenarios*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (Aug. 1, 2022), https://doi.org/10.1073/pnas.2108146119. *See also* Jeff Masters, *When will climate change turn life in the U.S. upside down?*, YALE CLIMATE CONNECTIONS (Aug. 19, 2024), https://yaleclimateconnections.org/2024/08/when-will-climate-change-turn-life-in-the-u-s-upside-down/. For examples of studies showing climate change intensifying extreme events, *see* World Weather Attribution, Home Page, https://www.worldweatherattribution.org/

[655] Gasparini, Haanaes, Tedards, Tufano, "When Climate Collaboration Is Treated as an Antitrust Violation", Harvard Business Review, October 2022, https://hbr.org/2022/10/when-climate-collaboration-is-treated-as-an-antitrust-violation; Gasparini, Haanaes, Tedards, Tufano, *The Case for Climate Alliances*, STANFORD SOCIAL INNOVATION REVIEW (2024), at 48 ("*businesses face few or no consequences for emitting greenhouse gases or engaging in other environmentally harmful actions. … government regulation may be ineffective if it is not well informed, if it is not worldwide, or if it is stalled by political gridlock. … Collaboration offers a third, complementary path for business leaders to address climate change.*"). Digital markets are another example where this collective action problem unfolds. "*Recent hopes that application of antitrust law to technology markets might lead to greater data protection and privacy outcomes seem naïve, in the absence of what appears to be an illusory economic benefit to competitors from advancing those goals.*" Max Huffman & Jack Parke, *Sustainability and antitrust – what to expect from the US*, in RESEARCH HANDBOOK ON SUSTAINABILITY AND COMPETITION LAW (Julian Nowag ed. 2024) (citing Pinar Akman, *A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets*, 16 Va. L.& Bus. Rev. 217 (2022)), https://dx.doi.org/10.2139/ssrn.3835280.

nuance, by analyzing the economy not as a system in equilibrium, but as a constantly evolving ecosystem, *i.e.*, a complex web of adaptive systems characterized by feedback processes, where boundedly rational market players act in ways that change the economy, and the evolving shape of the economy in turn affects these agents' actions, with a dynamic pathway and an end-state that are hard to predict.[656] This analysis suggests there are different phases in innovative processes and the transition to new clean technologies. These include an early R&D phase, where new technologies are developed (like renewables several decades ago, and advanced nuclear today); a subsequent evolution where new technologies start to displace the incumbent (like e-vehicles becoming competitive with internal combustion engine cars); and a "reconfiguration phase" where the new technology is displacing the old, but the wider system around that new technology still needs to be developed and adjusted (as is the case with wind and solar power, which are competitive in themselves, but still need complementary development to deal with, for instance, intermittency).[657] In each of these different stages, different forms of cooperation in the private sector can play a role. This includes net zero alliances such as the Net Zero Asset Owners Alliance and Climate Action 100+: "*By joining together business leaders—and sometimes civil-society and government actors—alliances can help firms be more ambitious, responsible, and effective in their efforts to accelerate systems change and save the planet.*"[658] The ultimate goal would be to create social, economic, and technological tipping points towards a net zero economy.[659]

Many forms of sustainability cooperation do not affect competition at all, and raise no issues under antitrust law. Whitelisted examples in the EU and UK Guidelines include:[660]

- Internal initiatives, like limiting printing, waste, and consumer plastic use within the business;
- Joint lobbying to government on sustainability issues;

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[656] J. Doyne Farmer, *Making Sense of Chaos; a Better Economics for a Better World* (2024).
[657] Simon Sharpe, *Five Times Faster: Rethinking the Science, Economics, and Diplomacy of Climate Change* (2023).
[658] Matteo Gasparini, et al., *The Case for Climate Alliances*, STANFORD SOCIAL INNOVATION REVIEW (2024), at 48.
[659] *See Global Tipping Points: Summary Report 2023*, GLOBAL SYSTEMS INSTITUTE (Timothy M. Lenton *et al*, eds., 2023) ("*positive tipping points offer the prospect that coordinated, strategic interventions can lead to disproportionately large and rapid beneficial results … positive tipping points to accelerate social change are the only realistic systemic risk governance option"*); Sandy Trust et al., *Climate Scorpion – The Sting Is In The Tail*, INSTITUTE AND FACULTY OF ACTUARIES (Mar. 14, 2024), at 29 ("*Positive tipping points have the potential to significantly accelerate the energy transition, which can be supercharged with the right policy support."*).
[660] EU Horizontal Guidelines at 18, 30, 39, 44–45, 96–102, 112–113; Competition and Markets Authority, *Green Agreements Guidance: Guidance on the application of the Chapter 1 prohibition in the Competition Act 1998 to environmental sustainability agreements* (Oct. 12, 2023) ("UK Guidance"), at 12–21. For an overview of various agreements reviewed and approved in the EU and UK, *see* Simon Holmes, *Sustainability and competition policy in Europe: recent developments*, JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE (Oct. 21, 2024), https://doi.org/10.1093/jeclap/lpae063 . *See also* COMPETITION LAW, CLIMATE CHANGE & ENVIRONMENTAL SUSTAINABILITY (Simon Holmes, Dirk Middelschulte & Martijn Snoep eds., Concurrences 2021); ICC, *When Chilling Contributes to Warming: How Competition Policy Acts As a Barrier to Climate Action* (Nov., 2022), https://iccwbo.org/wp-content/uploads/sites/3/2022/11/when-chilling-contributes-to-warming-2.pdf; Marjolein De Backer *et al*., *Sustainability and Competition Policy*, Concurrences N 1-2023 (Feb. 2023), https://www.concurrences.com/en/review/numeros/no-1-2023/on-topic/sustainability-and-competition-policy; ICC, *Taking the chill factor out of climate action: A progress report on aligning competition policy with global sustainability goals* (Nov. 2023), https://iccwbo.org/wp-content/uploads/sites/3/2022/11/2023-ICC-Progress-report-on-aligning-competition-policy-with-global-sustainability-goals.pdf; and RESEARCH HANDBOOK ON SUSTAINABILITY AND COMPETITION LAW (Julian Nowag ed. 2024).

- Joint advertising of clean products, services and sustainable policies covering all products industry-wide;
- Industry-led training and education available to all competitors;
- Agreements to comply with laws and regulations and forgo illicit commercial activity;
- Voluntary codes of conduct or targets, leaving competitors free to decide on implementation;
- Sustainability standards that meet the criteria for a "soft safe harbor";[661]
- Objective and non-binding lists of (un)sustainable practices, suppliers, and inputs;
- Joint R&D efforts to develop and market products and services that would not come to market (or not as quickly and cheaply) without cooperation, for instance, if the parties could not develop the technology alone, and their capabilities are complementary; and
- Certain coordination between shareholders to encourage investee companies to transition to a clean economy, or to divest from certain sectors.[662]

The Guidelines also warn against practices that are clearly not allowed under antitrust law, not even when they purport to reduce environmental damage or spur the development of climate technology. These include the following blacklisted agreements:[663]

- Price fixing and output limitations agreed between competitors to raise their prices and profits, and benefit financially at the expense of consumers;
- Geographic or product market allocation;[664]

[661] *See* EU Horizontal Guidelines ¶ 549: "*Sustainability standardisation agreements are unlikely to produce appreciable negative effects on competition as long as … six cumulative conditions are met*" (transparent, not obligatory, minimum standards, without unnecessary information exchange, with effective and non-discriminatory access, and a market share not exceeding 20% (or, if higher, no significant price increase or quality reduction).

[662] *See* UK Guidance ¶ 3.24: Agreements "*unlikely to infringe*" include "*an agreement between shareholders of a single business to vote in support of corporate policies that pursue climate change or environmental sustainability agreements or against policies that do not, or to lobby jointly for corporate changes that pursue environmental sustainability objectives, will be unlikely to infringe competition law*," ¶ 3.25 "*Equally, one shareholder indicating how it will vote regarding such policies is also unlikely to infringe applicable competition law.*" (allowing "shareholder vote signalling".), and ¶ 3.26: "*Similarly, where there is an agreement (or network of similar agreements together) covering shareholders' conduct in relation to several businesses that are competitors in a market, there is unlikely to be a negative effect on competition in that market if the corporate policies, or the changes the shareholders are agreeing to, support, encourage or require the adoption of any of the categories of agreement set out in Section 3 of this Guidance.*" In other words, agreements among shareholders to encourage their investee companies to enter into agreements are permissible if the latter are permissible. Outside these situations, shareholder cooperation needs to be examined on its merits (a rule of reason or exemption criteria): "*Where the shareholder activity falls outside of one of the categories set out in paragraphs 3.24 to 3.26, the shareholder activity may nonetheless be permissible but would need to be assessed under other parts of this Guidance (see Sections 4, 5 and 6).*" *Id.* ¶ 3.27.

[663] EU Horizontal Guidelines at 115; UK Guidance at 22–26.

[664] In some cases, block exemptions may be available for product specialization agreements below a market share ceiling and subject to conditions.

- Information exchanges, standards, or coordination that go beyond what is reasonably necessary to support a permissible sustainability arrangement;
- Agreements to pass on cost of emission reductions, or costs of emissions trading rights;
- Limitation of innovation;
- Agreements not to be more ambitious in pursuing sustainability goals than required by existing regulation; and
- Agreements to undermine or circumvent regulation.[665]

The analysis under EU, UK, and US law of these whitelisted and blacklisted types of agreements is unlikely to differ. The situation seems less clear, however, with respect to agreements that potentially restrict some aspects of competition but may be redeemed by countervailing benefits or efficiencies. These agreements qualify for exemption or a rule of reason under EU and UK law, and in certain other jurisdictions, but currently lack explicit guidance in the US. These include, for example:

- Arrangements to "*phase out, withdraw, or, in some cases, replace non-sustainable products (for example, plastics or fossil fuels, such as oil and coal) and processes (for example, coal-fired steel production) with sustainable ones.*"[666]
- Binding joint codes of conduct for supply chains, especially when combined with an agreement not to buy from suppliers who do not comply with objective sustainability rules;
- Open sustainability standard setting outside the "soft safe harbor" mentioned above, based on objective criteria, with the specifications available for all competitors to use, on fair and reasonable and non-discriminatory terms;
- Joint purchasing of sustainable inputs, in order to achieve upstream economies of scale, or speed up availability of such input on an affordable basis;[667]
- Joint production of sustainable products, in order to achieve economies of scale or scope;

[665] *See, e.g.*, European Commission, Press Release: *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars* ("AdBlue", July 7, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581. The case illustrates the ability of an antitrust authority to distinguish between pro-competitive and anti-competitive arrangements: The parties were fined because they agreed to fall short of existing regulation, through a limitation of a technical development, but in the same case received a blessing for a related technical standard setting that improved efficiency and interoperability (and thus promoted sustainability).

