When Chilling Contributes to Warming

How Competition Policy Acts As a Barrier to Climate Action[1]

The International Chamber of Commerce (ICC) calls upon all governments and competition authorities to do everything possible within their own legal systems to reduce or eliminate the disastrous inconsistency between the imperative of fighting climate change and competition law or policy. In some cases, this may mean a change in the law; in some cases more ambitious guidelines; and in others it means changes in the burden of proof and/or presumptions in favour of genuine efforts to fight climate change and meet the climate change goals to which governments have committed.

Key messages:

- Businesses can, need and want to work together to help fight climate change.
- Current competition policies are chilling this.
- Competition authorities and law makers can, and must, do more to reduce this chilling effect: practical guidance is needed.
- This can (largely) be done within current legal frameworks for competition law: where it cannot things need to change.
- Businesses, in turn, should take real-life examples of the chilling effect to the competition authorities.

1 This white paper has been produced by the ICC Task Force on Competition and Sustainability co-chaired by Paola Pugliese and Simon Holmes and with the invaluable assistance of Ian Giles. Other members of the Task Force include: Georgina Beasley, Johann Brück, Elżbieta Buczkowska, Carlos Edwin Camarillo, Daniel Castelo, Arjun Chandran, Xiaofeng Cheng, Paolo Chiricozzi, Polina Chtchelok, Jorge Alexander Cortés, Pablo Cortinez, Zhisong Deng, Maurits Dolmans, Shaha El-Sheemy, Carolina Espitia, Natalie Flores, Morgan Frontczak, Elisa Geraci, Dora Cecilia Gómez, Edwin González, Juan Andrés Gortaire, Ingrid Guete, Gönenç Gürkaynak, Sarah Hoskins, Wessen Jazrawi, Abd Alfatah Kahale, Siobhan Kahmann, Nicole Kar, Per Karlsson, Emmanuela Leal, Claudia Andrea Lopez Monterrey, Carlos Mena, Alejandro Mendiola Díaz, Yan Meng, Juan David Morales, Alexis Munro, Adolfo Naranjo, Gerrit Oosterhuis, Juan Camilo Pinzón, Angela María Plata, Anne Riley, María Eugenia Rinaudo, Karin Roberts, Ian Rose, Paolo Rotelli, Ana Patricia Rozo, Antonella Salgueiro, Mónica Sánchez Soliva, Beatriz Sanz Fernández-Vega, Mari Scimemi, Patrick Thieffry, Marceline Tournier, Kağan Uçar, and Sandy Walker. More details on the above contributors are provided at the end of the document.

Part 1: Introduction to the problem and purpose of this paper

The climate change emergency is driving companies worldwide to set increasingly ambitious sustainability targets. As frequently occurs, when regulation lags behind in driving and promoting change, the private sector has stepped forward and taken action. Rising sustainability concerns have created increasing pressure on businesses to make environment-friendly investments, innovations and purchasing decisions.

Business executives and top decision makers are now faced with the dual challenge of becoming the drivers for change, while still delivering good results to their shareholders. Indeed, while business success cannot be put at risk, being the first mover does not give rise to the advantages typically attributed to pioneers, as innovation and change for sustainability purposes do not necessarily mean that pioneering firms will reap the profits generally resulting from early action.

In fact, it may be quite the opposite: actions taken by businesses to advance their sustainability objectives usually require investments in the short term and possibly higher operating costs that often cannot be passed on in the prices charged to customers. Sometimes, this can go as far as companies challenging consumers' immediate interests when introducing new higher standards, as has been the case, for example, with the termination of plastic bags in supermarkets in a variety of countries.

A head start may therefore mean unhappy shareholders and unhappy customers in the short term, with the pioneers (and their customers) becoming easy prey for competitors. The answer to this puzzle could lie in a collective move: cooperation among competitors. When all, or most, competitors move together and in the same direction, change will occur. What if such change benefits the environment and society, but at the cost of temporarily reducing competition? How much of a reduction of competition are we ready to accept?

In other instances, the answer may not lie in a collective move, but it may have an equal effect on competition. Some unilateral commitments undertaken by the private sector can only be achieved through mergers and acquisitions. For example, becoming carbon neutral by a certain date may require that companies dramatically increase their recycling capabilities in the short term, which could be hard or even impossible to do organically. What if buying out recycling facilities is the answer? Again, how much concentration in the recycling industry are we ready to accept (if any), to achieve a greater good?

The interaction of competition law and sustainability has become a live question for competition agencies around the world, which are being asked to take a position and to say whether they will stand in the way of such initiatives or promote them. The fact, however, is that most competition agencies are taking hesitant positions, in search of the right answer between these extreme positions. Some agencies have been openly supportive of including sustainability elements in their antitrust assessments; others have been reactive to what they see as unorthodox economic analysis, or skeptical about suggestions that a reform of antitrust rules is needed to support sustainability objectives—and fearing that such objectives may be used as cover for anticompetitive practices. At both ends of the spectrum though, agencies have been encouraging the private sector to bring forward real-life situations for concrete assessments.

Businesses are citing a lack of sufficient clarity and comfort around antitrust rules as stifling their sustainability efforts in the context of industry-wide initiatives. At a general level, businesses seeking to participate in Environmental, Social and Governance ("ESG") initiatives—and in, particular, sustainability initiatives—are frustrated that the antitrust framework internationally is not providing the certainty they require that genuine sustainability-focused initiatives will not be considered to breach antitrust rules.

- They see the responsibility for articulating such a position as falling primarily on governments—and the competition authorities and courts ultimately under their control.
- They are frustrated that, despite some efforts being made and guidance provided in certain jurisdictions regarding sustainability agreements, it remains the case that companies are being asked to accept the burden of proof (and commercial risk) in bringing test cases to establish a precedent on the circumstances in which sustainability benefits from collective initiatives outweigh any effects on competition.
- In particular, businesses see that the lack of an agreed approach among competition authorities globally (e.g. through the International Competition Network) means that the possibility of implementing global sustainability-related initiatives will potentially require engagement with numerous competition regimes, including those requiring pre-approval before initiatives are implemented (which can involve lengthy and costly processes creating material delays for such initiatives).

