



# Taking the chill factor out of climate action

**A progress report on aligning  
competition policy with  
global sustainability goals**



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## Introduction

At the United Nations Conference of the Parties in November 2022 (COP27), the International Chamber of Commerce published a white paper<sup>1</sup> calling upon governments, legislators and competition authorities to do everything in their power to eliminate the inconsistency between the imperative to fight climate change and competition policies which were preventing companies from cooperating in a meaningful manner for purposes of transitioning to a green economy.

The white paper is built on ICC members' experience with competition authorities expressing doubts about competitors' real need to cooperate to neutralise the potential disadvantages of being a pioneer of change and to reach sustainability goals sooner and more efficiently.

Authorities were hesitant to embrace sustainability considerations fearing that competitors were in fact looking for an excuse to collude and that greenwashing was their real intention.

Similarly, the white paper presents twelve real-life examples of cooperations among competitors which were eventually abandoned for fear of antitrust sanctions. The examples supported what is widely agreed in the business community: that competition authorities and legislators could and should adjust antitrust policy to ensure a more transparent and certain environment for companies to pursue sustainability goals jointly, and to assess cooperations pragmatically when the parties can demonstrate that the main objective is reaching a sustainability goal.

Antitrust policy should properly integrate sustainability economics, taking account of market failures and collective action problems. These measures should encompass issuing guidelines, assessing concrete cases involving in-depth discussions on the intersection between sustainability and competition, or even shifting the burden of proof in such cases, acknowledging that the benefits of sustainability should outweigh potential negative effects on competition.

Launched at COP27 in 2022, the white paper was then promoted to several agencies in 2023. In parallel, the sustainability agenda and its interplay with competition laws got traction in academia and in numerous fora. Overall, the attention given to this topic has increased tremendously since COP27.

"Green guidelines" have been issued in several jurisdictions. That is not to say that no agency had until then given it proper attention: great contributions had already been made by pioneers like the Dutch, the Austrian, the Greek, the Japanese and Singaporean authorities, while the Germans had produced some initial relevant case law. But it is unequivocal that the regulatory framework has been enhanced considerably since November 2022, with the European Commission, the United Kingdom Competition and Markets Authority, and other jurisdictions having introduced, or considering introducing, sustainability considerations into their assessments of cooperations among competitors. ICC welcomes Brazil, India, Singapore, Belgium, Australia and Mexico joining the discussions. Even though this is undoubtedly positive, much remains to be done in China and the United States.

The present progress report complements the work presented in 2022. It aims to cover the global development of the regulatory framework to support climate action.

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<sup>1</sup> ICC, [How competition policy acts as a barrier to climate action](#), November 2022

**The progress report is divided into three parts:**

**Part 1** reports on the recent developments undertaken by competition authorities aimed at providing practical guidance to business to move green projects forward. Not only guidelines and soft law documents have been issued in order to clarify how these authorities will assess sustainability agreements. In addition, legislative amendments have been considered, new case law has been produced and sandbox projects and seminars have been promoted by the authorities to keep the agenda moving forward.

**Part 2** calls on the United States and China, in particular, to engage on the matter. While there is a growing consensus in various jurisdictions around the world that competition authorities have a role to play (e.g. by ensuring that competition law does not impede legitimate collaboration between businesses in relation to environmental sustainability) there is still little discussion on this subject in the United States and China – even though US law could accommodate sustainability under a “rule of reason” and Chinese law contains a specific provision allowing exemption of sustainability agreements. Debate in certain other jurisdictions is only in its infancy.

**Part 3** provides overall conclusions, highlighting the importance of a transparent set of policies and regulations to encourage companies to pursue sustainability goals jointly.

## **1. Green guidelines, case law and studies**

The business community has recognised for some time now that lack of clear guidelines, experience, and debate amount to significant legal uncertainty which translates to barriers for companies to engage in cooperative initiatives aimed at combating climate change. In return, authorities have started discussions on whether their own competition law frameworks are in any way being considered or perceived by companies as an obstacle to the adoption of initiatives to achieve environmental sustainability goals.

Many competition authorities around the world – particularly in Europe – have undertaken initiatives to include sustainability considerations in their enforcement agenda and have invited businesses and scholars for input on how to adapt competition policy to support green initiatives.

