

GREENER DEALS, CLEANER RULES: HOW ANTITRUST AGENCIES CAN BUILD REASONABLE CONSENSUS ON SUSTAINABILITY AGREEMENTS

Acordos Mais Verdes, Regras Mais Limpas: Como Autoridades Antitruste Podem Construir Um Consenso Razoável Sobre Acordos de Sustentabilidade

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Abstract: The article explores pragmatic solutions that antitrust agencies can adopt to move toward a reasonable global consensus on how to assess sustainability agreements between competitors. It begins by highlighting the essential role of cooperation among antitrust authorities in addressing climate change. The article then outlines practical suggestions to foster such cooperation, focusing on three key avenues: (i) active participation in multilateral discussions within international organizations and forums aimed at building common ground on the intersection of antitrust and sustainability; (ii) the development of local best practices and guidelines, and their sharing at the international level; and (iii) the use of competition advocacy to support the creation and consolidation of these practices.

Keywords: sustainability; climate change; energy transition; antitrust agencies; cooperation.

Resumo: O artigo aborda soluções pragmáticas que autoridades antitruste podem adotar para avançar em direção a um consenso global razoável no que se refere a acordos de sustentabilidade entre concorrentes. Inicialmente, destaca-se o papel essencial da cooperação entre essas autoridades no en-

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frentamento das mudanças climáticas. Em seguida, o artigo apresenta sugestões práticas para fomentar essa cooperação, com foco em três frentes principais: (i) a participação ativa em discussões multilaterais no âmbito de organizações e fóruns internacionais voltados à construção de entendimentos comuns sobre a interface entre antitruste e sustentabilidade; (ii) o desenvolvimento de boas práticas e diretrizes em nível local, com posterior compartilhamento internacional; e (iii) o uso da advocacia da concorrência como instrumento de apoio à criação e consolidação dessas práticas.

Palavras-chave: sustentabilidade; mudança climática; transição energética; autoridades de antitruste; cooperação.

I. Introduction

Obvious things are easy to ignore. As the University of Chicago professor and Freakonomics author Steven Levitt once said: “*The most obvious things are often right there, but you don’t think about them because you’ve narrowed your vision.*”⁴ When such things are problems, our narrow vision can also blind us to simple solutions and – rather strangely – lead us to overthink about the most complicated ones, fostering the so-called “analysis-paralysis”, while distancing ourselves from the expected outcomes.

Such “analysis-paralysis” is particularly harmful when we must tackle serious and imminent problems, such as climate change. It has already been warned that market forces themselves will not solve this problem, due to market failures.⁵ A company may feel discouraged from adopting more sustainable practices due to the fear that it will not be able to maintain competitive prices in the face of its competitors who continue to use more polluting methods.

Given this, it seems essential that companies act together to achieve sustainable goals. However, companies and their investors struggle

⁴ CASSIDY, Anne. Economist Steven Levitt on Why Data Needs Stories. **Fastcompany**. June 18, 2013. Available at: <https://www.fastcompany.com/1683190/economist-steven-levitt-on-why-data-needs-stories>. Accessed on: July 30, 2025.

⁵ DOLMANS, Maurits. Sustainable Competition Policy and the “Polluter Pays” Principle. In: HOLMES, Simon; MIDDELSCHULTE, Dirk; SNOEP, Martin. **Competition Law, Climate Change & Environmental Sustainability**. Nova York: Institute of Competition Law, 2021, p. 17-37.

to transition into a greener economy amidst widespread dissenting views among antitrust agencies on how to tackle competitor environmental collaboration, as such collaboration remains under the threat of anti-cartel prosecution (even including criminal liability). The outcome is the delay in getting the planet into energy transition, putting the next generations at risk.

Not surprisingly, while we continue to hear warnings that the planet is rapidly heating above pre-industrial levels, that by 2030 greenhouse gas emissions should be cut by half, lest the very existence of next generations is threatened by climate-driven food and water insecurity,⁶ the international antitrust community (comprising the academia, antitrust agencies, lawyers, economists, and other professionals) becomes lost in prolific discussions on how to reconcile antitrust and sustainability in the context of agreements between competitors to achieve sustainable objectives, frequently implying that there is a sharp dichotomy between them.

Although some antitrust agencies have sought to specify how benefits to sustainability can and should be taken into account in antitrust analysis in order to separate legitimate business cooperation from anticompetitive conduct through guidelines, which have already been put to use,⁷ those initiatives, unaccompanied by a reasonable alignment of competition authorities around the globe on the subject, will only take us so far. Many collaborations between competitors for the purpose of achieving sustainability goals are likely to have direct or indirect effects in more than one jurisdiction. Hence, a clear signal that a practice will not be seen as anticompetitive conduct in a given country will be worth little if the companies continue to fear investigations for cartel behavior in other jurisdictions.