As frequently happens, when companies are uncertain about the application of antitrust rules, private practitioners have been frequently asked to anticipate how they expect regulators in their jurisdictions to react to initiatives which may result in a reduction of competition (which may often be only temporary) where the benefits accrue to consumers and society more generally in the form of a more sustainable economy. However, competition authority reviews, particularly across numerous jurisdictions, are typically lengthy, costly for the parties involved and can be unpredictable—in particular on complex questions such as evaluation of benefits arising from agreements which might countervail any reductions in competition. Consequently, companies have frequently been reluctant to submit cases to the antitrust authorities for their concrete review. When business communities are faced with legal uncertainty and cost and delay to their plans, many projects are simply abandoned before they are even brought to any hesitant agency.

On their end, and perhaps as a consequence of the above, some agencies have been skeptical as to the degree of pressure that companies are indeed facing, when this has not been reflected in any significant number of cases, requests for guidance or mergers filed for their review.

This is the gap that this paper aims at bridging. In particular:

- the **reluctance of many competition authorities** to take effective action to ensure that competition law does not stand in the way of business cooperation to fight climate change, whether due to a lack of experience of the issue; scepticism as to the extent of the problem or (usually undue) fear of "greenwashing";[2] and

2 In the past competition authorities have seemed more receptive to action to achieve environmental benefits. A good example is the CECED decision of the European Commission where it approved an agreement between washing machine manufacturers to improve the energy efficiency of washing machines. Despite expecting an increase in price, the Commission accepted that the collective benefits for society (a reduction in energy consumption) outweighed these costs [CECED [1999] L187/47 OJ 2000].

- the **reluctance of businesses** to cooperate with competitors for (often unfounded) fear of competition law, and a reluctance to take their concerns or submit sustainability-related arguments to the competition authorities, to seek comfort/guidance.

The rest of this paper is divided into **two parts and an Annex**:

Part 2 introduces some **real-life business cases** where companies are looking to cooperate to make a significant contribution to the fight against climate change or where companies are considering sustainability-driven actions, but where fear of competition law (whether well founded or not) is inhibiting progress. In these cases guidance is being sought from private practitioners and, in some cases, the competition authorities.

Part 3 calls on **competition authorities to provide more practical help to businesses**—both in the form of general practical guidance but also giving guidance/comfort in relation to individual projects in a timely manner and without overburdening those businesses (particularly Small- and Medium-Size Enterprises 'SMEs') with excessive information demands. This requires a careful balance if competition authorities feel they need to safeguard against what they fear to be greenwashing. This is a global problem and we call on competition authorities to work together so that projects with effects across multiple jurisdictions can proceed in a timely manner. If we can do this to allow mergers to proceed, we should be able to do it to allow agreements combatting climate change to proceed. In the context of efforts to make dynamic changes to market behaviours, the chilling effect of the need to engage with multiple regulatory processes—involving potentially significant delays and material costs for the companies involved—should not be underestimated.

The Annex identifies the kind of **cooperation that is less likely to be problematic under competition law** (either not being caught at all or meriting some form of exemption/safe harbour) and sustainability-related arguments that authorities may safely take into consideration in their decisions. It also briefly identifies those aspects of cooperation or other agreements that are more likely to be problematic but calls on the competition authorities to help overcome these where their potential benefits in the fight against climate change are very significant (for example efforts to phase out fossil fuels). It is hoped that this will encourage and help businesses looking to engage in the fight against climate change, but also help those competition authorities with less experience of this issue.

Part 2: The real-life cases that competition agencies need to be aware of

The Global Competition Commission of the International Chamber of Commerce established in June 2022 the Task Force on Competition and Sustainability (the "Task Force") led by Simon Holmes in Europe and Paola Pugliese in South America, with the goal of benefiting from the experience of over 50 lawyers representing no fewer than 20 jurisdictions to provide insights on a number of real-life situations upon which their advice has been sought.

Advisors have seen numerous examples of companies seeking legal advice in relation to sustainability-related initiatives. Although legal advice is sought for guidance and an argument can typically be made that consumer benefits will outweigh any negative effects on competition from initiatives which seek to collectively change market behaviours, it is clear that businesses are concerned about how competition authorities may react to certain initiatives (e.g. industry codes of conduct), and the potential unpredictability regarding enforcement.

This section lists some real-life business cases that ICC members have encountered, where businesses are looking to cooperate to make a significant contribution to the fight against climate change, but where fear of competition law (whether well founded or not) is inhibiting progress. The examples provided are real-life cases, which have been anonymised and generalised in the interests of protecting corporate confidentiality.[3]

Business case 1: Naming and shaming for the greater good

- A trade association aims to put pressure on suppliers to remove commodities linked to deforestation [or any other unsustainable / unethical behaviour] from the distribution chain.
- Any individual unilateral "boycott" of suppliers connected with deforestation will not change supplier behaviour—as there will always be companies prioritising the cheapest input, especially in the current climate of increasing input costs.
- The trade association invites members to share supply chain due diligence with an external third party in order to identify which suppliers are (i) involved in deforestation or (ii) unable to prove that their commodities are not connected with deforestation.
- The trade association then publishes the list of suppliers which are on the "bad list" (and recommends members not to purchase from them), hoping that by "naming and shaming" these suppliers, this will force a change of behaviour.

Business case 2: Collective "boycott" of polluters

- A trade association aims to force suppliers to use a less polluting technique in mining aluminium.
- The less polluting technique currently has a higher cost than the polluting alternative, and therefore is likely to be a higher purchase price (which might be passed on to consumers).