Below we outline

- (i) the main guidelines (and draft guidelines) provided so far by competition authorities on sustainability agreements;
- (ii) relevant recent cases analysed by those authorities involving sustainability cooperation initiatives entered into by competitors; and
- (iii) sandbox projects and seminars organised by them to discuss the matter and next steps to move the debate forward.



## 1.1. The first green guidelines

We have seen in recent months green guidelines being issued by the European Commission and national antitrust authorities such as in the Netherlands, Greece, Japan, Singapore and the United Kingdom. This remarkable response to the business community's requests includes comprehensive sections designed to elucidate practical situations and hypothetical examples of cooperation among companies, commenting on whether such practices could raise competition-related concerns, how they may nonetheless be permitted and inviting business to come forward with novel cases.

### **The Netherlands: Oversight of sustainability agreements<sup>2</sup>**

The Dutch Authority for Consumers and Markets (ACM) has been at the forefront of the sustainability discussion and was the first one to develop a different standpoint on sustainability cooperation agreements. The two versions of draft guidelines included examples to illustrate two categories of permissible agreements: sustainability agreements that do not impose restrictions on competition, and sustainability agreements with benefits that offset restrictions on competition and meet the conditions for exemption.<sup>3</sup>

In October 2023, the ACM published its final “new policy” rule, which replaces previous draft guidelines. While following the Guidelines of the European Commission (discussed below), the ACM announces a more permissive enforcement position, where it clearly states that, when prioritising enforcement, it will in certain cases

- (i) adopt a broader definition of agreements that do not restrict competition (such as agreements regarding compliance with a binding sustainability rule, whether these rules are national, European, or international in origin), and
- (ii) count environmental and climate benefits to society overall (as opposed to only counting benefits to consumers affected by the agreements).<sup>4</sup>

The ACM encourages businesses to contact the ACM to ask for informal guidance if they need any clarification on whether a proposed sustainability cooperation agreement follows competition rules. The guidelines provide comfort in relation to fines in such cases. This has led to the ACM publishing several examples of allowable cooperation agreements.<sup>5</sup>

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<sup>2</sup> Authority for Consumers and Markets, [ACM's oversight of sustainability agreements: competition and sustainability](#), October 2023. See also Authority for Consumers and Markets, [Guidelines regarding collaborations between farmers](#), September 2022.

<sup>3</sup> Authority for Consumers and Markets, [First draft guidelines on sustainability agreements](#), July 2020; See also Authority for Consumers and Markets, [Second draft guidelines on sustainability agreements](#), January 2021.

<sup>4</sup> Authority for Consumers and Markets, [ACM's oversight of sustainability agreements: competition and sustainability](#), October 2023 (Sections 3.1 and 3.2). For background, see Authority for Consumers and Markets, [Legal memorandum](#) on the concept of “fair share for consumers”, September 2021.

<sup>5</sup> See examples in section 1.2

### **Japan: Guidelines concerning the activities of enterprises<sup>6</sup>**

In March 2023, the Japan Fair Trade Commission (JFTC) enacted new guidelines to enhance transparency and predictability in the application and enforcement of competition rules for businesses striving to contribute to a more environmentally sustainable society.

The Japanese guidelines are comprehensive, covering not only joint activities among competitors, but also restrictions on certain business activities, such as unilateral conduct and merger review requirements. The JFTC presents various examples of practices that pose, or do not pose, concerns under antitrust rules, providing clarification on R&D initiatives, standardisation activities, joint purchasing and producing and data sharing between competitors.

The JFTC offers consultations with the JFTC for businesses looking to minimise antitrust risks when entering into agreements for sustainability purposes.

### **The European Commission: Guidelines on the applicability of Article 101<sup>7</sup>**

In June 2023, the European Commission published a final version of its guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU), which dedicates an entire new chapter to sustainability agreements.

The European Commission recognises that individual production and consumption decisions can involve negative externalities – such as pollution or biodiversity loss – that are not sufficiently taken into account by the consumers or producers that cause them, and are not reflected in the price that is paid. This would ordinarily be addressed through regulation or taxation. The European Commission recognises however that private sector sustainability cooperation may become necessary where public policies and regulations do not fully resolve similar market failures.