⁶ UNITED NATIONS (UN). **UN Environment Program Emissions Gap Report 2023**. November 20, 2023. p. 15 and 21. Available at: <https://www.unep.org/resources/emissions-gap-report-2023>, Accessed on: July 30, 2025; UNITED NATIONS (UN). **Global Issues – Climate Change**. 2023. Available at <https://www.un.org/en/global-issues/climate-change>. Accessed on: July 30, 2025.

⁷ As a recent example, see: EUROPEAN COMMISSION. **Commission issues first opinion on the compatibility of a sustainability agreement in the French wine sector with competition rules for agriculture**. July 14, 2025. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1832. Accessed on: July 30, 2025.

Climate change knows no borders, so it is no surprise that tackling this problem requires international cooperation. For this reason, the main advances in relation to the subject are made through international treaties, and these treaties, for their part, can be considered as legal grounds for antitrust agencies around the globe to consider sustainability-related issues in their analysis.⁸ It should be noted that several of the guidelines on sustainability agreements issued by antitrust agencies make express reference to international treaties, such as the Paris Climate Agreement and the Convention on Biological Diversity.⁹

The intricacies of antitrust and sustainability, in particular in relation to competitor collaboration, are definitely not easy to tackle, especially when the objective is to obtain a reasonable consensus among several competition authorities on how to approach this subject. However, in view of the straightforward reality of an imminent global environmental crisis, the antitrust community must take a solution-oriented approach, and this involves being pragmatic and picking the right fights. Looking for effective

⁸ While the answer to the question of whether competition law should be influenced by sustainability, from a normative point of view, depends on the legal framework of each jurisdiction, it is important to note that this question does not depend solely on the competition laws of each country, which generally do not contain express references to sustainability (with the notable exception of Austria's recently amended Federal Cartel Act), but also of their constitutions and the international treaties incorporated into their legal systems. On the subject, see: NOWAG, Julian. **Sustainability & Competition Law and Policy** – Background Note. 2020. Available at: [https://one.oecd.org/document/DAF/COMP\(2020\)3/En/pdf](https://one.oecd.org/document/DAF/COMP(2020)3/En/pdf). Accessed on: July 30, 2025.

⁹ NETHERLANDS AUTHORITY FOR CONSUMER AND MARKETS (ACM). Policy rule – ACM's oversight of sustainability agreements Competition and sustainability. October 4, 2023. Available at: <https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf>. Accessed on: July 30, 2025; COMPETITION AND MARKETS AUTHORITY (CMA), **Green Agreements Guidance**: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements. CMA 185. October 12, 2023. Available at: https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf Accessed on: July 30, 2025.

solutions is better than going too fast and running out of air with “ideal” solutions that are hard to implement.¹⁰

The objective of this essay is to showcase potentially simple solutions that can be spotted in the toolkit that many antitrust agencies already have at hand, and upon which they can build towards reaching a reasonable consensus on competitor sustainability collaboration.¹¹

II. Cooperation among antitrust agencies though challenging is key

At the root of the suggestions made in this essay lies a common factor: cooperation among antitrust agencies around the globe. In an ideal scenario, such cooperation would potentially prompt the antitrust agencies to work together and reach a consensus over a global antitrust guideline or enter into an agreement establishing the approach of competition law towards sustainability agreements. A collaboration agreement between antitrust agencies that share a common goal would not be a novelty (one can think, for example, of the memorandum of understanding between the antitrust agencies of the countries that participate in the BRICS).¹² However,

¹⁰ HOLMES, Simon. Climate change, sustainability, and competition law. **Journal of Antitrust Enforcement**. Volume 8, Issue 2, p. 403. July 2020. Available at: <https://doi.org/10.1093/jaenfo/jnaa006>. Accessed on: July 30, 2025. The author states that a narrow approach to the duality between antitrust and sustainability is not necessary and can be an obstacle to vital collaborative action. He also states that jurisdictions need to use available tools of regulation and good practices to address the issue (including the issuance of positive and transparent statements by the competition authorities in actual cases, among others).

¹¹ “Sustainability” has different definitions in the guidelines issued by the various antitrust agencies so far (including the EC, the UK, the Netherlands, New Zealand and Singapore) – it can range from environmental-related matters, to ESG generally (including social initiatives and human rights). HEARN, Denise; HANAWALT, Cynthia; SACHS, Lisa. **Antitrust and Sustainability: A Landscape Analysis**. Columbia Center on Sustainable Investment (CCSI) and the Sabin Center for Climate Change Law. p. 12. Available at: <https://ccsi.columbia.edu/sites/default/files/content/docs/Antitrust-Sustainability-Landscape-Analysis.pdf>. Accessed on: July 30, 2025. In this essay, this term will also entail a broader meaning, unless otherwise specified.