3 The Task Force relied heavily on a similar compilation produced by some of its members, like the paper submitted by the European RoundTable ("ERT") in response to the public consultation on the draft European Horizontal Cooperation Guidelines.

- Any unilateral action by an individual company will not change behaviour, because the companies deploying polluting techniques will find alternative buyers and those buyers who have lower costs may gain market share by being able to price more aggressively.
- The trade association members agree not to buy from any suppliers who use the polluting technique, thereby denying them a large portion of the potential purchasing market and hopefully forcing through change.

Business case 3: Alternative base materials

- Road pollution is caused by emissions as well as fine particles from tyres and brakes.
- Industry successfully creates an alternative material for tyres and brakes which vastly reduces the amount of fine particles "emitted".
- This alternative is significantly more expensive but the cost could be significantly reduced if adopted by all manufacturers.
- Industry wants to agree that all new tyres and brakes manufactured will only use the new material.
- This will increase all manufacturers costs (at least in the short term) and each manufacturer is free to decide whether and how to pass on the price increase.

Business case 4: Sponsoring upstream sustainability

- The industry aims to encourage sustainable farming techniques on a wide-scale in order to make a measurable difference in reducing the need for fertilizers, prevent soil erosion and move toward carbon neutrality.
- In order to have a measurable impact, a minimum of 500 farms need to deploy the sustainable techniques.
- No individual company can sponsor and buy all the output of 500 farms.
- A number of competitors agree to support the farms by providing financial incentives and technical support to deploy the sustainable techniques.
- It will also be necessary to ensure the crops are all purchased.
- The competitors will need to agree how much each party buys and from which farm. It might even be necessary to agree upon a common price in order to convince the farms to join the programme.
- There will be no agreement as to how any increased costs are passed on to customers and no more exchange of commercially sensitive information than is strictly necessary.

Business case 5: Joint sustainability initiatives in the production process

- Industrial manufacturing is one of the key drivers of greenhouse emissions. In order to reduce these emissions, alternative production processes have to be developed. This is often associated with extra costs (at least in the short term), which industrial players cannot bear by themselves.
- To overcome this dilemma, joint development of production facilities with competitors might enhance the dynamic of a green transformation of carbon heavy industry, e.g. by switching from fossil energy sources to hydrogen.
- In this context, some information exchange with competitors is crucial for the planning process. Also transferring production capacities to joint production facilities with

competitors—by means of a joint venture or a contractual cooperation—could be considered as a restriction of competition.

Business case 6: Efficient use of resources relying on agreements among competitors

- The main sources of energy consumption in the telecom sector are the overlapping of networks and technologies, rather than the total amount of traffic carried.
- Network Sharing Agreements among competitors to carry the same amount of traffic over a reduced number of networks or technologies would greatly reduce energy consumption.
- This would require however site sharing and the exchange of the information necessary to permit site sharing and national roaming.

Business case 7: Horizontal data sharing for energy saving purposes

- Big Data and artificial intelligence applications are more and more used to optimise system performance to make networks as sustainable and cost-efficient as possible.
- The data transmitted by smartmeters is used for the targeted implementation of energy efficiency solutions, such as the application of standby mode to limit energy consumption when traffic is slowed down.
- Sharing this data among network operators would allow for large energy savings, but would also require competitors to share some competitively sensitive information which could potentially reduce competition among them

Business case 8: Horizontal data pooling across sectors

- Data centres, cloud services and connectivity account for a large part of the environmental footprint of the information technology sector.
- Agreements among competitors to share some B2B data and infrastructures and the creation of large data pools enabling Big Data analytics and machine learning would result in substantial energy savings and reduce carbon emissions, at the potential risk however of reducing competition among them.

Business case 9: Reducing competition to foster change

- A group of financial institutions wish to ensure that meatpackers monitor the supply chain, in order to eliminate deforestation.
- They agree that they will only offer certain financing products to meatpackers that can demonstrate efficient supply chain monitoring.
- Individual action by any of those financial institutions will not produce the desired effect, as the meatpacker who is not able to evidence consistent monitoring of the supply chain will resort to other banks for financing.
- As a result of such collective action, the banks are not expected to obtain any supra-competitive profits or gains, but rather only force the meatpackers to have better controls.

Business case 10: A carbon footprint calculation tool

- A business association of highly energy intensive manufacturers in the metal processing industry represents more than 50 individual companies.

- Its goal is to reach carbon neutral production by 2050.
- Among others, the association provides a “carbon footprint calculation tool” based on comprehensive data provided by member companies. The tool facilitates calculation and/or determination of individual product carbon footprints.
- Data input of individual companies includes visible competitively sensitive information on products, production processes and interaction (supplier/customer relationships) along the supply chain. That information/data could be considered as enabling an information exchange with potentially restrictive effects on competition among participating companies.

Business case 11: Agreement to reduce number of competing waste collection networks to drive greater efficiencies

- Waste collectors agree that due to the small size of the market a particular state would only need one general waste collection network operator to meet the needs of the whole country.
- They want to agree that only one of them will become the single operator of a network to handle all types of waste and for the other operators to run specific sub-networks.
- Under the arrangement the wider single network operator would pass all collected waste to the specialised sub-networks on non-discriminatory terms.
- The agreement would avoid duplication of networks as duplication makes recycling waste more costly, decrease efficiency and increase environmental costs.
- The waste recovery operators recognise this raises competition concerns and are uncertain as to how the competition authority would respond.