The new chapter offers guidance on how companies should self-assess agreements with competitors pursuing sustainability goals under European Union laws. It states that sustainability agreements are not a separate category of collaboration, so that they cannot evade antitrust scrutiny merely by referring to a sustainability objective.<sup>8</sup> However, sustainability agreements may qualify for exemption if they are necessary to achieve sustainability benefits that outweigh the costs for consumers, and competition is not completely excluded.

Unlike other jurisdictions' guidelines, the European Commission adopts a broad definition of “sustainability agreements”, which encompasses activities that support economic, environmental and social development, including labour and human rights.

The new guidelines provide clarification and examples of agreements that do not affect competition and which do not fall within the scope of antitrust law. Agreements fall outside the competition rules, for instance, if they “aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties”, which are “not fully

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<sup>6</sup> Japan Fair Trade Commission. [Guidelines concerning the activities of enterprises, etc. – Toward the realization of a green society under the Antimonopoly Act](#), March 2023

<sup>7</sup> European Commission. [Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements](#), July 2023. See also European Commission, [Amendment of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products](#), December 2013

<sup>8</sup> The Commission will take strict action against greenwashing cartels, like in the [Car Emissions \(Adblue\)](#) case.

implemented or enforced by a signatory State.” This covers so-called “compliance agreements” that serve to avoid parties taking advantage of inadequate implementation of international obligations – what is sometimes called “illicit competition”. Thus, businesses can work together to further international obligations on sustainability goals, even if these are not fully implemented or enforced by signatory States. Other agreements falling outside the prohibition of Article 101 TFEU include or those that do not influence price, output or exchange of sensitive information.

The European Commission provides a “soft safe harbour” for agreements that set sustainability standards, including minimum requirements that are binding on participating firms, subject to certain conditions. These conditions include making sure that the standard is not imposed on undertakings that do not wish to participate in the standard, and that it does not lead to a significant increase in price or significant reduction in the quality of the target products unless the parties involved hold less than a 20% market share. Moreover, companies should remain free to adopt higher sustainability standards. The guidelines make clear that firms may cooperate to achieve a higher sustainability standard than applicable regulation requires. Cooperation may also be justified if it means the objective can be achieved more quickly, and not just more cost-efficiently. Agreements not falling within the “soft safe harbour” may still fall outside competition law on a case by case basis (or meet the conditions for an exemption).

The European Commission provides examples of benefits that are relevant to the antitrust analysis. The guidelines provide that potential benefits resulting from a cooperation agreement only count to the extent they benefit the EU-based consumers affected by the practice – as opposed to society as a whole. This could limit the scope for sustainability agreements (although it is thought that in case of agreements between energy providers to mitigate climate risks, the Commission may in practice count the benefits for all EU consumers).

Here again, companies aiming to enter into sustainability agreements may request the European Commission to provide informal guidance to ensure compliance with competition law. This encourages companies to launch new cooperation initiatives even where significant market shares may be involved.

### **Singapore: Draft guidance note for environmental sustainability collaborations<sup>9</sup>**

In July 2023, Singapore’s Competition Consumer Commission (CCCS) announced a public consultation to seek feedback on its draft “Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives”.

The draft guidelines focus primarily on sustainability cooperation agreements involving competitors. They provide explanations regarding what can be classified as environmental sustainability goals, offer examples of cooperation agreements that would not negatively affect competition, outline the conditions under which competition-related concerns are less likely to emerge and set forth how to assess economic benefits resulting from this cooperation.

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<sup>9</sup> Competition and Consumer Commission of Singapore, [Draft guidance note for environmental sustainability collaborations](#), July 2023.



Similar to the United Kingdom and the Netherlands, the draft guidelines explain that, in appropriate cases, the CCCS will take into account the benefit of the agreement for all Singapore consumers and not just those who happen to buy the product or service in question.

The CCCS offers an open door policy, encouraging companies to ask for clarifications on specific projects. It also adopts a streamlined process for the assessment of agreements pursuing environmental sustainability objectives which is designed to provide quicker decisions by the CCCS.

