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Capital markets, customers, employees, and broader society increasingly expect companies to take voluntary measures to improve the sustainability of their business and promote environmental, social, and governance (ESG) goals. While companies can do a lot by acting alone, they can achieve more if they collaborate with industry peers. However, this may raise concerns under antitrust rules prohibiting collaborations among competitors that unreasonably restrict competition. To help companies assess the compliance of their sustainability agreements with EU competition law, the European Commission published detailed guidance and invited companies to seek comfort letters on planned collaborations in case of uncertainty. These efforts notwithstanding, concerns remain about whether the guidance offers any additional flexibility and if it is enough, given the need for more alignment on this issue at the international level. This article argues that EC's guidance offers new opportunities for companies that want to engage in ambitious sustainability collaborations. Specifically, it focuses on the exception for below-competition agreements and on the fact that most, if not all, genuine sustainability agreements would be subject to an effects assessment, thus potentially qualifying for an exemption under Article 101(3) TFEU based on the EC's approach to sustainability benefits.

The threat that climate change, biodiversity loss, and unsustainable business practices pose to humanity is well recognized.[2] Similarly, it is generally accepted that while government action and regulation play a key role in combating this threat, companies and consumers must also contribute in order for humanity to have a chance at mitigating its inevitable consequences.

Companies are increasingly expected by regulators, shareholders, consumers, and society at large to align their business practices with long-term sustainability objectives. While a lot can be done by companies acting individually, achieving more and faster often requires working together with competitors, suppliers, and customers. However, when considering these collaborations, companies must navigate competition laws that generally prohibit agreements that unreasonably restrict competition and harm consumers through increased prices or reduced choice without sufficient countervailing benefits.

Competition laws continue to be perceived as obstacles to sustainability collaborations. Despite proclamations from enforcers that it need not be so,[3] only a few competition agencies have so far provided guidance or shown flexibility with respect to such collaborations. The European Commission ("EC"), together with a few of the competition agencies of EU Member States (such as The Netherlands), and the UK Competition and Markets Authority ("CMA") have taken a leading role in this area by publishing guidance aiming to provide clarity and certainty to companies as to what collaborations are permissible under competition laws.

Arguably, this guidance also aims to remove some of the barriers that competition laws may pose to sustainability collaborations, creating opportunities for companies to be more ambitious with respect to agreements affecting these jurisdictions. And while the global competition law landscape is somewhat fractured in this respect, in particular because of the anti-Environment, Social and Governance ("ESG") push from some politicians and enforcers in the U.S., companies that can limit the effect of their collaborations to Europe can take advantage of these opportunities to act more sustainably. Doing so may not only be the right thing for society at large, it can also result in better business performance and a competitive advantage: the global economy will likely shift towards rewarding more sustainable business practices out of necessity.

In this article, we describe the EU's new guidance for the assessment of sustainability agreements under EU competition law. We also set out what we consider to be the new safe paths to compliance with EU competition law that this guidance opens up.

I. GUIDANCE ON SUSTAINABILITY AGREEMENTS IN EU GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS ("EU HORIZONTAL GUIDELINES")

The EC committed to implement the United Nations' 2030 Agenda sustainable development goals, i.e. a broad plan of action for "*people, planet, and prosperity.*"[4] In this context, the EC adopted the European Green Deal legislative package covering a broad range of policy areas aiming to "*transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use*" and where "*no one is left behind.*"[5]

While regulation plays a primary role in transforming the EU into a net zero economy by 2050, the EC acknowledged that sustainability collaborations among competitors can address certain market failures that cannot be fully cured by regulation or public policy.[6]

To assist companies in assessing whether their collaborations comply with EU competition law, the EC included a separate chapter on sustainability agreements in the EU Horizontal Guidelines adopted in July 2023.[7] The chapter applies to agreements that pursue a sustainability

2 United Nations, *Transforming our world - the 2030 agenda for sustainable development (A/RES/70/1), "[t]he future of humanity and of our planet is in our hands…. We have mapped the road to sustainable development; it will be for all of us to ensure that the journey is successful and its gains irreversible*". See also, Intergovernmental Panel on Climate Change, *AR6 Climate Change 2023 Synthesis Report, "Climate change is a threat to human well-being and planetary health (very high confidence). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence)."*

3 See e.g. French Competition Authority, *Développement durable et concurrence, une combinaison qui progresse*, https://www.autoritedelaconcurrence.fr/fr/page-riche/developpement-durable-et-concurrence (in French).

4 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development* (2015), https://sdgs.un.org/2030agenda.

5 *The European Green Deal*, COM(2019) 640 final, https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF.