¹² BRICS. **Memorandum of understanding between the competition authorities**

though not impossible, an agreement among several antitrust agencies to address specifically sustainability issues seems unlikely at this moment, and here are some reasons for that:

- (1) Environmental and sustainability issues are being *highly politicized*, at global and local levels. Globally, they carry geopolitical importance (reflecting especially the individual interests of the European Union – EU and the US in taking the lead and setting the tone in the debate, not to mention the national interests of other countries).¹³ Locally, the US has drawn attention as industry climate coalitions of banks, asset managers, and other service providers have been targeted by certain Republican politicians and state attorneys general as part of an alleged “woke” agenda strengthening America's adversaries abroad and potentially violating antitrust laws;^{14 15}
- (2) There is an ongoing debate over the role of antitrust and the concept of *consumer welfare*. While Europe seems to expand the concept of consumer welfare to incorporate sustainability

of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa on cooperation in the field of competition law and policy. May 19, 2016. Available at:

[https://cdn.cade.gov.br/Portal/acesso-a-informacao/convenios-e-transferencias/acordos-internacionais/MOU %20BRICS%20-%20Assinado%20%28002%29.pdf](https://cdn.cade.gov.br/Portal/acesso-a-informacao/convenios-e-transferencias/acordos-internacionais/MOU%20BRICS%20-%20Assinado%20%28002%29.pdf). Accessed on: July 30, 2025.

¹³ EUROPEAN PARLIAMENTARY RESEARCH SERVICE (EPRS). **Sustainability in the age of geopolitics.** July 2022. Available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/679092/EPRS_ATA\(2022\)679092_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/679092/EPRS_ATA(2022)679092_EN.pdf). Accessed on: July 30, 2025.

¹⁴ UNITED STATES HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE. **Judiciary Republicans: Woke Companies Pursuing ESG Policies May Violate Antitrust Law.** December 6, 2022. Available at: <https://judiciary.house.gov/media/press-releases/judiciary-republicans-woke-companies-pursuing-esg-policies-may-violate>. Accessed on: July 30, 2025.

¹⁵ On the politization in the US, see also NEW YORK UNIVERSITY'S - State Energy and Environmental Impact Center & Institute for Corporate Governance & Finance. **ESG and Antitrust: an AG's Perspective.** (Recorded event). April 20, 2024. 50'30''. Available at: <https://stateimpactcenter.org/news-events/events/esg-and-antitrust-an-ags-perspective>. Accessed on: July 30, 2025. About the discussion on the alleged “woke” Democratic agenda on sustainability, check 28'30''.

considerations into the antitrust analysis,¹⁶ in the US the discussion has been intersected by the debate opposing the University of Chicago's traditional consumer welfare approach and the Neo-Brandeisian movement focusing on antimonopoly policy and competitive process in place of efficiencies. However, the Neo-Brandeisian administration that ran the FTC (and also the DOJ) under President Joe Biden did not give due consideration to sustainability concerns but has focused its efforts on digital markets and big tech enforcement.¹⁷ ¹⁸ Whether the FTC and DOJ under the Trump Administration will treat sustainability as a legitimate consideration in antitrust enforcement remains to be seen, but it appears unlikely.

- (3) Authorities may refrain from engaging in antitrust and sustainability considerations to *keep their scope of action more limited* and focused on other issues. This is the case of authorities in the US but also in other jurisdictions. For instance, a

¹⁶ “While Europe continues to operate largely under the consumer welfare paradigm, with sustainability considerations expanding or altering aspects of these theories, the US is reckoning broadly with the consumer welfare paradigm and is actively pursuing alternatives (...). Sustainability concerns have been less present in US discussions, in part, due to the politicized nature of the debate.” HEARN, Denise; HANAWALT, Cynthia; SACHS, Lisa. *Op. Cit.* p. 15.

¹⁷ “The new brandeis movement does not support loosening antitrust enforcement to enable green collaborations that would normally be prohibited.” COLINO, Sandra Marco. Antitrust's Environmental Footprint: Redefining the Boundaries of Green Antitrust. **North Carolina Law Review**, Vol. 103, No. 1. p. 15. 2024. Available at: <https://ssrn.com/abstract=4730971>, Accessed on: July 30, 2025. On the neo-brandeisian movement characteristics, see KHAN, Lina. The New Brandeis Movement: America's Antimonopoly Debate. **Journal of European Competition Law & Practice**, 9(3), 131-132. March 2018. Available at: <https://doi.org/10.1093/jeclap/lpy020>. Accessed on: July 30, 2025.