### **United Kingdom: Green agreements guidance<sup>10</sup>**

In October 2023, the United Kingdom's Competition and Markets Authority (CMA) launched the Green Agreements Guidance to help business cooperate on environmental goals. The document is part of a wider awareness campaign that the UK authority has launched. It includes a video and a roadmap to help business understand the important legal matters involved.

The Green Agreements Guidance focuses on environmental sustainability (including climate agreements and arrangements to protect biodiversity), as opposed to other jurisdictions like the EU, which encompass a broader range of sustainability goals<sup>11</sup>.

Along with examples, the CMA sets out key principles that companies may use to shape their own decisions when entering into agreements pursuing environmental sustainability goals. It clarifies agreements unlikely to infringe competition rules, such as agreements that

- (i) do not appreciably affect competition, for example, because the parties' combined market share is too small;
- (ii) do not affect competitive parameters, including agreements on internal corporate conduct on, for instance, limiting internal use of non-sustainable material;
- (iii) provide for joint advocacy or environmental campaigns;
- (iv) enable the parties to do jointly something that none could do individually, that they could do together more efficiently or quickly;
- (v) involve cooperation that is required by law;
- (vi) relate to the pooling of information about the environmental sustainability credentials of a supplier or customer;
- (vii) create new environmental industry standards, provided that conditions for a safe harbour are met, and the participants are free to go further than the minimum standard required;
- (viii) relate to the phasing-out of non-sustainable products or processes;
- (ix) involve the creation of non-binding industry-wide environmental targets; or
- (x) provide for arrangements between shareholders to vote for promoting corporate policies that pursue environmental sustainability. This includes an agreement (or network of similar agreements together) covering shareholders' conduct in relation to several businesses that are competitors in a market, to pursue corporate policies supporting, encouraging or requiring the adoption of permissible sustainability agreements

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<sup>10</sup> Competition and Markets Authority. [Green agreements guidance: Guidance on the application of the chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements](#), October 2023

<sup>11</sup> See also the German and Belgian examples in section 1.2.

Information sharing between parties to a permissible environmental sustainability agreement will not raise competition concerns either, provided that it does not go beyond what is necessary and is proportionate to the agreement's objectives.

The guidance includes a section on how environmental agreements generally can benefit from an exemption from the ban on anti-competitive agreements (or benefit from the doctrine of ancillary restraints for agreements necessary for public policy goals). It helpfully lists some examples of agreements that may qualify for exemption. They include:

- (i) collective withdrawal agreements only to purchase from suppliers that sell sustainable products;
- (ii) agreements to switch to, or jointly to buy, sustainable inputs;
- (iii) agreements to phase out unsustainable or high-carbon-emitting production processes; and
- (iv) agreements not to provide products or services to customers that produce environmentally damaging products or services. The latter includes "net zero" agreements not to provide support such as financing or insurance to fossil fuel projects.

A welcome innovation is the "more permissive approach" taken when assessing "climate change agreements" (essentially taking into account the benefit of the agreement for all UK consumers - and not just those who happen to buy the product or service in question). Where this requirement is not obviously satisfied, some quantification of benefits may be required. The CMA provides some guidance on how to quantify benefits, but notes that the exercise may not be straightforward, and therefore offers to discuss proposed approaches for the cost—benefit analysis.

The CMA expressly mentions that it is determined to help businesses and support their sustainability initiatives, thus is operating an open door policy whereby companies may ask the authority to provide informal guidance on their proposed sustainability agreements.

Finally, the guidance provides considerable comfort in relation to fines for firms following the guidance or seeking advice from the CMA.

## **1.2. Relevant case law**

While discussions and the development of soft law advanced significantly in the past 12 months, concrete cases that comprehensively address aspects concerning the potential intersection between sustainability and antitrust rules remain relatively rare. Nevertheless, there has been a noticeable increase in recent times, particularly in the Netherlands and Germany, possibly as a result of a clearer position of the Dutch agency about its willingness to take sustainability arguments into consideration.

This section outlines examples of cases reviewed by competition authorities involving cooperation among competitors aiming at achieving sustainability goals<sup>12</sup>.

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<sup>12</sup> The original the cutoff period for this paper of 12 months was extended to 24 months to capture some interesting Dutch decisions rendered in the context of the pioneering position adopted by the ACM in the discussion of this topic

### **The Netherlands: Decision on the collaboration of waste collectors to stimulate recycling<sup>13</sup>**

In October 2023, the Dutch antitrust authority allowed cooperation among commercial waste collectors to promote waste recycling. It was the first agreement between competitors assessed under its new policy rule.