6 EC, Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (2023/C 259/01), at 565.

7 *Ibid.*

objective falling within the scope of the UN's 2030 Agenda Sustainable Development Goals ("Sustainability Agreements"), covering a broad range of economic, environmental, and social objectives.[8]

The EU Horizontal Guidelines do not (and cannot, given their legal status) alter the analytical framework under Article 101 of the Treaty of the Functioning of the European Union ("TFEU") with respect to Sustainability Agreements. However, they still break new ground in certain areas by stretching the analytical framework or hinting at remarkable flexibility in its application, for example as regards the assessment of procompetitive benefits under Article 101(3) TFEU.[9] As such, the EU Horizontal Guidelines offer some new paths to compliance with EU competition law for competitors contemplating more ambitious Sustainability Agreements. These are outlined in the following sections.

II. GREEN LIGHT: SUSTAINABILITY AGREEMENTS FALLING OUTSIDE THE SCOPE OF EU COMPETITION LAW

A. Sustainability Agreements and Compliance with Regulatory Requirements

Various EU regulations require companies competing with each other to cooperate on sustainability matters. However, regulatory requirements do not automatically shield companies from liability under competition law, as Article 101 TFEU supersedes both EU regulations or directives and national legislation.[10] For instance, the proposed Directive on Corporate Sustainability Due Diligence[11] ("Proposed CSDDD"), an instrument setting out due diligence requirements for in-scope companies, provides that "*companies are entitled to share resources and information within their respective groups of companies and with other legal entities in compliance with applicable competition law.*" Furthermore, where relevant, *"[c]ompanies shall be required to [...] in compliance with Union law including competition law, collaborate with other entities, including, where relevant, to increase the company's ability to bring the adverse impact to an end, in particular where no other action is suitable or effective."*[12]

The EU Horizontal Guidelines clarify that to the extent the exchange of Commercially Sensitive Information ("CSI") between competitors is limited to what is required by the applicable regulation – which may require implementing certain safeguards – such exchange of CSI should not raise competition concerns.[13] Additionally, and specifically in relation to Sustainability Agreements that provide for the sharing of information by setting up databases containing general information about suppliers that have (un)sustainable value chains, processes, or inputs, the Guidelines clarify that these are unlikely to be restrictive of competition, to the extent an agreement does not forbid or oblige parties to purchase from such suppliers or to sell to such distributors.[14]

However, while the EC may apply a more lenient approach when companies cooperate in order to comply with a regulatory requirement, it also strongly cautions against any agreements *not to exceed* a regulatory standard.[15]

B. Below Standard Competition Agreements Ensuring Compliance with Requirements in International Treaties

The EU Horizontal Guidelines create a new category of agreements that are considered as not restricting competition under Article 101(1) TFEU: the so-called "below standard competition" agreements, inspired by the Dutch Authority for Consumers and Markets ("ACM") Draft Guidelines on Sus-

8 Companies should keep in mind that not all governance objectives within the concept of ESG may qualify as sustainability objectives under the EU Horizontal Guidelines.

9 Under EU competition law, an agreement restricting competition under Article 101 TFEU is, in principle, prohibited unless its anticompetitive effects are outweighed by procompetitive benefits fulfilling the conditions in Article 101(3) TFEU. This legal test requires, *inter alia*, that the consumers affected by the restriction are fully compensated by the benefits arising from the anticompetitive agreement.

10 European Court of Justice ("ECJ"), *Skanska Industrial Solutions Oy*, C-724/17 (2019), at 24; see by analogy with Article 102 TFEU, ECJ, *Towercast*, C-449/21 (2023), at 51.

11 Proposed CSDDD, 2022/0051(COD) and amending Directive (EU) 2019/1937.

12 *Id.*, Articles 4(2) and 7(2)(e), respectively.

13 EU Horizontal Guidelines, *supra* note 7, at 372.

14 *Id.*, at 530.

15 See, for instance, EC Case No. AT. 40178 – *Car Emissions* (2021), sanctioning a number of car manufacturers for agreeing not to improve the effectiveness of their emissions-cleaning systems beyond what was legally required, despite the relevant technology being available.

tainability Agreements.[16] Under this approach, competition law is viewed as not intended to protect *"below standard competition," i.e.*, competition on products not complying with international regulatory standards requirements, which should not even be on the market in the first place.

In this context, the EC remarkably committed that it will not take enforcement action against Sustainability Agreements whose exclusive aim is to eliminate below standard competition by ensuring compliance with "*sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions, whether or not they have been implemented in national law*."[17] In the EC's view, such agreements fall outside the scope of Article 101(1) TFEU altogether.

