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Competition Law and Sustainability

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A Practice Note discussing the current state of play of sustainability in the context of competition law in several key jurisdictions.

ESG (Environmental, Social, Governance) and CSR (Corporate Social Responsibility) are important when it comes to investment and are considered the new normal.

While many areas of law have already adapted to this shift, competition law still seems to be searching for its place in the "sustainability movement". Combatting climate change is a priority item on the agenda of many governments. However, companies' market behaviour with regard to sustainability objectives (in particular their interaction with competitors) remains framed by competition law. Reconciling both objectives can be challenging. On the one hand, the task of combatting climate change will require contributions on many different fronts, and companies play an important role in this context. On the other hand, companies still have to compete with others in the market.

Imagine a company that wants to build a new production plant and decommission the older "dirty plant" to combat climate change. Given the significant investment this requires, the company may need to increase its prices and risks being at a competitive disadvantage vis-a-vis its competitors: a dilemma also described as the "first-mover disadvantage". To avoid this problem, the company agrees with its two main competitors that they will also modernize their respective plants.

From a sustainability point of view, such co-operation prima facie seems to be welcome. From the perspective of competition law enforcers, this type of co-operation rings alarm bells, and, as has been pointed out by Olivier Guersent, Director General for Competition at the EU Commission, among others, could constitute a prohibited cartel.

This Note provides an overview of the current position of sustainability in the context of competition law in several key jurisdictions.

Sustainability as Freedom to "Greenwash" Cartels?

While some advocate for a more liberal approach of competition law to sustainability co-operation agreements, others rigorously defend competition law principles and argue that empirically it can be shown that the incentives for companies to invest in green technologies are always greater in a competitive market. In a similar vein, the German Federal Cartel Office (FCO) points out that it is almost impossible to quantify with certainty the general welfare improvements that could result from co-operation between competitors.

Overall, this brings to light a much more fundamental conflict: should companies be allowed to achieve sustainability goals by co-operating with competitors or is it sufficient to rely on market forces to create enough incentives for companies to become more sustainable? Much will probably depend on how consumers value sustainability, that is, to what extent they are willing to pay a higher price for a more sustainable product.

Sustainability in the Focus of the Antitrust Authorities

In light of these dynamics, it is not surprising that the topic of sustainability is high on the agenda of many competition regulators. The Dutch Competition Authority was one of the first to publish a detailed guidance paper on how competition law will be applied to sustainability agreements (see Netherlands Authority for Consumers and Markets: Guidelines: Sustainability claims). Greece's Competition Commission followed in its footsteps with a working paper promising new guidelines to support businesses entering into sustainability collaboration arrangements (see Hellenic Competition Commission: Competition Law and Sustainability).

The UK's Competition and Markets Authority (CMA) has also published guidance on the application of competition law to sustainability agreements (see CMA: Guidance: Environmental sustainability agreements and competition law). Most recently, the European Commission has published draft guidance on the assessment of sustainability agreements as part of its draft revised Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal co-operation agreements, which will enter into force on 1 January 2023.

Understanding Regulatory Frameworks

Any collaboration or co-operation between competing businesses must be carefully considered to avoid breaching competition law.

Important issues to consider in evaluating risk in the context of sustainability co-operation include:

- Which government entities enforce the local competition laws.
- How frequently regulators take action against sustainability agreements.
- What procedures regulators follow to investigate cases involving sustainability co-operation.
- What standards apply to evaluating whether a particular practice infringes the jurisdiction's competition laws.
- What guidance documents the regulator has published regarding sustainability agreements, if any.
- How regulators typically resolve cases involving sustainability agreements.

The answers to these questions vary significantly among competition authorities around the world, and impact the risk profile for companies and individuals.

European Union

In the European Union, the general antitrust rules, in particular Article 101(1) of the TFEU which prohibits anti-competitive agreements, apply to collaboration agreements between companies on sustainability issues (see Practice Note, Article 101).

While the European Commission is live to the question on how competition rules and sustainability policies can work together, it seems that the current approach of the European Commission is to provide guidance on the application of the existing rules, with additional guidance on how these should be applied to sustainability agreements, rather than formulating new rules for sustainability co-operation. However, a specific exemption has recently been adopted in the agricultural sector (see Exemption for Agriculture).

The European Commission provides guidance on the assessment of certain co-operation agreements between (actual or potential) competitors in its guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (Horizontal Guidelines). This includes types of agreements that would typically also be relevant in a sustainability context, such as research and development agreements, joint purchasing agreements, production agreements, commercialisation agreements and standardisation agreements. Currently, the Horizontal Guidelines do not deal with sustainability considerations. However, the European Commission is in the process of revising the Horizontal Guidelines (the current version expires at the end of 2022) and a draft of its proposed updated version, issued in March 2022 for consultation, now includes a specific chapter on sustainability agreements (Draft EC Horizonal Guidelines).

Draft EC Horizontal Guidelines: New Chapter on Sustainability Agreements

Assessment of Sustainability Agreements Under Article 101(1) of the TFEU

Sustainability agreements are defined in the Draft EC Horizontal Guidelines as any type of horizontal co-operation agreement that genuinely pursues one or more sustainability objectives, regardless of the form of co-operation. Where such agreements do not affect the parameters of competition (price, quality, quantity, choice, innovation) they will normally not raise any competition concerns and should therefore not be caught under Article 101(1) of the TFEU. Conversely, where sustainability agreements affect one or more parameters of competition they may need to be assessed under Article 101(1) of the TFEU and it will be up to the parties to provide facts and evidence demonstrating that the agreement does promote sustainability and is not used to disguise a by object restriction of competition.