Multiple competing waste collectors took the initiative to agree among themselves always to offer new corporate clients a contract for at least two sorted waste streams. This initiative aimed at improving the circular use of waste materials.

The ACM applied its guidelines regarding sustainability agreements and allowed such cooperation. The authority concluded that this initiative aligns with a statutory waste-separation obligation as well as serving as an additional incentive for disposers to segregate their waste and foster a commitment to sustainable waste management.

### **The Netherlands: Decision on the joint agreement between soft-drink suppliers about the discontinuation of plastic handles<sup>14</sup>**

In July 2022, the Dutch antitrust authority granted approval for a cooperation agreement among soft-drink suppliers, which included companies like Coca-Cola and Vrumona, as well as the supermarket chains Albert Heijn and Jumbo. This agreement aimed at the discontinuation of plastic handles on all soft-drink and water multipacks.

Coca-Cola asked the ACM for an opinion on whether the agreement complied with antitrust rules. The soft-drink suppliers argued that by removing the handles on multipacks, they would become more recyclable, and less plastic would be needed. As a result of this joint agreement, over 70% of multipacks would no longer have handles.

One important aspect found by the ACM was that the participants in the agreement were still in the position of making their own decisions (sustainable or otherwise) and of choosing when and how they would cease adding handles to their multipacks.

In its assessment, the ACM applied the provisions set forth in its guidelines. The authority came to the conclusion that this particular cooperation would fall into at least two categories listed therein as allowed sustainability agreements.

### **The Netherlands: Ruling on the collaboration between Shell and TotalEnergies in the storage of CO2 in empty North Sea gas fields<sup>15</sup>**

In June 2022, the Dutch antitrust authority allowed competitors Shell and TotalEnergies to collaborate in the large-scale storage of CO2 in empty North Sea natural-gas fields. The goal of the agreement was to reduce the gas released into the atmosphere.

In response to the parties' consultation, the ACM assessed whether the cooperation agreement would violate antitrust rules. In line with its earlier draft guidelines, the ACM focused primarily on

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<sup>13</sup> Authority for Consumers and Markets. [ACM is positive about collaboration waste collectors to stimulate recycling](#), October 2023

<sup>14</sup> Authority for Consumers and Markets. [ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles](#), July 2022

<sup>15</sup> Authority for Consumers and Markets. [ACM: Shell and TotalEnergies can collaborate in the storage of CO2 in empty North Sea gas fields](#), June 2022.

whether these two companies could achieve the same outcome individually and mentioned that benefits for both consumers and for society should be taken into account in the competition analysis, particularly if the initiative contributed to achieving the objectives of the Paris Climate Agreement.

The ACM ultimately concluded that the benefits outweighed any potential negative effects of the agreement and deemed it important for reducing CO2 emissions.

### **The Netherlands: Agreement to arrangements of garden centres to curtail use of illegal pesticides<sup>16</sup>**

Another interesting decision of the ACM cleared an agreement between garden centres to bar growers of plants which continue using illegal pesticides after a first warning. The agreement was necessary because illegal pesticides continued to be used despite regulatory oversight. The ACM would thus permit agreements to eliminate “illicit competition” at home and abroad (e.g. an agreement not to buy products resulting from illegal deforestation from countries where deforestation laws are not effectively enforced).

### **Belgium: Ruling on a cooperation agreement concerning living wages<sup>17</sup>**

Although mostly associated with climate change cooperations, sustainability agreements may also encompass other aspects of the Environmental, Social, and Governance (ESG) space. In March 2023, the Belgian Competition Authority (BCA) approved a sustainability initiative focused on ensuring fair living wages in the banana industry chain.

This initiative was proposed by the IDH Sustainable Trade Initiative, a social enterprise working with various entities to promote sustainability in global supply chains, along with five supermarket chains. The proposed agreement aimed to enhance support for living wages for workers in the banana supply chain.