As to what are international treaties that contain "*sufficiently precise requirements or prohibitions*," the EU Horizontal Guidelines expressly refer to agreements on fundamental social rights or prohibitions on the use of child labor, the logging of certain types of tropical wood, or the use of certain pollutants.[18] Helpfully, the Proposed CSDDD contains a list of provisions of international treaties dealing with environmental concerns[19] that arguably meet this definition.[20]

For instance, the CSDDD refers to Article 4(1) and Annex A Part I of the Minamata Convention,[21] which would require in-scope companies to take appropriate measures against the manufacture, import, or export of mercury-added products exceeding a certain concentration level (e.g. in batteries, switches and relays, compact fluorescent lamps, and linear fluorescent lamps) according to specific phase-out dates (2020 (expired) and 2025). On this basis, major retailers could agree not to carry products that do not comply with this requirement.

The provisions of international treaties contained within the CSDDD are not the only ones that can meet this test. For instance, the Convention on Long-Range Transboundary Air Pollution imposes a requirement to "*undertak[e] to develop the best policies and strategies […] in particular by using the best available technology which is economically feasible and low- and non-waste technology*" to combat air pollution.[22] On this basis, clothing brands, for example, could develop a strategy to eliminate microfiber pollution from processes across the textile value chain. More recently, the UN formally adopted the High Seas Treaty, which defines protected marine areas in international waters, in which activity could occur, but only "*…provided it is consistent with the conservation objectives*," i.e. provided it does not damage marine life.[23] On this basis, major retailers could agree to reduce or eliminate their offering of seafood coming from these protected marine areas and caught in a manner inconsistent with the conservation objectives.

The above clearly shows that there are various opportunities for companies to enter into Sustainability Agreements that ensure compliance with sufficiently precise treaty requirements, despite the treaties not being implemented in the national law of the signatory states. However, it remains to be seen how the EC intends to apply the "*sufficiently precise*" test under the EU Horizontal Guidelines.

III. ORANGE LIGHT: SUSTAINABILITY AGREEMENTS THAT MAY BE EXEMPT UNDER ARTICLE 101(3) TFEU

A Sustainability Agreement that negatively affects one or more parameters of competition would be assessed under Article 101(1) TFEU to determine whether it restricts competition by object or effect, and if so, whether it can be exempted under Article 101(3) TFEU because its procompetitive benefits

16 *Guidelines on Sustainability Agreements – opportunities within competition law*, (2021) at 27-29, https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf. On October 4, 2023, the ACM confirmed this approach when it adopted its *Informal translation Policy Rule – ACM oversight on sustainability agreements*, https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf.

17 *Id.*, at 528.

18 *Id.*

19 Namely (i) the Minamata Convention on Mercury, (ii) the Stockholm Convention on Persistent Organic Pollutants, (iii) the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, (iv) the Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer, (v) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, (vi) the Convention on Biological Diversity, and (vii) the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

20 The targeted provisions within these international treaties are referred to as "*environmental conventions which create an obligation that is sufficiently precise and implementable for the companies*" - Commission Staff Working Document, *Follow-up to the second opinion of the Regulatory Scrutiny Board accompanying the document Proposal for a Directive [...] on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* (February 23, 2022).

21 Minamata Convention on Mercury (2013).

22 https://www.wsgr.com/en/insights/sustainability-initiatives-get-a-green-light-in-european-commissions-revision-of-rules-on-collaboration-among-competitors.html#13.

23 See https://www.wsgr.com/en/insights/sustainability-initiatives-get-a-green-light-in-european-commissions-revision-of-rules-on-collaboration-among-competitors.html#14.

outweigh its negative impact on consumers. While Article 101(3) TFEU can apply regardless of whether an agreement restricts competition by object or by effect, in practice, an object restriction is highly unlikely to meet its test and hence be exempt from the prohibition under Article 101(1) TFEU.

Thus, in order to realistically qualify for exemption under Article 101(3) TFEU, companies considering entering into a Sustainability Agreement must ensure that it cannot be characterized as resulting in a restriction of competition by object.

The EU Horizontal Guidelines, relying on (and expanding) recent EU case law,[24] are very helpful in this respect by expressly stating that when "t*he parties to an agreement substantiate that the main object of an agreement is the pursuit of a sustainability objective, and where this casts reasonable doubt on whether the agreement reveals… a sufficient degree of harm to competition to be considered a by object restriction, the agreement's effects on competition will have to be assessed…unless the agreement is used to disguise a by object restriction of competition such as price fixing, market sharing or customer allocation, or limitation of output or innovation.*"[25] This passage was worth quoting in full because it shows that the EC consciously expanded the relevant case law, which speaks of "[procompetitive] *effects* [that] *are demonstrated, relevant and specifically related to the agreement concerned*, [and] *sufficiently significant*,"[26] by simply requiring parties to substantiate that "*the main object of their agreement is the pursuit of a sustainability objective*," which should be a relatively straightforward task for all genuine Sustainability Agreements.