[666] EU Horizontal Guidelines ¶ 538.

[667] *See, e.g.*, *Google, Microsoft, and Nucor announce a new initiative to aggregate demand to scale the adoption of advanced clean electricity technologies*, NUCOR https://nucor.com/newsroom/google-microsoft-and-nucor-announce-initiative.

- Agreements not to supply products or services (including finance or insurance) for objectively unsustainable projects, like high-emissions activities, or new unabated fossil fuel development; and
- Coordination between shareholders that could affect competition, but that is justified by efficiencies or sustainability benefits.[668]

The EU and the UK Guidelines discuss conditions that must be fulfilled for this third group of agreements to be allowed. Under Article 101(3) TFEU and Section 9 of the UK Competition Act 1998, these agreements are exempted from the prohibition under antitrust law if they genuinely (1) contribute to improving the production or distribution of goods or to promoting technical or economic progress, including environmental and climate sustainability; (2) consumers receive a fair share of the resulting benefits; (3) the restrictions in the agreement are essential to achieving these objectives; and (4) there is enough competition left in respect of the products in question.

There is little precedent in US antitrust law specifically with respect to sustainability cooperation. During the first Trump administration, the US Department of Justice (DOJ) opened an investigation into auto companies coordinating with California to limit emissions, but that case was dropped absent evidence of a horizontal agreement.[669] As a result of this policy gap and perceived legal uncertainty in the US, international companies are unwilling to come forward with EEA-wide or world-wide sustainability cooperation, even if permissible in EEA, UK and elsewhere, since arrangements at that level would likely have effects in the US as well.[670] It has been suggested that the Federal Trade Commission (FTC) and the DOJ should update the Guidelines on Horizontal Cooperation between Competitors to reflect an analysis for sustainability agreements under a rule of reason,[671] but the Guidelines are now withdrawn.[672]

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[668] *See* UK Guidance ¶ 3.27, "*Where the shareholder activity falls outside of one of the categories set out in paragraphs 3.24 to 3.26, the shareholder activity may nonetheless be permissible but would need to be assessed under other parts of this Guidance (see Sections 4, 5 and 6).*"

[669] David Shepardson, *U.S. ends antitrust probe of four automakers over California emissions deal*, REUTERS (Feb. 8, 2020), https://www.reuters.com/article/business/us-ends-antitrust-probe-of-four-automakers-over-california-emissions-deal-idUSKBN2012NO/. There were allegations that senior officials in the Antitrust Division may have exercised improper political influence in opening the preliminary investigation. Staff of H.R. Rep. Comm. On the Judiciary, 116th Cong., *Testimony of John W. Elias* (Comm. Print June 24, 2020), at 6, https://www.congress.gov/116/meeting/house/110836/witnesses/HHRG-116-JU00-Wstate-EliasJ-20200624-U8.pdf. The Office of the Inspector General's preliminary review "*did not identify evidence of improper political influence … that was sufficient to warrant further review*" after the case was closed. *See* U.S. Dep't of Just, *Preliminary Review of Allegations Concerning the Antitrust Division's Handling of the Automakers Investigation*, No. 24-079 (July 2024), https://oig.justice.gov/sites/default/files/reports/24-079.pdf.

[670] ICC, "Taking the chill factor out of climate action: A progress report on aligning competition policy with global sustainability goals", paper produced by the ICC Sustainability and Competition Taskforce for COP 28 (November, 2023).

[671] Denise Hearn, et al., *Antitrust and Sustainability: A Landscape Analysis*, COLUMBIA CENTER ON SUSTAINABLE DEVELOPMENT (July, 2023), https://ccsi.columbia.edu/content/antitrust-and-sustainability-landscape-analysis. *See also* Dailey C. Koga, *Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change*, 95 Wash. L. Rev. 1989 (2020), https://digitalcommons.law.uw.edu/wlr/vol95/iss4/8 ("*Congress should pass an exemption to antitrust law for sustainability agreements… [This] fits quite well within the rule of reason analysis currently used by American courts because it could function as a burden-shifting analysis just like the rule of reason."*).

[672] F.T.C., Press Release: *FTC and DOJ Withdraw Guidelines for Collaboration Among Competitors* (Dec. 11, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-doj-withdraw-guidelines-collaboration-among-competitors; U.S. Dep't of Just., *Justice Department and Federal Trade Commission Withdraw Guidelines for Collaboration Among Competitors*, https://www.justice.gov/atr/media/1380001/dl?inline.

2. The writing on the wall in the US

The Heritage Foundation Report. In the US, climate initiatives have drawn political opposition. The Heritage Foundation's Project 2025 report, published in April 2022, recommended that the FTC set up an ESG/DEI collusion task force to investigate firms, particularly in private equity, to determine whether ESG is used to "*meet targets, fix prices, ... reduce output,*" or otherwise violate antitrust laws.[673] Even though the incoming President repudiated that report during his campaign, there remains a possibility that the FTC or DOJ might take that recommendation on board.

The House Majority Reports. Net zero alliances between financial institutions and insurance companies have been targeted with legal threats, which caused several institutions to leave, and drove alliances to pull back from their stated goals.[674] In July 2024, the majority in the US House Judiciary Committee issued an interim staff report (the "Majority Report") asserting that a " '*climate cartel' of left-wing environmental activists and major financial institutions has colluded to force American companies to 'decarbonize' and reach 'net zero.'* "[675] Organizations like Climate Action 100+, Ceres, CalPERS, and Arjuna, for instance, allegedly "*declared war on the American way of life,*" to limit how Americans "*drive, fly, and eat*." They allegedly did this through collective boycotts, "*forcing corporations to disclose their carbon emissions, to reduce their carbon emissions, and ... handcuffing company leadership and muzzling corporate free speech and petitioning.*" The report was followed by a hearing by the House Judiciary Committee, and on July 31, 2024 by a demand for production of documents sent to more than 130 companies, retirement systems, and Government pension plans allegedly involved in coordinated investor action to encourage investee companies to transition to net zero, through Climate Action 100+.

The Majority Report was political in approach, and contained little legal analysis. It concluded that it will "*examine the sufficiency of federal law*" and "*whether legislative reforms are necessary,*" effectively acknowledging that there is no basis for accusations of collective boycotts under current antitrust law.[676]

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[673] MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 873-874 (Paul Dans & Steven Groves eds., The Heritage Foundation 2023) ("Project 2025"), https://www.project2025.org.

[674] For example, the Tennessee AG letter accused the Net Zero Financial Service Providers Alliance of antitrust violations: *Tennessee Attorney General Leads Multistate Letter Expressing Concerns over Net Zero Financial Service Providers Alliance*, TN.GOV (Sept. 13, 2023), https://www.tn.gov/attorneygeneral/news/2023/9/13/pr23-37.html. For a response, *see Minerva's Response to US Republican AG Letter On the Net Zero Financial Services Providers Alliance*, VALUE EDGE ADVISORS (Sept. 15, 2023), https://valueedgeadvisors.com/2023/09/15/minervas-response-to-us-republican-ag-letter-on-the-net-zero-financial-services-providers-alliance/.

[675] Staff of H.R. Rep. Comm. on the Judiciary, 118th Cong., *Climate Control: Exposing the Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing* (Comm. Print June 11, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-06-11%20Climate%20Control%20-%20Exposing%20the%20Decarbonization%20Collusion%20in%20Environmental%2C%20Social%2C%20and%20Governance%20%28ESG%29%20Investing.pdf.

[676] For some more detail *see* Maurits Dolmans, *The Need to Integrate Externalities, Market Failures, and Collective Action Problems in Antitrust Analysis—Thoughts on the US House Judiciary Committee Report on ESG Investigation and the Rebuttal Report*, NYU COMPLIANCE AND ENFORCEMENT (June 2024), https://wp.nyu.edu/compliance_enforcement/2024/06/22/the-need-to-integrate-externalities-market-failures-and-collective-action-problems-in-antitrust-analysis-thoughts-on-the-us-house-judiciary-committee-report-on-esg-investigation-and-the-rebu/.

On December 13, 2024, the US House Judiciary Committee majority supplemented the Majority Report with additional allegations concerning the alleged "*climate cartel's 'net-zero' pressure campaign*" against ExxonMobil, which led to the replacement of three of ExxonMobil's board members and the adoption of net zero commitments by ExxonMobil for the first time (the "Supplemental Report").[677] And just before Christmas, the Committee send information requests to 60 asset managers about their involvement in the Net Zero Asset Managers' initiative.[678]

The Supplemental Report is thin on legal analysis, too. The Report cites a few cases as authority for the proposition that: "*Under U.S. antitrust law, competitors may not self-regulate markets through 'private governance' designed to reduce the output of disfavored products.*" The bare citations in the opening paragraph, without explanation or elaboration, fail to mention the rule of reason. Two of the cases cited, *FTC v Wallace* and *Fashion Originators Guild*, involved a horizontal attempt to exclude rivals[679] - which is neither the aim nor effect of investor initiatives to encourage climate action by portfolio companies. Two others, *National Society of Professional Engineers* and *Indiana Federation of Dentists*, concerned agreements between rivals to restrict price or other information to customers, which the defendants claimed were necessary to ensure quality of service. These cases, too, concerned horizontal agreements where the competitive impact was felt in the market where the parties were active, and the purpose was to raise prices. While even these cases recognized that such restraints on competition should be analyzed under the rule of reason, it was no surprise that the Supreme Court concluded in these cases that "*the discipline of the market*" would deliver the optimal outcome for consumers.[680] In the case of climate agreements to remedy market failures, on the other hand, unmitigated market forces have exactly the opposite effect, harming consumer welfare. The Supplemental Report does not even begin to address this, and the cases it fleetingly cites do not support the conclusions it reaches. One can legitimately conclude that these Reports are intended to intimidate rather than enlighten. The recent withdrawals from the NZBA, and the suspension of the NZAM suggest this strategy may have been effective, whatever its merits.[681]

The House Minority Report. A report from Democratic members of the House Judiciary Committee (the "Minority Report") rebutted the Majority Report with a detailed factual and legal analysis. It found that "*[i]nvestor-led ESG initiatives respond to a genuine demand from investors for greater transparency into public companies' exposure to climate change*", and "*[t]he evidence produced in this investigation undermines, rather*

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[677] Staff of H.R. Rep. Comm. on the Judiciary, 118th Cong., *Sustainability Shakedown: How a Climate Cartel of Money Managers Colluded to Take Over the Board of America's Largest Energy Company* (Comm. Print Dec. 13, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2024-12/2024-12-13-Sustainability-Shakedown-Report.pdf.