The Draft EC Horizontal Guidelines focus in particular on the analysis of sustainability standardisation agreements, which are expected to be the most frequent form of co-operation for pursuing sustainability objectives. They provide for a "soft" safe harbour under which sustainability standardisation agreements that satisfy certain criteria fall outside the scope of Article 101(1) of the TFEU. These criteria include:

- Transparency.
- Voluntary participation.

- Freedom to adopt higher standards.
- No exchange of sensitive information.
- Non-discriminatory application.
- A monitoring mechanism to ensure compliance.

The soft safe harbour will only apply if the sustainability standardisation agreement will not lead to a "significant increase in price" or a "significant reduction in the choice of products". Unfortunately, the European Commission does not clarify when a price increase could be considered as "significant". Companies should be cautious when assuming that their price increase is insignificant.

Assessment Under Article 101(3) of the TFEU

As with any type of agreement caught under Article 101(1) TFEU, in order to benefit from an individual exemption under Article 101(3) TFEU a sustainability agreement will need to cumulatively meet the four conditions of that provision:

- **Efficiency gains.** The agreement needs to contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress. Any efficiencies claimed will need to be substantiated and cannot simply be assumed. They will need to be objective, concrete and verifiable. If the parties claim their agreement will result in product improvement, they will need to specify the characteristics of that improvement and provide an estimate of the size of the claimed benefit.
- **Indispensability.** The agreement should not include any restrictions that are not indispensable. The parties will need to demonstrate that the agreement, and each of the restrictions on competition it entails, are reasonably necessary to achieve the claimed sustainability benefits. Where legislation already requires businesses to meet a specific sustainability goal, any restrictions in an agreement between competitors aimed achieving that goal will not qualify as indispensable, unless the aim of the co-operation agreement is to reach that goal in a more cost efficient way.

  The Draft EC Horizontal Guidelines recognise that a sustainability agreement may be needed to avoid free-riding on investments that are necessary to achieve a sustainability goal (first mover disadvantages), or to achieve economies of scale to cover the fixed costs of setting up, operating and monitoring a sustainability standard or green label.
- **Pass-on to consumers.** Consumers must receive a fair share of the claimed benefits. This will be the case where the benefits resulting from the agreement outweigh the harm caused by it, and the sustainability benefits must therefore relate to the consumers of the products that are covered by the agreement. The Draft EC Horizontal Guidelines differentiate between three different types of consumer benefits:
  - individual use value benefits;
  - individual non-use value benefits; and
  - collective benefits.

  The assessment of whether the benefits of an agreement outweigh the harm of any restriction on competition should normally be done on the relevant market to which the agreement relates, but where two markets are related, efficiencies achieved on separate markets can be taken into account as long as the consumers affected by the restriction benefiting from the efficiencies are substantially the same.
- **No elimination of competition.** Finally, the agreement must not allow the parties to eliminate competition in respect of a substantial part of the relevant products. This condition will be met even if the agreement relates to the entire industry, provided the parties to the agreement continue to compete on at least one key aspect of competition, such as price, quality, variety. The elimination of competition for a limited period of time (for example, to introduce to the market a sustainable substitute for an existing product), will also not be an obstacle, provided there is no impact on competition in that market once the period lapses.

The Draft EC Horizontal Guidelines also make it clear that the knowledge or involvement of public authorities in a sustainability agreement does not necessarily mean that the agreement is compatible with the competition rules and that the parties cannot be liable for infringement, unless they were compelled or required by the authorities to enter into the agreement.

A co-operation agreement may also benefit from a "safe harbour" under one of the European Commission's Block Exemption Regulations. Block Exemption Regulations that could be relevant in the context of collaboration agreements on sustainability issues include the Block Exemption Regulation on certain categories of R&D agreements (Commission Regulation (EU) 1217/2010), the Block Exemption Regulation on certain categories of specialisation agreements (Commission Regulation (EU) 1218/2020) and the Block Exemption Regulation on categories of vertical agreements and concerted practices (Commission Regulation (EU) 330/2010). All three Block Exemption Regulations are due to expire in 2022 and are also currently being reviewed by the European Commission.

Exemption for Agriculture

Regarding the agricultural sector, the EU has recently introduced a specific derogation from Article 101(1) of the TFEU for certain sustainability agreements. Regulation (EU) 2021/2117 of 2 December 2021, which amends the Common Market Organisation Regulation, provides that Article 101(1) of the TFEU shall not apply to sustainability agreements concluded between producers and/or other actors in the food value chain aimed at achieving higher standards than required by EU or national law in terms of environmental protection, climate change prevention, animal health and animal welfare (*Article 210a, TFEU*). The derogation applies only if the restrictions of competition resulting from the agreement are indispensable for the achievement of the desired standard, that is, they do not restrict competition more than necessary. The European Commission needs to issue guidelines on the conditions for the application of the derogation by 8 December 2023. From this date, producers may also request an opinion from the European Commission on the compatibility of agreements, decisions, and concerted practices with this derogation which the European Commission shall issue within four months of receipt of a complete request.