The cooperation agreement involved carrying out discussions, meetings, and the sharing of data and information, which the authority did not consider anticompetitive. An important aspect highlighted by the Belgian authority when assessing the case referred to the commitment made by the parties not to establish or even recommend minimum prices and not to disclose any cost changes related to their supply chains.

### **Germany: Bundeskartellamt sees no reason for detailed examination of a German initiative for sustainable cocoa<sup>18</sup>**

In June 2023, the Bundeskartellamt indicated that the authority did not see reasons for a detailed examination of the German Initiative on Sustainable Cocoa, which concerns a joint initiative of representatives of public authorities, companies of the cocoa and chocolate industry – a major part of the German retail grocery trade – and international non-governmental organisations (NGOs).

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<sup>16</sup> Authority for Consumers and Markets, [ACM agrees to arrangements of garden centers to curtail use of illegal pesticides](#), September 2022

<sup>17</sup> Belgian Competition Authority, [The Belgian Competition Authority assesses a sustainability initiative on 'living wages in the banana sector](#), March 2023

<sup>18</sup> Bundeskartellamt, [German Initiative on Sustainable Cocoa – Bundeskartellamt sees no reason for detailed examination](#), June 2023

One of the primary goals of the joint initiative is to help cocoa farmers in Ghana and Côte d'Ivoire earn a sustainable income. To achieve this, the forum encourages its members to voluntarily commit themselves to individualised minimum purchase prices, quotas and premium systems to achieve better farm gate prices for producers.

One of the factors that the Bundeskartellamt relied upon in its assessment was the voluntary nature of the commitments made by the initiative's members, given that there is no mechanism for imposing sanctions if members fail to meet their commitments. Moreover, the decision was based on the fact that information regarding individual commitments is disclosed with the producers' and regions' names anonymised; and that the contributions of the producers represent only a relatively small portion of the overall price determination within the value chain and in the final chocolate products.

### **Brazil: Decision on a cooperation to develop and operate a B2B software platform tracking and standardising sustainability metrics<sup>19</sup>**

In June 2023, the Administrative Council for Economic Defense (CADE), the Brazilian antitrust authority, approved a joint venture involving players in the agricultural commodities sector. The aim of the joint venture was to develop and operate a B2B software platform designed for tracking and standardising sustainability metrics across food and agricultural supply chains.

The decision issued by the Board of CADE was still generic and applicable to any form of collaboration among competitors, given that it did not provide more specific guidelines regarding the interplay between sustainability and competition rules. The decision relied on safeguards typically implemented and required by CADE to mitigate risks associated with the sharing of sensitive information. These safeguards included the use of firewalls and transactional and governance measures to maintain the independence of the competing entities.

Nevertheless, this represents an initial step towards more advanced discussions in Brazil, especially because to date, CADE has not initiated drafting guidelines or conducted in-depth discussions involving sustainability parameters.

## **1.3. Sandbox projects and seminars**

Various competition authorities have made efforts to organise seminars and “sandbox” projects as well as to produce study reports that look at the intersection between antitrust and sustainability goals. These initiatives are relevant as they demonstrate that such authorities are making efforts to deepen the debate and move the discussions forward.

### **Germany: Federal Ministry for Economic Affairs and Climate Action released report on competition and sustainability in Germany and the EU<sup>20</sup>**

In March 2023, the Federal Ministry for Economic Affairs and Climate Action published an extensive study entitled "Competition and Sustainability in Germany and the EU."

This study, compiled by academic experts, aims to provide general insights on how to evaluate sustainability collaborations from an antitrust perspective. In its conclusions, it argues for the

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<sup>19</sup> Administrative Council for Economic Defense. Merger procedure No. 08700.009905/2022-83

<sup>20</sup> Bundeskartellamt. [Competition and Sustainability in Germany and the EU](#), March 2023.

inclusion of ESG benefits for society in the antitrust analysis and suggests that the requirements and the substantive assessment involving merger control review should be updated to include considerations on sustainability aspects.

### **Mexico: Federal Economic Competition Commission organised Jornada por la Competencia 2023<sup>21</sup>**

2023 marks the 10<sup>th</sup> anniversary of Mexico's competition law. The annual seminar Jornada por la Competencia organised by the Federal Economic Competition Commission took place in September 2023 and proposed for the first time in Latin America to engage in the debate about "climate change and the effective enforcement of competition policy"<sup>22</sup>.