Business case 12: Competitive pressures could undermine sustainable packaging initiatives

- In certain luxury and premium FMCG markets, end consumers associate weightier packaging with product quality.
- Suppliers may be able to reduce significantly the environmental footprint of their products by “lightweighting” them or removing unnecessary packaging. This would have a significant cascading effect on greenhouse gas emissions—not only would there be a reduction in the carbon per unit of product from not producing the “excess” packaging in the first instance, but also carbon reductions would be achieved in the subsequent stages of transportation and waste/recycling hauling.
- However, suppliers are reticent to take unilateral action in this regard, as they could lose sales to (“free riding”) competitors with less sustainable packaging that consumers associate with a premium feel.
- One way to quickly overcome this deadlock is for the industry to take collective action by agreeing to remove unnecessary packaging or minimise its weight. Collective action would result in reduced greenhouse gas emission reductions much more quickly than waiting for independent action by competitors competing on the premium feel of their products.
- There would be no discussion or agreement between competitors on costs, pricing, or actual product quality.
- Such collective action would significantly improve the environmental footprint of the industry but would also require agreement between competitors on a potential parameter of competition.

The examples above, taken from real-life situations brought to external counsel for their advice, illustrate how there are no simple solutions to the legal issues raised by sustainability-enhancing arrangements. In all of these cases individual action was inadequate, and some form of collective action was necessary (in particular to overcome "free-rider" problems or to avoid a first mover disadvantage). They are all legitimately aiming to produce sustainable results but have the potential to a certain degree to result in a reduction of competition-at least in the short term.

However, these examples are just the tip of the iceberg as in many cases potential projects are "still born" and never get as far as lawyers who may be able to facilitate their execution. ICC members have identified many situations where collective action to fight climate change (or to put markets on an ecologically sustainable basis) is needed but as a result of competition law concerns, collective action, is either not happening at all or is happening to a much lesser extent than the urgency of the situation requires.[4]

Race to Zero Initiatives

Certain well-known initiatives that do not require fictionalisation because of their public nature are the initiatives sponsored by the United Nations ("UN") that seek to encourage companies to cooperate in an effort to become carbon-neutral by 2050, under the umbrella of the UN's Race to Zero initiative. These include, among others, the Net Zero Asset Owners Alliance (NZAOA), the Net Zero Insurance Alliance (NZIA) and the Glasgow Finance Alliance for Net Zero (GFANZ). Designed to be aligned with the UN's Race to Zero campaign, these initiatives have focused on implementing methodologies for measuring portfolio and investment related emissions, and then asking members to agree on targets for reducing such emissions over time in order to achieve the overarching target of net zero emissions by 2050.

The UN's Race to Zero initiative has set out a number of criteria for members, and a recently updated version of the Interpretation Guide to these criteria required members to accept: "*an immediate halt on building new coal plants and a phaseout of coal-fired electricity generation by 2030 in OECD countries and 2040 in non-OECD countries, as well as no new oil and gas fields*."[5] Were members of these alliances to agree to such criteria as regards their operations, they would effectively be agreeing not to support any new coal ventures, or oil and gas fields, and to support a phase-out of coal-generated power within a specified timeline. These requirements are based on the latest scientific research and intended to support transition to a net zero global economy by 2050.

To date, not all asset-owners, financial institutions or insurance companies are members of these initiatives. However, if that were the case, or even if a substantial majority of potential members were to sign up, and if such alliance members then agreed not to engage with high-emitting companies or projects, this could have a potentially significant impact on the ability of such high-emitting companies or projects to continue current activities. For this reason, these alliances are potentially a very powerful tool in the fight against climate change.

However, from a competition law perspective, if companies agree not to deal with particular market participants, this may be considered a collective "boycott" under the rules of different jurisdictions, and is certainly capable of distorting competition in some relevant markets (e.g.

4 See, for example the submission by Unilever to the European Commission in the context of its early plans to revise its horizontal guidelines. [https://www.unilever.com/sustainable-living/our approach-to-reporting/engaging-with-stakeholdrers/] undr "competition law and sustainability".

5 https://www.edie.net/race-to-zero-toughens-up-membership-criteria-with-new-requirements-on-fossil-fuel-financing-and-lobbying/

production of electricity in jurisdictions where there is currently material coal-fired generation, and where such generation could face increased costs—or inability to operate—as a consequence of agreements entered by the members of the types of alliances described above). While the sustainability benefits might be considered to far outweigh any harms to competition arising from such a “boycott”—or even from agreed changes in market behaviour which make it harder for higher-emitting companies to compete—proving such benefits may be complex. The legal standard and burden of proof vary between jurisdictions, and this can create a significant disincentive for the companies involved in engaging with these types of sustainability initiatives.

Indeed, in this context, and following reported concerns of members, the Race to Zero ultimately has amended its Interpretation Guide to retreat from requiring member organisations to explicitly stop working on new coal projects.[6] Furthermore, one of the most important of the net zero alliances, GFANZ, has recently announced that it is dropping the requirement for its members to sign up to the UN Race to Zero initiative. Again, fear of the competition law implications are at the heart of this decision.[7]

While initiatives like the UN Race to Zero campaign pushes companies in one direction to try and meet the science-based targets agreed to by governments under the Paris Agreements, competition authorities’ actions or inactions can push them in a different one. Greater consistency and clear guidance are urgently needed.