UK

In the UK, sustainability agreements are assessed under Chapter I of the Competition Act 1998 (CA 1998) which prohibits agreements, decisions and concerted practices between undertakings which have as their object or effect the restriction, distortion or prevention of competition within the UK (see Practice Note, Chapter I prohibition). As with the European Commission, the CMA has adopted an approach of positioning sustainability agreements within the existing antitrust framework and in January 2021 issued guidance (see CMA: Guidance: Environmental sustainability agreements and competition law (CMA Guidance)) to help firms engage in collaborative agreements in the context of sustainability in a competition compliant manner. Here, the CMA defines sustainability agreements as "co-operation agreements between businesses (including industry-wide initiatives and decisions of trade associations) for the attainment of sustainability goals, such as tackling climate change". It goes on to acknowledge that sustainability can have a broad definition, but states that the scope of the guidance issued so far is limited to the environmental aspect.

The CMA Guidance sets out the following framework for assessment to be applied to sustainability agreements. As yet there has not been any case law which gives additional insight into the practical application of this framework to sustainability agreements.

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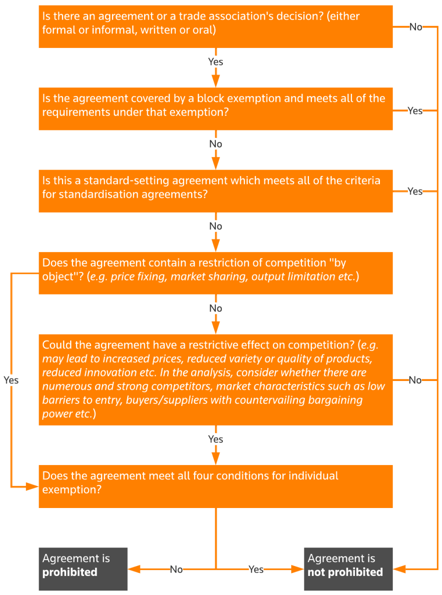
CMA framework for assessment of sustainability agreements



Source: CMA Guidance Environmental sustainability agreements and competition law, 27 January 2021

Within the CMA Guidance, the following types of arrangements are considered in greater detail:

- **Standard Setting Agreements.** Standardisation Agreements are an EU concept, defined within the Horizontal Guidelines as those which have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply. Not inherently anti-competitive, the Horizontal Guidelines specify at section 7.4.1 by way of example that "standards on for instance quality, safety and environmental aspects of a product may ... facilitate consumer choice and can lead to increased product quality." The CMA Guidance does not elaborate on such agreements in the context of sustainability, and instead gives general advice to say that access to the standard should be fair and reasonable, and that standardisation agreements should not make it difficult for businesses to develop alternative standards, or products that do not comply with the standard.
- **Avoiding Serious Restrictions of Competition and Anti-Competitive Behaviour.** The CMA Guidance refers to the most serious forms of anti-competitive behaviour including "by object" restrictions, business cartels and the sharing of competitively sensitive information (CSI), setting out a brief description of each. In its separate guidance on CSI the CMA defines

CSI as "any non-public strategic information about a business' commercial policy [including] future pricing and output plans" (see CMA: Guidance: Managing competitively sensitive information). In the context of sustainability agreements, therefore, it is imperative to exercise caution when discussing prospective plans with competitors, and the CMA recommends that firms seek the advice of a competition lawyer whenever unsure.

- **Exemptions.** Sustainability agreements assessed under the CA 1998 benefit from the same exemptions, or "safe harbours" provided for under the EU block exemption regulations as retained in the UK or for agreements of minor importance (see European Union). The CMA makes particular reference to the market share thresholds which provide that an agreement would generally be unlikely to breach competition law if the market share of the business involved does not exceed the thresholds specified by the relevant exemption.

Although the CMA's guidance so far has been limited to interpreting existing antitrust guidance and regulations, there have been some high level indicators of possible areas of future focus. One of the CMA's current key themes, as set out in its annual plan for 2021/22 is "supporting the transition to a low carbon economy". This looks set to stay, as one of the themes in the 2022/23 annual plan is "supporting the transition to low carbon growth, including through the development of healthy competitive markets in sustainable products and services".

According to the CMA's Sustainability Blog, there is currently an ongoing international discussion on the interplay between competition law and environmental sustainability, focusing on topics including:

- Whether efficiencies generated by sustainability agreements (for example, in the form of reduced Co2 emissions, increased biodiversity, reduced waste) can be taken into account if they benefit society as a whole rather than a group of consumers affected by the agreement.
- How these efficiencies should be evaluated and measured.

In addition, the CMA is led in its approach by the overall government strategy, as in July 2021 the Department for Business, Energy and Industrial Strategy (BEIS) commissioned the CMA to provide advice on how competition and consumer regimes could better support the UK's net zero and environmental sustainability goals (see BEIS: Letter from Kwasi Kwarteng (19 July 2021).

In response, the CMA ran a consultation seeking views from a wide range of stakeholders with an interest in these issues by early 2022. It published its advice to government in March 2022 (see Legal update, CMA advice to government on how competition and consumer regimes can support environmental sustainability goals), in which it responded to the three prescribed questions as follows:

- If, and how, do current competition and consumer legal frameworks constrain or frustrate initiatives that might support the UK's Net Zero and sustainability goals?