[678] *See* House Judiciary Committee Republicans, Press Release: *Judiciary Committee Probes 60+ Companies over ESG Ties* (Dec. 20, 2024), https://judiciary.house.gov/media/press-releases/judiciary-committee-probes-60-companies-over-esg-ties

[679] *FTC v. Wallace*, 75 F.2d 733, 737 (8th Cir. 1935); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941).

[680] *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 690, 695 (1978); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461-463 (1986).

[681] Net Zero Asset Managers Initiative, Press Release: *Update from the Net Zero Asset Managers initiative* (Jan. 13 2025), https://www.netzeroassetmanagers.org/update-from-the-net-zero-asset-managers-initiative/

than supports, theories of potential antitrust liability for these ESG initiatives". It mentioned the need to avoid free rider problems and "*first mover disadvantages*" as a justification, and concluded: "*There is no theory of antitrust law that prevents private investors from working together to capture the risks associated with climate change. There is certainly no antitrust law that prevents investors from asking corporations how they plan to transition to a climate-resilient economy.*"[682] To the contrary, petitioning for climate-related policy change, and exercising rights to vote on shareholder proxy resolutions, are allowed under "*longstanding precedent immunizing expressive activity from antitrust condemnation*" and "*an actual group boycott of fossil fuel companies motivated by a desire to end climate change could likely make a colorable argument for First Amendment protection.*"[683]

Recent appointments to US antitrust leadership suggest the debate may continue. The new administration tapped Andrew Ferguson as the chair of the FTC. While much of the FTC and DOJ attention may be directed at the digital sector, continuing the recent Brandeisian streak in that area, Ferguson's application for the position stated that he might "*investigate and prosecute collusion on DEI, ESG, and advertiser boycotts, etc.*"[684] At the same time, Ferguson promises to "*protect freedom of speech*" and to stay away from "*politically motivated investigations*".

3. The test case – *Texas v Blackrock*

Eleven State Attorneys General led by Texas stole a march on the Federal antitrust authorities, on November 27, 2024. *Texas v Blackrock, State Street, and Vanguard* is one of the first US court challenges under antitrust law against climate cooperation.

The Plaintiff States claim that BlackRock, State Street Corporation, and Vanguard Group (the "Defendants") engaged in unlawful, anti-competitive practices in the name of ESG activism that "*artificially constrained the supply of coal, significantly diminished competition in the market for coal, increased energy prices for American consumers, and produced cartel-level profits for the defendants.*"[685] The causes of action are two-fold: first, that the Defendants' acquisitions and use of stock in coal companies allegedly resulted in "*concentrated ownership of horizontal competitors [which] poses a significant threat to competition in the markets for coal*" (assessed under Section 7 of the Clayton Act). Second, the Defendants' use of their shares "*by engagement, by proxy voting, and otherwise*" to lessen carbon emissions by reducing coal output is said to have resulted

[682] Democratic Staff of H.R. Rep. Comm. on the Judiciary, *Unsustainable and Unoriginal: How The Republicans Borrowed A Bogus Antitrust Theory To Protect Big Oil* (June 11, 2024), https://democrats-judiciary.house.gov/uploadedfiles/2024.06.11_final_esg_report.pdf.

[684] Adam Kovacevich (@adamkovac), *FTC Commissioner Andrew N. Ferguson for FTC Chairman*, X (Dec. 6, 2024), https://x.com/adamkovac/status/1865158761054196147. For a response by the Democratic members of the FTC Alvaro Bedoya and Rebecca Kelly Slaughter, *see* Alvaro Bedoya (@BedoyaFTC), X (Dec. 10, 2024), https://x.com/BedoyaFTC/status/1866668817893728495.

[685] Complaint ¶ 6.

from an unlawful agreement that reduced competition in the coal markets (analyzed under Section 1 of the Sherman Act).

Section 7. The Section 7 complaint observes that the Defendants have a collective stake of between 8% and 34% in eight publicly-held coal producers (which represented c.46% of US domestic coal production). It asserts that the Defendants individually wield "*immense influence*" over the publicly-held coal companies, and as the three largest shareholders of every publicly-held coal company in the U.S.,[686] collectively "*possess a power to coerce management that is all but irresistible.*"[687] While normally, an investor's power to influence management decisions, such as output or pricing, poses an insignificant risk to competition,[688] the Plaintiff States insist that the Defendants' significant investment across these publicly held coal companies puts the Defendants in the position to "*influence the* entire *industry*."[689] Even though they do not actually allege facts showing that the Defendants' minority shareholding conveys control of these companies,[690] they argue that the Defendants' investments across all public coal companies "*pose a similar risk to competition as an outright merger of those competing coal producers.*"[691] It is the Plaintiff States' belief that the Defendants' acquisitions of competing coal companies *alone* is therefore prohibited by under Section 7 of the Clayton Act.[692] This is a novel theory, even apart from the questions whether the theory reflects the real objective in bringing the case, and whether the facts fit the theory.[693]

Section 7 of the Clayton Act does "*not apply to persons purchasing such stock solely for investment and not using the same ... to bring about, or [attempt] to bring about, the substantial lessening of competition.*"[694] Defendants bought the shares as investment rather than to bring about a merger, and any active stewardship was incidental to the protection of the value of their investment rather than to take control of management. The Plaintiff States allege, however, that the Defendants no longer remained passive investors.[695] "*Defendants openly committed to wielding the substantial power of the shares they control to recalibrate carbon production and competition to reduce overall coal production and thereby increase market-wide profits above competitive levels.*"[696] All three Defendants joined Climate Action 100+ ("CA 100+") and the Net Zero Asset

[686] *Id.* ¶¶ 20, 89.
[687] *Id.* ¶ 5.
[688] *Id.* ¶ 92.
[689] *Id.* ¶ 93.
[690] The Complaint refers to anecdotal evidence of policy or governance changes in other companies linked to activist shareholder and proxy campaigns (*Id.* ¶¶ 90-91). It does not explain how these instances demonstrate control on a lasting basis or provide evidence of control or other influence concerning the specific coal companies in question.
[691] *Id.* ¶ 95
[692] *Id.* ¶ 112.
[693] For a recent brief discussion of this approach, *see* Fed. Trade Comm'n, *Reply Comment of the U.S. Department of Justice Antitrust Division and the Federal Trade Commission*, No. AD2-6-000 (Apr. 25, 2024), in response to a Notice of Inquiry from the Federal Energy Regulatory Commission. The DOJ and FTC discuss "*the potential for a partial ownership interest to enable an investor to exercise influence or control over an issuer and, to a lesser extent, the potential for common ownership to lead to anticompetitive effects by altering competing firms' incentives even in the absence of control,*" but recognize that "*[n]ot surprisingly, various commenters reach opposite conclusions*," and do not refer to a presumption. A plaintiff would have to prove additional factors showing that the common shareholding "*may be substantially to lessen competition, or to tend to create a monopoly*."
[694] Complaint ¶ 114 (quoting 15 U.S.C. § 18).
[695] *Id.* ¶¶113-15.
[696] *Id.* ¶ 152.

Managers Initiative ("NZAM"), and are alleged to have committed to reach net zero greenhouse gas emissions and achieve "decarbonization goals" by 2050 across all assets under management.[697] Specifically, they each committed to phasing out coal assets and ceasing support to coal companies that engage in certain activities, such as building new coal infrastructure or expansion of mining.[698] The Plaintiff States allege that all three Defendants publicly commented that they would use their shareholder rights to enforce their goals.[699]

The Plaintiff States claim that the "*Defendants' pressure campaign also had its intended effect*"—the public coal companies, complying with the Defendants' wishes, reduced coal production.[700] The Plaintiff States do not allege the coal companies actually exchanged information to determine available reserves or otherwise coordinated a reduction in output, or that the shareholders somehow caused the coal companies to raise prices, but still claim that the effect of the Defendants' "*sharing of information, communications with management, and their voting of their shares*" drastically constrained competition in domestic coal markets.[701] This meant, they say, that when coal prices spiked in 2022, the coal companies did not expand output accordingly. In summary, the "*Defendants blocked their portfolio Coal Companies from responding to market forces—a response that would have lowered energy prices for all Americans.*"[702] The Defendants allegedly created an artificial shortage of coal, leading to an increase of prices, and resulting in "cartel-level" profits for the Defendants.[703]

Section 1. The Section 1 claim seems underdeveloped. There appears to be no allegation of horizontal collusion to fix prices or reduce output in a relevant financial services market, or that the exercise of shareholders' rights reduced competition between Defendants in attracting investors or opportunities. While the Complaint alleges exchange of competitive information, it does not identify exactly what non-public information was exchanged; nor does it prove a hub-and-spoke cartel in the coal markets (perhaps because it would implicate the coal companies and could lead to damage claims against them). The Defendants will undoubtedly point out that they made and make their investment and stewardship decisions independently, and that their purpose is not to raise prices or reduce their output and thereby benefit financially, or to exclude rivals from the market to increase their market power, but to comply with their fiduciary duty to protect their shareholders' long-term interests against climate damage.[704] Indeed, a recent