We call upon all governments and competition authorities to do everything possible within their own legal systems to reduce or eliminate this disastrous inconsistency between the imperative of fighting climate change and competition law or policy. In some cases, this may mean a change in the law (as in the case of Austria mentioned below); in others more ambitious guidelines; and in others it means changes in the burden of proof and/or presumptions in favour of genuine efforts to fight climate change and meet the climate change goals to which the governments have committed.[8]

---

6 https://www.bloomberg.com/news/articles/2022-10-08/wall-street-banks-win-key-net-zero-concession-a-month-before-cop?srnd=premium&sref=Hhue1scO

7 Reuters 28/10/2022.[Mark Carney….drops UN climate initiative requirement]

8 See further below:”Competition Agencies:what business needs from you”

Part 3: Business needs guidance

Although it seems possible in some of the cases described above to mitigate competition risks (introducing firewalls, limiting the scope of certain arrangements, etc), companies have often taken a conservative route when confronted with some level of exposure. For instance, we are aware of businesses:

- declining to participate in industry-wide initiatives in favour of undertaking unilateral sustainability efforts (cognisant that these may not be as impactful as industry-wide initiatives) for fear of potential antitrust risks;
- ensuring minimal publicity around their business' sustainability intentions and achievements (even though they are aware this may be overly cautious) to avoid the antitrust risks associated with potential "signalling" to their industry peers; and
- being concerned about reporting data, e.g. on carbon footprints, even in response to market demand for transparency, due to concerns that such data could be considered a mechanism to allow monitoring of behaviour by competitors in breach of competition rules.

Some of the concerns above do not appear justified based on the case-law in many jurisdictions, and the helpful (draft) guidance published by several competition authorities-for example by the European Commission and the Dutch, ACM.[9] These are very welcome and a big step in the right direction but those from the European Commission need to go further if European law/policy is not to impede vital action to fight climate change (see ICC comments on the European draft guidance document).

Nonetheless, companies have been frequently very cautious regarding competition law risks given the potential severity of sanctions. While seeking legal advice can often go a long way, many businesses are reluctant to take the steps they would otherwise wish to take as an industry towards tackling the climate crisis without greater clarity and predictability from competition authorities as to how the antitrust rules would apply.

Typically, severe sanctions are required to disincentivise companies from perpetrating conducts that generate substantial private gains for the perpetrators to the detriment of consumers or to the detriment of any other "public interest" consideration. When balancing the potential benefits and the potential risks, the antitrust exposure must outweigh the benefits so as to generate a deterrence effect. In the case of sustainable goals, the fact is that most of the time businesses are not reaping immediate substantial gains with the conduct that exposes them to antitrust risks. They will obviously benefit from the results, but not immediately and definitely not alone, as the results are shared with society. Antitrust risks may frequently become excessively onerous in that scenario.

Companies can often make a variety of good legal arguments as to why their agreements might not affect competition, or why they have benefits far outweighing the harms, but they are being asked to do this in a global context where:

9 EGs include: Chapter 9 ("Sustainability Agreements") of the European Commission's draft Guidelines of 1 March, 2022 on Horizontal Agreements and the draft guidelines of the Dutch Competition Authority ("ACM") on "Sustainability agreements: opportunities within competition law" of 26th February, 2021 (and various press releases of the ACM in relation to individual agreements to promote sustainability). See also the guidance provided by the European Commission on 8 July, 2021 to German car manufacturers on areas of cooperation on sustainability that did not give rise to concern (accompanying its decision fining those manufacturers for restricting competition in emission cleaning the so-called "AdBlue" decision of the same date [IP/21/3581].

- there is a multiplicity of regimes with different legal tests and publicly stated differences of opinion on how sustainability benefits weigh against restrictions on competition;
- authorities are often sceptical in fear of being greenwashed;
- several of these regimes operate pre-approval processes, which increase cost and delay in engaging with them—or have active litigation regimes where companies risk being sued by "victims";
- the burden of proof would typically be on the parties to show the benefits and potentially to go as far as to calculate and show how these benefits might accrue to consumers.

Businesses willing to cooperate can seek approval or comfort from relevant competition authorities that their arrangements might be considered to have "benefits" outweighing any competitive harm that they might have. This may be in the context, e.g. in jurisdictions such as Australia and Brazil (but also several others), of a need for pre-authorisation before such agreements are implemented. But for corporate governance reasons, companies will also want comfort from a number of other authorities around the world before engaging in such conduct, and in particular from those authorities with a track record for imposing significant penalties for competition infringements.

In most cases, the legal test for demonstrating "efficiencies" or consumer benefits is tightly constrained, with very few precedent cases where such benefits have been found to outweigh anticompetitive effects. Moreover, these tests will typically put the burden of proof on the parties, and may require—for example—calculation of specific (economic) benefits accruing to consumers in the markets where the loss of competition has taken place. In a world with nearly 150 competition authorities operating different legal tests and with differing procedures for grant of pre-approval or comfort to parties participating in such initiatives, this creates a significant obstacle to companies that are members, for example, of alliances adopting positions aligned with the latest UN Race to Zero criteria.

The efficacy of the UN's efforts, and that of other similar initiatives, therefore depend on member companies being comfortable that the arrangements they engage in do not raise competition law concerns, and also that they can be implemented quickly without the cost and complication of lengthy engagements with numerous competition authorities.[10]

The published guidance from a number of competition authorities has been clear that sustainability agreements *which do not restrict competition* should not raise concerns (see, e.g. the European Commission's draft *Horizontal Guidelines*), but there has been much more limited guidance or precedent—or even agreement between agencies—as to how the benefits of sustainability agreements might be weighed against any restrictive effects on competition (See the ICC paper responding to the European Commission's draft guidelines referred to and linked above). To the extent that different national approaches start to develop, this will increase legal uncertainty, and therefore deter businesses from engaging in vital industry sustainability initiatives.

Competition agencies and law makers: what business needs from you

1. **Clear guidelines** about what are the safe harbours and what level of reduction in competition (if any) agencies are willing to accept, in favour of a greener economy.

---

10 Reflecting this there have ben several instances where member firms have said they may withdraw from key net zero initiatives such as GFANZ.

