Sustainability and Competition Law

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International Developments and Comments Task Force

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Executive Summary

The pressure on businesses to address their negative environmental externalities is increasing. Many businesses are responding by transforming their products, operations, and strategies. Often, companies do so unilaterally and can gain a competitive advantage as a result. However, addressing large-scale environmental externalities, such as pollution or deforestation, may require collaboration with competitors. At times, this collaboration is either perceived to be, or actually is, in tension with competition law. Since addressing climate change and other environmental issues are increasingly a priority for governments, regulators, investors, and other key stakeholders, businesses may increasingly face questions on the intersection between sustainability and competition law. At the same time, competition authorities may face increasing calls to intervene, clarify, or revisit enforcement policy.

The Antitrust Law Section (Section) considers that a wide range of agreements—both horizontal and vertical agreements—with sustainability objectives will be lawful under existing law based on sound economics, while others may raise antitrust concerns. This report articulates the positions of the Section on the intersection between sustainability and competition law. It sheds light on the intersection between sustainability and competition law and aims to inform the agenda for policy makers and antitrust authorities.

Chapter 1. Agreements Not Normally Raising Concerns. There are many lawful, socially beneficial competitor collaborations that are not subject to antitrust liability. These collaborations include: those where the procompetitive benefits outweigh anticompetitive harms; where the parties in question lack market power; non-binding sustainability targets or codes; agreements to comply with legal requirements and government petitioning; joint initiatives to develop new products or markets with appropriate safeguards to prevent anticompetitive conduct, and many vertical agreements that do not restrict competition. Notwithstanding the many examples of competitor collaboration that are unlikely to raise antitrust questions, there is a risk that the specter of antitrust could have a chilling effect on such initiatives. Given this uncertainty, the Section recommends that antitrust authorities and policy makers:

- Provide guidance on sustainability-related conduct that poses no significant antitrust concerns;
- Consider adoption of a market share-based safe harbor for sustainability collaborations with a limited combined market share; and
- Provide assurance that competition laws will not be used to penalize legitimate efforts by industry to proactively clarify laws and policies related to sustainability initiatives.

Chapter 2: Agreements Potentially Raising Concerns. Notwithstanding the latitude that competitors are afforded to collaborate in ways that are procompetitive, some collaborations may raise antitrust concerns. Examples of collaborations that could trigger scrutiny include mandatory, industry-wide agreements to either phase out unsustainable products or create sustainable products at scale. The legal uncertainty surrounding such agreements arises out of a lack of clarity regarding, among others, which consumers must be shown to benefit, how to weigh future cost decreases against current cost increases, and how to quantify sustainability benefits. Given this uncertainty, businesses may forgo sustainability collaborations out of a fear for antitrust scrutiny. Amid an

increasing number of ambitious sustainability goals set by governments, the Section recommends that antitrust authorities and policy makers:

- Adopt guidelines on how they will assess sustainability initiatives including, among other factors, the substantive standards they will apply, the economic framework and tools they will utilize to assess the competitive impact of sustainability initiatives, and the evidence they will require to substantiate sustainability claims and procompetitive benefits—to assist businesses to distinguish lawful from unlawful sustainability efforts;
- Rely on expedited business review letters or other forms of "comfort letters" to provide some level of assurance to businesses, if antitrust authorities believe that it is too early to adopt guidelines on the intersection between competition law and sustainability;
- Refrain from imposing fines on or pursuing businesses that have discussed their sustainability arrangements with antitrust authorities (i.e., obtain pre-clearance); and
- Issue formal "non-enforcement decisions" to grant an even higher level of certainty for sustainability agreements.

Chapter 3: Merger Review. Increasingly, sustainability is recognized as a factor in merger review. In this context, sustainability concerns can arise in the substantive assessment of potential anticompetitive harms from a proposed transaction, the appraisal of possible efficiencies that justify transaction approval, and in the consideration for the design of remedies to allow approval of a proposed transaction. To clarify the scope of sustainability considerations in the context of merger control review, this Section recommends that antitrust authorities and policy markets:

- Provide guidance on the assessment of a transaction's effects on sustainability as an element of their substantive assessment in merger review, not simply as an element of innovation competition;
- Provide guidance on their treatment of sustainability benefits in the assessment of efficiencies which should be harmonized with the assessment of sustainability benefits in a rule of reason/Article 101(3) TFEU or similar context;
- Clarify how they will weigh sustainability effects against price effects; and
- Clarify the relevance of sustainability in the assessment of remedies proposed to eliminate concerns that a merger would otherwise raise.

Chapter 4: The Economics of Sustainability Arrangements. This chapter considers the practical challenges of conducting a cost-benefit analysis of sustainability agreements. These challenges arise from the fact that there is ambiguity regarding to whom the benefits must accrue. It underscores that the impacts of climate change or other environmental issues are particularly challenging to measure given that they are both diffuse and irreversible. To address this challenge, some jurisdictions are expanding beyond market values to include the societal costs of carbon, and imputed value, which refers to government-intended future emission paths. The Section considers that applying several techniques allows values to be triangulated—or checked against initial estimates—to develop a value or range of values against which a transaction's costs can be compared.

Chapter 5: Conclusions. This chapter includes the Section's conclusions and discusses the possibilities for international policy and enforcement cooperation in the sustainability arena. It also considers opportunities for promoting consistent analytical approaches across jurisdictions in the appraisal of sustainability initiatives.

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In summary, the Section maintains that there is no need to overhaul competition law or enforcement policy to take express account of sustainability considerations. Competitors are able to legally collaborate pro-competitively for the benefit of consumers and the environment. However, businesses may forgo prosocial collaboration out of fear of antitrust scrutiny. The Section invites competition authorities to address any chilling effects by clarifying the scope of permissible collaboration.

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Introduction

Businesses face many calls to address their negative environmental externalities, including to mitigate climate change and other forms of harm such as deforestation, pollution of air water and soil or reduced biodiversity.[1] The pressure is coming from a wide range of stakeholders including investors, regulators and lawmakers, employees, NGOs, and communities, among others.[2] Businesses can and do respond through unilateral action, which can often provide a competitive advantage. However, in some situations, the scale and complexity of the challenges require collaboration with competitors. There are several reasons why unilateral action can be unfeasible or ineffective: a firm may face cost increases when introducing more sustainable practices that it could not bear without losing its competitive edge (first-mover disadvantage), or it may lack necessary scale to viably engage in the initiative. Depending on the circumstances, businesses may want to join forces to meet or exceed targets set by regulation[3] or seek to advocate jointly for higher sustainability standards.[4]

In many cases, competitor collaboration to address sustainability goals is consistent with antitrust law. In other cases, there may be real or strongly perceived tensions between competition law and competitor collaboration. Given the increasing focus on the private sector to address climate change and other environmental issues, businesses are likely to face novel questions and competition authorities may face calls to intervene, clarify, or revisit relevant enforcement policy. This paper therefore seeks to inform and to formulate the positions of the Antitrust Law Section (Section) on the intersection between sustainability and competition law with a view to informing the Section's approach to comment opportunities. In doing so, this report provides suggestions for how both competition authorities and businesses can approach the intersection of sustainability and competition law.

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[1] The concept of sustainability is evolving and there is not yet consensus on its precise scope. An often-cited definition is from the United Nations Commission Report on Environment and Development, which defined sustainability as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Rep. of the World Comm'n on Env't & Dev.: note / by the Secretary-General, at 54, U.N. Doc. A/42/427 (1987), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N87/184/67/IMG/N8718467.pdf?OpenElement. This understanding of sustainability encompasses "sustainable development" and acknowledges that this includes economic development, social development, and environmental protection. This is not a universally held view and for some sustainability refers foremost to environmental issues. This report does not purport to define sustainability but considers legal and economic principles that can be broadly applied.

[2] *See*, Peter Eavis & Clifford Krauss, *What's Really Behind Corporate Promises on Climate Change?*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html?referringSource=articleShare.

[3] For instance, to respond to regulation defining levels of recycled plastics in packaging, which may make the case for joint offtake agreements for recycled plastics even stronger.

[4] For instance, several car manufacturers joined forces in the United States to negotiate and agree to a framework for applying stricter emission standards advocated by the State of California. The framework agreement was the subject of an antitrust investigation by the United States Department of Justice as confirmed by some of the car manufacturers involved. *See*, Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html;Brent Kendall & Timothy Puko, *Justice Department Drops Antitrust Probe of Automakers Involved in California Emissions Deal*, WALL STREET J. (Feb. 7, 2020), https://www.wsj.com/articles/justice-department-drops-antitrust-probe-of-auto-makers-involved-in-california-emissions-deal-11581114207. An agreement among U.S. pork producers to practice humane euthanization of hogs, achieved with direct government participation, is likewise instructive. *See*, Press Release, Dep't of Justice, Department of Justice Supports National Pork Producers Council's Ability to Combat Meat Shortage (May 15, 2020), https://www.justice.gov/opa/pr/department-justice-supports-national-pork-producers-council-s-ability-combat-meat-shortage.

The aim of this report is three-fold. First, it reaffirms that many collaborative efforts do not fall afoul of antitrust laws and explains why the promotion of sustainability and antitrust policy need not conflict. Second, it highlights where clarifications to the law may be helpful if businesses are to promote sustainability and suggests legal and economic factors that policy makers and antitrust authorities may consider when assessing the compatibility of individual or collective sustainability initiatives with antitrust laws. Third, it contributes to the current antitrust and sustainability debate by seeking to inform the approach of antitrust authorities and policy makers.[5] In setting out these elements, the paper recognizes the important role for continued antitrust enforcement, including to prevent businesses from relying on sustainability claims to "greenwash" (i.e., disguise) cartels or other anticompetitive behavior. This paper does not discuss whether a dominant company can rely on sustainability claims to justify conduct that is deemed abusive or monopolization/abuse of dominance, but this is a potential area for competition authorities to consider.[6]

This report proceeds in four parts. Chapter 1 clarifies the scope of competitive collaborations to address sustainability that are unlikely to raise antitrust concerns. In doing so, it hopes to reduce any chilling effects that a fear of antitrust scrutiny may be having on sustainability initiatives. Chapter 2 highlights areas where further guidance may be useful and identifies factors that antitrust authorities may consider taking into account when assessing individual or collective sustainability initiatives. Chapter 3 discusses sustainability initiatives in the merger control context. Chapter 4 provides an economic framework for assessing sustainability initiatives. Chapter 5 includes the report's conclusions with perspectives on the scope for international policy and enforcement cooperation to promote consistent analytical approaches and review outcomes across jurisdictions. An appendix that summarizes the leading precedents at the intersection between antitrust and sustainability is included at the end.

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[5] While the relationship between sustainability efforts and competition policy is just beginning to take shape in the United States, the Dutch, German and Greek antitrust authorities have put forward guidance and/or internal working papers on these topics. *See*, Auth. for Consumers & Mkts., Guidelines: Sustainability Agreements (Draft) (July 2020), *available at* https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf [hereinafter Netherlands Sustainability Guidelines]; Bundeskartellamt, Offene Maerkte und nachhaltiges Wirtschaften, Gemeinwohlziele als Herausfordering fuer die Kartellrechtspraxis (Oct. 1, 2020), *available at* https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf?__blob=publicationFile&v=2 (available only in German); Hellenic Competition Comm'n, Staff Discussion Paper on Sustainability Issues and Competition Law (2020), at https://www.epant.gr/en/enimerosi/competition-law-sustainability.html. In addition, the European Commission (EC) conducted a consultation the results of which will likely be reflected in the forthcoming block exemption regulations and related guidance on horizontal and vertical cooperation agreements. *See*, *Competition Policy Contributing to the Green Deal*, EUR. COMM'N, https://ec.europa.eu/competition/information/green_deal/index_en.html.

[6] The Section notes that some antitrust authorities have acknowledged that there is scope for a dominant company to rely on sustainability objectives to defend monopolization/abuse of dominance claims. For example, Greece's submission to the OECD roundtable on sustainability and competition in December 2020 notes that "a dominant firm may justify its conduct leading to foreclosure on the grounds of efficiencies or objective justification based on a proportionality test." OECD, Sustainability and Competition—Note by Greece, DAF/COMP/WD(2020)64, ¶ 41 (Nov. 3, 2020), *available at* https://one.oecd.org/document/DAF/COMP/WD(2020)64/en/pdf. At one end of the spectrum of academia in Europe, some academics argue that "unsustainable business practices that lead to environmental degradation and social injustice can be viewed as 'abuses' of dominant positions within the meaning of Article 102 TFEU." *See*, Marios C. Iacovides & Chris Vrettos, *Falling Through the Cracks No More? Article 102 TFEU and Sustainability I – The Nexus Between Dominance, Environmental Degradation, and Social Injustice* 3 (Stockholm Fac. of L. Res. Paper Series No. 79, 2020), *available at* https://ssrn.com/abstract=3699416.

Chapter 1:

Agreements Not Normally Raising Concerns

Before addressing clarifications that may help antitrust enforcement to promote sustainability, policy makers should acknowledge the already favorable state of the law. Many competitor collaborations are lawful, and collaborations that seek to promote efficiency and public benefits—while observing safeguards to prevent anticompetitive conduct—are generally consistent with existing legal and economic analytical approaches. Accordingly, while clarification, and in some cases policy changes, may be appropriate to ensure that antitrust constraints do not hinder beneficial sustainability collaborations, much progress can be made without wholesale changes to enforcement policy or antitrust laws.