[697] *Id.* ¶¶ 120-30.
[698] *Id.* ¶131.
[699] *Id.* ¶¶ 136, 138.
[700] *Id.* ¶ 183.
[701] *Id.* ¶ 225.
[702] *Id.* ¶ 241.
[703] *Id.* ¶ 232.
[704] State Street, for instance, explained that it "*acts in the long-term financial interests of investors with a focus on enhancing shareholder value. As long-term capital providers, we have a mutual interest in the long-term success of our portfolio companies.*" Blackrock stated that "*our focus is on delivering them financial returns,*" and that "*[t]he suggestion that BlackRock has invested money in companies with the goal of harming those companies is baseless and defies common sense.*" Leif Le Mahieu, *Republican AGs Sue BlackRock, Say It Has Conspired Against Coal Production*, DAILY WIRE (Nov. 27, 2024), https://www.dailywire.com/news/republican-ags-sue-blackrock-say-it-has-conspired-against-coal-production. For a further indication of the Defendants' position, *see* Dalia Blass, *Letter to Attorneys General of the States re: Attorneys General Letter, dated Aug. 4, 2022* (Sept. 6, 2022), https://bit.ly/4eB2oq9

EDHEC study concludes that even without climate tipping points, financial assets could lose 40% of their value as a result of climate change physical and systemic risk.[705]

Apart from these points, questions arise about the causal connection between the alleged conduct and the alleged coal or energy price increases. It appears from the Complaint that the reductions in coal production were mainly the result of reduced production in the two largest mines, Black Thunder Mine and North Antelope Rochelle Mine.[706] That decrease can largely be attributed to the fact that the coal power plants downstream from these mines were retiring or repurposed.[707] Further, cheap renewables,[708] cheap gas from fracking,[709] and the 2020 Russia–Saudi oil price war,[710] all appear to be alternative reasons behind the fall in production.[711] The Defendants may also not have had as much influence on coal prices as the Plaintiff States allege.[712] About 85% of coal produced in the US is consumed domestically.[713] The majority of domestic coal trade takes place

("BlackRock seeks to realize the best long-term financial results consistent with each client's investment guidelines. Our participation in these initiatives is entirely consistent with our fiduciary obligations"). Apart from this, it makes little sense for index funds to pressurize coal companies to lower output (even if it does increase profits), because that increases costs and thus lowers profits for buyers of coal such as electricity generators or steel companies, which the index funds also own. Why spend time and energy moving money from one pocket to another? A District Court in Texas recently held that, because there was no "*cognizable basis for claiming that certain ESG considerations capture material financial risks*" and the supposedly "*unproven and nebulous*" nature of climate change , American Airlines breached its fiduciary duties in delegating proxy voting to Blackrock in the light of Blackrock's pro-ESG voting behavior in portfolio companies (*Spence v. American Airlines*, No. 4:23-cv-00552-O, at 36 (N.D. Tex. Jan. 10, 2025)). The judgment acknowledges, however, that consideration of climate change factors would be consistent with fiduciary duties if this is reasonably viewed as maximizing a financial benefit (*Id.* at24-27; 55).

[705] *See* Riccardo Rebonato et al., *How Does Climate Risk Affect Global Equity Valuations? A Novel Approach*, EDHEC-RISK CLIMATE IMPACT INSTITUTE. (July 2024), https://climateimpact.edhec.edu/climate-risk-and-equity-valuation-should-investors-worry.

[706] Complaint at Table 4, 84.

[707] For Black Thunder Mine, *see* Taylor Kuykendall, *Arch Resources Winding Down Massive US Coal Mine as Customer Base Dwindles*, S&P GLOBAL (Feb. 23, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/arch-resources-winding-down-massive-us-coal-mine-as-customer-base-dwindles-62788531. This is exacerbated by the fact that coal fired plants often use a specific coal quality, making it difficult for the coal to be sold elsewhere. *Id*. For North Antelope Rochelle Mine, *see* Gregory Meyer & Neil Hume, *Value of World's Largest Coal Mine Slashed by $1.4bn*, FINANCIAL TIMES (Aug. 5, 2020), https://www.ft.com/content/1ce6db64-ce52-40b7-825b-7e42a82f2d8c. On the other hand the increase in production in privately owned mines, which the Plaintiff States allege to be a response to market forces, appears to be almost exclusively driven by mines owned by Eagle Specialty Materials. These mines were previously idled in 2019 (the beginning of the relevant period) due to the bankruptcy of their previous owner Blackjewel LLC. *See* Taylor Kuykendall & Gaurag Dholakia, *Closures, More Volume Declines Hitting Powder River Basin Coal Region in US*, S&P GLOBAL (Feb. 9, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/closures-more-volume-declines-hitting-powder-river-basin-coal-region-in-us-62561546.

[708] *See generally* Michael Taylor et al., *Renewable Power Generation Costs In 2021*, INTERNATIONAL RENEWABLE ENERGY AGENCY (2022), https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2022/Jul/IRENA_Power_Generation_Costs_2021.pdf; *see also* U.S. Dep't of Energy, *Leveraging Federal Renewable Energy Tax Credits*, No. DOE/EE-1509 (Dec. 2016), https://www.energy.gov/scep/slsc/articles/leveraging-federal-renewable-energy-tax-credits.

[709] *See generally* International Energy Agency, *Global Energy Review 2019* (Apr. 2020), https://www.iea.org/reports/global-energy-review-2019

[710] *See generally* Thai-Ha Le et al., *The Historic Oil Price Fluctuation During the Covid-19 Pandemic: What are the Causes?*, 58 RESEARCH IN INTERNATIONAL BUSINESS AND FINANCE 101489 (2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC9756000/pdf/main.pdf.

[711] U.S. Energy Info. Admin., *Annual Energy Outlook 2021* (Feb. 2021), https://www.eia.gov/outlooks/aeo/pdf/AEO_Narrative_2021.pdf.

[712] Complaint ¶ 225.

[713] International Energy Agency, *Coal 2022* (Dec. 2022), at 82, https://iea.blob.core.windows.net/assets/91982b4e-26dc-41d5-88b1-4c47ea436882/Coal2022.pdf.

under long-term or medium-term contracts with fixed prices.[714] Only two of the six privately-held coal mines sampled were able to (modestly) raise output when prices spiked in 2022.[715] Therefore, contrary to the Plaintiff States's assertion,[716] producers were largely unable to take advantage of higher prices even when they temporarily emerged with the price shock in 2022.[717]

In addition to the allegations under Section 7 of the Clayton Act and Section 1 of the Sherman Act, the Plaintiff States claim that the Defendants' actions violated State antitrust law in Texas, Montana, and West Virginia,[718] and that BlackRock has engaged in deceptive trade practices, in violation of Texas law, when it made statements regarding its non-ESG funds.[719] The State Plaintiffs seek damages, injunctions, equitable relief, and divestment.

Non-antitrust implications of the Complaint. Apart from the antitrust flaws, a concern arises that Plaintiff States are proposing to interfere in the shareholders' business judgment on how to limit climate change risks in order to limit climate damage to the remainder of their portfolio. This seems inconsistent with the *laissez faire* approach the States otherwise advocate. The possible implications for investment funds and managers are noteworthy, too. The Plaintiff States argue that "*when a shareholder owns stock in a single firm, maximizing the profits of that firm maximizes the profits of that shareholder; but when that shareholder owns stock in all the firms that compete in an industry, maximizing the profits of the entire industry maximizes the profits of the shareholder.*" This supposedly influences management, too: "*when management knows their firm is owned by so-called 'horizontal shareholders'—i.e., by shareholders who own shares in the competing firms across an industry—management has an incentive to maximize the profits of the industry. In other words, the incentive is to operate as a cartel.*"[720] It is unclear how, but if that argument succeeds, it could present asset owners and asset managers with a dilemma: to either become silent and passive (in which case they can be universal asset owners, but not be active stewards and cannot take action to reduce systemic "beta" risk so as to preserve asset value, even if that is in the interest of their beneficiaries), or to limit active investment to one investee company per market only (in which case they can be active stewards, but not engage in proper risk spreading so as to reduce "alpha" risk, even if that is in the interest of their beneficiaries). They may not be able to be both active investors and own shares in companies that compete. These implications, if the complaint is upheld, could curtail the investment thesis of ETFs and index funds (including anti-ESG funds like Vivek Ramaswamy's Strive Management that engage in shareholder activism), curb universal asset ownership as a method to spread

[714] Taylor Kuykendall & Kriska Rosario, *Long-Term Contracts Still Eluding Coal Sector as Short-Term Deals Dominate*, S&P GLOBAL (July 30, 2024), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/long-term-contracts-still-eluding-coal-sector-as-short-term-deals-dominate-59240348
[715] Complaint ¶ 228. For the remaining four privately-held firms, output held stable or actually declined between 2021 and 2022.
[716] Complaint ¶ 228.
[717] International Energy Agency, *Coal 2022* (Dec. 2022), at 82.
[718] Complaint ¶¶ 260, 264, 266.
[719] *Id* ¶ 269.
[720] Complaint ¶ 109.

idiosyncratic risk, and interfere with shareholders' rights and fiduciary duties that asset owners owe to their investors and other beneficiaries.

The case also raises questions under the free speech protections of the Constitution. The goal in this case is not rent-seeking through a refusal to deal, but the protection of asset values and reduction of risks and damage for investors, through investment in and active engagement with portfolio companies. If the Defendants' actions were "*designed to force governmental and economic change*", as the plaintiffs appear to think, they did so by bringing awareness to and taking financial action on climate change as an important political and economic issue of the day.[721] The Defendants thus enjoy protections under the First Amendment's freedom of speech clause, which includes "*commercial speech*" – even profit-motivated speech.[722] In fact, "*[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.*"'[723]

The divestment remedy the Plaintiff States seek raises its own questions: it is not only ironic, considering that Texas and other States have opposed calls for divestment from fossil fuel companies, but could also have a negative impact on listed companies – beginning with the coal companies themselves. Most of these large asset managers own shares in hundreds of public companies. If they had to divest, it is unclear who would step in to purchase those interests, thus potentially impacting the liquidity, share prices, and access to capital for those companies.

4. Efficiencies defense and the rule of reason[724]

It is conceivable that the claims in *Texas v Blackrock* will be dismissed for failure to state a claim because, for instance, there are no allegations of a conspiracy to harm competition among asset managers, no merger or acquisition of sole or joint control over the coal companies, no direct financial benefit to the Defendants, and the Defendants are not active in the markets where effects are allegedly felt. Moreover, no hub-and-spoke cartel is properly alleged. Alternatively, the claims might not survive a motion for summary judgment, or may fail in trial, for instance, because there is no evidence of acquisition of control, no agreement (since each party decided independently in the exercise of its fiduciary duties), no market power, no competitive effect, or no causal connection between the alleged anticompetitive conduct and reduction in output, as discussed above. In addition, the claims could be found to interfere with shareholders' rights, freedom of speech, or fiduciary duties.