2. **Case-law**: assessment of individual cases will allow business to draw the lines of what is permitted and what will be considered unlawful.
3. **Convergence of incentives**: in order to drive business in one clear direction, avoiding conflicting goals.
4. **An agreed approach among competition authorities globally** (e.g. through the ICN). In the context of efforts to make dynamic changes to market behaviours, the chilling effect of the need to engage with multiple regulatory processes—involving potentially significant delays and material costs for the companies involved—should not be underestimated.
5. **Shifting the burden of proof**: there is a need for international recognition that pro-sustainability initiatives, such as those championed by the UN under the Race to Zero, should be presumed to generate benefits outweighing any harms to competition, unless it is proven not to be the case.[11]
6. **Pre-authorisation processes for agreements capable of producing anti-competitive effects should be reconsidered**, to prevent genuine sustainability efforts needing to go through pre-authorisation processes, which cause material delay and cost, and deter collective action. At the very least they need to be speeded up and simplified.

In relation to this last point, the creation of a **full-function joint venture**, to which merger control rules apply and where therefore scrutiny of the authority within a short period of time and then legal certainty could be expected, is not always business' preferred option. The otherwise short statutory timeline can be substantially increased through protracted pre-notification discussions and stopping of the clock. In the meantime, the risk of being found to have "jumped the gun" means that pre-transaction planning may become extremely difficult.

However, setting up a **joint venture or other partnership** which does not qualify for merger control everywhere is also difficult. In such cases, whether or not it is justified, the parties may be concerned that the authorities will make an assumption of "greenwashing", and that they will treat the collaboration with suspicion despite its clear aims.

In any of the structures considered for a collaboration, the parties need at some point to enter into detailed discussions about what they can achieve together, and this is likely to include the **exchange of some amount of commercially confidential information**. Companies have different approaches to the concept of "clean teams" and to the handling of information, and this can significantly slow down the progress of a project and lead to unnecessary misunderstandings and frictions between the parties.

---

11 The Austrian government passed legislation making it easier to meet the conditions for an exemption under Austrian law in the case of agreements with demonstrable ecological benefits. [Kartell und Wettbewerbsrechtsanderungsgesetz (KaWeRAG) 2021, Austrian Federal Law Gazette I 2021/176].

Annex

Some "do's" and "don'ts" of sustainability agreements

We set out below some examples of the sort of arrangements or provisions that are likely to make an agreement between businesses:

- less likely to be caught by competition law (or benefit from some sort of exemption/safe harbour if prima facia caught); or which
- are more likely to be caught/ be less likely to be exempt.

It is hoped that this will encourage and help businesses looking to engage in the fight against climate change, but also help those competition authorities with less experience of this issue.

While we briefly identify those aspects of cooperation or other agreements that are more likely to be problematic we call on the competition authorities to help overcome these where their potential benefits in the fight against climate change are very significant (for example efforts to phase out fossil fuels).

This is only meant to provide some helpful indicators which seem likely to be relevant across many jurisdictions around the world based on the experience of ICC members and their competition lawyers, and on the indications given so far from various competition authorities. More specific guidance has been given by a number of authorities and these can be applied directly in relation to specific jurisdictions and are of indicative value elsewhere.[12]

Three important points should be noted:

- Some competition authorities may take a stricter or more lenient/flexible approach.
- These matters can be very context/fact specific. For example, while agreements to pass on any extra costs resulting from more sustainable production/sourcing are generally less likely to be accepted and cleared by competition authorities, there may be circumstances where this may be justifiable.[13]
- Where it seems likely that an agreement is caught by competition law (or there is a serious risk that that is the case) and it is not clear that the relevant criteria are met, but the potential gains for the climate are enormous, we call upon business and the competition authorities to work together to find a solution that is both satisfactory from a competition law perspective and which enables these gains to be realised. Examples would include the various initiatives to phase out support for fossil fuels.[14] [15]

---

12 See for example, the guidance referred to in footnote 9. Furthermore, although often not reflected in guidance as such, other competition authorities (such as the Chinese AML)' practice sometimes show a willingness to take into account sustainability relaterd factors such as energy conservation and environmental protection-even in the area of merger control.

13 See, for example, the UK OFT's Submission to OECD RoundTable on Sustainability and Competition, 2010.

14 For example, the various UN sponsored net zero initiatives discussed above.

15 This part is not divided neatly between (a) factors relevant to not being caught by competition law (e.g. the Article 101(1) TFEU prohibition on anti-competitive agreements) and (b) those relevant to the agreement benefitting from an exemption (e.g. under Article 101(3) TFEU. This is for three reasons: first, the same factors may be relevant to both these questions; secondly, the indications here are intended to be of general application and not limited to EU law (or national laws with the identical structure); thirdly, even under EU law, where businesses are generally expected to "self-assess" their agreements, it is of secondary importance whether the agreement escapes the prohibition completely or whether it is caught but exempt (what matters is that the agreement is lawful).

A. Some "do's" — and circumstances and provisions making it less likely that competition law is a problem.

1. Cooperation on sustainability between companies that are not competitors will rarely be a problem. Obvious examples are agreements with firms up and down the supply chain (e.g. with suppliers and customers)[16] or agreements with suppliers of complementary products (eg between a supplier of brakes and brake pads to reduce the release of harmful particles into the atmosphere).
2. Sustainability cooperation agreements between competitors may in many or most circumstances also comply with competition law and the points that follow apply in relation to such agreements between competitors.
3. It is important to show that cooperation between competitors is necessary in the sense that without such cooperation the sustainability benefits would not be achieved: at all; at the necessary scale; or within a reasonable time scale: *i.e.* there is an environmental problem[17] that the cooperation addresses in an effective manner). Helpful evidence could include:
   - past failures to make the transition to the sustainable products/method of production;[18]
   - sales of sustainable products being stuck at a low level for many years (e.g. less than 10%) despite the competing efforts of suppliers when there is a need to move the whole (or most of) the industry onto a sustainable basis; and
   - increased costs linked to the sustainable alternative (at least in the short term) which customers seem unwilling to pay for through higher prices (or to an insufficient extent): *i.e.* there is a low "willingness to pay".
4. Where competitors cooperate in relation to things which are unlikely to have any significant impact on competition between them. The most obvious examples are where the cooperation does not have any significant effect on any "parameter of competition" such as price, quantity, quality, choice or innovation.[19]
5. Another example is where the cooperation does relate to a parameter of competition (e.g. cost/price) but the impact is likely to be insignificant: eg cooperation on an input such as a raw material or the wages of workers in the global south that represent less than (e.g. 10%) the cost of production.
6. No more information is exchanged than necessary to achieve the sustainability objective.[20]
7. Cooperation should be limited to the products/ processes where the sustainability benefits are to be gained: eg if working to make one input more sustainable (e.g. recycled plastic), the cooperation should not extend to any other input (unless that can be justified either on its own account or because of its interaction with the first input).