A partial list of key analytical principles and of business combinations with sustainability goals, for which antitrust risks are unlikely to arise, follows. This list should be read as illustrative, not exhaustive.

Key Principles: Parameters of Competition and Market-Share Safe Harbors

The policy assumption underlying the antitrust laws is that competition will lead, in the long run, to "the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress."[7] Therefore, antitrust law prohibits unreasonable restraints on competition, including where such restraints are imposed as part of a collaboration. The determination of what constitutes an unreasonable restraint can be complex, but three principles should be borne in mind. First, collaboration and competition are not opposites—some collaborations restrain competition between the parties but many others have no anticompetitive effect, and some are procompetitive.[8] Second, when a collaboration restrains parties' competition, antitrust law condemns the restraints only if they are unreasonable in light of the collaboration's competitive benefits. Third, collaborations run the risk of substantially restraining competition only if they affect a significant share of a relevant market.[9] Therefore, collaborations whose participants represent a small collective market share should be presumed to have no anticompetitive effect and may be eligible for market share-based safe harbors in many jurisdictions. The first of these principles should be sufficiently straightforward that no further explanation is necessary; the second and third are further explained below.

Antitrust Law Prohibits Only "Unreasonable" Agreements

Agreements that impose restraints on competition as to price, quality, or quantity of goods and services are subject to analysis under antitrust laws but only "unreasonable" restraints are condemned. Certain agreements are *per se* illegal, meaning that they are conclusively presumed to

7 N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

8 A procompetitive collaboration enables its participants, collectively or individually, to compete in ways that would not be possible or that would be less efficient otherwise.

9 Absent "hard-core" antitrust violations such as price fixing and bid rigging, which are not the focus here.

be unreasonable and no inquiry is made into their potential procompetitive effects. These primarily include conspiracies among competitors to fix prices, rig bids, and allocate output quantities or customers or markets, all of which are considered to be "the supreme evil of antitrust."[10] Most other agreements are not presumptively harmful but are subject to a weighing of restraints versus benefits and efficiencies. In the United States, this weighing is known as the "rule of reason," which asks whether the agreement has a net adverse effect on competition; if so, whether the agreement's parties can produce evidence of the procompetitive benefits of the conduct; and if so, whether the person objecting to the agreement can show that the challenged conduct is not reasonably necessary to achieve the stated objective, or that the anticompetitive effects outweigh any procompetitive benefits.[11]

Under the competition rules in the European Union (EU), particularly Article 101 TFEU, no formal rule of reason test exists. Instead, once an agreement is found to produce anticompetitive effects under Article 101(1) TFEU, the question is whether it can be justified under Article 101(3) TFEU. This is the case if (1) the agreement produces efficiency gains; (2) consumers receive a fair share of those efficiencies; (3) the agreement does not include restrictions that are not indispensable to the attainment of the identified efficiencies; and (4) the agreement does not eliminate competition.[12] In practice, the EU and U.S. approaches are substantively similar and depend on a balancing of pro- and anticompetitive effects.[13] Most other jurisdictions have balancing tests similar to the EU regime, which weigh an agreement's restrictions on competition against its benefits.

Market Power and Share-Based Safe Harbors Should—and Do—Apply

For an agreement to have a substantial adverse effect on competition—the first element of the rule of reason test—the parties must have "market power," which requires defining a relevant market and showing that the parties to an agreement have "the ability to raise prices above those that would be charged in a competitive market."[14] A low market share usually will preclude a finding of market power, whereas a high market share indicates the possibility that market power exists. In one seminal case, the U.S. Supreme Court found that a thirty percent market share was insufficient to support a finding of market power.[15] U.S. courts generally apply the thirty percent threshold as the level below which market power cannot be shown.[16]

[10] Verizon Comm. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

[11] 1 ANTITRUST LAW DEVELOPMENTS § 1.B.3.b (8th ed. 2017) [hereinafter ALD 8th]. Examples of the formulation of the "rule of reason" include *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011 (7th Cir. 2012) ("[t]he rule of reason directs an assessment of the total economic effects of a restrictive practice that is plausibly argued to increase competition or other economic values on balance."). An expansive formulation of the rule of reason was articulated by Supreme Court Justice Brandeis in *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.") For an articulation of "rule of reason" in relation to vertical restraints, *see e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) ("[u]nder this rule, the factfind[er] weighs all of the circumstances of a case").

[12] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreement, 2011 O.J. (C 11) 1, ¶ 49.

[13] *See infra* Ch. 2, section on The Rule of Reason.

[14] NCAA v. Bd. of Regents, 468 U.S. 85, 109 n.38 (1984).

[15] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26-29 (1984).

[16] ALD 8th, *supra* note 11, § 1.B.3.b(1)(c).

The U.S. Federal Trade Commission (FTC) and Department of Justice (DOJ) Antitrust Division *Antitrust Guidelines for Collaborations Among Competitors* describe a type of safe harbor called an "antitrust safety zone." "absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected."[17] A similar twenty percent market-share safety zone appears in the FTC-DOJ *Antitrust Guidelines for the Licensing of Intellectual Property.*[18] The Dutch competition authority's *Draft Guidelines on Sustainability Agreements* describes a partial safe harbor for collaborations involving sustainability issues, where the parties have a combined market share of "no more than 30%."[19] At this point or below, which the agency describes as a limited, combined market share, a mere "qualitative assessment will suffice" to justify the collaboration (meaning it will be enough if the benefits can be plausibly explained in a narrative fashion) and more detailed economic and quantitative assessment will not be required.[20]

There is not yet international agreement on a single threshold for a market share-based safe harbor for collaborations, whether the collaboration involves sustainability or any other topic. But the foregoing examples show that antitrust authorities understand that collaborations among parties representing a low market share pose little risk to competition. Collaborating parties should be alerted to the possibility of safe harbors that may apply in particular jurisdictions. The Section suggests that appropriate market share-based safe harbors for sustainability collaborations will promote certainty and improve the speed and efficiency of analysis by both private parties and competition authorities. The Dutch guidelines provide a useful model in this regard. The Section recommends that authorities consider publicly announcing a market share-based safe harbor for sustainability collaborations that have a limited, combined market share, such as thirty percent or less of a properly defined relevant market.

Horizontal Agreements

A horizontal agreement is one between companies that are direct competitors, whereas a vertical agreement is between firms at different levels in a chain of distribution.[21] Antitrust analysis approaches horizontal agreements with more skepticism than vertical agreements[22] because the number of subjects for legitimate, procompetitive coordination is fewer between rivals than between parties in a vertical relationship (for example, a wholesaler and retailer). When it comes to sustainability topics, however, direct competitors may have legitimate reasons to collaborate on projects that are competitively neutral or even procompetitive. The following are examples.

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[17] FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 4.2 (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf. "The safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied." *Id.*

[18] FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 4.3 (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/download.

[19] Netherlands Sustainability Guidelines, *supra* note 5, ¶ 47.

[20] *Id.*

[21] The terms derive from pictorial illustrations of a classic distribution chain, with, for example, producers at the top, wholesalers in the middle, and retailers at the bottom. Two wholesalers would occupy the same tier horizontally in such a picture; therefore, an agreement between them would be a horizontal agreement. The agreement of a wholesaler with a producer or with a retailer would be a vertical agreement.

[22] *See, e.g.*, Leegin Creative Leather Prods. v. PSKS, Inc. 551 U.S. 877, 888 (2007) ("[o]ur recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements").

Non-Binding Targets, Sustainability Codes, and Certifications

Collective statements and codes of conduct embracing sustainability targets should raise no antitrust concerns, so long as they are not binding on individual competitors and do not involve intrusive rival-to-rival auditing of compliance. For example, a group of rival manufacturers may collectively release a statement saying that members of the collaboration intend to reduce carbon dioxide emissions by fifty percent in five years. Customers may believe that this increases the reputation of the industry as a whole and the quality of each complying participant's products. If each participant can determine its own path to realizing such a reduction, the participants do not share competitively sensitive information, and the only enforcement mechanism is reputational (not an ability of one member to penalize another), then such a collaboration should have no significant effect on competition.

A certification process would take the foregoing concepts one step further by, for example, awarding a seal of approval for participants who meet a sustainability goal. Participants may work together to establish standards about how to measure carbon dioxide emissions and how to award appropriate credit for carbon credits or carbon sequestration. Such standards and certification potentially could be misused, such as when a group of incumbents conspires to deny certification to a rival without reasonable justification, thereby improperly restricting that rival's ability to compete.[23] But if participation criteria are transparent, access to the standard is on the basis of reasonable and non-discriminatory criteria, and certification is awarded objectively—particularly if the ultimate arbiter is an independent third party—the sustainability benefits of such an effort should outweigh any potential for competitive harm. This assumes, again, that participation is optional and non-exclusive. If participants have the option to participate in multiple sustainability certifications, or none at all, the chances of anticompetitive effects are reduced.

Agreements by Parties to Comply with Legal Requirements and Government Petitioning

Collective statements and codes of conduct also may aim to ensure that multiple competitors comply with laws and regulations. If sustainability-related laws have the effect of increasing costs, such that violating such laws would give one rival a cost advantage over the others, then a legal compliance pledge may be helpful for assuaging firms' fears that their public-spirited actions might cause them to be undercut by non-compliant firms.[24] As with other codes of conduct, it will be helpful for purposes of competition analysis if each participant to a legal compliance pledge can determine its own path to compliance, the participants do not share competitively sensitive information, and the parties leave the question of enforcement and penalties to government officials. Such a collaborative statement should not, by itself, raise competition concerns.

Collective actions by industry can play a particularly important role in clarifying existing law and in working with governments to craft laws that are efficient and enforceable. The mere fact that rivals jointly discuss clarifications or changes to law should not, without more, be condemned by competition enforcers. Reference may be made to the well-developed body of law and best practices surrounding the conduct of trade associations, which often serve a legal interpretation and government relations function. For example, the U.S. FTC has published a web

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[23] *See*, Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982).

[24] A legal compliance pledge may be important in economies that have weak legal systems or law enforcement, such that the opportunities to avoid enforcement are increased.

page, "Spotlight on Trade Associations," which mentions some topics that are unobjectionable, others that should be avoided, and guidance on how to conduct information exchange without undue risk of violating the antitrust laws.[25] In general, in jurisdictions outside the United States, similar principles apply. While the European Commission (EC) has not codified its policy in relation to trade associations, some national competition enforcement agencies in Europe have.[26]

In the United States, petitioning governmental authorities for clarification or change of laws and policies—even when done by a collaboration of competitors—is immune from antitrust challenge, under legal precedent that follows two Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight* and *United Mine Workers v. Pennington*.[27] This so-called *Noerr-Pennington* doctrine is based on the United States Constitution's First Amendment, which states that the "right . . . to petition the Government for a redress of grievances" shall not be infringed.[28] Some other jurisdictions recognize a similar principle. In the EU, the competition rules potentially apply to any collaboration among competitors but have never been applied to collective government petitioning in the absence of additional restrictive covenants. The Section recommends that antitrust authorities and, if necessary, other governmental bodies worldwide make clear that the competition laws will not be used to penalize bona fide attempts to clarify laws and policies involving sustainability topics.

Joint Initiatives Necessary to Create New Products or Markets

Situations may arise in which collective action by rivals may be necessary in order to bring a new product to market. For example, a new type of battery technology may be developed for automobiles, which requires a certain level of scale to make provision of raw materials and charging stations economically feasible. If no single competitor in the automobile industry could provide that scale, the technology might languish unused, or at least be slow to come to market. If, instead, several manufacturers collectively agree to manufacture for sale at least 100,000 vehicles each of which uses the technology and can use the relevant charging stations, and this provides necessary scale for the product to come to market economically, this collaboration is unlikely to pose competitive concerns. In this example, the competitors would not be collaborating to avoid manufacturing any other type of vehicle, nor would they be sharing competitively sensitive information or placing any other limits on price, quantity, or quality. Rather, the collaboration would be giving a fighting chance to one technology but not stifling any other.

Vertical Agreements

As mentioned above, vertical agreements are less suspect under the antitrust laws than horizontal agreements.[29] This is because parties in a vertical relationship are not necessarily

[25] *Spotlight on Trade Associations*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade.

[26] *See e.g.*, Competition & Mkts. Auth., Guidance: What do trade associations need to know about competition law? (Sept. 25, 2014), https://www.gov.uk/government/publications/competition-law-dos-and-donts-for-trade-associations/what-do-trade-associations-need-to-know-about-competition-law. Outside Europe, other antitrust authorities have also codified their approach to trade associations. For example, on July 20, 2017, the Chinese antitrust authority adopted guidelines on industry-wide collaborations via trade associations. *See*, Guidelines on Price-related Conduct of Trade Associations (available in Chinese), https://www.ndrc.gov.cn/xxgk/zcfb/gg/201707/t20170725_961180.html.

[27] E.R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961); and United Mine Workers v. Pennington, 381 U.S. 657 (1965).

[28] U.S. CONST. amend I.

[29] *See supra* note 21 and accompanying text.

competitors and often need to collaborate as a matter of course; they "constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently."[30] While vertical restraints under some circumstances can injure competition in the broader market,[31] there usually is no immediate prospect for a vertical agreement to eliminate competition between the parties to the agreement.