  The CMA concluded that it had not seen evidence to suggest that the current competition and consumer law frameworks are an obstacle to sustainability initiatives and considers that there is some flexibility under the current legal framework to accommodate environmental benefits brought about by agreements that restrict competition. However, it noted that there was scope to enhance the existing legal framework and leaves open the possibility of amending it if necessary.

  The CMA stated that it intends to provide more guidance on when sustainability agreements will not restrict competition; the concept (and measurement) of "benefits" in section 9 of the CA 1998 (conditions for exemption from the Chapter I prohibition) in a sustainability context; and the issue of what constitutes a "fair share" of benefits for consumers for the purposes of benefiting from an exemption.

- Are there changes to the UK's competition and consumer law that would help to achieve the UK's Net Zero and sustainability goals?

  CMA stated that while there was no need for immediate significant change to the frameworks, possible amendments to consumer law could clarify the existing framework. Recommendations included creating standardised definitions of commonly used environmental terms, requiring mandatory disclosure of certain information (for example, recyclability and durability), and extending consumer protection remedies to address harm to the environment caused by commercial practices.

- Are there other opportunities within the UK's competition and consumer policy toolbox that would support the UK's Net Zero and sustainability goals, which the government should be considering?

  The CMA sets out several actions it intends to take to increase the positive impact of the competition and consumer regimes on sustainability. These include launching an internal sustainability taskforce which will engage with stakeholders, develop formal guidance, maintain a network of experts to inform the CMA's work going forward and contribute to overall organisational strategy. The CMA also committed to launching at least one new market study in a net-zero relevant market in the next year, following its recent study into electric vehicle charge points.

As the CMA grows into its new role as an enforcer of sustainable business, it should seek to develop an arsenal of complementary powers allowing for a holistic approach to regulation. Although its guidance on sustainability agreements is currently high level, it can be expected to become more detailed and focused as and when the CMA gains experience in this area.

US

In the United States, the general antitrust laws, including Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits contracts, combinations, or conspiracies in restraint of trade or commerce, as well as Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair methods of competition, may apply to collaboration agreements between companies on sustainability issues.

The US Department of Justice and the Federal Trade Commission (Antitrust Agencies) have not issued specific guidance on how sustainability may be promoted within the context of the US antitrust laws. As a result, existing US antitrust authorities and guidance should inform any assessment of the legality of proposed collaborations, including the Antitrust Agencies' non-binding guidance on the Antitrust Guidelines for Collaborations Among Competitors (Guidelines), issued in April 2000 (see Practice Notes, Section 1 of the Sherman Act: Overview and Competitor Collaborations in the US).

The following are some of the rules that may influence the analysis of collaborations between competitors on sustainability issues:

- **Safety zones.** Antitrust "safety zones" could conceivably be employed to engage in collaborations on sustainability. While the Guidelines do not specifically address sustainability, they establish the two safety zones for arrangements the Antitrust Agencies believe to be unlikely to yield anti-competitive effects and are therefore presumed to be lawful. The first safety zone applies to any form of collaboration where the market shares of the collaborating entities collectively account for no more than 20% of each relevant market in which competition may be affected, provided, *inter alia*, that the arrangement is not per se illegal. The second safety zone applies to R&D arrangements. Absent extraordinary circumstances, the Antitrust Agencies will not challenge a collaboration in an "innovation market" where three or more independently controlled research efforts, in addition to those of the collaboration, possess the required specialised assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration. The Antitrust Agencies have recognised that collaboration on R&D is typically pro-competitive, and that sharing technical know-how, rather than company-specific data about prices, wages, outputs, or costs, may be necessary to achieve the pro-competitive benefits of certain collaborations.
- **Standard setting.** Collaborations that seek to harness the potential for new technologies to promote sustainability by setting industry standards may be compatible with US antitrust laws. Given the significant impact of new technologies on sustainability initiatives, it is worth noting that private companies may lawfully collaborate for the purpose of setting industry standards (including standards relating to sustainability), unless, for example, the collaboration facilitates collusion. Private standard setting by competitors in a market (a form of collaboration that might otherwise be viewed as a naked agreement among competitors not to manufacture, distribute, or purchase certain categories of products) may be lawful when pursued in a non-partisan manner that yields pro-competitive benefits. However, if competitors employ standard setting as a mechanism to limit competition or erect barriers to entry, the collaboration may be unlawful (see, for example, *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494 (2015) (state dental association standard that restricted teeth whitening procedures, a task traditionally performed without a license, to licensed dentists held to be an unlawful restraint of trade)) (see Practice Note, Antitrust Risks in Standard-Setting Organizations).
- **Pro-competitive effects analysis.** Notwithstanding the above, no US court has held the promotion of sustainability, without more, to constitute a relevant pro-competitive benefit under US antitrust law. Under a so-called Rule of Reason analysis, which is the level of scrutiny applied to most arrangements under US antitrust law, courts will engage in a fact-intensive, burden-shifting assessment that weighs the claimed pro-competitive benefits of an arrangement against its anti-competitive effects. However, there are two relevant limitations. First, courts will not inquire into the pro-competitive benefits of an arrangement if the arrangement is deemed to be per se unlawful, for example, if it involves price fixing or group boycotts. Second, even under a Rule of Reason analysis, any purported benefits arising from an arrangement that are unrelated to competition may be deemed to be irrelevant to the US antitrust analysis. In other words, the fact that an arrangement generally tends to promote social welfare (including, for example, sustainability goals), will not render an arrangement permissible under Section 1, unless the arrangement is separately shown to have specific pro-competitive effects, such as higher output, lower prices, an alleviation of market failure, or a promotion of the competitive process.