¹⁸ KOVACIC, William . **Does Antitrust Help or Hinder Sustainability?** (Webinar). CCSI – Columbia Center on Sustainability Investment. April 25, 2023. 50'40''. Available at: <https://www.youtube.com/watch?v=YsDun0K6Yzk>,. Accessed on: July 30, 2025.

former president of the Brazilian antitrust agency once rendered an opinion expressly stating that, although environmental issues are important, it is not CADE's role to tackle them.¹⁹

This setting makes it challenging for antitrust agencies to find consensus on the application of antitrust law and enforcement to sustainability collaborations. However, agencies should earnestly seek practical ways to facilitate cooperation and exchanges of experiences (even if they end up not formalizing a single global guideline). That would be particularly helpful to (1) *reduce inconsistencies among agencies' decisions and approaches*, (2) *limit the risk of overdeterrence* (not only by the launch of formal investigations, but also by the issuance of official letters and information requests in situations in which violation of competition law is unlikely), and (3) *set the tone and provide legal certainty for private litigation* (so as not to expose lawful competitor collaborations to opportunistic private antitrust claims).

As an illustration of how competition policy and sustainable development must walk hand in hand and authorities should avail themselves of international cooperation, there is the final draft of the Partnership Agreement between Mercosur and the EU ("Agreement"), released in December 2024 as the negotiations for the Agreement were concluded after decades of discussions.²⁰ By the Agreement, Mercosur and the EU reiterated their commitment to combat anticompetitive practices, in line with their respective

¹⁹ BRASIL. Conselho Administrativo de Defesa Econômica (CADE). **Opinion of CADE's Presidente Alexandre Cordeiro in Concentration Act No. 08700.009905/2022-83**. July 3, 2023. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskj7ohC8yMfhLoDBLddaoNc4CW6a-AYZPgAOn-PUOv9Awqw0M4AY8RX4KDrYt71xJtK3EQqpg3o1I3kwdrfH0Wc6XXQ85NB8jxdngrGw-K. Accessed on: July 30, 2025.

²⁰ On December 6, 2024, the conclusion of the negotiations for the Partnership Agreement between Mercosur and the EU was announced, marking the end of two and a half decades of negotiations. EU-Mercosur Agreement. **European Commission**. 6 December 2024. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercotur/eu-mercotur-agreement_en#:~:text=The%20European%20Un-

local legislations, and established the basis for cooperation between their competent authorities to strengthen institutions dedicated to competition defense.²¹ This should also be interpreted in the context of the Agreement's provisions on Trade and Sustainable Development,²² including its Annex,²³ reinforcing the commitment of both blocs to promote sustainable production chains and inclusive trade.

The next chapter lays out suggestions of practical ways to overcome the current challenges and find proactive (and effective) cooperation

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ment.&text=The%20EU%20is%20Mercosur's%20num-
ber%20one%20trade%20and%20investment%20partner. Accessed on: July 30, 2025.

²¹ “Article 5. Exchange of non-confidential information and enforcement cooperation. 1. With a view to facilitating the effective application of their respective competition laws, the competition authorities may exchange non-confidential information”. Also: “Technical assistance The Parties will engage in capacity building activities in the area of competition policy subject to the availability of funding for such activities under the Parties' cooperation instruments and programmes”. EU-Mercosur: Text of the agreement. **European Commision**. 6 December 2024. Available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en. Accessed on: July 30, 2025. See also: EUROPEAN COMMISSION. **Trade part of the EU-Mercosur Association Agreement**. (Draft). September 8, 2022. Chapter: Competition. Available at: <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/fee88cce-3f87-40e3-b4ba-03cb32a78266/details?download=true>. Accessed on: July 30, 2025.

²² “Article 11. Trade and Responsible Management of Supply Chains. (...) 4. The Parties shall exchange information as well as best practices 3 and, as appropriate, cooperate on issues covered by this article, including in relevant regional and international fora.” See: EUROPEAN COMMISSION. **Trade part of the EU-Mercosur Association Agreement**. (Draft). September 8, 2022. Chapter: Trade and Sustainable Development. Available at: <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/63854154-7f3f-45d6-bfe6-53e330818fd0/details?download=true>. Accessed on: July 30, 2025.

²³ EUROPEAN COMMISSION. **Trade part of the EU-Mercosur Association Agreement**. (Draft). September 8, 2022. Annex to the Trade and Sustainable Development chapter. Available at: <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/19d538eb-d33c-4039-8afa-42dfe7cc66b6/details?download=true>. Accessed on: July 30, 2025.

among antitrust agencies aimed at a consensus on competitor sustainability collaboration.