Even if a complaint overcame these and other hurdles, arrangements like the alleged are not an agreement "*whose nature and necessary effect are so plainly anticompetitive that*

[721] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982), *reh'g denied*, 459 U.S. 898 (1982).
[722] *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *see also 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2320 (2023).
[723] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011), quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989).
[724] *See generally* Maurits Dolmans et al., *Sustainability and Net Zero Climate Agreements – A Transatlantic Antitrust Perspective*, 8 COMPETITION LAW & POLICY DEBATE 63 (Nov. 2023), https://www.elgaronline.com/view/journals/clpd/8/2/clpd.8.issue-2.xml

no elaborate study of the industry is needed to establish their illegality", which would be "*illegal per se*" (for purposes of Section 1).[725] A rule of reason would therefore apply under Section 1, which dictates that courts consider whether the benefits of the agreement at issue outweighs any competitive harm, as discussed below.

Similarly, for purposes of Section 7, the arrangements alleged would not necessarily bring about a "*substantial lessening of competition*". Outgoing FTC Chair Lina Khan suggested that "*[t]he laws ... prohibit mergers that 'may substantially lessen competition or tend to create a monopoly.' They don't ask us to pick between good and bad monopolies.*"[726] The point is, though, that an arrangement that resolves a market failure or creates efficiencies does not lessen the competitive process, but improves it.

Accordingly, "*[t]he trend among lower courts ... has been to recognize or at least assume that evidence of efficiencies may rebut the presumption that a merger's effects will be anti-competitive.*"[727] Defendants here could legitimately argue that their actions improve effective competition, and would "*result in significant economies and that these economies ultimately would benefit competition and, hence, consumers*."[728] The efficiencies would have to be "merger specific," in the sense that the transaction is necessary to achieve the efficiencies, and they cannot be obtained by one party acting alone. They must also verifiable and not speculative. The considerations mentioned in the context of the rule of reason below would be relevant in this context, too.

A rule of reason proceeds in accordance with a four-step burden-shifting approach:

"*[P]laintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market . . . . After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive 'redeeming virtues' of their combination. Assuming defendant comes forward with ... proof [of procompetitive justifications], the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole. Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior.*"[729]

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[725]. *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 692. Compare in the EU: Case C-228/18, *Versenyhivatal* v. *Budapest Bank and Others*, ECLI:EU:C:2020:265, ¶35 ("*certain types of coordination between undertakings reveal a sufficient degree of harm to competition to be regarded as being restrictions by object, so that there is no need to examine their effects"*).

[726] Lina Khan, *ESG Won't Stop the FTC*, THE WALL STREET JOURNAL (Dec. 21, 2022), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135.

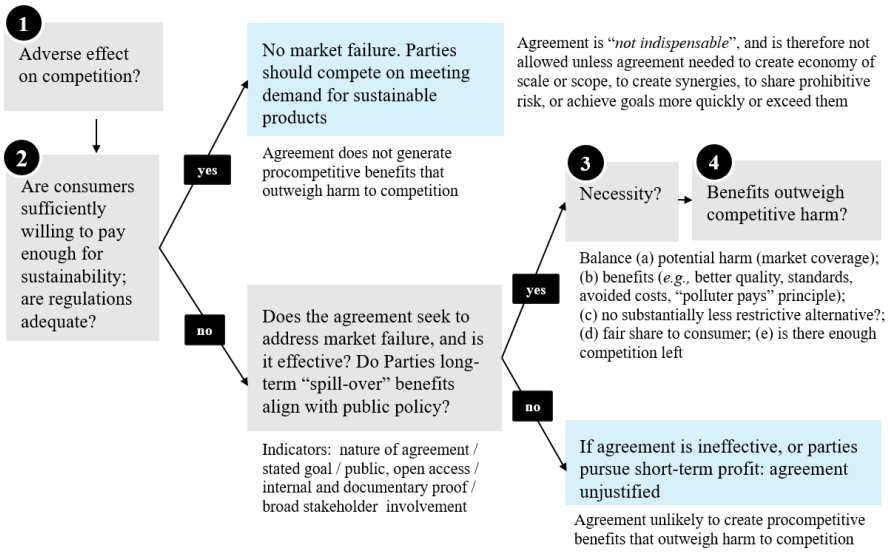
[727] *N.Y. v. Deutsche Telekom*, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020).

[728] *FTC v. Penn State Hershey Med. Ctr*., 838 F.3d 327, 349 (3d Cir. 2016).

[729] *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assoc., Inc.*, 996 F.2d 537, 543. This four-step text also applies in the Fifth Circuit, in which the appeal against a judgment in *Texas v. Blackrock* would be heard. *Impax Las., Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021). For a discussion of the various steps, and inconsistencies in case law as to the fourth balancing test, *see* Mark Lemley & Michael Carrier, *Rule or Reason? The Role of Balancing in Antitrust Law*, RUTGERS LAW SCHOOL (July 15, 2024), https://ssrn.com/abstract=4896529..

The diagram below illustrates these steps for assessment under a rule of reason for sustainability agreements.[730] We then discuss each of the justification steps.

Decision Tree for assessing restrictions in climate/sustainability agreements



Alleviating market failure as a justification (Step 2): Proper sustainability arrangements seek to correct or compensate for negative externalities, as explained above, or to create positive externalities by pooling resources to achieve efficiencies or economies that the parties could not achieve independently, so as to support the transition to (and increased output of) low-carbon and clean production to benefit consumer welfare. Even if it reduces production of, or demand for, high-greenhouse gas emitting products, "*alleviating a negative externality can reduce output of a relevant product yet increase consumer welfare*".[731] This is also relevant for agreements to stay away from providing

[730] For a version of the decision tree reflecting an EU/UK approach, *see* Maurits Dolmans et al., *Sustainability and Net Zero Climate Agreements – A Transatlantic Antitrust Perspective*, 8 COMPETITION LAW & POLICY DEBATE 63-80 (Nov. 2023), https://www.elgaronline.com/view/journals/clpd/8/2/clpd.8.issue-2.xml. A Section 7 assessment is consistent with this: "*Federal courts assess § 7 claims under a three-part, burden-shifting framework.*" *FTC v. Hackensack Meridian Health, Inc*., 30 F.4th 160, 166 (3d Cir. 2022); *accord In re AMR Corp.*, No. 22-901, 2023 WL 2563897, at *2 (2d Cir. Mar. 20, 2023); *U.S. v. Baker Hughes Inc.,* 908 F.2d 981, 982-83 (D.C. Cir. 1990) (Thomas, J., joined by R.B. Ginsburg, J. & Sentelle, J.). At the first step, the plaintiff "*must establish a prima facie case that the merger is anticompetitive.*" *U.S. v. U.S. Sugar Corp.*, 73 F.4th 197, 203 (3d Cir. 2023) (emphasis added). To establish a prima facie case, the plaintiff must propose a proper relevant market and show that the effects of the merger in that market will likely be anticompetitive. *Id.*; *FTC v. IQVIA Holdings Inc.,* 710 F. Supp. 3d 329, 352 (S.D.N.Y. 2024). Usually, the plaintiff demonstrates likely anticompetitive effects "*by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition.*" *Deutsche Telekom AG*, 439 F. Supp. 3d at 199 (quoting *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008)) (emphasis added). If the plaintiff successfully sets forth a prima facie case, "*the burden shifts to the defendant to present evidence that the prima facie case 'inaccurately predicts the relevant transactions probable effect on future competition,' or to 'sufficiently discredit' the evidence underlying the prima facie case.*" *U.S. v. AT&T, Inc.*,916 F.3d 1029,1032 (D.C. Cir. 2019) (emphasis added) (citations omitted); *accord FTC v. Univ. Health, Inc*., 938 F.2d 1206, 1218 (11th Cir. 1991). This is also where the efficiency defense and the market failure explanations would come in. If the defendant rebuts the plaintiff's prima facie case, "*the burden of producing additional evidence of anticompetitive effects shifts to the [plaintiff], and merges with the ultimate burden of persuasion, which remains with the [plaintiff] at all times.*" *U.S. Sugar Corp.*, 73 F.4th at 204 (emphasis added) (citation omitted).

[731] John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 Iowa L. Rev. 563 (2022). *See also* Amelia Miazad, *Prosocial Antitrust*, 73 Hastings L. J. 1637 (2022), https://repository.uclawsf.edu/hastings_law_journal/vol73/iss6/3/; Herbert Hovenkamp, *Are Regulatory Agreements to Address Climate Change Anticompetitive?*, THE REGULATORY REVIEW (Sept. 11, 2019),

finance or insurance for new fossil fuel developments (which have in the past been criticized as "collective boycotts" of fossil fuels), or agreements to encourage investee companies to do so.[732] The goals are not ethical or moral, but economic in nature, to protect consumer welfare.

Appalachian Coals is an early case recognizing that solving market failures can be a redeeming virtue justifying a restriction of competition.[733] In that case, 137 coal companies in the Appalachian territory during the 1930 economic crisis appointed a common sales agent for their coal, in order to resolve a market failure.[734] The joint sales agency was recognized as "*an attempt to organize the coal industry and to relieve the deplorable conditions resulting from overexpansion, destructive competition, wasteful trade practices, and the inroads of competing industries,*" which they were trying to mitigate by generating "*internal economies and the elimination of duplication and waste*".[735] Accordingly, "*nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets*."[736] *Appalachian Coals* is sometimes described as outdated, because later case law confirmed that price-fixing is illegal per se regardless of whether it is reasonable. That same later case law, however, recognized that the joint agency arrangement in *Appalachian Coals* was legitimate because it was intended to address market failures, and any effect on prices was "*wholly incidental*" to that legitimate purpose.[737]

Similarly, in *Indiana Federation of Dentists*, the Supreme Court expressed the readiness to consider "*some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services*".[738] In the end, the court condemned the agreement, but the reference to "efficiencies in the operation of a market" as a possible justification is particularly

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https://www.theregreview.org/2019/09/11/hovenkamp-are-regulatory-agreements-to-address-climate-change-anticompetitive/.