---

16 It will still be necessary to comply with any local competition rules covering "vertical" agreements -such as those applying in the EU and UK (but less in the US).

17 And what economists would call a "market failure".

18 For example, in 2019 Lidl pulled back from its unilateral commitment to selling only fairtrade bananas in Germany and Switzerland after there was insufficient customer support for the move. [https://www.bananalink.org].

19 The Commission gives several examples of this in its draft horizontal guideless (see FN 9 at paras 551 to 554. The ACM also gives examples in its draft guidelines (FN 9 at paras 23 to 29).

20 As with other aspects of cooperation, the sort of safeguards typically included in a competition compliance programme should be observed (eg data exchanged being historic; aggregated; and/or passed through a third party).

8. Similarly, cooperation should be limited to the commercial aspects necessary to achieve the sustainability benefits: e.g. if it is agreed to procure an input only on a sustainable basis (or even joint purchasing), there should generally not be any agreement as to how and to which extent any increased cost is passed on to customers.

9. Restrictions that are purely "ancillary" to a sustainability agreement (that itself complies with competition law) will also fall outside competition law.[21]

10. Agreements between competitors to comply with certain minimum sustainability standards can usually be set up so as not to be caught by competition law (e.g. only to use an input meeting certain minimum objective criteria). Guidance on this has been given by a number of competition authorities over the years. The most important considerations are that the standard should be transparent; all interested parties should be able to participate in the process for developing the standard; and competitors should be free to go beyond the standard.[22]

11. The greater the sustainability benefits (and the better they can be substantiated/evidenced), the less likely an agreement will be problematic under competition law.[23] This is most obviously relevant to the circumstances in which an agreement is caught by competition law (e.g. Article 101(1) TFEU) but may merit an exemption (e.g. under Article 101(3)).[24] In practice, however, it is also likely to be relevant to whether an agreement is caught in the first place (e.g. it is relevant to the need to cooperate discussed in Point 3 above) and as to whether the arrangement is ever likely to be challenged by a competition authority.

12. Many sustainability agreements concern only buying products meeting certain sustainability standards (or only buying from suppliers meeting these standards). Examples would be only buying fish, soya or timber sourced on a sustainable basis. Such arrangements are less likely to be problematic if: the criteria for the products or approved suppliers are objective and transparent; they are drawn up by an independent third party; or, if drawn up by market participants all interested competitors and suppliers can participate in the process; and there is a fair, objective (and ideally independent) system to monitor and review the approved products /approved supplier list.

13. The more it can be shown that the benefits of the cooperation agreement will be passed on to the consumers, the greater the chance that the agreement will benefit from an exemption (and the less likely that it will be challenged).[25]

---

21 See, for example, para 548 (and Section 1.2.6) of the Commission's draft horizontal Guidelines referred to in FN 9.

22 See further, for example, paras 561 to 575 of the Commission's Draft Horizontal Guidelines [fn 9] and, in particular, the "soft safe harbour" in para 572.

23 This should not be misunderstood to mean that just because an agreement has laudable objectives and will have significant sustainability benefits that it will automatically be exempt from competition law. There is no "get out of jail free card" for sustainability agreements.

24 See, for example, paras 577 to 579 of the Commission's draft Horizontal Guidelines (FN 9).

25 The European Commission identifies 3 types benefits to consumers: "individual use benefits" (eg vegetables grown with organic fertilisers may taste better and/or be healthier); "individual non-use value benefits" (eg consumers appreciating that furniture made from wood grown and harvested sustainably is better as it reduces de-forestation etc-not because it is of a higher quality; and "collective benefits" (eg agreements reducing pollution or the release of greenhouse gases).[See paras 588 to 609 of the Commission's draft Horizontal Guidelines {FN9].

14. In practice, an agreement is probably more likely to benefit from an exemption (or not be challenged) if the sustainability benefit relates to climate change or some other aspect of environmental sustainability.[26]

15. The more it can be shown that there will still be competition in the market(s) affected by the sustainability agreements, the less likely the arrangements are to be challenged and the more likely that the agreement may benefit from an exemption.[27]

B. Some "don'ts"—circumstances and provisions making it more likely that competition law is a problem.

Most of the circumstances and provisions that make it more likely that a sustainability agreement is caught by competition law; less likely to benefit from an exemption; and be more likely to be challenged by competition authorities are essentially the obverse of those discussed at Point A above. In view of this only some of the more important indicators are briefly flagged here:

- Where the firms concerned have a high market share.[28]
- Where the firms concerned could achieve the benefits sought unilaterally (at a sufficient scale and in a reasonable timescale)
- Where the cooperation is likely to have a significant effect on an important parameter of competition such as price.
- Where cooperation spills over into other areas or other aspects of competition between the businesses concerned.
- Where there is less evidence as to how consumers will benefit from the cooperation.

None of these are necessarily a bar to cooperation between companies, but they are all factors that mean the specific context of the cooperation will need to be looked at carefully and advise sought in relation to key jurisdictions likely to be relevant to the project.