In this connection, the previous head of the Antitrust Division of the Department of Justice observed in published comments in 2019 that "[t]he loftiest of purported motivations do not excuse anti-competitive collusion among rivals." For example, the Supreme Court has rejected the argument that an attempt to restrict competitive bidding among engineers could be justified on the basis of "public safety" (see *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, (1978)). Similarly, the Court rejected an argument that improving the quality of legal representation for indigent defendants through a group boycott could be justified based on its goal of setting a reasonable price for such representation, since the "social justifications" for defendants' conduct did not render it any less unlawful, and the Sherman Act precludes any inquiry into whether competition is "good or bad" (see *F.T.C. v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411 (1990)).

- **The Noerr-Pennington Doctrine.** Finally, the doctrine articulated by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127* (1961) and *United Mine Workers v. Pennington, 381 U.S. 657* (1965) (the Noerr-Pennington Doctrine) may be relevant to consider in the context of collaborations between companies on sustainability issues. The Noerr-Pennington Doctrine generally permits competitors to engage in certain "political activity" with implications for competition, for example, petitioning the government and advocating for specific legislation or policies that, if implemented, could tend to harm competition. Noerr involved the legality of a publicity campaign waged by railroads that was designed to foster the adoption of laws that would be destructive of the railroads' primary competitors, that is, the trucking business. The court held that because the railroads' campaign was directed at obtaining government action, it was not prohibited under the Sherman Act, and was not rendered unlawful based solely on the alleged anti-competitive intent that may have motivated the railroads' campaign. Accordingly, under the Noerr-Pennington Doctrine, companies could conceivably advocate for and solicit government action on legislation or policies that would promote sustainability without violating US antitrust laws, even if the measures (if enacted) would tend to diminish competition in a particular market (see Practice Note, Noerr-Pennington Antitrust Immunity).

In terms of possible future policy initiatives, US President Joseph R. Biden issued an Executive Order on "Promoting Competition in the American Economy" on 9 July 2021, which represents the Administration's most extensive statement on US antitrust policy to date (see Legal Update, President Biden Signs Executive Order to Restore Competition). The Order generally affirmed the policy of the Administration to enforce the US antitrust laws by combatting excessive concentration in industry, abuses of market power, and the harmful effects of monopoly and monopsony. The Order announced a "whole-of-government" approach in these efforts. However, the Order notably did not articulate any specific policy initiatives with respect to promoting sustainability or otherwise address the impact of the US antitrust laws on collaborations involving sustainability.

Asia

At this stage, there has not been a clear focus on the intersection of sustainability and competition law in Asia. In all the jurisdictions examined (Brunei, Cambodia, China, Hong Kong, India, Indonesia, Japan, Korea, Laos, Malaysia, Myanmar, Pakistan, Philippines, Singapore, Taiwan, Thailand, Vietnam), the relevant competition prohibition is the general prohibition against anti-competitive agreements/arrangements: there is no specific prohibition that would only apply to collaboration agreements between companies on sustainability issues.

The laws in each of these jurisdictions include potential exemptions that could, if the facts allow, be applied to agreements, such as those on sustainability issues. Typically, these exemptions are described as applying in circumstances where the arrangement serves to improve quality, industrial development, technological innovation, or operational efficiency, while allowing consumers a fair share of the resulting benefit. The laws in Cambodia and Malaysia specifically refer to arrangements that have significant identifiable social benefits, although no further explanation of this criterion is provided (and the Malaysia Competition Commission announced in its strategic plan for 2021-25 that it will study how the country's competition act could encourage the ESG agenda). Therefore if the benefits flowing from a collaboration agreement between companies on sustainability issues can be shoe-horned into one of these existing categories, then an exemption from the general prohibition may be available. To date, however, there has been very limited guidance from the competition authorities in Asia.

Further information on select jurisdictions is set out below. Singapore is included as one of the more mature jurisdictions that incorporates many of the exemptions found in other jurisdictions.

China

China is the only country in APAC that explicitly incorporates the concept of "sustainability" into its competition law.

Articles 13 and 14 of the Anti-Monopoly Law (AML) prohibit anti-competitive agreements (known as monopoly agreements) similar to Article 101 (1) of the TFEU. These Articles have general application and could apply to collaboration agreements between companies on sustainability issues.

Article 15 of the AML sets out a list of potential exemptions to Articles 13 and 14. The fourth exemption disapplies Articles 13 and 14 of the AML if it can be proven, first, that the agreement or collaboration serves public interests in energy conservation, environmental protection, or disaster relief, and second, that the agreements reached will not substantially restrict competition in the relevant market and that consumers will share the benefits derived therefrom. To date, there have been no published cases applying the Article 15 AML exemption and no additional guidance is available.

Japan

Article 3 of the Antimonopoly Act is the general provision against monopolisation or unreasonable restraints of trade. This could apply to collaboration agreements between companies on sustainability issues.

Unlike the law in China, there are no specific exemptions in the Japanese Act that relate to sustainability. That said, the Japan Fair Trade Commission (JFTC) has demonstrated flexibility in assessing such agreements. Reiko Aoki, a commissioner of the JFTC, has noted that the JFTC may be willing to "trade off social benefits" to relevant issues that might otherwise restrict competition. For example, in June 2020, the JFTC allowed three convenience stores to agree to set plastic bag prices at three yen, partly because such agreement will benefit the environment.