[732] The Complaint in *Texas v. Blackrock* does not explicitly assert the existence of a collective boycott. For a discussion of collective boycott allegations, *see* Jenner & Block, *Dear Asset Manager Letter Memorandum* (Dec. 23, 2023), https://uploads-ssl.webflow.com/6310f9983f7764c4dbfe70eb/664b6845ce0890f7a7d368c9_Jenner%20Dear%20Asset%20Manager%20Letter%20memo.pdf ; and Maurits Dolmans et al., *Sustainability and Net Zero Climate Agreements – A Transatlantic Antitrust Perspective*, 8 COMPETITION LAW & POLICY DEBATE 63-80 (Nov. 2023), https://www.elgaronline.com/view/journals/clpd/8/2/clpd.8.issue-2.xml. *See also* Compl., *X Corp. v. World Fed'n of Advertisers*, No. 7:24-cv-00114 (N.D. Tex. Aug. 6, 2024), ECF No. 1, https://deadline.com/wp-content/uploads/2024/08/X-Vs-Advertisers-Lawsuit.pdf. X Corp complained that companies who did not wish to see their products advertised right next to hate speech, bullying, fake news, conspiracy theories, and calls for civil war in Europe engaged in a "collective boycott" and a "per se" violation of the law.

[733] *Appalachian Coals, Inc., v. U.S.*, 288 U.S. 344, 375 (1933).

[734] Sheldon Kimmel, *How And Why The Per Se Rule Against Price-Fixing Went Wrong*, U.S. DEP'T OF JUST. (March 2006), https://www.justice.gov/atr/how-and-why-se-rule-against-price-fixing-went-wrong.

[735] *See U.S. v. Appalachian Coals, Inc.*, 1 F. Supp. 339, 341 (W.D. Va. 1932); *Appalachian Coals*, 288 U.S. at 359; *see also U.S. v. Socony-Vacuum Oil Co., Inc*., 310 U.S. 150, 214 (1940). Specifically, individual sellers found themselves forced to make distress sales of small volumes of unsold sizes of coal, which was "*one of the worst practices in the coal industry*". A regional sales agency could solve this by lumping sales together to realize economies of scale, because "*being in a position to obtain orders for a large volume of coal, [it] would be able by the allocation of orders to mitigate this situation, and reduce the amount of distress coal on the market, because eventually the demand for the various sizes of coal will absorb the production.*" Findings of Fact at n.11, *Appalachian Coals, Inc. v. U.S.* (W.D. Va. 1932).

[736] *Appalachian Coals, Inc., v. U.S.*, 288 U.S. 344, n. 48 at 375.

[737] *See Socony-Vacuum Oil Co., Inc*., 310 U.S. at 216.

[738] *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 475 (1986). *See also N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018) ("*Because the alleged restraints might avoid a flaw in the market, the full rule-of-reason analysis applies*") (emphasis added).

relevant since it includes mitigation of market failures to achieve a more efficient and sustainable allocation of resources and away from production and consumption that overexploit public goods.

When assessing a justification, it is necessary to check whether there is a market failure, and whether the agreement seeks to address that. As Prof. John Newman explains,

"[P]rocompetitive justification analysis entails three steps. First, the defendant must identify a specific cause of market failure. … high transaction costs, free-rider problems, downstream market power, information asymmetries, or another well-established cause of market failure … Second, the defendant must prove that the relevant market actually failed (or would have failed) absent the challenged restraint. … Third, the defendant must prove that the challenged restraint actually alleviated the market failure."[739]

First, if enough consumers are sufficiently willing to pay for sustainability, enough to create economies of scale and scope to make the sustainable products more competitive than the unsustainable alternatives in the eyes of the general consumer, no cooperation is normally needed.[740] In such a case, the companies should compete to be (and to be recognized as) the greenest and cleanest.[741] This is the upper branch on the right side of the decision tree above.

Second, if there is a market failure, for instance, because willingness to pay is insufficient, the court would assess whether the agreement in fact seeks to, and does effectively,

[739] John M. Newman, *Procompetitive Justifications in Antitrust Law* 94 Ind. L J. 501, 506 (2019).

[740] Even if there is some willingness to pay, there are at least three dimensions to keep in mind to assess whether it is adequate to avoid a market failure: how many consumers are willing to pay for sustainability, for what products and what share of demand for those products (and how important are these as a share of the carbon emissions), and how much of the sustainability cost are they willing to pay (and is that enough for the sustainable alternative to achieve a minimum efficient scale of production and sales to compete effectively with the demand from consumers without willingness to pay). The willingness-to-pay bell curve may differ for different products – a larger percentage (of a smaller pool) of consumers might be willing to pay more for sustainable luxury products (responsible for a lower share of overall emissions) than for sustainable basic necessities (including electricity, fuel, and food, which are responsible for a higher share of emissions).

[741] *See* Maarten Schinkel & Leonard Treuren, *Corporate Social Responsibility by Joint Agreement*, 123 JOURNAL OF ENVIRONMENTAL ECONOMICS AND MANAGEMENT (2024), https://www.sciencedirect.com/science/article/pii/S0095069623001158. Schinkel and Treuren oppose sustainability agreements on the grounds that on balance they do not achieve their intended effect. But the analysis appears to beg the question. It assumes that "*[t]he types of joint agreements considered here, however, have few spillovers, which we therefore ignore in the main analysis and only return to briefly in the concluding remarks*" and "*it is unclear why there would be sizable spillovers in the cases concerned, which are about transitioning to known cleaner or fairer production methods. Instead, one would expect early movers to benefit from building a reputation with customers and financiers as a responsible company. It does not suffice that firms may realize that they too will suffer from climate change or revolts against social injustices — not even as an existential threat. These global issues seem too immense for even the largest multinational companies to internalize sufficiently strongly.*" This assumes away the very problem their model is supposed to investigate (*i.e.,* whether there is a market failure, whether cooperation has positive externalities that can mitigate that, and whether cooperation can be effective). Another issue is that their model looks at sustainability as "quality differentiation," which almost by definition is antithetical to coordination –"differentiation" by implication assumes the supplier is serving a consumer segment that is willing to pay for the specific differentiator that others are unwilling to pay for. Sustainability should be seen instead as a "quality improvement" across the board, like innovation, from which everyone benefits. Positive spillover effects can occur, for instance, from shareholder arrangements as shareholders encourage portfolio companies to innovate in sustainable technology, economies of scale and scope are achieved, and innovation is shared in the market through technology transfer allowing others to innovate on top.

address the market failure, and pursue long-term positive externalities that are aligned with public policy like climate change mitigation and adaptation.[742]

As part of this analysis, it is important to doublecheck whether the objective of the cooperation is in reality to raise prices, capture rents, and benefit the parties financially by restricting output, or by excluding rivals to increase their market power market and financially benefit from the loss of competition in the market where they are active. If so, the agreement is unjustified. This is the lower branch on the right of the decision tree above.

Based on publicly available information, profit-taking is not the objective of the shareholder initiatives discussed in the Majority and Minority Reports and under review in *Texas v Blackrock*. They instead appear to serve to minimize climate damage for the companies involved, their shareholders, suppliers and customers. As the Minority Report points out, "*the same extreme weather events that pose an existential risk to human populations around the globe also threaten corporations' assets and commercial dealings.*" Preserving shareholder value in the face of climate threats is consistent with the investment firms' fiduciary duty to "*maximize the value of ... [investment] portfolios against climate-related risk"* by, for instance, encouraging their portfolio companies to transition to renewables.[743] In the case of an agreement not to support new fossil fuel field development, the objective is to lower climate damage by meeting the goals of the Paris Agreement. The IEA has explained in detailed reports that there is no carbon budget for new fossil fuel development, and that there is no need either, since existing fields are more than adequate to meet the world's needs through 2050, as we transition to clean energy.[744] Conversely, the risks of tipping points resulting from even a temporary overshoot are prohibitive.[745]

Necessity (Step 3): If the justification is proven, the burden of proof switches back to the claimant, who must then show that there is an equally effective but less restrictive alternative. Where there is a market failure, such as the overexploitation of unpriced natural resources, there are good arguments that a joint initiative is reasonably necessary

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[742] On public policy to stop using coal by 2035, *see generally*, Attracta Mooney, *G7 pact to stop using coal by 2035 sets up next battle over gas supplies*, FINANCIAL TIMES (Apr. 30, 2024), https://www.ft.com/content/c3e41090-aec9-4207-9cdd-37e52d046be6; Powering Past Coal Alliance, *PPCA Declaration* (Nov. 16, 2017), https://poweringpastcoal.org/declaration/; and Ewan Thomson & Ian Shine, *Phasing down, phasing out, or transitioning away: What did COP28 agree on fossil fuels?*, WORLD ECONOMIC FORUM (Nov. 21, 2023), https://www.weforum.org/stories/2023/11/phase-down-out-fossil-fuel-arguments/#:~:text=The%20deal%20states%20an%20intention,reduction%20in%20fossil%20fuel%20use.

[743] *See id*.; UNEP-FI, PRI, Generation Foundation, *A Legal Framework for Impact: Summary Report* (2024); Andreas Wildner & Maurits Dolmans, *Sustainable Fiduciary Duties – the Time Has Come for Financial Fiduciaries to Adapt to the New Climate Reality* (Sept. 18, 2024).

[744] International Energy Agency, *Net Zero by 2050 A Roadmap for Global Energy* (2021). *See also* Robin Lamboll, Zebedee Nicholls & Christopher Smith et. al., *Assessing the size and uncertainty of remaining carbon budgets*, NATURE CLIMATE CHANGE (2023), https://doi.org/10.1038/s41558-023-01848-5; Sandy Trust, et al., *The Emperor's New Climate Scenarios*, INSTITUTE AND FACULTY OF ACTUARIES (July 2023), https://actuaries.org.uk/media/qeydewmk/the-emperor-s-new-climate-scenarios.pdf.

[745] Tessa Möller et. al., *Achieving net zero greenhouse gas emissions critical to limit climate tipping risks*, NATURE COMMUNICATIONS (Aug. 1, 2024), https://www.nature.com/articles/s41467-024-49863-0 ("*stringent emission reductions in the current decade are critical for planetary stability*") (emphasis added); Andreas Meyer & Christopher Trisos, *Ecological impacts of temperature overshoot: The journey and the destination*, SCIENCE DIRECT (Dec. 15, 2023), https://www.sciencedirect.com/science/article/pii/S259033222300550X#fig1.

in the absence of effective regulation. The Minority Report mentions the need to avoid free rider problems and "first mover disadvantages".