III. Finding ways of cooperation among antitrust agencies: practical suggestions

In our view, to foster cooperation in the issue at stake, it is paramount that agencies consider the following strategic lines:

(1) Engage in multilateral discussions with a focus on building common ground regarding antitrust and sustainability within international organizations and *fora*;

(2) Set best practices/guidelines at their local level and, by ensuring transparency, enhance the informal sharing of those practices internationally; and

(3) Use competition advocacy to help create and consolidate best practices.

Apart from agencies themselves, non-governmental professionals, such as the Bar, should be taken into consideration and accepted as important players in the process of building convergence, as the Bar can help facilitate a nuanced and growing cooperation among agencies with the potential to ultimately benefit all stakeholders.

Below we go over practical suggestions that fall under one or more of the strategic lines above (as they are intersecting and interdependent approaches). As it will be noted, the suggestions make reference to tools and practices that are already available to antitrust agencies and the antitrust community broadly:

i. *Engage within the International Competition Network and other major international forums to create/advance sustainability-focused groups and work products.* Antitrust agencies should make efforts to set up and join a sustainability and antitrust focused working group within the ICN. It is worth mentioning that there has been demand for the creation of such a group, but it has not yet been set up to date.²⁴ The participation in an ICN

²⁴ INTERNATIONAL COMPETITION NETWORK (ICN). ICN's Vision for its

working group and the consolidation of the work of such a group in a report or working paper may lead to ICN ultimately issuing recommendations and suggested best practices.²⁵

Potentially having the ICN, as a multilateral and independent organization representing antitrust agencies worldwide, issue a recommendation or best practices suggestion on competitor sustainability collaboration would be highly valuable to build a certain level of consensus on the issue. Even if a common recommendation or guidance is not reached, engagement within the working group would already be helpful for agencies to share best practices that could help them produce local guidelines and orientations potentially more consistent among themselves. In this regard, it is worth noting the realization of the first ICN workshop on “The Role of Competition in Supporting Sustainable Development Goals,” which was organized by the French Autorité de la Concurrence and held online from July 2-3, 2024. The workshop explored “the crucial role that competition plays in achieving sustainable development goals”, and aimed at providing “a platform for experts, heads of agencies, and non-governmental advisors (NGAs) to discuss and share insights on integrating sustainability considerations into competition law assessments.”²⁶

Active participation in the OECD Competition Committee is also helpful, as the committee organizes best practice roundtables and studies on

Third Decade. [s.d.] p. 48. Available at: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2022/12/ICN-Vision-for-its-Third-Decade.pdf>. Accessed on: July 30, 2025. Existing ICN working groups are listed at: INTERNATIONAL COMPETITION NETWORK. **Working Groups.** [s.d.] Available at: <https://www.internationalcompetitionnetwork.org/working-groups/>. Accessed on: July 30, 2025.

²⁵ INTERNATIONAL COMPETITION NETWORK. **ICN Recommendations** (recommended practices and other ICN recommendations). [s.d.] Available at: <https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/icn-recs/>. Accessed on July 30, 2025. Documents generally address the work of the ongoing working groups (cartel enforcement, merger review, unilateral conduct, and advocacy).

²⁶ INTERNATIONAL COMPETITION NETWORK. **ICN Sustainability Workshop** – Join Us for the ICN Workshop on Competition and Sustainable Development. May 27, 2024. Available at: <https://www.internationalcompetitionnetwork.org/featured/sustainabilityworkshop/>. Accessed on: July 30, 2025.

antitrust and sustainability, which lead to the creation of background notes and other initiatives that are very influential and can lead to concrete outcomes for agencies. It is worth mentioning that the draft Guidelines on Sustainability Agreements of the Netherlands Authority for Consumer and Markets (ACM), one of the first guidelines of this type, was the object of discussion within the OECD.²⁷

ii. *Build upon general principles to reach a common ground on antitrust and sustainability.* One could ask what an ICN recommendation or best practice suggestion, or another type of document generated by an international forum, would look like. This is no trivial question, as consensus should be reflected on the contents of the work product. Here, our proposal is that agencies across the world seek to discuss general principles to establish a starting point from which they could have plenty of autonomy to issue their decisions on competitor sustainability collaborations.