Singapore

Section 34 of the Competition Act, which prohibits anti-competitive agreements, is the general prohibition that could apply to collaboration agreements between companies on sustainability issues. There are no specific guidelines or exemptions for sustainability collaboration agreements. Further, there is no precedent to show that the Competition Commission of Singapore (CCCS) and the Competition Appeal Board have considered sustainability initiatives. Having said that, pursuant to paragraphs 2.5 and 2.6 of Business Collaboration Guidance Note, an anti-competitive agreement may still be exempt if its economic benefits (for instance, lower costs, improvements in the quality or services, or the production of new innovative products) outweigh the negative competition effects and cannot be achieved without the agreement and any restrictions in it.

The CCCS has declared sustainability to be one of the key priorities in 2022. In 2021, it invited proposals for research on sustainability, competition and consumer protection in Singapore, including but not limited to quantifying environmental benefit of businesses collaborations that may harm competition. As such, guidelines or policies regarding sustainability collaboration agreements may be forthcoming from the authority.

Australia

Australia's cartel laws and general prohibitions against anti-competitive conduct apply to sustainability collaborations. However, the Competition and Consumer Act 2010 (CCA) contains provisions which allow, following an authorisation application, for firms to engage in collaborative activity that has net public benefits (including sustainability or environmental benefits).

Australia's cartel laws strictly prohibit any contract, arrangement or understanding between competitors (or potential competitors) that has either:

- The purpose or effect of fixing, controlling or maintaining prices.
- The purpose of restricting output or acquisitions, colluding in tender or rigging bids, or sharing markets by allocating customers, suppliers, territories, product lines or areas of business.

There is an exception to the cartel prohibitions for certain forms of collaborative joint venture arrangements. The joint venture exception will apply if:

- The joint venture is for the production, supply or acquisition of goods or services.
- The joint venture is not for the purposes of substantially lessening competition.
- The cartel provision is for the purposes of, and reasonably necessary for, undertaking the joint venture.

Where the exception applies, a cartel provision will only contravene the CCA if it has the purpose, effect or likely effect of substantially lessening competition.

If competitors are intending to enter into a sustainability collaboration agreement, then they may structure the arrangements so as to benefit from the joint venture exception and "self-assess" the extent to which this exception applies.

In circumstances where the joint venture exception may not apply, or where the parties are seeking further comfort regarding the competition law risk, parties may seek authorisation from the Australian Competition and Consumer Commission (ACCC) on net public benefit grounds.

There are also anti-overlap rules. If an arrangement constitutes both cartel conduct and exclusive dealing (as defined in section 47 of the CCA), then the conduct is not assessed as cartel conduct with strict liability but is rather subjected to a competition test before being considered unlawful.

ACCC Guidelines

In March 2019, the ACCC published its Guidelines for Authorisation of Conduct (non-merger) (ACCC Guidelines) which aim to provide information to potential applications about the authorisation process and the analytical framework implemented by the ACCC.

The ACCC Guidelines specifically note that public benefits include environmental benefits.

In particular, the ACCC notes that most public benefits that it accepts can be attributed to improvements in economic efficiency through addressing a source of market failure or market imperfection. Environmental benefits may often be achieved through addressing an externality. As stated in the ACCC's Guidelines:

> "An externality is when some of the benefits or costs from an activity are incurred by third parties and are not considered by individuals when making production and consumption decisions. Where there are externalities, prices do not fully reflect all the costs and benefits of production and consumption and can result in too little, or too much, of the goods and services being produced and consumed."

The ability to obtain authorisation based on achieving environmental public benefits was also recognised in a speech in 2013 by the former ACCC Deputy Chair Delia Rickard, where she stated:

> "On the competition side of the ACCC's work, particularly our authorisation work, we've been working to ensure that schemes purporting to deliver environmental benefits do indeed lead to such important public benefits that outweigh any anti-competitive detriment."

(See Australian Competition and Consumer Commission: Creating an affordable, secure and sustainable energy market.)

Enforcement Frameworks

European Union

Since entry into force of Regulation (EC) 1/2003 (Regulation 1/2003), the European Commission has moved away from granting individual exemptions from Article 101(1) of the TFEU towards a system of self-assessment. Consequently, companies themselves are responsible for assessing the legality of their agreements and practices. Nevertheless, the European Commission has communicated that it is open to consider requests by companies for individual guidance letters in relation to sustainability initiatives that raise novel issues. By way of example, in the car emissions case (see German car sector: Car emissions), the European Commission published a letter to the parties setting out areas of co-operation which it did not deem necessary to investigate further as a competition law infringement (see European Commission: Case AT.40178 - Car Emissions.

Furthermore, the European Commission can adopt decisions finding that the competition rules do not apply to sustainability initiatives (pursuant to Article 10 of Regulation 1/2003) where the public interest so requires.

Similarly, regulators in many EU member states have indicated that they are prepared to enter into a dialogue with companies willing to co-operate at an early stage to examine the admissibility of projects under antitrust law. In Germany, companies are already benefiting in this respect from a recent revision of competition law: The FCO must issue a statement within six months on whether co-operation between companies is permissible. The Greek competition authority introduced a competition law sustainability "sandbox". Within such safe space the industry can experiment with new business formats that aim to realise more quickly and efficiently sustainability goals, and which involve co-operation between competing undertakings or even more permanent changes in market structure.