Investment managers or pension funds should – under principles of fiduciary duties – take into account that investments in new unabated high-emission projects would cause climate risk and damage to all other assets managed or held by them, as well as to assets held or managed by others (who in turn would do the same). In the best interest of investors and other beneficiaries, they have to avoid these investments, invest instead in viable impact projects with positive externalities, and encourage portfolio companies to do the same and engage in climate innovation (with positive spillover effects as clean technology is developed and economies of scale and scope are achieved).[746] But individual action tends to be ineffective, absent market power. It would have little positive effect so long as others continue business as usual, and would merely leave more room for free-riding rivals. Coordination would be reasonably necessary to mitigate this market failure. Similarly, combining skills and resources for active stewardship of investee companies would be reasonably necessary to achieve efficiencies and economies, and lower associated costs.

Balancing of interests (Step 4): Finally, some cases require a further balancing test where "*the factfinder must balance the benefits against the harms in order to evaluate the net effect of the conduct.*"[747] In the EU and UK, this is done by verifying the existence of residual competition, and whether consumers receive a fair share of the benefit of the agreements. This would be the case to the extent that the arrangements lower the potentially huge costs to current and future consumers of an unmitigated climate crisis, and these benefits outweigh competitive harm.[748]

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[746] On these aspects of fiduciary duties, *see* UNEP-FI, PRI, Generation Foundation, *A Legal Framework for Impact: Summary Report* (2024), https://www.unepfi.org/industries/investment/a-legal-framework-for-impact-summary-report/#:~:text=This%20summary%20report%20concludes%20the,the%202021%20Freshfields%20legal%20report; *see also* Andreas Wildner & Maurits Dolmans, *Sustainable Fiduciary Duties – the Time Has Come for Financial Fiduciaries to Adapt to the New Climate Reality* (Sept. 18, 2024), https://www.netzerolawyers.com/publications/sustainable-fiduciary-duties---the-time-has-come-for-financial-fiduciaries-to-adapt-to-the-new-climate-reality.

[747] *See* Mark Lemley & Michael Carrier, *Rule or Reason? The Role of Balancing in Antitrust Law*, RUTGERS LAW SCHOOL (July 15, 2024), above, referring to *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946, 983, 985-86, 990 (9th Cir. 2023) and other cases.

[748] In the US, out-of-market benefits count for this analysis: *see Epic Games, Inc. v. Apple, Inc*., 67 F.4th 946, 990 (9th Cir. 2023) ("*[T]he Supreme Court has considered cross-market rationales in Rule of Reason and monopolization cases.*"). The US Supreme Court's skepticism of the practice is expressed in dicta only in a per se case, *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972) (questioning whether courts can "*weigh … destruction of competition in one sector of the economy against promotion of competition in another sector*"), but that dictum did not concern rule of reason cases. In the EU, the *Mastercard* case is invoked to take account of "out-of-market" benefits only with respect to consumers who substantially overlap with consumers who buy the products affected by the agreement, and only for EU-based consumers. *See* EU Commission Horizontal Guidelines, above, ¶ 583. But *Mastercard* concerned a balancing of financial/commercial private benefits and private costs for different groups of consumers, not a balancing of private costs against public benefits. The principle underpinning *Mastercard* is that it is unfair in a two-sided market to ask one group of consumers to pay (without compensating them) for a private benefit for another group of consumers. Similarly, however, it is unfair to ask one group/society to accept a climate cost caused by production/consumption benefiting another group (without compensation). See also the "polluter pays" rule in Art 191(2) TFEU. Out-of-market benefits to different consumers should therefore be recognized as justifying a sustainability agreement, if public benefits or avoided social costs exceed private costs. Only if private costs exceed public benefits/avoided social costs, then consumers who pay should receive a fair share in the form of "*appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for*

The argument that benefits to consumers outweighs any competitive harm is compelling in the case of genuine sustainability agreements. Recent reports express increasing concern and alarm because the atmosphere appears to be more sensitive to greenhouse gases than previously thought, the oceans and land absorb less greenhouse gases than in the past, and the albedo effect diminishes as clouds and ice cover decrease. The result is that the risk of climate and economic tipping points and cascading events increases,[749] as indicated by some representative quotes:

- The 2024 **UN Environment Programme** "Emissions Gap Report" concludes that the world is on course for a "catastrophic" temperature rise of 3.1C. "*This would bring debilitating impacts to people, planet and economies.*"[750]
- The 2024 **state of the climate report** warns that "*We are on the brink of an irreversible climate disaster. This is a global emergency beyond any doubt . . . fossil fuel emissions have increased to an all-time high, the 3 hottest days ever occurred in July of 2024 . . . Last year, we witnessed record-breaking sea surface temperatures . . . the hottest Northern Hemisphere extratropical summer in 2000 years . . . and the breaking of many other climate records.*"[751]
- A study by **Exeter University** on global tipping points warns that "*[s]ome Earth system tipping points are no longer high-impact, low-likelihood events, they are rapidly becoming high-impact, high-likelihood events . . . At 2°C global warming and beyond, several more systems could tip, including the Amazon rainforest and subglacial basins in East Antarctica, and irreversible collapse of the Greenland and West Antarctic ice sheets is likely to become locked in.*"[752]

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competition." *See also* Authority for Consumers & Markets, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?* (Sept. 27, 2021), https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf. The UK CMA recognizes benefits to any consumers (including out-of-market benefits, albeit still only those within its jurisdiction) – at least for agreements that combat or mitigate climate change, because it represents a 'special category of threat.' UK Guidance ¶¶ 1.11 and 6.4.

[749] *Global Tipping Points: Summary Report 2023*, GLOBAL SYSTEMS INSTITUTE (Timothy M. Lenton *et al*, eds., 2023), above.

[750] UN Environment Programme, Press Release: *Nations must close huge emissions gap in new climate pledges and deliver immediate action, or 1.5°C lost*, (Oct. 24, 2024), https://www.unep.org/news-and-stories/press-release/nations-must-close-huge-emissions-gap-new-climate-pledges-and. *See also* Attracta Mooney, '*We're running out of time': UN warns of 3.1C temperature rise*, FINANCIAL TIMES (Oct. 24, 2024), https://www.ft.com/content/ed16d880-4f63-4d64-b62e-5d2681a59494?emailId=5dec5a8b-81cf-4c55-aa06-1aaba119ade2&segmentId=a8cbd258-1d42-1845-7b82-00376a04c08f.

[751] William Ripple et al., *The 2024 state of the climate report: Perilous times on planet Earth*, 74 BioScience, 812, 812 (2024), https://doi.org/10.1093/biosci/biae087

[752] *Global Tipping Points: Summary Report 2023*, GLOBAL SYSTEMS INSTITUTE (Timothy M. Lenton *et al*, eds., 2023). *See also* David Armstrong McKay et al., *Exceeding 1.5°C global warming could trigger multiple climate tipping points*, SCIENCE (Sept. 2022), https://www.science.org/doi/10.1126/science.abn7950. For an illuminating online video summary, *see* Johan Rockström, *The tipping points of climate change — and where we stand*, TED (July, 2024), https://www.ted.com/talks/johan_rockstrom_the_tipping_points_of_climate_change_and_where_we_stand?subtitle=en. *See also* Will Steffen et al., *Trajectories of the Earth System in the Anthropocene*, 115 PNAS 8252 (2018), https://www.pnas.org/doi/epdf/10.1073/pnas.1810141115 and L. Caesar et al., *Planetary Health Check: A Scientific Assessment of the State of the Planet*, POSTDAM BOUNDARIES SCIENCE (2024), https://www.planetaryhealthcheck.org/storyblok-cdn/f/301438/x/a4efc3f6d5/planetaryhealthcheck2024_report.pdf (6 of 9 key planetary boundaries are breached, 7 tipping points are at risk, and people will be exposed to unprecedented heat).

- A study by **Utrecht University** focuses on one of these tipping points, the Atlantic Meridional Overturning Current (AMOC), which determines the climate in North-West Europe and North East America, with worldwide implications, and estimates the probability of an AMOC collapse before the year 2050 to be 59% (±17%).[753] The risk of collapse has been "*greatly underestimated*" and will have "*devastating and irreversible impacts*" for North-East America, North-West Europe, and indeed the world.[754]

The impact on the economy and society at large is potentially very serious.

- The "**Climate Endgame" report** found that climate risk cascades could lead to economic and societal risk cascades involving disease, food and water shortages, mass population displacements, economic crises, political change, "state fragility" in various forms, and local and international conflicts. "*There is ample evidence that climate change could become catastrophic. We could enter such "endgames" at even modest levels of warming. . . . Facing a future of accelerating climate change while blind to worst-case scenarios is naive risk management at best and fatally foolish at worst.*"[755]

- The **"Security Blind Spot" report** explains that "*[s]ecurity threats resulting from climate change should be at the core of the government's approach. These threats have been consistently and significantly underestimated and now pose major security risks.*"[756]

- A report by the **Network for Greening the Financial System** (NGFS), a network of 114 central banks and financial supervisors, finds that the economic cost of climate change will likely be much more severe than previously feared. The projected physical risk impact of climate change on gross domestic product has quadrupled by 2050 in some scenarios. At about 3ºC of warming, the NGFS

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[753] Emma Smolders et al., *Probability Estimates of a 21st Century AMOC Collapse*, UTRECHT UNIVERSITY (2024), https://arxiv.org/html/2406.11738v1?utm_source=substack&utm_medium=email. *See also* Stefan Rahmstorf, *Is the Atlantic overturning circulation approaching a tipping point?* 37 Oceanography 17 (2024), https://tos.org/oceanography/article/is-the-atlantic-overturning-circulation-approaching-a-tipping-point. For some insightful graphics, *see* Raymond Zhong & Mira Rojanasakul, *How Close Are the Planet's Climate Tipping Points*, N.Y. TIMES, (Aug. 11, 2024), *https://www.nytimes.com/interactive/2024/08/11/climate/earth-warming-climate-tipping-points.html?smid=nytcore-android-share*.