Such common ground could work as a head start, allowing jurisdictions to acknowledge the importance of the issue and potentially agree on baseline principles to guide local decision-making, such as no elimination of competition and preservation of freedom of initiative (that is, com-

²⁷ NETHERLANDS. Netherlands Authority for Consumers and Markets (ACM). **Second draft version:** Guidelines on Sustainability Agreements – Opportunities within competition law. January 26, 2021. Available at: <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>. Accessed on: July 30, 2025; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). **Sustainability and Competition** – Note by the Netherlands. November 6, 2020. Available at: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)66/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)66/en/pdf). Accessed on: July 30, 2025. Later, due to the publication of the revised version of the European Guidelines, which included a chapter about competition and sustainability agreements, ACM's draft guidelines were replaced by a policy rule: NETHERLANDS. Netherlands Authority for Consumers and Markets (ACM). **Policy rule** – ACM's oversight of sustainability agreements Competition and sustainability. October 4, 2023. Available at: <https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf>. Accessed on: July 30, 2025.

panies could not be barred from adopting individual sustainability commitments),²⁸ demonstrated necessity (of a competitor collaboration),²⁹ and positive effects/efficiencies for consumers or a population at large.³⁰

This would be different from detailing which collaborations would be problematic or not or setting forth detailed criteria or standards of analysis, as such an approach could lead to divergence and frustration.

The use of baseline principles as guidelines for the interpretation of competitor collaboration instruments should bring about more consistent decision-making at the local level, as national authorities could reference those principles in their rulings and draw the logical paths of their decision-making process under their light. It would also be important to include a list of examples of sustainability agreements that would clearly not violate the antitrust laws, as such a list would help the decision makers in the private sector.

²⁸ Or prohibition on total elimination of competition. See, for example, EUROPEAN COMMISSION. **European Commission's revised Horizontal Guidelines**. May 31, 2023. p. 161. Available at: https://competition-policy.ec.europa.eu/document/download/fd641c1e-7415-4e60-ac21-7ab3e72045d2_en?filename=2023_revised_horizontal_guidelines_en.pdf. Accessed on: July 30, 2025.

²⁹ COMPETITION AND MARKETS AUTHORITY (CMA). **Green Agreements Guidance**. *Op. Cit.* p. 29. Available at: https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf. Accessed on: July 30, 2025.

³⁰ SINGAPORE. Competition and Consumer Commission of Singapore (CCCS). **Environmental Sustainability Collaboration Guidance Note**. March 1, 2024. p. 11. Available at: https://isomer-user-content.by.gov.sg/45/33cad1c1-03a9-419f-8231-a6bd0ff1663e/CCCS%20Environmental%20Sustainability%20Collaboration%20Guidance%20Note_full.pdf. Accessed on: July 30, 2025.

iii. *Foster the use of non-binding consultation procedures and sandboxing.* Many jurisdictions already have in their legal framework instruments such as consultations (Brazil),³¹ business review letters (USA),³² or the Comfort Letter Process (EU)³³ aiming at providing a safe space for market players to submit a consultation on whether certain envisaged practices could be deemed anticompetitive.³⁴ Usually, those instruments are enforceable in relation to the undertakings but do not generate binding case law. Also, while a broader agreement, guidelines or consensus regarding competitor sustainability collaboration is not reached among agencies, they could engage in discussions on how to make those consultation instruments attractive and effective to address *bona fide* questions and concerns from the private sector without committing to firm positions on matters.

³¹ BRASIL. Conselho Administrativo de Defesa Econômica (CADE). **Resolution No. 15/2023**. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/RESOLU%C3%87%C3%83O%20N%C2%BA%2012.pdf>. Accessed on: July 30, 2025.

³² U.S. Department of Justice (DOJ). **DOJ Antitrust Division's instructions on Business Reviews**. Updated June 15, 2023. Available at: <https://www.justice.gov/atr/what-business-review>. Accessed on: July 30, 2025.

³³ EUROPEAN COMMISSION. **Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines**. June 1, 2023. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2990. Accessed on: July 30, 2025.

³⁴ More recently, the Competition and Markets Authority (CMA) created an 'open-door policy' for businesses seeking informal guidance from the agency regarding environmental sustainability agreements (UNITED KINGDOM. Competition and Markets Authority (CMA). **How to request informal guidance on environmental sustainability agreements**. April 15, 2024. Available at: <https://www.gov.uk/government/publications/informal-guidance-on-environmental-sustainability-agreements>. Accessed on July 30, 2025. making available also a Submission Guide laying out the requested information on the intended agreement and envisaged effects on competition (UNITED KINGDOM. Competition and Markets Authority (CMA). **Preliminary Information to Provide to the CMA in Respect of Informal Guidance Requests**. [s.d.] Available at: https://assets.publishing.service.gov.uk/media/661cf0c908c3be25cfbd3d6a/Submission_guide.pdf. Accessed on: July 30, 2025.