### **India: Recent statements of officials on competition policy and climate change**

In October 2023, the BRICS Competition Conference was held in New Delhi, India. The conference included the session "Sustainability and Climate Change: New Dimensions in Competition Law". On this occasion, Ravneet Kaur, Chairperson of the Competition Commission of India (CCI), said that the agency is looking at how to integrate sustainability goals into the Indian competition law framework<sup>23</sup>.

In December 2022, the Indian Secretary Jyoti Bhanot participated in a conference to celebrate the World Competition Day in New Delhi, India. Speaking at a panel on competition policy and climate change, the Secretary highlighted the role of innovation and competition as key drivers of economic growth, mentioning that these pillars needed to be supported by sustainability goals. The Secretary explained that, while the Commission's prior experience on this matter had been limited, such discussion should move forward, pointing out that the Indian Competition Act offers flexibility to incorporate sustainability aspects in the analysis. She supported use of the guiding principles of necessity and proportionality. They had already been applied by the CCI during the COVID-19 pandemic<sup>24</sup>.

### **Greece: Sandbox for sustainability and competition in the Greek market<sup>25</sup>**

In October 2022, the Hellenic Competition Commission (HCC) launched a regulatory "sandbox" for sustainable development in the market. The initiative allows companies to submit their projects involving sustainability agreements to the authority to assess whether their benefits outweigh potential competition concerns. After analysing the case, the Greek authority may issue a "no-enforcement action letter" to the parties, meaning that they can proceed to implement their projects under the supervision of the HCC.

The sandbox aims at enhancing legal certainty and mitigating regulatory risks for investments that align with the broader public interest objectives related to sustainable development.

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<sup>21</sup> Comisión Federal de Competencia Económica. [Jornada por la Competencia 2023](#)

<sup>22</sup> This meeting followed a meeting between COFECE and the ICC Sustainability and Competition Taskforce earlier in 2023.

<sup>23</sup> Centre for Business and Commercial Laws. Green competition: [Adopting a flexible regulatory framework](#), accessed in November 2023.

<sup>24</sup> Centre for Competition, Investment & Economic Regulation. [Competition cannot remain insulated from sustainability aspects – Jyoti J. Bhanot Secretary, CCI on the occasion of World Competition Day](#), December 2022

<sup>25</sup> Hellenic Competition Commission. [Sandbox for sustainability and competition in the Greek market](#), accessed in November 2023



## 2. Where are America and China in the debate?

The goals and enforcement of antitrust laws are subject to debate in the United States. A few antitrust officials have hinted that benefits such as efforts to mitigate environmental impacts or development of sustainability initiatives might be considered in antitrust policy, but the US enforcement agenda does not yet reflect this.

The Federal Trade Commission's (FTC) Chair Lina Khan has argued and made efforts to demonstrate that "consumer welfare" (focused mainly on lower prices) is not - or should not be - the sole objective of antitrust law. According to the Chair, competition law should be concerned not only with the traditional economic aspects such as reduced supply or increased prices, but also with the entry of new players into the markets and increased economic inequality. In theory, this opens the possibility of taking sustainability goals into account, although in March 2023, FTC Chair Khan stated in general terms that there is no ESG exemption in merger control and that collusion between competitors remains generally unlawful. The question whether genuine sustainability agreements constitute collusion remains open.

Sustainability cooperation has been the subject of political criticism in some circles in the United States. An example are the allegations levied against net-zero associations under the aegis of the Glasgow Financial Alliance for Net Zero (GFANZ). GFANZ is a worldwide coalition comprising a series of distinct net-zero alliances. These alliances consist of member institutions in finance, investment and insurance that have committed to facilitating the transition to a net-zero economy by 2050 and aligning with the goals set forth in the COP21 Paris Agreement.