For example, consider a technology company that operates cloud computing services and thus consumes a large amount of electrical power. If the technology company enters agreements with its power suppliers that they must source 100 percent of their electricity from renewable generation, this is presumptively lawful under the antitrust laws. The technology company and its power vendors are in a customer-supplier relationship, not a competitive one, and thus cannot eliminate competition between them. Another power vendor may be disappointed by such agreements if that vendor does not source renewable generation, and thus cannot win such a contract, but there is no injury to competition; instead, what has occurred in economic terms is that the customer has found the "quality" of that vendor's product—its nonrenewable nature—to be lacking. This is not a lack of competition, but rather competition on a particular aspect of product quality, which the technology company lawfully may reflect in a contractual requirement.

The EC's *Guidelines on Vertical Restraints* establish a safe harbor for vertical agreements where "the supplier's and the buyer's market share is each 30% or less."[32] But like other safe harbors, this comes into play only where the restraint impacts competition in the first instance. When reviewing a vertical restraint, the first question should be whether competition is affected at all. In the context of sustainability and crisis response, the answer may be that vertical agreements do not restrict competition and thus do not need to consider safe harbors.

Conclusion

Businesses should be confident that many collaborations are inherently lawful, and collaborations (including between competitors) that seek to promote efficiency and public benefits, with appropriate guardrails to prevent anticompetitive conduct, can be defended under existing legal regimes. Antitrust authorities and policy makers should—as many already have—provide guidance to the private sector on sustainability-related conduct that poses no significant antitrust concerns.

There is not yet international consensus for a single threshold for a market share-based safe harbor for collaborations, whether the collaboration relates to sustainability initiatives or otherwise. The Section recommends that antitrust authorities consider a market share-based safe harbor for sustainability collaborations with a limited, combined market share, such as thirty percent or less of a properly defined relevant market.

The Section further recommends that antitrust authorities and, if necessary, other governmental bodies acknowledge that competition laws will not be used to penalize legitimate efforts to clarify laws and policies related to sustainability initiatives.

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[30] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763-64 (1984).

[31] *See generally*, Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1.

[32] *Id.* ¶ 23. The safe harbor is inapplicable to a small number of "hardcore" restrictions, none of which has specific application to sustainability issues.

Chapter 2:

Agreements Potentially Raising Concerns

Regulation often can play an appropriate role in setting minimum standards for sustainable activities. However, regulatory standards may not be sufficient or timely enough to meet businesses' more ambitious sustainability targets, for example due to jurisdictional limitations. Regulatory frameworks often lag the pace of market developments,[33] may be limited in geographical reach, inconsistent between jurisdictions, or set at a level that firms regard as inadequate.[34] For these reasons, regulation may be insufficient to bring about desired shifts in industry standards.[35]

In many cases, competitor collaboration may offer an effective way to achieve ambitious and up-to-date sustainability targets. However, businesses may forgo beneficial sustainability collaborations due to concerns about the potential of these collaborations to violate competition law. The combination of a lack of clear antitrust guidance, the limited number of cases in which antitrust authorities have considered and determined how sustainability benefits can be obtained consistent with competition law, limited (if any) international alignment, and very significant remedies (including substantial fines) for infringements of antitrust rules may cause businesses to adopt unnecessarily risk-averse approaches to sustainability agreements.

Areas of Potential Legal Uncertainty

Certain sustainability-related agreements among economic actors, in particular horizontal agreements between competitors that affect or are likely to affect the price of products or services, or other competitive parameters such as quality or innovation, are likely to come under antitrust scrutiny. This includes the following categories of agreements.

Mandatory standardization agreements, which require the use of process or technical standards that involve a particular technology or practice in carrying out specific commercial

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[33] The 2019 Sustainable Development Goals Report, for example, laments that globally the rate of progress on adopting frameworks for the protection of terrestrial, freshwater, and mountain biodiversity has slowed significantly since 2010. United Nations, The 2019 Sustainable Development Goals Report 53 (2019), https://unstats.un.org/sdgs/report/2019/The-Sustainable-Development-Goals-Report-2019.pdf.

[34] *See*, *e.g.*, Sustainable Dev. Sol. Network & Inst. Eur. Envtl. Policy, 2019 Europe Sustainable Development Report at 19 (November 2019), https://ieep.eu/uploads/articles/attachments/3af13d3d-41a6-47d5-8199-405052fd620f/Europe%20Sustainable%20Development%20Report%202019.pdf?v=63741369539 (analysis of the discrepancies between EU Member States in their respective progress towards a climate neutral and "circular economy"—an economic system aimed at eliminating waste and the continual use of resources). The "circular economy" has also been defined as "a model of production and consumption, which involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible. In this way, the life cycle of products is extended." Press Release, Eur. Parliament, Circular Economy: Definition, Importance and Benefits (Mar. 3, 2021), https://www.europarl.europa.eu/news/en/headlines/economy/20151201STO05603/circular-economy-definition-importance-and-benefits.

[35] In addition, because many of these markets are subject to market failures, are highly complex and technical, and display information asymmetries, sectoral regulators, antitrust authorities, and legislative institutions may lack the knowledge to regulate the economic activities at issue optimally. They may, therefore, need to rely in varying degrees and in various ways on regulated economic entities that possess more knowledge and experience with the activity at hand.

activities, to achieve sustainability goals.[36] These could include, for example, the concerted phasing out of non-sustainable (input or output) products,[37] from energy-inefficient washing machines and coal-fired plants[38] to a possible collective conversion of the automotive industry to carbon-neutral steel in cars,[39] packaging design requirements to improve plastics recyclability,[40] agreements to counter the effects of deforestation,[41] or collectively enforced supplier standards. In a recent decision (which has yet to be published), the EC underlined that there is little room for limitations of environmentally friendly technology via standards.[42] While the EC's press release regarding the decision indicates how difficult it is to draw the line between legitimate and illegitimate standardization, it does not elaborate on mandatory standards that enhance the environmental footprint of products. The case underscored the need for guidance in some areas.[43]

Investment or offtake agreements, which involve competing manufacturers jointly developing, producing, and selling an environmentally superior product that the contracting parties would otherwise not have been able to develop. This could include, for example, commitments to volume guarantees to ignite supplier investment in sustainable aviation fuel[44] or recycled plastics[45] or to collectively fund the development of collection and sorting infrastructures for batteries[46] or plastics waste. Enumerated below are factors that can be considered when assessing the compatibility of sustainability agreements with antitrust rules. These factors are intended to be illustrative, and not exhaustive.

Businesses must, and will continue to need to, self-assess against existing case law and enforcement practice in a number of jurisdictions. However, precedents were often adopted at a

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[36] Alexander Okuliar, Ensuring the Proper Application of Antitrust Law to Standards Development, Address Before the Intellectual Property Rights Policy Advisory Group of the American National Standards Institute (May 28, 2020), https://www.justice.gov/opa/speech/file/1281926/download.

[37] Case IV.F.1/36.718—CECED, Comm'n Decision, 2000 O.J. (L 187) 47.

[38] Press Release, Auth. for Consumers & Mkts., Notitie ACM over sluiting 5 kolencentrales in SER Energieakkoord (Sept. 26, 2013), https://www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM-over-sluiting-5-kolencentrales-in-SER-Energieakkoord.

[39] Pim Vercoulen, Carbon-Neutral Steel Production: Is It A Possibility?, CAMBRIDGE ECONOMETRICS (Nov. 25, 2019), https://www.camecon.com/blog/carbon-neutral-steel-making/.

[40] FoodDrinkEurope, Competition Policy supporting the Green Deal (Nov. 20, 2020), https://www.fooddrinkeurope.eu/wp-content/uploads/2021/02/FoodDrinkEurope_contribution_Green_deal_and_competition_policy.pdf.

[41] It is widely acknowledged that deforestation (particularly through forest fires) is predominantly due to insufficient enforcement of existing laws, not a lack of legislation. *See* Rizki Akbar Putra, *Lax Law Enforcement Causing Indonesia's Forest Fires: Greenpeace*, DW (Sept. 17, 2019), https://p.dw.com/p/3Pixw.

[42] In July 2021, the EC fined German car manufacturers for agreeing certain technical standards—AdBlue tank sizes and ranges related to emission cleaning technology for new diesel passenger cars—and exchanging commercially sensitive information on these elements. The EC found that the conduct amounted to a by-object infringement in the form of a limitation of technical development. *See*, Press Release, Eur. Comm'n, Antitrust: Commission Fines Car Manufacturers €875 Million For Restricting Competition In Emission Cleaning For New Diesel Passenger Cars (July 8, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581. In contrast, in the United States, a court dismissed a class action brought by a group of plaintiffs in the Northern District of California on related facts. The class action had followed media reports of investigations by the EC and the German Federal Cartel Office.

[43] In the EC's press release, Commissioner Margrethe Vestager noted "today's decision is about how legitimate technical cooperation went wrong." *Id*. In light of the novelty of the case, the EC reduced the fines imposed on the German car manufacturers. The EC also provided guidance to the car manufacturers on aspects of their collaboration that did not give rise to competition concerns, such as in relation to standardization.

[44] As discussed in the ICLA's contribution to the European Commission's Green Deal consultation of November 2020. *See generally Competition Policy Contributing to the European Green Deal*, EUR. UNION https://ec.europa.eu/competition/information/green_deal/index_en.html.

[45] FoodDrinkEurope, *supra* note 40.

[46] *See, e.g.*, Press Release, Austl. Consumer & Competition Comm'n, Voluntary Battery Stewardship Scheme Granted Authorization (Sept. 4, 2020), https://www.accc.gov.au/media-release/voluntary-battery-stewardship-scheme-granted-authorisation; and Glob. Competition Rev., Sustainability and Antitrust in Australia: An Outlier or Blueprint? (Dec. 7, 2020), https://globalcompetitionreview.com/sustainability/sustainability-and-antitrust-in-australia-outlier-or-blueprint.

time when there was less focus on sustainability objectives. Sustainability guidelines could establish a helpful framework of assessment and provide case examples. The adoption of specific guidance on agreements with sustainability objectives and/or the communication of enforcement priorities in this area would enable businesses to assess better whether collaborations with sustainability objectives are compliant with antitrust rules and ensure greater legal certainty.

Scope of Antitrust Prohibitions and Exemptions: General Principles to be Considered When Assessing the Compatibility of Sustainability Agreements With Antitrust Laws

As explained *infra*, not all sustainability agreements will restrict competition and violate antitrust laws. Antitrust authorities can consider the applicability of the rule of reason or an exemption or the availability of a specific exclusion when assessing the compatibility of a sustainability agreement with competition law.

The Rule of Reason

As described above, in the United States, pursuant to the rule of reason, competitor collaborations are not considered to breach antitrust law if they are pro-competitive on balance. Under EU law, the Article 101(1) TFEU prohibition can be cast somewhat wider. In line with the European Court of Justice (ECJ)'s rejection of a U.S.-style rule of reason in favor of the "bifurcation" of Article 101(1) and Article 101(3), pro- and anticompetitive aspects of an agreement should be considered exclusively under Article 101(3).[47] While critics observe that the EU's rejection of the rule of reason standard causes too many agreements to be caught by the prohibition, satisfying the requirements of Article 101(3) provides a legal exception to the prohibition in Article 101(1). Businesses must self-assess whether their agreements fall foul of Article 101(1) but can be exempted under Article 101(3). The ECJ has held that a restriction of competition cannot be found "wholly abstractly"—a full market analysis is required.[48] Although the EU has not adopted a rule of reason approach, there are parallels with the EU's bifurcated paradigm—an agreement can be exempted only if (1) it generates efficiencies; (2) consumers receive a fair share of those efficiencies; (3) it does not include restrictions that are not indispensable to the attainment of the identified efficiencies; and (4) it does not eliminate competition.

Applying existing legal and economic frameworks to sustainability agreements acknowledges that antitrust laws should focus on protecting competitive processes and applying the consumer welfare standard. It follows that the substantive standard for assessing the compatibility of a sustainability agreement with competition law should be whether that agreement significantly restricts competition considering all dimensions of competition, i.e., price and other key terms, quality, effects on innovation as well as dynamic forms of competition. This also implies that when assessing a sustainability agreement's compatibility with competition law, antitrust authorities may consider the full range of that agreement's potential economic benefits including (i) developments in innovation and advances in the quality of the product/service; and (ii) costs reductions, both in the short- and longer-term. It is possible, for example, that certain

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[47] Case T-112/99, Métropole télévision v. Comm'n, 2001 E.C.R. II-02459, ¶ 74 (Ct. First Instance); Commission Guidelines on the application of Article 101(3) TFEU, 2004 O.J. (C 101) 97, ¶ 11.

[48] *Id*. ¶ 76.

sustainability agreements that lead to higher prices might only do so in the short-term and that in the longer term the agreement will result in cost-savings for businesses and therefore potentially lower prices (and potentially other benefits) for consumers. Conversely, sustainability cannot justify conduct that would otherwise be regarded as anticompetitive. For example, solar-panel companies could not agree to raise prices on the ground that it would reduce output and thereby maintain natural resources that would otherwise be used as inputs for solar panels.

However, some commentators nonetheless consider that antitrust authorities have traditionally interpreted "consumer welfare" too narrowly when assessing the lawfulness of sustainability agreements,[49] including as part of the rule of reason assessment. These commentators argue that environmental and social benefits, even if they do not translate into price reductions, quality improvements or innovation in the established sense, should be considered within the analysis of horizontal agreements where they reduce negative externalities, i.e., costs that would otherwise be borne by (current or future) society.