UK

Historically, parties were able to seek guidance (not just in relation to sustainability agreements) from the CMA in the form of a Short-form Opinion to confirm the compatibility of specific proposed arrangements with competition law. This procedure was withdrawn in July 2021, and no similar processes have been introduced since. The CMA has however indicated that it will consider giving, through opinions or other means, its non-binding views on the application of competition law to novel questions.

US

Parties may request an Advisory Opinion from the Bureau of Competition of the Federal Trade Commission, see *16 C.F.R. §§ 1.1 – 1.4*, or a Business Review from the Antitrust Division of the Department of Justice, see *28 C.F.R. § 50.6* (see Practice Note, Seeking DOJ Business Review Letters and FTC Advisory Opinions).

Asia

As with horizontal co-operation agreements generally, it is possible to ask the competition authorities in Hong Kong, China, Taiwan, Japan, Brunei, Cambodia, Malaysia, Singapore, Thailand, Vietnam, Pakistan, Indonesia and the Philippines to assess the legality of a planned sustainability collaboration agreement by way of applying for individual exemptions or requesting pre-notification consultations. However, it is not possible to receive a comfort letter or non-enforcement letter from the authorities.

As for Korea, Laos and Myanmar, since there is no option of granting individual exemptions or pre-notification consultations, companies themselves are responsible for assessing the legality of their agreements and practices.

Australia

The ACCC does not provide comfort or non-enforcement letters in respect of conduct outside of the formal authorisation or notification processes.

Businesses seeking to enter into sustainability focused collaboration agreements can "self-assess" their compliance with the joint venture exception. Most likely, however, parties will seek authorisation from the ACCC on net public benefit grounds as a successful authorisation application provides statutory immunity and certainty regarding the arrangements.

A party may apply for authorisation from the ACCC to enter into a proposed sustainability collaboration agreement that may otherwise contravene Australia's competition laws. If obtained, the applicant is granted statutory protection from legal action under the CCA for the period of time specified in the authorisation.

The test that the ACCC will apply depends on the type of conduct being authorised. For cartel conduct, the ACCC may only grant authorisation if it is satisfied that the conduct will result in net public benefits (that is, the ACCC is satisfied in all the circumstances that the conduct would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct).

Public benefits are defined broadly as "anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress"(*Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242*; cited with approval in *Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677*). Such public benefits include benefits to the environment.

Similarly, public detriments are defined broadly as "any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency" (*Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683*). While not limited, the most common public detriments considered by the ACCC in assessing authorisation applications relate to detriments arising from the authorised conduct leading to a reduction in competition.

The authorisation process is public, with applications and submissions published by the ACCC (subject to redactions for confidentiality). Third parties are invited to make submissions in relation to applications. The process takes a maximum of six months. Decisions of the ACCC may be appealed to the Australian Competition Tribunal.

The ACCC encourages parties to contact it before lodging an authorisation application. However, given the availability of authorisation, it is not in the practice of issuing comfort letters.

These options are well understood and it is relatively common for parties to apply for and obtain ACCC authorisation for collaborations with environmental benefits.

Practical Guidance in Notable Cases

European Union

In July 2021, the European Commission imposed a fine of EUR875 million against the three car manufacturers Daimler, BMW and Volkswagen group in the car emissions case (*Case* AT.40178).

The European Commission found that the car manufacturers breached EU antitrust rules by colluding on technical development in the area of nitrogen oxide cleaning. According to the findings of the European Commission, the companies had co-ordinated AdBlue tank sizes and ranges between refills and exchanged information about assumed average AdBlue-consumption. The European Commission found this conduct to be by its very nature capable of restricting competition with regard to product characteristics of their new diesel passenger car models and thereby limiting technical development and customer choice.

Also, at an EU member state level, the regulators are highly active. For example, in Germany the following recent developments are noteworthy:

- The German retail sector voluntarily committed to responsible procurement practices for bananas (see Bundeskartellamt: Achieving sustainability in a competitive environment: Bundeskartellamt concludes examination of sector initiatives). The participating companies agreed to develop processes to monitor transparent wages and plans to gradually increase the sales volume of bananas which are produced and procured in line with criteria providing for a living wage.

The FCO assessed this initiative and concluded that it complies with competition law restrictions since the co-operation does not involve:

- information exchange on competitive parameters, that is, procurement prices, other costs, production volumes and margins; or
- the introduction of minimum prices or surcharges.

- The animal welfare initiative (*Initiative Tierwohl*) is an agreement between the agricultural, meat production and food retail sectors. Livestock owners are rewarded for improving the conditions in which animals are kept.

  Since its beginning in 2012, the FCO closely monitors the initiative. The co-operation was tolerated for a transitional period due to the project's pioneering nature, free access to the initiative for other retailers and because there were no concerns about sensitive information exchange.

  With respect to a planned extension of the initiative in the field of fattening cattle, the FCO requested amendments. In particular, the FCO stressed that companies should introduce labels so that consumers can identify meat produced in line with animal welfare criteria. In addition, and this will be subject to further discussions, the initiative should gradually introduce competition elements in the financing model.

- The FCO voiced concerns regarding a financing concept that certain milk producers discussed with the agency (see Bundeskartellamt: Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law).