One of the sector-specific alliances part of GFANZ is the Net Zero Banking Alliance (NZBA). In October 2022, a group of Republican attorneys general launched an investigation against six of the NZBA signatories, including Bank of America, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, and Wells Fargo. The attorneys general argued that the emissions reduction targets set by NZBA represent a coordinated attempt to prevent fossil fuel companies from accessing financial services. They further alleged that the participation of these banks in NZBA activities could potentially violate both consumer protection and antitrust laws. Since then, there have been additional accusations of 'collective boycotts'. Others point out that these net-zero agreements alleviate market failures, resolve collection action problems, and have consumer welfare enhancing effects by lowering the potentially significant costs to consumers of an unmitigated climate crisis. They explain that antitrust authorities and courts can and should take account of these redeeming features and sustainability economics under a 'rule of reason' analysis.<sup>26</sup>

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<sup>26</sup> J. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 2022 107 ILR 573 et seq; A. Miazad, 'Prosocial Antitrust', 2022, 73 HLJ 6; Dolmans, Lin and Hollis, *Sustainability and Net Zero Climate Agreements – A Transatlantic Antitrust Perspective*, October 2023; Hearn, Hanawalt and Sachs, *Antitrust and Sustainability: A Landscape Analysis*, July 2023; Hanawalt and Hearn, *The Slippery Notion of Boycotts in the Anti-ESG Movement – Climate Law Blog*, June 2023

In essence,

*“the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. [...] If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. [...] If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.”<sup>27</sup>*

The pro-competitive rationale for the restraint can be to alleviate a market failure,<sup>28</sup> such as those that give rise to the climate and biodiversity crises, or that lead to large scale pollution.

Accordingly, while there is a beginning of a discussion on antitrust policy as applied to sustainability agreements in the US – and the “rule of reason” should provide room for such agreements – there are no direct precedents nor guidelines yet.

We are not aware of guidelines or precedents in China either. Interestingly, Article 24 of the 2022 Chinese Anti-Monopoly Law provides for an exemption where the parties can demonstrate that a cooperation agreement aims at achieving energy conservation, environmental protection, disaster relief or other public interests, provided that such agreement does not seriously restrict competition and that it ultimately results in benefits to consumers. Article 34, which concerns merger control, provides that

*“the Anti-Monopoly Enforcement Authority under the State Council may make a decision not to prohibit the concentration of undertakings where the undertakings can prove that the positive effects of the concentration on competition significantly outweighs its adverse effects, or that the concentration of undertakings is in the public interest.”*

So far, the State Administration for Market Regulation (SAMR) has not provided guidance on sustainability projects in the context of cooperation agreements, nor does it appear to have taken sustainability arguments into account to exempt sustainability agreements.

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<sup>27</sup> US Supreme Court, *Ohio v American Express Co.*, 585 U.S., 2018

<sup>28</sup> J. Newman, *Procompetitive Justifications in Antitrust Law*, 2019

### 3. Conclusion

Competition authorities and antitrust agencies around the world adopt different approaches towards sustainability cooperation agreements. Nonetheless, a general trend has evolved in the recent past, particularly the last 12 months, towards broader recognition of the potential benefits of sustainability cooperation, even as antitrust authorities (properly) take action against greenwashing and collusion. ICC welcomes efforts made by certain competition authorities to adapt antitrust policies in alignment with sustainable objectives.

Several competition authorities listened to businesses' concerns, published guidelines to enhance transparency in antitrust assessments and organised seminars to debate the matter with academic and business representatives. In addition, certain authorities started to carry out a more in-depth analysis of cases involving sustainability cooperation agreements. They provide the companies with important guidance on how to assess potential competition risks. This should encourage companies to consider working together to achieve bolder and more impactful sustainability objectives, while avoiding collusion and unnecessary restrictions of competition.

Giving companies incentives to align their practices with sustainability and climate objectives will demand a comprehensive set of policies and regulations that cover all sectors of the economy. Given that sustainability agreements can have widespread geographic effects, there is also a need for legal consistency across jurisdictions. It is encouraging that both the International Competition Network, a body comprising over 100 competition authorities worldwide, and the OECD Competition Committee have begun to focus on sustainability and competition law. More work is needed, however.

Ultimately, it is vital that competition authorities across jurisdictions maintain open discussions and progress towards establishing a more transparent and less uncertain environment for companies to engage in sustainability cooperation agreements. There is a particular need for the US and the Chinese antitrust agencies to join in the trend as well as for others not discussed in depth in this submission. Such efforts could enable businesses to jointly pursue proportional and legitimate sustainability objectives, benefiting consumers, society as a whole and, hopefully, the planet.

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