Specific Exclusions

Specific sectors or economic activities may be explicitly granted immunity from antitrust liability or may have implied immunity through pervasive regulation. For instance, in the United States, the Capper-Volstead Act[50] immunizes certain activities of agricultural producer co-operatives, including price-setting, while the Fishermen's Collective Marketing Act[51] grants immunity to fishing co-operatives. In the EU, there are relatively few specific exemptions, at least at a pan-European level. However, antitrust immunity for sustainability agreements could follow from the case law of the ECJ, which excludes restrictions of competition from the remit of European antitrust law if the restriction is inherent to the pursuit of a legitimate public interest objective.[52] To the extent that competitor collaborations aim at establishing a sustainable level

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[49] *See*, Simon Holmes, *Climate Change, Sustainability and Competition Law*, 8 J. ANTITRUST ENFORCEMENT 354, 362–365, and 372 (2020); Maurits Dolmans, Sustainable Competition Policy, Competition Law and Policy Debate (Vol. 5, Issue 4 and Vol. 6, Issue 1, March 2020), https://ssrn.com/abstract=3608023; Grant Murray, *Antitrust and Sustainability: Globally Warming Up to be a Hot Topic?*, KLUWER COMPETITION LAW BLOG (Oct. 18, 2019), http://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a-hot-topic/; Michael Ristaniemi & Maria Wasastjerna, *Sustainability and Competition: Unlocking the Potential*, *in* SUSTAINABILITY AND COMPETITION LAW (Concurrences nº 4-2020, art. nº 97390) at 26–65, 53; Christina A. Volpin, *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*, CPI ANTITRUST CHRON. (July 28, 2020), https://www.competitionpolicyinternational.com/sustainability-as-a-quality-dimension-of-competition-protecting-our-future-selves/#; Sandrine Delarue & Mike Walker, *United Kingdom*, *in* COMPETITION LAW, CLIMATE CHANGE & ENVIRONMENTAL SUSTAINABILITY (2021); Response by Freshfields Bruckhaus Deringer to the European Commission's Call For Contributions on Competition Policy Supporting the Green Deal, ¶¶ 7 and 48, *available generally at* https://ec.europa.eu/competition/information/green_deal/index_en.html; Dirk Middelschulte, *Article 101 TFEU in the Decisive Decade*, *in* SUSTAINABILITY AND COMPETITION LAW, (*Concurrences* nº 4-2020, art. nº 97390). For a U.S. perspective, *see e.g.*, Amelia Miazad, Prosocial Antitrust 22 (Mar. 11, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194.

Some authors define consumer welfare more broadly as coinciding with "'an absence of market power'." *See*, *e.g.*, Cristoforo Osti, *Interpreting Convergence: Where Antitrust Meets Consumer Law*, 377 EUR. COMPETITION J. 377, 381 (2009). While the question of whether it is better to have separate or merged competition and consumer protection agencies is beyond the immediate scope of this report, the issue is dealt with extensively in literature. *See e.g.*, OECD, The Interface Between Competition and Consumer Policies, DAF/COMP/GF(2008)10 (June 5, 2008), https://www.oecd.org/daf/competition/40898016.pdf; and Max Huffman, *Bridging the Divide? Theories For Integrating Competition Law and Consumer Protection*, 6 EUR. COMPETITION J. 7, 30 (2010).

[50] 7 U.S.C. § 291.

[51] 15 U.S.C. § 521.

[52] Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-01577, ¶¶ 107-110 ("the proper practice of the legal profession"); Case C-519/04 P, Meca-Medina and Majcen v. Comm'n, 2006 E.C.R. I-06991 (the fairness of sports); or Case C-1/12, Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0001.

playing field, e.g., via mandatory standards, there may be scope to assess such collaborations under criteria similar to those that the ECJ applied to anti-doping rules in *Meca-Medina.*[53] The Court found that those rules "were adopted. . . for competitive sport to be conducted fairly"[54] in order to "ensure healthy rivalry between athletes"[55] and "to safeguard equal chances [and]. . . the integrity and objectivity of competitive sport and ethical values in sport."[56]

Likewise, there may be scope to follow the ECJ's approach in the Albany case.[57] In that case, the ECJ held that EU competition law, properly interpreted in the light of EU constitutional provisions, did not apply to collective bargaining at all. If the ECJ were to follow this essentially policy driven view in relation to collective bargaining, then, in principle, it could potentially take a similar policy approach faced with sustainability imperatives.

The Section does not advocate the adoption (or, where applicable, the extension) of available exemptions. Instead, this report suggests factors that might be considered when assessing sustainability arrangements. Accordingly, guidance relating to the applicability of existing immunities or exemptions to sustainability agreements would be welcome. Such guidance could also cover—and potentially help to limit—the scope for businesses, whether intentional or not, to violate antitrust laws under the cover of promoting sustainability.[58]

Antitrust authorities should consider a variety of factors when assessing the legitimacy of sustainability-related agreements. To the extent that antitrust authorities are concerned that taking steps to promote—or, at least, not hinder—sustainability measures would in certain circumstances constitute some form of inappropriate overreach, then it may be necessary for antitrust authorities to consult with other domestic authorities and/or, ultimately, for regulation or legislation to be introduced to permit such steps.

Who Must Benefit From Sustainability Initiatives?

When considering agreements that potentially involve sustainability benefits, as well as potential restrictions on competition, one methodological complication that arises is in relation to the question whether the sustainability benefits or efficiencies must accrue to the same users or consumers that potentially suffer the negative effects arising from the restrictive agreement. For example, a market-wide agreement to adhere to higher sustainability standards in the area of food production may result in higher prices for current consumers in a relevant market but may produce positive sustainability effects particularly for future generations of consumers, customers in other markets, non-users, such as employees, or society at large.

Particularly under EU competition law and the laws of the EU member states, this would be potentially problematic in the event antitrust agencies require that the efficiencies associated with the agreement benefit the same classes of consumers negatively affected by the agreement and that, as a result, "out-of-market" efficiencies cannot be taken into account. Indeed, in that case competition law risks condemning private agreements that are on balance beneficial for society, but fail to bring benefits to the class of customers that are negatively affected based on a narrow

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53 Case C-519/04 P, Meca-Medina and Majcen v. Comm'n, 2006 E.C.R. I-06991.

54 *Id*. ¶ 43.

55 *Id*. ¶ 45.

56 *Id*. ¶ 43.

57 Case C-67/96, Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-05751. *See also Wouters*, 2002 E.C.R. I-01577; and *Meca-Medina*, 2006 E.C.R. I-06991.

58 *See*, *e.g.*, Case AT.39824—Trucks, Comm'n Decision, (Sept. 27, 2017), (summary at 2020 O.J. (C 216) 9), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39824/39824_8754_5.pdf.

interpretation of the applicable antitrust standard.[59] This would have the effect of continued externalization of the true costs of unsustainable practices, meaning that they are shouldered by society and/or future consumers, rather than by those who cause them through unsustainable consumer behavior.

Efforts to substantiate the benefits of sustainability agreements will depend on the definition of consumers that is adopted, as well as issues discussed below (e.g., definition of baseline or counterfactual). However, at the center of substantiating benefits is the need to develop a clear theory of change (or logic model) that would provide the economic theory underpinning the link between the relevant agreement and its effect on the consumers in question. Setting out the transmission mechanisms and their accordance with economic theory underpins the definition of metrics and development of quantitative evidence. The economics of sustainability arrangements is discussed further below.

Guidance on this issue is welcomed. The Section recognizes, for example, that following the EC's 2020 consultation on the European Green Deal and competition policy, it appears that the EC, building on its own earlier decisions,[60] is considering recognizing "out of market" benefits such as emission reductions, even if they materialize only outside the European Union.[61] It is expected that the EC will address these issues in a new section on sustainability agreements in its revised Horizontal Guidelines, which are due to be issued in 2022.

More specifically, further guidance on the definition of "consumers" would be welcome, including whether the definition:

(a) includes broader society, rather than just the immediate purchasers of the product/service covered by the agreement.
(b) includes future consumers and, if so, how far into the future is relevant. The recently published draft ACM Guidelines state that the benefits on future customers should be considered when assessing the lawfulness of sustainability agreements.[62]
(c) includes those based in other jurisdictions. Given the impact of unsustainable practices, sustainability agreements often will be felt across multiple countries and even multiple continents. Accordingly, there are good arguments for taking account of consumers based in other jurisdictions when undertaking a rule of reason assessment of sustainability agreements. However, such a supranational approach could potentially raise comity concerns, including potentially conflicting findings by different competition authorities in respect of the same consumer groups, and would therefore benefit from international consultation and cooperation.

Must the Sustainability Benefits be Quantified?

Quantitative data help businesses and antitrust authorities to assess the impact of sustainability agreements by measuring and balancing the benefits and harm arising from the

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[59] *See, e.g.*, Auth. for Consumers & Mkts., ACM's Analysis of the Sustainability Arrangements Concerning the "Chicken of Tomorrow" (Jan. 26, 2015), https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf [hereinafter ACM Chicken of Tomorrow] (finding that industry-wide arrangements for the so-called 'Chicken of Tomorrow' restrict competition); *see also* Press Release, Eur. Comm'n, State aid: Commission Approves Compensation for Early Closure Of Coal Fired Power Plant in the Netherlands (May 12, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_863 (the prohibition of coal for the production of electricity in the Netherlands).

[60] Case IV/33.640—Exxon/Shell, Comm'n Decision, 1994 O.J. (L 144) 20; Case IV/34.252—Philips/Osram, Comm'n Decision, 1994 O.J. (L 378) 37; Case IV.F.1/36.718—CECED, Comm'n Decision, 2000 O.J. (L 187) 47.

[61] Lewis Crofts & Andrew Boyce, *EU Weighs Environmental Benefits in New Antitrust Rules*, MLEX (Mar. 25, 2021), https://content.mlex.com/#/content/1275006.

[62] Netherlands Sustainability Guidelines, *supra* note 5.

agreements. However, regulators should recognize that in the absence of quantitative data, substantiations may need to be qualitative in some cases. This is not uncharted territory—many questions in antitrust law are a matter of assessing both quantitative and qualitative evidence to come to a reasoned judgement.

The U.S. agencies' 2020 Vertical Merger Guidelines, for example, note that "[t]he Agencies may also determine that a merger may substantially lessen competition based on an evaluation of qualitative evidence of all potential effects."[63] Similarly, EU guidance acknowledges that not all benefits are quantitative[64] and the draft ACM Guidelines recognize that it is not possible to quantify the effects of all sustainability agreements.[65] Furthermore, there is no basis in EU law to assume that non-quantifiable benefits are less relevant than quantifiable benefits. Antitrust authorities may also wish to advise more generally on the extent to which sustainability efficiencies must be substantiated in terms of the level of detail, degree of quantification, likelihood, and time frame. The jurisprudence of the Australian Consumer and Competition Commission in this field shows that sustainability efficiencies can be captured effectively without quantification.[66]

Notwithstanding the ability to use qualitative evidence and arguments, there are well accepted metrics that allow quantification of some sustainability impacts. They might include metrics of well-being impacts (e.g., quality adjusted life-years and variations on them); econometric or similar modelling of future price changes (potentially including the price of carbon); and relative shifts in demand for more or less carbon intensive products and resulting consumer or social benefits. In a comprehensive joint paper, the Dutch and Greek competition authorities have laid out various avenues to quantify sustainability benefits.[67] Antitrust agencies can consider these metrics alongside both qualitative evidence and more traditional quantitative metrics.

In concrete terms, the Section suggests that antitrust authorities recognize that situations may arise where the quantification of benefits may be difficult and, therefore, less rigorous, or may need to be entirely dispensed with. Moreover, agencies may seek to establish non-exhaustive criteria for identifying, on a case-by-case basis, whether such circumstances apply. The criteria could include, among other factors: (1) the nature of readily-available evidence regarding the impact of the sustainability agreement (including its extent/coverage, perceived veracity of quantitative and qualitative evidence presented); (2) whether, on the basis of that (or other) information, the sustainability efficiencies clearly outweigh any negative effects; (3) whether a full quantification assessment has been carried out in a similar case and, if so, the results of that assessment; and (4) the potential detrimental impact of not carrying out a full quantification assessment. In addition, if the definition of "consumers" were expanded, guidance would be useful

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[63] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 6 (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[64] Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 8, ¶¶ 59, 69-72, 93, and 102-104.

[65] Netherlands Sustainability Guidelines, *supra* note 5, ¶¶ 45-48 .

[66] *See*, *e.g.*, Authorisation No. AA1000476—Battery Stewardship Council, Final Determination, ¶¶ 4.13–14 (Sept. 4, 2020), https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2004.09.20%20-%20PR%20-%20AA1000476%20-%20BSC_0.pdf; and Authorisation No. A91096—Inner Sydney Waste Management Group of Councils, Determination, ¶¶ 6.51–54 (Oct. 29, 2008), https://www.accc.gov.au/system/files/public-registers/documents/D08%2B110060.pdf.

[67] Netherlands Auth. for Consumers & Mkts. & Hellenic Competition Comm'n, Technical Report on Sustainability and Competition (Jan. 2021), https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf [hereinafter ACM-HCC Technical Report].

on how to identify or characterize the relevant, i.e., affected, consumer group(s) as well as how to assess the costs or benefits to them.[68]

When is Collaboration Necessary to Achieve Sustainability Objectives?

Many sustainability initiatives will be considered proportionate as they are premised on the urgent need for cross-industry collaboration. However, to safeguard the very purpose of competition law of maintaining competitive markets and protecting consumers, restrictions of competition that are not indispensable to attaining the sustainability objective in question must continue to be scrutinized. It follows, therefore, that collaborations must be necessary to achieve a certain objective and sustainability agreements must not contain any unnecessary restrictions of competition.