  The concept envisaged to apply retroactive surcharges to raw milk prices. These surcharges should enable producers to cover their production costs.

  In the FCO's view, this would contain price-fixing elements and result in an industry-wide price rise. The FCO found that the initiative did not cater for sufficient sustainability criteria and, consequently, did not see any justification.

- Also in the milk sector, the FCO has no serious competition law concerns against the introduction of the "industry agreement milk" (*Branchenvereinigung Milch*) which encompasses the introduction of a label for products which fulfil the animal welfare criteria set by the QM+ programme, and the financing of the additional costs incurred through a so-called animal welfare surcharge payable to farmers.

Applying its sustainability guidance the Dutch Authority for Consumers and Markets (ACM) earlier this year approved an agreement between distribution system operators aimed at reducing Co2 emissions. The operators agreed to use a uniform price for Co2 calculation models for grid investments to make it more attractive to invest in projects resulting in lower Co2 emissions. The ACM concluded that the sustainability benefits resulting from the arrangement outweigh the potential higher cost for users and approved the scheme.

The ACM has previously also approved a joint purchase arrangement by VEMW (an association for business energy and water users) for electricity purchased from a wind farm. The arrangement allowed all members of the VEMW to procure green energy directly from the producer and allowed them to promote the production of sustainable energy.

UK

While there have not yet been any cases directly considering sustainability agreements, the CMA has shown an interest in certain sectors in other areas of its sustainability work. In 2020, the CMA launched an investigation into the market for Electric Vehicles. The final report makes recommendations around government intervention rather than addressing specific commercial agreements. However, it is easy to see how this is a growing sector in which collaboration between undertakings will be necessary, whether in the form of standard setting or knowledge sharing agreements.

In relation to its separate work on the regulation of environmental claims, where it has introduced the Green Claims Code, the CMA launched a compliance review of the fashion industry in January 2022.

US

The most significant recent action was an investigation initiated under the previous US Administration. In September 2019, the Department of Justice announced an investigation into four major car manufacturers, BMW AG, Ford Motor Company, Honda Motor Company and Volkswagen Group. The manufacturers had entered into a voluntary agreement with the State of California to meet certain fuel efficiency standards. In public statements at the time, the Head of the Antitrust Division of the Department of Justice warned of consumer harm in the form of higher prices that would result from the deal, which effectively committed the four manufacturers to produce cars with a higher average fuel efficiency than required by US national standards.

Under US antitrust law, it would not be unlawful for each manufacturer to commit to the State of California to adhere to the efficiency standards. However, if the manufacturers had discussed the efficiency standards among themselves and agreed to implement them, in addition to agreement to do so with California, this would arguably satisfy the requirement under Section 1 of the Sherman Act that there be a contract, combination, or conspiracy in restraint of trade (subject to a complex set of issues under the Noerr-Pennington doctrine and, potentially, the Act of State doctrine, which immunises from antitrust scrutiny actions taken by government or compelled by law).

The investigation ended without further action in 2020. Nevertheless, the investigation may have had the effect of increasing the perception in industry of antitrust-related risk arising from potential collaborations on sustainability.

Asia

There are no notable cases in Asia that we are aware of.

Australia

There are several instances where the ACCC has granted authorisation on the basis that the proposed arrangements would give rise to environmental benefits.

For example, on 16 December 2021, the ACCC granted authorisation to the Metropolitan Waste and Resource Recovery Group to conduct a collaborative tender process to procure sorting services for comingled household recyclable waste collected from residents' kerbsides. The ACCC found that it would lead to high quality recyclable materials, an increase in the resource recovery rate, and more diversion of recyclable waste from landfill.

Further, several authorisations have been granted by the ACCC to facilitate the managing, and proper disposal, of certain end of life products, which gives rise to environmental public benefits. Recent examples include:

- In 2021, the ACCC granted authorisation to Paintback Limited in respect of a scheme to safely dispose of architectural and design paints (see ACCC: ACCC re-authorises industry levy to fund paint collection and recycling activities). The ACCC found that the reduction in improperly disposed paint is a "significant public benefit in the form of an environmental benefit".
- In 2021, the ACCC granted authorisation to Refrigerant Reclaim Australia Limited in respect of its operation of a product stewardship programme to recover ozone depleting and synthetic greenhouse gas refrigerants (see ACCC: ACCC authorises refrigerant gas product stewardship scheme for further 10 years). The ACCC concluded that this scheme would lead to public benefits by reducing environmentally damaging emissions of greenhouse gases.
- In 2020, the ACCC granted authorisation to the Battery Stewardship Council in respect of a national stewardship scheme for end of life batteries (see ACCC: Voluntary battery stewardship scheme granted authorisation). The aim of the scheme is to provide appropriate disposal and re-use of end of life batteries by imposing a levy on imported batteries, which will be used to fund rebates for recyclers at the collection, sorting and processing stages. The ACCC noted that the scheme is likely to increase the number of batteries that will be appropriately recycled and as such, "is likely to result in significant environmental benefits."
- In 2018, the ACCC granted authorisation to Tyre Stewardship Australia in respect of a scheme seeking to increase the rate of end of life tyres being put to environmentally sound use (see ACCC: ACCC re-authorises Tyre Stewardship Scheme). The ACCC noted that the scheme would lead to clear public benefits through the reduction in environmental and safety hazards.