[754] See open letter by 44 oceanographers from 15 countries calling for urgent action: Sascha Pare, *Key Atlantic current could collapse soon, 'impacting the entire world for centuries to come,' leading climate scientists warn*, LIVESCIENCE (Oct. 22, 2024) https://www.livescience.com/planet-earth/rivers-oceans/key-atlantic-current-could-collapse-soon-impacting-the-entire-world-for-centuries-to-come-leading-climate-scientists-warn.

[755] Luke Kemp, et al., *Climate Endgame: Exploring catastrophic climate change scenarios*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (Aug. 1, 2022), https://doi.org/10.1073/pnas.2108146119. See also Jeff Masters, *When will climate change turn life in the U.S. upside down?*, YALE CLIMATE CONNECTIONS (Aug. 19, 2024), https://yaleclimateconnections.org/2024/08/when-will-climate-change-turn-life-in-the-u-s-upside-down/. Just focusing on food shortage: a study for Lloyds found there is a 2.3% chance of a "major" food shock scenario each year, costing at least $3 trillion globally over a five-year period. Over a 30-year period, those odds are about 50%, and probably higher since the risks increase each year. *The Economic Impact – How vulnerable could you be?*, LLOYD'S, https://www.lloyds.com/news-and-insights/futureset/futureset-insights/systemic-risk-scenarios/extreme-weather-leading-to-food-and-water-shortage/economic-impact.

[756] Laurie Laybourn et al., *The security blind spot: Cascading climate impacts and tipping points threaten national security*, IPPR (Oct. 9, 2024), https://www.ippr.org/articles/security-blind-spot.

model points to GDP losses of roughly 30%, although the "*strong negative impacts on GDP could be mitigated by timely transition efforts.*"[757]

The impact on GDP is dramatic, potentially existential for our global economy, and would have a very material impact on investment valuation, which financial institutions wish to preserve through cooperation.

- The **British Institute and Faculty of Actuaries** find that "*we expect 50% GDP destruction – somewhere between 2070 and 2090 . . . It is worth a moment of reflection to consider what sort of catastrophic chain of events would lead to this level of economic destruction.*" [758] "*[I]f we do not mitigate climate change, it will be exceptionally challenging to provide financial returns.*"

- Bilal and Känzig of **Harvard and Northwestern** Universities demonstrate that the macroeconomic impacts of climate change are six times larger than previously thought. "*Business-as-usual warming implies a 29% present welfare loss and a Social Cost of Carbon of $1,065 per ton . . . These effects are comparable to experiencing the 1929 Great Depression, forever.*" [759]

- A study by **EDHEC** finds that "*[t]he difference in equity valuations between a no-climate-damage world and a world with climate damages can be significant, ranging from less than 10% if prompt and robust abatement action is taken, rising to more than 40% in a close-to-no-action case. In the presence of climate tipping points, this range widens from less than 10% for robust abatement to more than 50% in the case of very low emission abatement.*"[760]

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[757] Network for Greening the Financial System, *NGFS Scenarios for central banks and supervisors* (Nov. 2023), https://www.ngfs.net/sites/default/files/medias/documents/ngfs_climate_scenarios_for_central_banks_and_supervisors_phase_iv.pdf.

[758] Sandy Trust, et al., *The Emperor's New Climate Scenarios*, INSTITUTE AND FACULTY OF ACTUARIES (July 2023), https://actuaries.org.uk/media/qeydewmk/the-emperor-s-new-climate-scenarios.pdf; Sandy Trust et al., Timothy M. Lenton, Jesse F. Abrams & Luke Kemp, *Climate Scorpion – The Sting Is In The Tail*, INSTITUTE AND FACULTY OF ACTUARIES (Mar. 14, 2024), https://actuaries.org.uk/news-and-media-releases/news-articles/2024/mar/14-mar-24-climate-scorpion-the-sting-is-in-the-tail/ (emphasis added).

[759] Adrien Bilal & Diego Känzig, *The Macroeconomic Impact of Climate Change*, No. 32450, NATIONAL BUREAU OF ECONOMIC RESEARCH (2024), https://www.nber.org/papers/w32450#:%7E:text=This%20paper%20estimates%20that%20the,12%25%20decline%20in%20world%20GDP. Similarly, the Potsdam Institute for Climate Impact Research estimate that the world is already committed to a loss of 19% by 2050, and possibly up to 29%. Maximilian Kotz et al., *The economic commitment of climate change*, 628 Nature 551, 552 (2024), https://www.nature.com/articles/s41586-024-07219-0. "*Under a middle-of-the road scenario of future income development . . . this corresponds to global annual damages in 2049 of 38 trillion in 2005 international dollars (likely range of 19–59 trillion 2005 international dollars).*" An article in Forbes concluded "*[t]his means total economic collapse.*" Phil de Luna, *Crossing Climate Tipping Points Will Slash Global GDP,* FORBES (Apr. 22, 2024), https://www.forbes.com/sites/phildeluna/2024/04/22/crossing-climate-tipping-points-will-slash-global-gdp/.

[760] Riccardo Rebonato et al., *How Does Climate Risk Affect Global Equity Valuations?,* EDHEC-RISK CLIMATE IMPACT INSTITUTE (July 2024), https://climateimpact.edhec.edu/sites/ercii/files/pdf/ercii_publication_how_does_climate_risk_affect_equity_valuations.pdf.

For summary slides, see Riccardo Rebonato, *The Impact of Climate Risk on Global Equity Valuations*, EDHEC-RISK CLIMATE IMPACT INSTITUTE (2024), https://climateimpact.edhec.edu/sites/ercii/files/pdf/presentation_rr_webinar_020724_final.pdf?_cldee=VCzWFJQUqYeEAPiZwDjC3wlVk9UKSipQw0DpcMByfSh0BiqBss-JX3VyUGNzOypv&recipientid=lead-1dc1ae8185c4eb11bacc00224881a1ed-25401114dc664f13b087b22af9e84c55&esid=ab6aa9b4-d533-ef11-8409-000d3a29a53b. The study integrates asset pricing techniques with IAMs to forecast climate change impact reflecting

Conversely, the positive benefits of climate action are substantial.

- Bilal and Känzig conclude that the domestic cost of carbon in the US "*largely exceeds policy costs . . . [and] unilateral decarbonization policy is cost-effective for the United States.*"[761]

- Finally, a report by Bolton and Kleinnijenhuis ("The Great Coal Arbitrage") is particularly relevant for *Texas v. Blackrock*.[762] It explains that if coal mines shut down and coal plants are replaced by clean energy, the world would be better off to the tune of 78 trillion USD net. This is after deducting the present value of costs of phasing out coal (investments in replacement clean energy, and opportunity costs of giving up coal). The benefit equals around 1.2 percent of current world GDP every year until 2100. And that is just for coal, and based on a conservative estimate of the social cost of carbon ($75 per ton of CO2).

In sum, the political risk of antitrust action against sustainability agreements may be higher in the new administration. It cannot be excluded that the FTC or the DOJ will open investigations to complement *Texas v. Blackrock*, or intervene to support the Plaintiff States. But there are robust reasons to conclude that if the case is not dismissed, a rule of reason analysis and efficiencies defense should and could justify coordinated shareholder action, even if that were found to encourage portfolio companies to stay away from new unabated high-emission investments, or to transition to a sustainable business. These agreements address the market failures that impede an orderly and timely transition to global net zero and avoidance of the serious consumer welfare harm associated with climate change damage.

5. Conclusion

Texas v. Blackrock may become a test case for the assessment of sustainability cooperation under US antitrust law. It will reveal if these antitrust complaints are simply hot air, or if some net zero alliances could find themselves in hot water. The complaint may well fail on the facts, for instance, because there was no agreement between the defendants, no acquisition of individual or joint control over the portfolio companies' management, no impact on competition between the defendants or between the investee companies, no causal connection between the alleged action and effect (because coal production fell for other reasons like availability of cheap clean energy and gas from fracking), and no evidence of "cartel-like" profits that would indicate anticompetitive

economic and climate uncertainties, and uses state-dependent discounting and a consistent analysis of transition costs and physical damages. Note that the "robust abatement" to which the authors refer is one "*aiming for the 2°C target of the Paris Agreement*" – suggesting that keeping global average temperature increase around 1.5°C could further reduce loss below 10%. See also Riccardo Rebonato et al., *The Impact of Physical Climate Risk on Global Equity Valuations*, SSRN (Apr. 23, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4804189; Noël Amenc et al., *It's getting physical – Some investors in infrastructure could lose more than half of their portfolio to physical climate risks by 2050*, EDHEC INFRASTRUCTURE & PRIVATE ASSETS RESEARCH INSTITUTE (Aug. 2023), https://sipametrics.com/paper/its-getting-physical/#:~:text=Summary,event%20of%20runaway%20climate%20change.

[761] Adrien Bilal & Diego Känzig, *The Macroeconomic Impact of Climate Change*, No. 32450, NATIONAL BUREAU OF ECONOMIC RESEARCH (2024).

[762] Patrick Bolton et al., *The economic case for climate finance at scale*, BRUEGEL (June 11, 2024), https://www.bruegel.org/policy-brief/economic-case-climate-finance-scale.

motives. Most importantly, US antitrust law as it stands (as is the case under EU and UK competition law) leaves room for a thoughtful efficiency defense and rule of reason analysis to allow shareholder cooperation to mitigate the market failures that lead to climate change, nature loss, and large-scale pollution.

If the complaint succeeds, it could cause serious collateral damage, in that it could hamper the ability of universal asset owners to exercise shareholder rights, interfere with their fiduciary duties, require them (perhaps ironically) to divest from fossil fuels, interfere with the creation of ETF and index funds, and undermine freedom of speech by asset owners and economic freedoms under the US Constitution. Even more importantly, it could hamper private sector attempts to reduce damage from climate change and mass nature loss. Climate change and nature loss not only create transition risks, litigation risks, and physical risks for business, but also presents a potentially existential threat to our economy, to the viability of the companies involved, to the value of the assets under management, and to consumer welfare. It is in consumers' and everyone's interests – Republicans and Democrats alike – to reduce the risk of the next hurricane, heatwave, flood, or wildfire, the threat to prosperity and food and water security, the plight of displaced populations from climate-related disasters, and systemic risks to our economy and society. We should come together to face and defeat this common threat. Antitrust law and politics should not stand in the way.