Parties to a sustainability agreement can be expected to make a plausible case that no other, less anticompetitive alternative is available for realizing the same objective. Parties could do so, for example, by demonstrating that a collective agreement is necessary because no competitor can afford to be the first to change its behavior. In addition, a sustainability agreement can be indispensable if one or more businesses are able to realize the objective only to a demonstrably less efficient degree, for example, because of a lack of expertise or scale. In that case, sustainable products can be introduced sooner or more effectively as a result of the sustainability agreement. Guidance from antitrust authorities would be welcome on the factors they will take into account when determining whether a sustainability agreement is necessary to achieve its objectives.

What Approaches Can Agencies Adopt When Assessing New Forms of Collaboration to Meet Sustainability Objectives?

In light of the ambitious sustainability goals being set by governments and the need to take rapid action, there is greater scope for antitrust authorities to provide comfort to businesses collaborating on sustainability initiatives, particularly with respect to agencies operating under an administrative system. There are a number of ways that authorities can do this.

Issuance of Guidelines

An antitrust authority could adopt guidelines on how it will assess sustainability initiatives including, among others, the substantive standards it will apply, the economic framework and tools it will utilize when assessing the competitive impact of a sustainability initiative, and the evidence it will require businesses to provide to substantiate sustainability claims and the procompetitive benefits of the relevant initiative. The guidelines could also explain how businesses considering sustainability initiatives can obtain an indication of agency enforcement priorities and intentions in specific cases. This approach has been adopted by the Dutch antitrust authority. Some agencies may consider it early to adopt guidelines in the absence of an established track record of assessing sustainability-related arrangements. In such case, agency guidance in individual cases may be appropriate such as in the form of business review letters or comfort letters.

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[68] For example, in the case of climate change, although non-binding, the reports of the Intergovernmental Panel on Climate Change (IPCC) could serve as a starting point for identifying and characterizing relevant consumer groups. The IPCC's reports document current and future impacts around the world based on the consensus view of scientists and practitioners. *See Reports*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, https://www.ipcc.ch/reports/.

Business Review or Comfort Letters

The use and issuance of "comfort letters," "business review letters," or their equivalents assure businesses that an antitrust authority has no intention to challenge a particular agreement. In the United States, the FTC and DOJ issued statements at the start of the pandemic on an expedited system for health and safety protections related to COVID-19.[69] In fact, the Department of Justice issued more business review letters in 2020 than during the entire five-year period preceding the pandemic.[70] Given that rapid and urgent action is needed to meet sustainability objectives, a similar use of comfort letters and equivalent mechanisms to provide fast and flexible review of collaborations and joint ventures to address market failures caused by a crisis may encourage businesses to seek to enter into arrangements in support of sustainability. For example, the EC re-introduced "comfort letters" in the context of the COVID-19 pandemic to allow certain forms of collaboration in some sectors,[71] and, similarly, the UK's Competition and Markets Authority issued guidance on its approach to business cooperation in response to the pandemic and offered informal guidance on a case-by-case basis.[72]

Immunity From Fines

Authorities could adopt policies under which they would not impose fines when businesses have discussed their sustainability arrangements with the authorities (preferably at an early stage) and no major concerns have been identified, but the arrangements are subsequently found to be incompatible with competition law. This approach was recently suggested in the draft ACM Guidelines, which identify that immunity from fines may be granted where firms have followed existing guidelines in good faith, but the arrangements are subsequently found to be incompatible with competition law.[73]

Non-Infringement Decisions

The EC is contemplating issuing so-called non-infringement decisions to grant an even higher level of legal certainty for sustainability agreements. Introduced in 2004 with Article 10 of Regulation 1/2003,[74] this instrument has never been applied. However, it is deemed a particularly suitable instrument to develop a binding case practice in relation to sustainability co-operations.

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[69] *Joint Antitrust Statement Regarding COVID-19*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19.

[70] *See*, Eleanor Tyler, *ANALYSIS: Flurry of DOJ Business Review Letters Breaks Trend,* BLOOMBERG LAW (May 21, 2020), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-flurry-of-doj-business-review-letters-breaks-trend.

[71] Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, 2020 O.J. (C 116I) 7.

[72] Competition & Mkts. Auth., CMA approach to business cooperation in response to COVID-19 (Mar. 25, 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-.pdf. The UK government also temporarily relaxed elements of competition law for certain key sectors where businesses were working together to respond to the pandemic, including groceries. The Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, https://www.legislation.gov.uk/uksi/2020/369/pdfs/uksi_20200369_en.pdf.

[73] Netherlands Sustainability Guidelines, *supra* note 5, ¶ 62.

[74] Council Regulation (EC) No 1/2003of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

Conclusion

A wide range of agreements—both vertical and horizontal agreements—aimed at achieving sustainability objectives are lawful under the existing legal and economic frameworks. Policy makers should therefore be wary of calls for fundamental changes to enforcement policy or antitrust law. However, businesses would welcome further guidance on how sustainability will be assessed within the existing legal and economic frameworks. Further guidance on the analytical approaches that antitrust authorities will apply in relation to sustainability agreements would empower businesses to engage in sustainability initiatives that are antitrust compliant and, simultaneously, assist businesses with identifying unlawful sustainability efforts. Particularly under EU competition law and the laws of the EU member states, such guidance could cover, among others, the applicability of the rule of reason/Article 101(3) TFEU exemption or their equivalents to sustainability agreements and the class of consumers to be considered when assessing the compatibility of sustainability agreements with antitrust law.

Clarifications to existing law, policy, and guidance from antitrust authorities could take various forms, ranging from issuing guidelines, as the Dutch antitrust authority has done, to issuing business review letters or other forms of “comfort letters” on a case-by-case basis.

Chapter 3:

Merger Review

In the merger review context, sustainability concerns can arise in at least three ways. First, sustainability considerations may be relevant to the substantive assessment of potential harms from a proposed transaction, in particular harms to sustainability objectives, and in market definition. Second, potential sustainability benefits may qualify as efficiencies justifying approval of a transaction that would otherwise be prohibited. Third, sustainability objectives may need to be considered in the design of remedies to allow approval of transactions that would otherwise be prohibited.

This discussion is limited to antitrust-based substantive standards of review, e.g., "significant impediment to effective competition" (SIEC) in the EU or a "significant lessening of competition" (SLC) in the United States. The Section does not consider the possibility of addressing sustainability outside the SLC/SIEC context as a public interest concern. Some jurisdictions provide for public interest concerns to be addressed directly in the merger control process (e.g., South Africa and Spain) or in a separate but related process (e.g., France and Germany). Although such an approach may be an appropriate way to address sustainability concerns that cannot be adequately addressed in the traditional antitrust-based review process, this option is outside the scope of this report.[75]

Sustainability and Theories of Harm

In the United States, the DOJ and FTC perform an initial review of every reported transaction to determine which transactions require a closer inspection. Transactions requiring further review are assigned to one agency, normally based on the relevant industry expertise of the agency, and the reviewing agency assesses whether the transactions are likely to "create, enhance, or entrench market power or to facilitate its exercise."[76] Such transactions can elevate market power or lead to "reduced product quality, reduced product variety, reduced service, or diminished innovation."[77]

The U.S. agencies historically have not taken other public policy considerations, such as environmental sustainability, into consideration when considering the impact on competition.

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[75] Although sustainability considerations are most often discussed in the context of cooperative agreements, a number of commentators have expressly addressed the treatment of such considerations in the merger review context. *See*, *e.g.*, Nicole Kar, Emma Cochrane & Bella Spring, *Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to Support Green Investment*, *in* COMPETITION LAW, CLIMATE CHANGE & ENVIRONMENTAL SUSTAINABILITY, 117-138 (2021); Alec Burnside, Marjolein de Backer & Delphine Strohl, *Can Environmental Considerations Trump an EUMR Decision?*, *in* COMPETITION LAW, CLIMATE CHANGE & ENVIRONMENTAL SUSTAINABILITY, 139-152 (2021). Merger review issues were addressed in several governmental submissions in connection with the December 2020 OECD Competition Committee roundtable on sustainability and competition (http://www.oecd.org/daf/competition/sustainability-and-competition.htm) and an EU consultation on competition policy contributing to the European Green Deal (https://ec.europa.eu/competition/information/green_deal/index_en.html).

[76] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [hereinafter U.S. HORIZONTAL MERGER GUIDELINES].

[77] *Id.*

However, the U.S. agencies may distinguish between sustainable and non-sustainable products when defining relevant markets. For example, the DOJ and FTC have distinguished between different types of power generation[78] and organic and inorganic products.[79] When consumer demand distinguishes between sustainable and non-sustainable products, the U.S. antitrust agencies may treat the more sustainable products as a distinct relevant market when assessing the competitive effects of a transaction.

In the EU, the EC must assess whether notified concentrations "would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, in the common market or a substantial part of it."[80] The EC has explained that, through its review, it prevents mergers that would increase the ability of the merged entity "to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition."[81]

Although the EUMR gives the EC broad discretion in the types of harm that it may consider under the SIEC test, the EC has not accepted that purely public interest considerations can be taken into account for this purpose. Although the EC has referenced public policy benefits in EUMR decisions,[82] in 2017, Commissioner Margrethe Vestager expressly rejected environmental harm as a separate consideration in merger review.[83] Thus, the EC is unlikely to take account of sustainability considerations as such in its substantive assessment of transactions under the EUMR—at least at this time. To the extent that sustainability considerations are relevant to competition, however, the EU Horizontal Merger Guidelines confirm that the EC has broad discretion to consider sustainability effects as a "parameter[] of competition."[84]

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[78] The FTC has noted that owners of coal-fired electricity cannot easily substitute to renewable inputs "because it is expensive and time-consuming to construct new facilities powered by natural gas, renewables, or nuclear fuels." Complaint, ¶18, Fed. Trade Comm'n., In Re Peabody Energy Corp. and Arch Coal, Inc., FTC Docket No. 9391 (Feb. 26, 2020), https://www.ftc.gov/system/files/documents/cases/d09391_peabody_energy-arch_coal_administrative_complaint_0.pdf. Several tech companies are reported to be in a "race to buy up renewable energy," and even to finance the building of renewable capacity, at a higher cost than purchasing existing non-renewable energy. Sam Schechner, *Amazon and Other Tech Giants Race to Buy Up Renewable Energy*, WALL STREET J. (June 23, 2021), https://www.wsj.com/articles/amazon-and-other-tech-giants-race-to-buy-up-renewable-energy-11624438894. It is therefore possible that a "'product' market can be narrowed substantially by the preference of customers. . . . For example, situations may exist where customers have a specific demand for green energy, in which case those customers will not consider fossil fuel energy to be an acceptable substitute even though at a physics level the electrons in the transmission line are indistinguishable. In this case, a market may be defined as narrowly as 'green energy,' meaning that an authority could assert harm from a renewables merger even though plenty of competition from fossil fuel energy exists." Hill Wellford, Darren Tucker & Evan Miller, Antitrust Issues in Renewable Energy (June 22, 2020), https://www.velaw.com/insights/antitrust-issues-in-renewable-energy/.

[79] *See e.g.*, *United States v. Danone S.A. and the WhiteWave Food Company*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/case/us-v-danone-sa-and-whitewave-foods-company; *In the Matter of Post Holdings, Inc.*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/191-0128/post-holdings-inc-matter.

[80] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EUMR), art. 2, 2004 O.J. (L 24) 1.

[81] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 5, ¶ 8 [hereinafter EU Horizontal Merger Guidelines]. *See also* Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008 O.J. (C 265) 6 [hereinafter EU Non-Horizontal Merger Guidelines].

[82] *See e.g.*, Case M.7932—Dow/DuPont, Comm'n Decision, ¶¶ 1975, 1977 and 1986 (Mar. 27, 2017) (summary at 2017 O.J. (C 353) 5), https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf.

[83] Letter from Margrethe Vestager to Petitioners, (Aug. 22, 2017), https://ec.europa.eu/competition/mergers/cases/additional_data/m8084_4719_6.pdf ("potential negative effects linked to Monsanto's and Bayer's products, including risks for human health, food safety, consumer protection, the environment and the climate. . . do not form the basis for a merger assessment.").

[84] EU Horizontal Merger Guidelines, *supra* note 81, ¶ 8.

The potential for a transaction to harm competition in relation to sustainability is most commonly discussed as an aspect of "innovation competition."[85] The EU Horizontal Merger Guidelines note that:

> In markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, [because the merger would bring an end to innovation competition between them].[86]

Cases in which the EC has closely examined the effects of a proposed merger on innovation competition generally focus on R&D competition.[87] From this perspective, a merger's potential impact could be measured by, for example, comparing the patents granted to the merging parties and their competitors, as well as the value and closeness of such patents. Sustainability may of course be an important element of innovation competition in R&D, for example where firms compete to develop less-polluting processes for extracting raw materials or means of manufacturing or otherwise producing products and services.[88]

But sustainability may play an important role in many other aspects of competition not so easily conceived as "innovation competition." For example, a company may engage in more sustainable, and possibly more expensive, purchasing and manufacturing practices. A firm engaging in such practices may seek to benefit from these practices, and recoup some or more of the costs, in different ways depending on its business model. For example, a "green" sportswear company may seek to develop a premium brand commanding higher price points than its competitors (but not so much higher as to place its products in different markets). A company selling a commodity, such as gasoline, may seek to develop a "green" reputation to encourage consumers to buy its products rather than its competitors' even if the products themselves are substantially identical. In some cases, firms may decide to employ more sustainable practices without a realistic expectation of recouping the incremental costs they incur through such practices.