It seems very important to facilitate access to the authorities and to set forth informal and less burdensome processes with a view to incentivize companies to step in and explain the projects and their main features without requesting great amounts of data and evidence that could not be readily available. Good examples of “open-door policy” seem to be the ones that give the companies the comfort that they will not be fined provided that the parties did not withhold relevant information from the authorities, as guaranteed by the UK authority (CMA) in its current guidelines³⁵, for instance.

Another helpful tool is the so-called regulatory “sandboxes”, where companies can implement their collaboration initiatives under the supervision of a competition agency and are not subject to sanctions in case their conduct ends up amounting to an antitrust violation. The sandbox created by the Greek antitrust agency (the Hellenic Competition Commission) seems to be an interesting example of that, as it enables the experimentation of innovative business initiatives targeting sustainability, while securing legal certainty regarding the application of antitrust law.³⁶

iv. *Use competition advocacy as signaling and positive influence for best practices.* In light of antitrust advocacy’s non-enforcement role and its importance in fostering competition culture and awareness, advocacy can also function as a strategic instrument to lead to consensus among competition agencies in the long run. Agencies could do it by carrying out or commissioning relevant research and publishing market studies regarding, for instance, the impacts of collaboration agreements on the economic behavior

³⁵ UNITED KINGDOM. Competition and Markets Authority (CMA). **Green Agreements Guidance:** *Loc. Cit.*

³⁶ GREECE. Hellenic Competition Commission (HCC). **Creation of the Sandbox for sustainable development and competition.** (Press release). June 22, 2022. Available at: <https://www.epant.gr/en/information/press-releases/item/2226-press-release-creation-of-the-sandbox-for-sustainable-development-and-competition.html>. Accessed on: July 30, 2025.

of consumers and their choice for sustainable products, the viability of relevant market definitions focusing on sustainable products, etc.³⁷ Agencies could also work on analyses of the impacts of new or existing regulation, and issue recommendations in cases where it could stifle investments in sustainable innovation. Finally, advocacy can help harmonize criteria for the so-called “green public procurement”, including purchasing groups of competitors, to permit the adoption of equivalent technologies in tenders and incentivize sustainable suppliers, while mitigating antitrust concerns.³⁸

For example, resorting to advocacy, Mexico’s antitrust agency (COFECE) promoted the introduction of Clean Energy Certificates to create a competitive market for clean energy generation in Mexico, and opposed proposed regulatory changes that could disincentivize investments in clean generation capacity and negatively affect competition.³⁹ In Brazil, CADE’s Department of Economic Studies has routinely been issuing market studies and opinions that are non-binding to the agency⁴⁰ (although so far the agency has not issued studies on sustainability, these instruments are certainly adequate and should be used for such purpose in the near future to show commitment from the agency and exert a positive influence over peer

³⁷ It is worth noting, for example, that a technical report broadly demonstrating how to quantify sustainability-related benefits was produced at the request of the Netherlands Authority for Consumers and Markets (ACM) and the Hellenic Competition Commission (HCC). See: Inderst, Roman; Sartzetakis, Eftichios; Xepapadeas, Anastasios. **Technical Report on Sustainability and Competition**. January 2021. Available at: https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf. Accessed on: July 30, 2025.

³⁸ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). **Environmental considerations in competition enforcement**. OECD Competition Committee Discussion Paper. 2021. p. 46. Available at: <https://web.archive.org/2021-11-19/616916-environmental-considerations-in-competition-enforcement-2021.pdf>. Accessed on: July 30, 2025.

³⁹ *Ibid.* p. 45.

⁴⁰ BRASIL. Conselho Administrativo de Defesa Econômica (CADE). **Economic Studies**. [s.d.] Available at <https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/estudos-economicos>. Accessed on: July 30, 2025.

authorities, especially in South America, where CADE's guidelines in other subjects are also used as reference).⁴¹

v. *Engagement of the bar and business associations as a catalyst for government proactiveness.* The fight against climate change and environmental imbalance is everyone's fight. All of us are stakeholders and must take responsibility for our part of the problem. In this sense, non-governmental antitrust professionals, notably lawyers, can greatly contribute to the antitrust agencies' endeavors towards building consensus. Lawyers are attuned to the needs of companies and can be a catalyst to incentivize the engagement of authorities and the establishment of common practices, even if only indirectly, for instance, by engaging in local and international fora, participating in focus groups, and helping draft working papers. They can also organize themselves to present formal proposals in the context of public consultations promoted by local authorities.