26 Although the European Commission's Draft Guidelines give a very broad definition of "sustainability" (para 543), in practice much of the focus is on environmental sustainability in the light of the European Green Deal. The ACM has singled out "environmental-damage" agreements for more favourable treatment under Dutch law (see paras 45 to 52) of the Dutch draft Guidelines [FN9]. See also the change to Austrian law referred to in footnote 11.

27 Indeed, under EU (and many national laws) the continuance of some degree of competition is a pre-condition for an exemption (See Article 101(3) and paras 610 to 614 of the draft Horizontal Guidelines [FN 9].

28 Although in some instances a high market share may be essential (and justified) if the necessary changes are to be realised-in particular where free riding is a risk (a point recognised by the European Commission at para 575 of its draft guidelines (cited in footnote 9).

ICC Task force on Competition Policy and Sustainability

ICC Argentina	Pablo Cortinez, Professor, Argentine Chamber Of Commerce And Services
ICC Bolivia	Polina Chtchelok, Partner, ESPCS Corporate & Environmental Advisors
	Claudia Andrea Lopez Monterrey, Legal Representative, ESPCS Corporate & Environmental Advisors
ICC Brazil	Paola Pugliese, Partner, Demarest
ICC Chile	Elżbieta Buczkowska, Counsel, Baker Mckenzie
	Natalie Flores, Lawyer, Baker Mckenzie
ICC China	Xiaofeng Cheng, Lawyer, Jingtian & Gongcheng Law Firm
	Zhisong Deng, Senior Partner, Dentons Beijing Office
	Yan Meng, Compliance Manager., JA Solar Technology Co., Ltd.
ICC Colombia	Carlos Edwin Camarillo, Dean, Engineering & Science, Universidad Área Andina
	Jorge Alexander Cortés, Professor, Institución Universitaria Colegios De Colombia
	Carolina Espitia, Director of the Environmental Engineering Program, Central University
	Dora Cecilia Gómez, Director of Cooperation, Universidad La Gran Colombia
	Edwin González, Dean, Environmental Engineering, Antonio Nariño University
	Ingrid Guete, Adviser, CCB
	Emmanuela Leal, Business International, Global International P&R Of Colombia
	Juan David Morales, Sustainability Manager, Consejo Empresarial Colombiano Para Desarrollo Sostenible
	Adolfo Naranjo, Professor, Central University
	Juan Camilo Pinzón, Operations Manager, Corporación Punto Azul
	Angela María Plata, Director of the Master in Mitigation and Adaptation to Climate Change, Universidad Sergio Arboleda
	María Eugenia Rinaudo, Sustainability Coordinator, Ean University
	Ana Patricia Rozo, Director of the Biology program, Central University
ICC Ecuador	Daniel Castelo, Director, Bustamante Fabara
	Juan Andrés Gortaire, Partner, Heka Law Firm
ICC France	Nicole Kar, Partner, Linklaters
	Patrick Thieffry, Member of Paris & New York Bars, Independent Arbitrator

ICC Germany	Johann Brück, Lawyer, Hermanns Wagner Brück—Rechtsanwälte
ICC Italy	Paolo Chiricozzi, Function Europe, Head of Antitrust and State Aid, Enel SPA
	Elisa Geraci, Corporate, M&A, Finance, Sustainability, Freebly Benefit Law Firm
	Paolo Rotelli, Engineer, Consorzio Polo Tecnologico Magona
ICC Mexico	Carlos Mena, Partner, Creel, García-Cuellar, Aiza Y Enriquez, S.C.
	Alejandro Mendiola Díaz, Partner, Nader, Hayaux Y Goebel, S.C.
ICC Netherlands	Gerrit Oosterhuis, Partner, Houthoff
ICC Paraguay	Antonella Salgueiro, Partner, ICC Paraguay
ICC Spain	Mónica Sánchez Soliva, Senior Competition Counsel, Telefonica Sa
	Beatriz Sanz Fernández-Vega, Director of Competition, Telefonica S.A.
ICC Sweden	Sarah Hoskins, Head Of Sustainability, Mannheimer Swartling
	Per Karlsson, Founding Partner, Advokatfirman Per Karlsson & Co Ab
	Karin Roberts, Lawyer, Delphi
	Ian Rose, Vice President, Compliance, Volvo Trucks
ICC Switzerland	Marceline Tournier, Global Head of Antitrust, Nestlé
ICC Syrian Arab Republic	Abd Alfatah Kahale, General Manager, Kahale Technical Group
ICC Turkey	Gönenç Gürkaynak, Partner, Elig Gürkaynak Attorneys-At-Law
	Kağan Uçar, Counsel, Elig Gürkaynak Attorneys-At-Law
ICC United Kingdom	Georgina Beasley, Secretary General, Net Zero Lawyers Alliance
	Maurits Dolmans, Partner, Cleary Gottlieb
	Shaha El-Sheemy, Senior Associate, Norton Rose Fulbright Llp
	Morgan Frontczak, Senior Antitrust Counsel, Shell International Petroleum Co Ltd
	Ian Giles, Head of Competition, Partner, Norton Rose Fulbright LLP
	Simon Holmes, Judge, Competition Appeal Tribunal
	Wessen Jazrawi, Partner, Hausfeld
	Siobhan Kahmann, Of Counsel, CMS Cameron Mckenna Nabarro Olswang LLP
	Alexis Munro, Climate & Environment Manager, Natwest
	Anne Riley, Lawyer, Anne Riley—Independent
	Mari Scimemi, Director, Global Competition Team, Barclays
ICC United States	Arjun Chandran, Antitrust Counsel, Diageo
	Sandy Walker, Partner, Dentons US LLP

About the International Chamber of Commerce (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 130 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.

33-43 avenue du Président Wilson, 75116 Paris, France
T +33 (0) 1 49 53 28 28   E icc@iccwbo.org
www.iccwbo.org   @iccwbo