As sustainability becomes more important as a competitive parameter, sustainability considerations may impact authorities' approach to market definition.[89] As a result, more sustainable products may be differentiated in consumers' eyes from products that are less sustainable, potentially leading to their being considered to fall into separate markets.[90] To the

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85 In its consultation on competition policy contributing to the Green Deal, the Commission noted that "mergers can eliminate the pressure between firms to innovate on sustainability aspects of some products or production processes. . . . Research and advances in technology are fundamental for economic progress. The goal of promoting sustainable development requires protecting and encouraging innovation, so that firms come up with new and better technologies." *See*, Eur. Comm'n, Competition Policy supporting the Green Deal: Call for Contributions 4-5 (Oct. 13, 2020), https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf [hereinafter EU Consultation].

86 EU Horizontal Merger Guidelines, *supra* note 81, ¶ 38.

87 *See e.g.*, Case M.7932—Dow/DuPont, Comm'n Decision (Mar. 27, 2017) (summary at 2017 O.J. (C 353) 5), https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf.

88 Accounting for the effects of mergers on innovation competition is not unique to the EU or the United States. Other antitrust authorities have also relied on "innovation competition" theories.

89 *See e.g.*, Eur. Comm'n, Commission Staff Working Document Evaluation of the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law of 9 December 1997 § 2.2 (July 12, 2021), https://ec.europa.eu/competition-policy/system/files/2021-07/evaluation_market-definition-notice_en.pdf ("If for instance, there are more consumers today who take purchasing decisions based on whether products are sustainable or not, the market definition may reflect a potential definition of markets for sustainable products on the one hand and conventional products on the other hand.").

90 *See*, *e.g.*, EU Consultation, *supra* note 85, at 5.

extent that sustainability considerations lead to more sustainable products being considered as part of separate antitrust product markets from less sustainable products that otherwise fulfil similar customer needs, the practical impact could be to hinder mergers of firms selling more sustainable products because the merging firms would likely have higher market shares, increasing the chance of the transaction being prohibited absent evidence of potential market entry.

The EU Consultation sought input on situations in which a merger could harm consumers by reducing their choices of environmentally friendly products and/or technologies and whether merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal. The responses revealed a range of views among European antitrust authorities, from advocates for antitrust authorities taking a more proactive role in promoting sustainability objectives to skeptics who argue that no changes are required.[91] Most authorities who responded to the EC's merger control-related questions seem to be skeptics. The Czech antitrust authority commented that "there is no urgent need to change competition policy or its tools in the context of the Green Deal objectives even in the area of merger control."[92] Similarly, the French Autorité de la Concurrence commented that the existing tools of competition analysis such as those allowing to assess price and non-price effects are sufficient to take into account environmental issues.[93] The German Federal Government noted that "it would be conceivable to give consideration to common-interest objectives (including climate change) after the assessment under competition law has been completed" (i.e., not as part of the merger review process).[94] The Polish Office of Competition and Consumer Protection commented that "it does not seem that concentration control regulations can make a comprehensive contribution to environmental protection."[95]

On the other hand, the Spanish authority noted, "While public interest considerations do not form part of the substantive analysis of a merger within the European Union [under the EUMR], Member States may wish to reflect other legitimate interests among which we believe sustainability could be included."[96] The Autoritat Catalana de la Competència commented that "merger analysis [requires] an evaluation of the 'risk to reduce the green technological innovation' or the 'environmental impacts' as effects to be combated, so that it can be subject to conditions or even prohibit the merger in order to preserve the green technological innovation or the environmental policies."[97]

In merger control systems that apply competition-based standards of review such as SLC/SIEC, without expressly taking public interest considerations into account, there does not seem to be a need, or broad support, for introducing negative effects on sustainability as a new

[91] Jay Modrall, *Sustainability and Antitrust – A Course Change for the EU?*, KLUWER COMPETITION BLOG (Feb. 15, 2021), http://competitionlawblog.kluwercompetitionlaw.com/2021/02/15/sustainability-and-antitrust-a-course-change-for-the-eu/.

[92] Comments by the Hynek Brom, Vice-Chairman for the Office or the Protection of Competition 3 (Nov. 20, 2020), *available generally at* https://ec.europa.eu/competition/information/green_deal/index_en.html.

[93] Comments by the Autorité de la Concurrence 3 (Dec. 1, 2020), *available generally in French at* https://ec.europa.eu/competition/information/green_deal/index_en.html.

[94] Comments by the German Federal Government on the contribution of competition policy in support of the Green Deal 3 (Nov. 2020), *available generally at* https://ec.europa.eu/competition/information/green_deal/index_en.html.

[95] Office of Competition and Consumer Protection, Competition Policy Supporting the Green Deal 8 (Nov. 2020), *available generally at* https://ec.europa.eu/competition/information/green_deal/index_en.html.

[96] Comisión nacional de los mercados y la competencia, Competition Policy Supporting the Green Deal, Call for Contributions 21-22 (2020), https://bit.ly/3y9lxLv.

[97] Autoritat Catalanade la Competència, ACCO is committed to the implementation of changes to the competition policy which will make 'Green Competition' possible 7 (Nov. 20, 2020), http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20201120_ob_53_2020_contribucio_acco_consulta_green_deal_eng.pdf.

theory of harm separate from theories of harm developed in previous cases. On the other hand, the focus on sustainability from the innovation competition perspective can be narrow. This need not be the case where sustainability can be assessed in terms of improvements to quality. Trying to fit all theories of harm based on a reduction in sustainability into the category of "innovation competition" may become artificial, and tools developed to assess innovation competition effects may not apply to all forms of sustainability competition. Accordingly, some antitrust authorities have suggested that sustainability be recognized as a potentially relevant parameter of competition in its own right, while acknowledging the ways in which sustainability competition may relate to or overlap with other types of competition (including innovation competition).

The Section recommends providing guidance on these issues and the relationship between theories of harm based on a reduction in sustainability competition and price effects. For example, a reduction in sustainability competition could lead to the merged firm decreasing prices (for example, if one or both parties abandoned more sustainable, but more expensive, manufacturing practices). This could be the case, for example, where a manufacturer acquires a competitor seeking to differentiate itself based on more sustainable processes and products that are more expensive than those of the acquirer. If the acquirer chooses not to continue the target's sustainability efforts, the merged entity's products may be cheaper than the target's products were pre-acquisition. That outcome should not preclude an authority from challenging such a merger on the basis that it would reduce sustainability competition if that were found to be a meaningful quality dimension of consumer preference. Conversely, a merger could be pro-competitive even if the buyer anticipates raising the prices charged for the target's products because it plans to invest in more sustainable practices post-merger.

Sustainability as an Efficiency Defense

Sustainability considerations may also be relevant as part of an "efficiencies defense," where efficiencies are argued to counteract the otherwise harmful effects of a merger on competition.

In the United States, the DOJ and FTC will weigh the potential anticompetitive effects of a transaction against cognizable efficiencies. "Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service."[98] In other words, U.S. enforcers would not credit sustainability efficiencies that result directly from anticompetitive conduct.

When a transaction has cognizable efficiencies, U.S. antitrust enforcers consider whether those efficiencies would be sufficient to offset a transaction's potential harm to consumers in the relevant markets. If the efficiencies "are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market," then the agencies will not challenge the transaction.[99]

The U.S. agencies would in principle acknowledge efficiencies related to increasing innovation/R&D when verifiable or improving a product to be more sustainable when that is valuable to consumers. However, the U.S. agencies would require proof of such claimed efficiencies and would not give greater weight to sustainability efficiencies than other types of efficiency.[100]

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[98] U.S. HORIZONTAL MERGER GUIDELINES, *supra* note 76, at 30.

[99] *Id.*

[100] Then=Assistant Attorney General for Antitrust, Makan Delrahim, said the following when the DOJ investigated four major U.S. automakers for announcing that they would follow stricter fuel efficiency standards than those required by the federal

In the EU, the EC notes that it "may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for [prohibiting a transaction]. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have."[101]

For the EC to take account of efficiencies in this way, they must satisfy three cumulative conditions: "the efficiencies have to benefit consumers, be merger-specific and be verifiable."[102] The EC's conditions for taking account of efficiencies in EUMR review are similar but not identical to the Article 101(3) TFEU criteria discussed *infra*, in particular the "fair share of benefits" test. In the EUMR context, "[t]he relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur."[103] The EC elaborates that "the concept of 'consumers' encompasses intermediate and ultimate consumers, i.e., users of the products covered by the merger. In other words, consumers within the meaning of this provision include the customers, potential and/or actual, of the parties to the merger."[104]

The EC acknowledges that "[m]ergers may bring about various types of efficiency gains that can lead to lower prices or other benefits to consumers,"[105] but the EU Horizontal Merger Guidelines focus mainly on whether and how cost savings would be likely to lead to the merged entity charging lower prices. The EC notes that "[c]onsumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R&D and innovation,"[106] but the only example given is setting up a joint venture company to develop a new product.

As regards the relevant timeframe, the EC notes that efficiency benefits must be timely, since "the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them."[107]

In the EUMR context, efficiencies discussions often focus on the merged firm's incentives to pass efficiency gains on to consumers. The EC notes:

> The incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to the consumer. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or

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government: "The loftiest of purported motivations do not excuse anti-competitive collusion among rivals." Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA TODAY (Sept. 12, 2019), https://eu.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/. The statement implies that claimed efficiencies must be justified within existing legal frameworks.

[101] EU HORIZONTAL MERGER GUIDELINES, *supra* note 81, ¶ 77.

[102] *Id*. ¶ 78. Case M.9409—Aurubis/Metallo Group Holding, Comm'n Decision, ¶ 844 (May 4, 2020), *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m9409_3908_3.pdf (rejecting claimed environmental efficiencies on the basis that they were not verifiable or likely to arise in a timely fashion).

[103] EU HORIZONTAL MERGER GUIDELINES, *supra* note 81, ¶ 79 (footnotes omitted).

[104] *Id*., n.105.

[105] *Id*. ¶ 80 (emphasis added).

[106] *Id*. ¶ 81.

[107] *Id*. ¶ 83.

> leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.[108]

The EU Horizontal Merger Guidelines' analysis of incentives of a merged firm to pass on efficiencies from a merger seem applicable mainly to benefits in the form of cost savings. The EU Non-Horizontal Merger Guidelines similarly discuss cost savings in the vertical merger context but note that:

> a vertical merger may align the incentives of the parties with regard to investments in new products, new production processes and in the marketing of products. For instance, whereas before the merger, a downstream distributor entity might have been reluctant to invest in advertising and informing customers about the qualities of products of the upstream entity when such investment would also have benefited the sale of other downstream firms, the merged entity may reduce such incentive problems.[109]

This broader approach to the potential benefits from changed incentives across the supply chain could be relevant to merged firms' incentives to pursue sustainability objectives.

The Section recommends that the U.S., EU, and other antitrust authorities review their criteria for evaluating efficiency defenses relating to sustainability and provide greater guidance on how sustainability benefits should be assessed in the context of an "efficiencies defense."[110] The UK Competition and Markets Authority's March 2021 Merger Assessment Guidelines specifically recognize reduced carbon emissions as potentially relevant to an efficiencies analysis,[111] but otherwise appear to take a restrictive approach to sustainability benefits in the efficiencies context (*e.g*., focusing on "Benefits to UK customers," apparently excluding consideration of benefits that do not accrue to the merging firms' customers, as well as out-of-jurisdiction benefits). It will be important that when antitrust authorities assess sustainability benefits in the "efficiencies defense" context they consider consistency of approach and harmonization with the approach to sustainability agreements, as discussed *infra*.

Areas for further clarification and harmonization include elaborating on the concept of "consumer" (only consumers of products in the relevant antitrust markets, or others as well?); which benefits (other than cost benefits) can be taken into account and whether and how to quantify them; and the appropriate timeframe to assess them (a longer time horizon may be appropriate). These issues are discussed in greater detail below.

Sustainability in Merger Remedies

Where an antitrust authority concludes that a proposed merger may impair competition under an SLC, SIEC, or similar standard, the merging parties may be able to eliminate the relevant

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[108] *Id*. ¶ 84.

[109] EU Non-Horizontal Merger Guidelines, *supra* note 81, ¶ 57.

[110] *See*, Response by the Competition and Consumer Protection Commission to the European Commission's Call For Contributions on Competition Policy Supporting the Green Deal 5 (2020), *available generally at* https://ec.europa.eu/competition/information/green_deal/index_en.html ("The European Commission and NCAs may have to consider whether additional guidance is required . . . in the context of a merger review for assessing environmental efficiencies").

[111] UK Competition & Mkts. Auth., Merger Assessment Guidelines ¶¶ 8.3(b) and 8.21 (Mar. 18, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970322/MAGs_for_publication_2021_.pdf.

concerns through appropriate remedies. Sustainability considerations may be relevant in the remedy context, as well as in the assessment of the underlying transaction.

The U.S. agencies seek to craft remedies that are enforceable, preserve competition, do not create ongoing government regulation of a market, and impose the risk of failure on the transacting parties, not consumers.[112] The U.S. agencies tend to favor structural remedies and prefer to use conduct relief to support structural relief rather than as a stand-alone solution.[113] However, the agencies will sometimes use conduct relief as a stand-alone remedy in some circumstances.[114] As with the rest of the United States' competitive analysis, remedy structures are based first and foremost on preserving competition and do not consider other policy considerations, such as environmental sustainability, as separate factors. To the extent the competitive concern relates to a reduction in sustainability (e.g., based on a reduction in quality or innovation), the remedy would need to be crafted to address the identified concern.