As an example, lawyers working with the International Chamber of Commerce (ICC) have already produced very important documents, of which we highlight three: (1) the 2020 working paper called "Competition Policy and Environmental Sustainability", (2) the 2022 white paper "When chilling contributes to warming"; and (3) the 2023 progress report "Taking the chill factor out of climate action".⁴²

Following the steps of the Global Task Force, the Competition Committee of Brazil's division of the ICC launched a working paper in Portuguese, prepared by a group of lawyers, including in-house counsels, laying out suggestions to CADE and, in fact, asking CADE to issue guidelines

⁴¹ For example, CADE's 'Guidelines for the Analysis of Previous Consummation of Merger Transactions', which addresses gun jumping practices, and which has been a reference in Chile and in Latin America broadly. See PAVIC, Lorena; PARDO, José; TORRES, Bendamín. 19. Navigation Competition Rules From a Chile Perspective. **Latin Lawyer**. August 3, 2021. Available at: <https://latinlawyer.com/guide/the-guide-corporate-compliance-archived/second-edition/article/19-navigating-competition-rules-chile-perspective>. Accessed on: July 30, 2025.

⁴² INTERNATIONAL CHAMBER OF COMMERCE (ICC). **How competition policy acts as a barrier to climate action**. November 18, 2024. Available at: <https://iccwbo.org/news-publications/policies-reports/how-competition-policy-acts-as-a-barrier-to-climate-action/>. Accessed on: July 30, 2025.

and establish a streamlined consultation process for competitor sustainability collaborations.⁴³

Apart from comments on countries' draft guidelines on the theme, such as the comments on the Hellenic Competition Commission's Sustainability Sandbox Proposal⁴⁴, the American Bar Association (ABA) has also prepared an important paper and published insightful articles on Sustainability and Competition Law.⁴⁵

IV. Conclusion

Never has it been so urgent to have competition authorities around the globe aligned and cooperating to address issues of climate change and other sustainability concerns. Cooperation is key, and the focus of this essay was to discuss practical ways to proactively reach global consensus among antitrust agencies on the approach of competition law to sustainability agreements, prioritizing the use of the toolkit that is already at hand.

⁴³ INTERNATIONAL CHAMBER OF COMMERCE (ICC). **Working Paper: Concorrência e Sustentabilidade. Proposta de Diretrizes para a Análise de Acordos de Sustentabilidade Ambiental pelo CADE.** [s.d.] Available at: https://www.iccbrazil.org/wp-content/uploads/2024/04/Working-Paper-Concorrencia-e-Sustentabilidade_V5.pdf. Accessed on: July 30, 2025.

⁴⁴ UNITED STATES OF AMERICA. American Bar Association (ABA). **Report of the International Developments and Comments Task Force, in response to the Hellenic Competition Commission's proposal for the creation of a sandbox for sustainability and competition in the Greek market.** August 26, 2021. Available at: https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/august-2021/comment-s-82621-greece.pdf. Accessed on: July 30, 2025.

⁴⁵ UNITED STATES OF AMERICA. American Bar Association (ABA). **Sustainability and Competition Law, Report of the International Comments and Policy Committee.** March 8, 2024; SNYDER, Brent; MCDONALD, Matthew; WANG, Ada. **Antitrust and Sustainability: Potential Paths Forward for U.S. Companies.** August 30, 2023. Available at: https://www.americanbar.org/groups/antitrust_law/resources/source/2023-august/antitrust-and-sustainability/. Accessed on: July 30, 2025; GREGG, Juge; MORGAN, Drake; NAVIN-JONES, Marcus. **Sustainability lawyers need to add antitrust expertise to their arsenal.** October 25, 2024. Available at: https://www.americanbar.org/groups/environment_energy_resources/trends/2024-nov-dec/sustainability-lawyers-need-antitrust-expertise/. Accessed on: July 30, 2025.

This involves agencies' engagement in multilateral discussions with a focus on building a common ground, establishing and sharing best practices, using competition advocacy in a strategic manner, and joining forces with the antitrust community broadly (notably the Bar and business associations) to overcome differences and excessive politicization for the greater good.

Antitrust agencies are uniquely positioned to set the tone on the debate and prevent it from being captured by interests of individual groups to the detriment of society. Following the example of what they have already been doing with success in other less transversal areas of antitrust (such as cartel enforcement, merger review, unilateral conduct, and advocacy), within the ICN and other relevant international forums, agencies must take a stance and find as much convergence and agreement as possible to advance sustainability goals globally as they are allowed to do so by their respective legislatures.

We hope that, by taking action and not getting carried away by the legal and political debate, agencies and the antitrust community are able to do more with less and get closer to a sustainable future as we build an environmentally friendly antitrust enforcement going forward.

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