In the EU, the EC's approach to merger remedies is set out in the EU Remedy Notice.[115] In the EUMR context, it is up to the parties to propose potential remedies and provide detailed information on the proposed remedy, such as detailed information on the divestiture of a business to enable the EC to assess the viability, competitiveness and marketability of the business by comparing its current operation to its proposed scope under the commitments. In a divestiture remedy, the EC must also evaluate the suitability of proposed purchasers of a divestment business.[116]

The EU Remedy Notice does not expressly address sustainability, but sustainability considerations can be relevant both to the evaluation of the suitability of proposed remedies to eliminate identified concerns and the suitability of proposed divestiture buyers. This is particularly the case where sustainability considerations are an element of the theory of harm, but potentially also in other contexts. For example, even if sustainability is not a concern in the theory of harm that led the EC to consider a divestiture remedy necessary, the EC must determine that the acquisition by the proposed purchaser does not itself create competition problems, which could include issues under a sustainability theory of harm. This principle could also apply in other jurisdictions.

Outside the divestiture context, sustainability considerations may be addressed through behavioral remedies. The EU Remedies Notice expresses a strong preference for structural remedies such as divestitures, but the EU Remedies Notice and EU case law also recognize that behavioral remedies may be suitable to address certain theories of harm.[117] In the EC's practice, behavioral remedies have often been accepted in vertical or conglomerate mergers where remedies such as non-discrimination or access remedies may be more appropriate to address the potential harm than a divestiture. Behavioral remedies may also be particularly well suited to address sustainability theories of harm, either alone or in combination with a structural remedy. For example, if an authority's theory of harm includes the risk that a combination will reduce sustainability competition (for instance where the target, but not the acquirer, follows a

[112] U.S. DEP'T OF JUSTICE, MERGER REMEDIES MANUAL 3-5 (Sept. 2020), https://www.justice.gov/atr/page/file/1312416/download.

[113] *Id.* at 13-15.

[114] *Id.* at 16.

[115] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and Commission Regulation (EC) No 802/2004, 2008 O.J. (C 267) 1.

[116] *Id.* ¶¶ 48-49.

[117] *Id.* ¶ 15.

sustainability-based competitive strategy), a remedy could include a commitment for the acquirer to continue those sustainability efforts if these can be identified with sufficient precision.

Conclusion

Sustainability is increasingly recognized as a parameter of competition in many markets. The Section recommends that the U.S., EU, and other antitrust authorities provide guidance on the assessment of transactions' effects on sustainability as an element of their substantive assessment in merger review, not simply as an element of innovation competition. Trying to reduce all effects on sustainability to "innovation competition" may impose artificial constraints on the evaluation. Similarly, agencies should clarify how they will weigh sustainability effects against price effects, for example where a proposed merger may reduce prices but also sustainability competition.

Agencies should similarly provide guidance on their treatment of sustainability benefits in the assessment of efficiencies merging parties may advance to justify an otherwise anti-competitive merger. This assessment should be harmonized with the assessment of sustainability benefits in a rule of reason/Article 101(3) TFEU or similar context.

Finally, the Section recommends that agencies clarify the relevance of sustainability in the assessment of remedies proposed to eliminate concerns that a merger would otherwise raise. In particular, potential sustainability harms and benefits from a proposed divestiture should be assessed in the same way they would be if the divestiture were being reviewed under the applicable merger control regime (whether or not such a review is in fact triggered by the divestiture).

This report does not consider the advisability of revising antitrust-based standards of review to take express account of sustainability considerations or to introduce a parallel review process for that purpose. Such steps would in our view become advisable only once the avenues for taking greater account of sustainability considerations in merger review have been fully explored.

Chapter 4:

The Economics of Sustainability Arrangements

There are a number of challenges when seeking to undertake a cost-benefit analysis (or measure efficiencies) from a transaction that might improve sustainability in the sector or for the products in question. Some of these have been discussed earlier and are widely covered elsewhere in this report.

For the purposes of this section, the Section sets those issues aside and considers instead the practical issues linked to measuring the costs and benefits, and to whom they accrue. There is merit in considering the issue of measurement even if the legal status of such arguments is unclear. First, as noted elsewhere, competition authorities and courts are reconsidering previous precedents in light of rising government commitments—including legally binding commitments of various forms—to tackle climate change. Second, competition authorities may have the ability outside of any particular case or investigation to issue guidance about how such benefits could be quantified and incorporated into cases for consideration. Such a step might be seen as anathema to some—over-stepping into the role of elected representatives. To others it might seem consistent with approaches adopted by other regulatory authorities (e.g., to calculate the value of a life in deciding on various health issues, to take future consumers into account when regulating infrastructure investment decisions). More broadly it may be consistent with a view that enforcement policies adapt over time to wider societal priorities.[118]

Economic Assessments

There is a well-established economic toolkit for valuing the benefits of various non-market actions. For example, Hicksian Compensating Variation is the amount of money that would have to be given to an individual to return them to the utility prior to the change.[119] Their Willingness to Accept can be assessed based on their behavior (e.g., how far they would be willing to travel—at what expense—to experience what has been taken away locally). Alternatively, surveys or choice experiments can be used to try to assess the value placed on the change in question.

While these approaches work to varying degrees for many aspects of sustainability (e.g., loss of natural environment, reduction in air quality), they are conceptually more difficult to apply in the case of climate change.[120] The impacts of climate change are more diffuse, affect future and current generations, and may be hard (or impossible) to "reverse" once in place. More such approaches might be needed at first with cases, then used to converge on an agreed approach.

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[118] *See, e.g.,* Ariel Ezrachi, *Sponge*, 5 J OF ANTITRUST ENFORCEMENT 49 (April 2017).

[119] *See* OECD, Sustainability and Competition—Note by Germany, DAF/COMP/WD(2020)63 (Nov. 27, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)63/en/pdf.

[120] In some cases, it may be possible to link climate change to other sustainability outcomes (e.g., loss of natural environment) against which the above valuation methods could then be applied. In other cases, the fact that the impacts might be in the future (sometimes a generation or more) or may be diffuse (i.e., impact on many aspects of the broader set of issues that come under "sustainability") means that it would be far preferable to attach a value specifically to greenhouse gas emissions rather than mapping out their full consequences.

The particular challenge when it comes to climate change is valuing the reduction in greenhouse gas (GHG) emissions arising from the situation under consideration. Valuing the reduction in GHG emissions requires determination of three factors:[121]

- Baseline or *counterfactual*: the level of emissions under "business as usual" assumptions, *i.e.*, absent the transaction or situation in question;
- Revised forecast or *factual*: the level of emissions if the proposition in question is approved; and
- Value: the appropriate value of GHG emissions to attribute to the difference between the counterfactual and the factual cases.

Again, there are well established techniques for determining the counterfactual and factual scenarios, including forms of "difference-in-difference" estimation, propensity score matching and other regression techniques. This econometric analysis is frequently used to determine counterfactual and factual sales projections or similar in such cases and is equally credible (possibly with some added scientific input) for forecasting GHG emissions.

The real lack of precedent exists for the right value to place on the GHG emissions themselves. There are broadly three sources of value that could be used individually or in combination.

Market Values. There is a large and growing number of carbon markets (of which California's cap-and-trade system and the EU Emissions Trading System are two of the largest) that provide an estimated cost of carbon. They have the advantage of being determined in a market that is not controlled by any one individual and are increasingly liquid and credible. They have the disadvantage of being focused on very particular sectors and the prices are a function of abatement costs in those sectors, rather than across the entire economy.

Social Values. There are government recognized values for the social cost of carbon that are widely used to appraise governments policy decisions. They are often officially published (e.g., in the UK through HM Treasury's Green Book guidance, in the United States through the EPA). They have the advantage of reflecting government's view of the cost to all of society of GHG emissions and the disadvantage of the potential to change depending on shifting societal views.

Imputed Values. Climate change agreements (whether the international Paris Agreement[122] or specific domestic legislation) imply a future path for emissions (e.g., consistent with keeping temperature rise well below 2°C above pre-industrial levels or with reaching net zero GHG emissions by 2050). That required path for emissions—the path that is consistent with obligations entered into by government—can be used to impute a cost of GHGs. There is a value at which the stated objective can be met.

Applying several techniques allows values to be triangulated—or checked against initial estimates—to develop a value or range of values against which the costs of the transaction can be compared.

[121] *See* ACM-HCC Technical Report, *supra* note 67.
[122] *See* Paris Agreement (2015), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

Chapter 5:

Conclusions

The foregoing chapters of this report explained that fundamental revision of competition law is not necessary to accommodate sustainability initiatives. Competitors can and do engage lawfully in procompetitive collaboration and mergers under current laws, and the antitrust laws contain sufficient flexibility to enable sustainable development. Yet, businesses may forgo some of the most beneficial sustainability-focused collaborations and mergers due to uncertainty as to whether they will violate competition law.

Competition agencies can—and have begun to—provide guidance to clarify opportunities for pro-sustainability activities under competition law in an effort to overcome such risk-aversion. The Section applauds these initiatives and suggests that agencies develop clear, up-to-date approaches and guidance on the range of issues discussed herein. These include when sustainability agreements will not normally raise competition law concerns, e.g., based on competition safety zones and applicable exemptions, and the analytical approaches that the competition authority will apply in relation to sustainability collaborations and mergers, e.g., with respect to quality and innovation, the assessment of efficiencies, the treatment of out-of-market benefits and consumers, and the quantitative and qualitative approaches to be employed.

Agency consideration of additional domestic flexibilities to provide comfort to businesses engaging in sustainability initiatives also is warranted. For example, agencies could aim to enhance the application of business review or comfort letters to such initiatives and/or allow immunity from fines for sustainability activities that were the subject of advanced consultation with the agency or entered into after good faith assessment of existing guidance and that are subsequently found incompatible with competition law. These domestic actions will help to promote the legal certainty needed for business to engage on a broader range of welfare-enhancing sustainable activities.

International engagement and cooperation, such as in the context of the OECD or International Competition Network, is also advisable to promote policy and enforcement consistency, and thus greater legal certainty, regarding issues at the intersection of sustainability and competition law.

International Policy Engagement

Many antitrust authorities have just begun to grapple with the competition policy implications of sustainability-related collaborations and mergers, whereas others have produced studies,[123] worked through case analyses,[124] and/or are developing guidance in the area.[125] The Section supports initiatives that encourage and facilitate the sharing of this learning on, and experience with, these issues among agencies. The Section believes that it would be particularly beneficial to advance early thinking, while focusing agency efforts and avoiding duplication of work. The exchange of learning and experience also can lead to greater consistency among

[123] *See e.g.,* ACM-HCC Technical Report, *supra* note 67.
[124] *See* Appendix at the end of this report for summaries of leading international cases.
[125] *See, e.g.,* Netherlands Sustainability Guidelines, *supra* note 5.

approaches adopted across agencies. Such cross-border policy consistency can help to promote greater legal certainty for businesses determining whether to engage in sustainability-related collaborations and mergers that impact multiple jurisdictions.[126]

Agency discussion of the treatment of sustainability arrangements under competition law in multilateral and regional fora is at an early stage.[127] Deepening this dialogue is an important first step toward developing consistent approaches to assessing sustainability collaborations and mergers under competition law across jurisdictions. As agencies gain more experience in this area, the Section anticipates that a set of internationally accepted norms would emerge as a precursor to convergence. The Section stands ready to contribute to these efforts.

Agency Enforcement Cooperation

Agency enforcement cooperation regarding sustainability collaborations and mergers under concurrent review also can help to limit potentially conflicting approaches and avoid inconsistent outcomes. Cooperation allows agencies to discuss their analyses and address differences in the context of an individual matter. Given recent business interest and incentives to enter into sustainability-related collaborations and mergers with cross-border effects, we can expect an increasing number of these arrangements to be subject to review by multiple competition agencies. As these matters inevitably will raise novel issues at the intersection of competition law and sustainability, it will be important for agencies to engage in cooperation and to do so early in the process to allow adequate time to assess differences in analytical and empirical approaches and seek coherent outcomes. Early engagement also will allow agencies to consider potential comity concerns, such as those raised above, to find mutually acceptable solutions in light of the respective interests involved.[128]

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[126] A mandatory standardization agreement, along the lines discussed *infra*, applied on an industry-wide, cross-border basis would be an example of a sustainability collaboration that would impact multiple jurisdictions.

[127] *See, e.g.,* OECD Competition Committee, Hearing on Sustainability and Competition, https://www.oecd.org/daf/competition/sustainability-and-competition.htm.

[128] *See* OECD, Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings, OECD/LEGAL/0408, §§ III and IV (2014), https://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf (addressing consultation and comity).

Appendix:

Case Studies on the Intersection Between Antitrust and Sustainability

Appendix 1:

Europe

French Competition Authority (FCA) – Polyvinyl Chloride (PVC) and Linoleum Floor Covering Cartel[129]

In October 2019, the FCA imposed €302 million in sanctions against three of the leading manufacturers of PVC and linoleum floor coverings in France, Forbo, Gerflor, and Tarket, together with the relevant industry association, Syndicat Français des Enducteurs Calandreurs et Fabricants de Revêtements de Sols et Murs (SFEC). The cartel involved price fixing, information sharing and, notably, an agreement to limit the amount of communication on the environmental performance of the relevant products.

With respect to the latter, Forbo, Gerflor and Tarket, together with the SFEC, entered into an agreement that barred the manufacturers from independently advertising the environmental performance of their products. Instead, the manufacturers were allowed to communicate only environmental performance information derived from joint data sheets produced by the SFEC. The stated purpose of the agreement was to limit competitive marketing practices based on environmental characteristics, avoid unnecessary controversy relating to such marketing, and adopt a consistent marketing approach in order to prevent reckless green marketing.

When a retailer of the relevant products requested approval from the SFEC to convey product information concerning volatile organic compound releases to consumers, the SFEC rejected the request. In its letter setting out its reasons for the rejection, the SFEC stated that the current amount of environmental information was sufficient and that conveying further information would not benefit consumers.

The FCA commented that the agreement deprived consumers of environmental information to inform their purchasing decisions and disincentivized the participants from innovating to improve the environmental performance of their products, thus limiting environmental performance as a feature of product differentiation.

Netherlands Authority for Consumers and Markets (ACM) – Review of Coal Plants Agreement[130]

In September 2013, the ACM reviewed a proposed agreement by members of Energie Nederland (EN), the trade association representing the Dutch energy industry. The agreement pertained to a coordinated plan by electricity producers to shut down five coal power plants that had been built in the 1980s. The ACM evaluated whether the agreement was consistent with Dutch and EU competition law.

In its assessment of the agreement, the ACM observed that the coal plants represented approximately ten percent of production capacity available in the Netherlands and that, if the plants were shut down, the demand served by them would have to be served instead by electricity

[129] Press Release, Autorité de la Concurrence, Cartel in the Floor Coverings Sector (Oct. 19, 2017), https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/19-october-2017-cartel-floor-coverings-sector.

[130] Press Release, Auth. for Consumers & Mkts, *supra* note 38.

production capacity with a higher cost per unit. As a consequence, the agreement would be expected to produce upward pricing pressure on electricity prices.

The ACM proceeded to consider whether the agreement could be saved by the efficiency exclusion under Dutch/EU competition law. The ACM stated that "environmental benefits that are the result of making energy supply more sustainable can be considered benefits" for the purposes of the efficiency exclusion. The closing down of the coal power plants was expected to reduce emissions of carbon dioxide (CO2), sulfur dioxide (SO2), nitrogen oxide (NOx), and particles. But only the reduced emissions from 2016, when the plants were to start being shut down, to 2021 were considered. The agreement would not produce any benefits from 2022 onward because the plants would be expected to be shut down for commercial reasons notwithstanding the agreement.

The EN claimed that the agreement would reduce the average annual emission of CO2 by 4.7 mton, NOx by 1.5 kton, SO2 by 2.0 kton and particles by 0.1 kton. Although the ACM accepted that the agreement would result in environmental benefits from reduced emissions of NOx, SO2 and particles, it argued that the agreement would not have the same impact on CO2. The ACM noted that CO2 was subject to the EU emissions trading system. As a result, if the agreement resulted in certain producers making fewer claims for CO2 emission allowances under the system, these allowances would just be claimed by other producers. In other words, the agreement might reduce the CO2 emissions of some producers but would allow other producers to emit more CO2, thus not reducing CO2 emissions on net.

The ACM calculated the shadow prices of the reduced NOx, SO2 and particles emissions resulting from the agreement and concluded that it would result in environmental benefits valued at EUR 180 million during the entire period. However, it estimated that price effect of the agreement would result in consumers paying EUR 450 million more for electricity during the same period. Consequently, the ACM concluded that the agreement was not saved by the efficiency exclusion because the environmental benefits did not offset the detrimental effect on electricity consumers.

ACM – Review of "Chicken of Tomorrow" Initiative (COT)[131]

In January 2015, the ACM released its assessment of the COT. The purpose of the COT was to further sustainability by establishing minimum standards in the production of chicken that went beyond regulatory requirements. Under the COT, participating supermarkets representing ninety-five percent of the chicken sold to consumers in the Netherlands committed to only selling chicken produced in accordance with COT standards by 2020. The COT would not apply to smaller supermarkets, butchers, poulterers, and market traders, which constituted the other five percent of the chickens sold to consumers, nor would it apply to chicken exporters.

The ACM determined that the COT would restrict competition in the retail market for chicken meat by reducing the ability of consumers to purchase chicken meat that fell below COT standards. The COT would thus limit consumer choice in the purchase of chicken meat. Moreover, by increasing the costs of chicken production, the COT would also likely increase chicken prices. The ACM estimated the costs to consumers from the COT to be EUR 1.46 per kilo of chicken filet.

With respect to the efficiency exclusion, the ACM assessed whether the claimed benefits of the COT in the form of improvements to animal welfare, the environment and public health would offset the potential harm to consumers. In order to estimate these benefits, the ACM conducted a study to determine consumers' willingness to pay for the claimed benefits. The study

131 ACM Chicken of Tomorrow, *supra* note 59.

suggested that consumers would be willing to pay EUR 0.68 per kilo of chicken filet for improved animal welfare and 14 eurocents per kilo of chicken filet for improved environmental effects. The study did not place any value on the COT's claimed benefits to public health because this was to be achieved through the reduced use of antibiotics, which was likely to occur regardless of the COT.

The ACM concluded that the COT's benefits to consumers (totaling EUR 0.82 per kilo of chicken filet) would not be sufficient to offset the harms (which amounted to EUR 1.46 per kilo of chicken filet).

European Commission (EC) – Approval of Environmental Agreements[132]

In 2000, the EC granted approval to a pair of agreements that sought to promote environmental and sustainability objectives.

In the first agreement, the European Council of Manufacturers of Domestic Appliances (CEMED) sought to reduce the energy consumption of domestic washing machines and thereby reduce polluting emissions from power generation. The agreement would cover most of CEMED's membership and the participants to the agreement would make up over ninety-five percent of the EU market. Participants agreed to stop producing and importing the least energy efficient washing machines, and to promote technological development and consumer awareness of the more environment-friendly machines. The agreement also provided for an independent notary to monitor the agreement and report to the EC and CEMED. Although the CEMED agreement would restrict competition by restricting the participants' freedom to manufacture certain types of washing machines, the EC nevertheless found that the agreement would satisfy the efficiency exclusion for the following reasons:

- more efficient and technologically advanced products are likely to replace those phased out;
- savings on electricity bills for individual purchasers more than compensate for potentially higher purchase costs; and
- the agreement is also beneficial in reducing emissions from electricity generation and does not eliminate competition, which is vigorous in this market, as regards prices, washing performance, brand image, etc.

The EC noted that the environmental aspects of the agreement were central to its approval and that competition enforcement and environmental objectives were not contradictory.

In the second agreement, twenty manufacturers of standard low voltage motors, who were part of the European Committee of Manufacturers of Electrical Machines and Power Electronics (CEMEP), sought to reduce the sale of motors that have low energy efficiency and, as a consequence, to reduce toxic emissions. The agreement aimed to establish a 3-category classification and labelling system for these motors, which are used in industrial pumps, ventilators, and compressors, based on their energy efficiency. The agreement was drawn up in coordination with the Directorate-General Transport and Energy and formed part of the EU strategy to reduce emissions of carbon dioxide by improving the energy efficiency of electrical appliances. Under the agreement, the participants committed to reduce sales by fifty percent of the

[132] Press Release, Eur. Comm'n, Commission Approves an Agreement to Improve Energy Efficiency of Washing Machines (Feb. 11, 2000), https://ec.europa.eu/commission/presscorner/detail/en/IP_00_148; Press Release, Eur. Comm'n, Commission Clears European Manufacturers' Agreement to Improve Energy Efficiency of Electric Motors (May 23, 2000), https://ec.europa.eu/commission/presscorner/detail/en/IP_00_508.

least efficient category of appliances. To facilitate the achievement of this target, the CEMEP would publish reports of the participants' aggregate sales.

In its competition assessment, the EC noted that:

- energy efficiency is not a criterion that consumers considered in purchasing appliances because of the lack of homogenous definitions and classifications;
- the CEMEP agreement established an overall target rather than precise individual obligations, thus allowing participants considerable discretion in meeting the objectives of the agreement; and
- the CEMEP would be the one monitoring compliance with the agreement and would not make individual data available to competitors.

The EC concluded that the CEMEP agreement would not amount to a restriction of competition under EU competition law.

Appendix 2:

North America

United States (U.S.) – Business Review Letters Confirming No Action Against Joint Harvesting Agreements[133]

In a series of business review letters to fishing associations and cooperatives, the U.S. Department of Justice (DOJ) confirmed that it did not intend to bring enforcement actions against the proposed joint harvesting agreements. These agreements were developed to sub-allocate among group members the fixed catch quota allotted each group by the U.S. government under the American Fisheries Act. The sub-allocation was desired to overcome the prior "olympic system," which was deemed inefficient and wasteful, as it incentivized all group members to harvest as much as they could as fast as possible, until the group's quota was met. The DOJ identified that the agreements would not appear to have any incremental anticompetitive effect in the regulated output setting in which the agreement would take place. To the contrary, it noted that the sub-allocation agreement could have pro-competitive effects in the form of: (1) more efficient processing that increases output of the processed fish; and (2) the reduction of inadvertent by-catch of other fish species protected by the government.

U.S. – Suit Against Automobile Manufacturers' Agreement Not to Innovate in the Development of Air-Pollution Control Equipment[134]

In this matter, the United States brought an action to prohibit an agreement among manufacturers to suppress the development of environmentally friendly technology. Specifically, the (DOJ) brought a civil action against major automobile manufacturers for conspiracy to eliminate competition in the research, development, and manufacturing of air-pollution control equipment, in violation of the antitrust laws. According to the United States, the defendants had agreed both to develop air-pollution control equipment on a non-competitive basis and to delay the installation of air-pollution control equipment. Notably, the government "alleged that the major U.S. automobile producers entered into an agreement that required all members to grant royalty-free patent licenses to each other and to only take patent licenses from outsiders if all members could obtain the same license under the same terms," which had the effect of eliminating rivalry in the development of pollution-abatement technology.[135] The action was settled through a consent decree enjoining the defendants from engaging in the allegedly illegal conduct.[136]

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[133] Business review letters for Akutan Catcher Vessel Association, Offshore Pollock Catchers Cooperative (OPCC), UniSea Fleet Cooperative, Northern Victor Cooperative, The Arctic Enterprise Association, The Peter Pan Fleet Cooperative, The Westward Fleet Cooperative, Unalaska Fleet Cooperative, and The Mothership Fleet Cooperative. *See generally Business Review Letters of 2000*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/business-review-letters-and-request-letters#page-15.

[134] *See* Complaint at 5-8, United States v. Automobile Mfrs. Ass'n, Inc., 307 F. Supp. 617 (C.D. Cal. 1970) (No. 69-75-JWC). *See also*, United States v. Motor Vehicle Manufacturers Association of the U.S. et al., 643 F. 2d 644.

[135] Anne K. Bingaman, Innovation and Antitrust, Address Before the Commonwealth Club of California (July 29, 1994), https://www.justice.gov/atr/speech/innovation-and-antitrust.

[136] *See* Complaint at 5-8, United States v. Automobile Mfrs. Ass'n, Inc., 307 F. Supp. 617 (C.D. Cal. 1970) (No. 69-75-JWC).

Appendix 3:

Asia Pacific

Australian Competition & Consumer Commission (ACCC) – Authorization of Environmental Levies[137]

The ACCC has granted authorizations to a series of levies set by industry associations to facilitate environmental initiatives. The authorizations provide statutory protection from court action for conduct that would otherwise raise concerns under the competition provisions of the Competition and Consumer Act 2010. Broadly, the ACCC may grant an authorization when it is satisfied that the public benefit outweighs any public detriment.

One such authorization relates to a levy that contributes to the cost of recovering and disposing of ozone-depleting refrigerant gases used in Australia. The scheme allows importers to impose a levy on the importation and sale of refrigerant gases. The levy funds the work of the industry association, Refrigerant Reclaim Australia, relating to the recovery, reclamation, and destruction of refrigerant gases. The ACCC noted that without the authorization, the industry agreement to impose a levy would have raised competition concerns. However, it considered that the impact of the levy on retail prices of refrigerators would be minimal and that the agreement would have significant countervailing benefits, including environmental benefits and assisting Australia in complying with its international greenhouse gas commitments.

The other ACCC authorization relates to a voluntary national scheme for the disposal of batteries. Under this scheme, batteries imported by members would attract a levy. Rebates would then be paid to recyclers to help offset the collecting, sorting, and processing of expired batteries. In order to prevent freeriding on the scheme's benefits, members agreed to deal only with other members along the supply chain (with limited exceptions such as for pre-existing arrangements). The ACCC noted that in the absence of the authorization, the requirement to work only with other scheme members, as well as the collective imposition of the levy, would have raised competition concerns. The ACCC pointed to the environmental benefits of the scheme when explaining the reasons for its authorization.

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[137] Press Release, Austl. Competition & Consumer Comm'n, ACCC Allows an Increase in Refrigerant Gas Levy (May 15, 2008), https://www.accc.gov.au/media-release/accc-allows-an-increase-in-refrigerant-gas-levy; Press Release, Austl. Competition & Consumer Comm'n, Voluntary Battery Stewardship Scheme Granted Authorisation (Sept. 4, 2020), https://www.accc.gov.au/media-release/voluntary-battery-stewardship-scheme-granted-authorisation.