Therefore, in practice, most, if not all, genuine Sustainability Agreements will be assessed based on their effects and can qualify for an exemption under Article 101(3) TFEU.

If those are established, e.g. in the form of increased prices or reduced choice, the agreement may be justified under Article 101(3) TFEU if it meets four cumulative conditions: (i) it must contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) consumers must receive a fair share of the resulting benefits; (iii) the restrictions must be essential to achieving the agreement's objectives; and (iv) it must not give the parties any possibility of eliminating competition in respect of substantial elements of the products in question.

In the context of Sustainability Agreements, the most critical condition is the second one, i.e. that consumers receive a "*fair share of the resulting benefits*" ("Fair Share Test"). Despite acknowledging the existence of market failures in terms of sustainable development,[27] the EC maintains the traditional application of the Fair Share Test, which requires that consumers negatively affected by the restriction be compensated in full.[28]

Still, the EU Horizontal Guidelines broaden the scope of benefits that may be taken into consideration under the Fair Share Test by defining three categories of sustainability benefits: (i) individual use value benefits, (ii) individual non-use value benefits, and (iii) collective benefits.

Individual use value benefits are those that arise from the product's quality or variety resulting from qualitative efficiencies or take the form of a price decrease as a result of cost efficiencies.[29] In particular, where a sustainable product is more expensive to buy (short-term benefits) but less expensive in terms of electricity and/or water consumption (long-term benefits), the long-term benefits should be taken into consideration.[30]

Individual non-use value benefits are benefits arising from the consumers' appreciation of the impact of their sustainable consumption on others, as measured for example by their willingness to pay more for sustainable products.[31] An example of such an approach is the *Chicken of Tomorrow* case in the Netherlands, where the ACM assessed an agreement by which supermarkets, poultry farmers, and broiler meat processors wanted to agree on better living conditions for chickens, which led to an increase in the price of chicken meat. While finding that consumers were willing to pay more for a more sustainable production of chicken meat (through a quantification), the ACM did not permit the agreement because the price consumers were willing to pay was below the increased price resulting from the agreement.[32]

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24 Case C-307/18, Generics (UK), 2020 EU:C:2020:52, at 66 and 103-107 and C-883/19 P, HSBC v Commission, 2023, EU:C:2023:11, at 139.

25 EU Horizontal Guidelines, at 534.

26 Generics (UK), *supra* note 25,, at 107.

27 *Id.*, at 519-520 and 564-566.

28 Arguably, by doing so, the EC applies de facto a "*polluter-must-benefit*" principle, instead of the "*polluter-must-pay*" principle enshrined in Article 191(2) TFEU.

29 EU Horizontal Guidelines, *supra* note 7, at 571-574.

30 *Id.*, at 571 "*[individual use value benefits] may take the form of a price decrease as a result of cost efficiencies.*" See also at 603.

31 EU Horizontal Guidelines, *supra* note 7, at 575-581.

32 ACM, ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow,' (ACM/DM/2014/206028), https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf.

Collective benefits are benefits occurring outside the relevant market on which the restrictions affect the consumers.[33] Collective benefits arise "*where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market that occur outside that market can be taken into account if they are significant enough to compensate the consumers in the relevant market for the harm that they suffer*."[34]

For instance, drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air if less fuel were to be used. Since the consumers (i.e. the drivers) and the wider beneficiaries (i.e. individuals living in the EU) substantially overlap, the sustainability benefits of cleaner air can be taken into account, provided that they compensate the consumers in the relevant market for the harm suffered. However, if the sustainability effect is too diffuse or local, such as reducing the use of fertilizers and water on the land on which cotton is produced, collective benefits will not be taken into consideration, since the benefits only occur on the land itself and thus there is no overlap with the wider beneficiaries.[35]

In addition, the market coverage of the agreement must be significant, since otherwise it is unlikely the collective benefits will materialize. For instance, if the agreement is not industry-wide, and non-sustainable products are still on the market, self-interested consumers could switch to polluting models and the reduction of pollution will only be residual.[36]

The recognition of collective benefits constitutes a significant improvement towards a more flexible approach to Sustainability Agreement by the EC. Whether this results in a meaningful difference in the "fair share" assessment depends on how strictly the EC applies the relevant conditions, i.e. (i) whether there is a substantial overlap between affected consumers and beneficiaries outside the relevant market, and (ii) whether the benefits (combined with individual use and non-use value benefits) outweigh the harm to affected consumers. Encouragingly, the EC is willing to recognize qualitative evidence if there is "*no available data that allows for a quantitative analysis of the benefits provided that it shows a clearly identifiable positive impact on consumers in the relevant market*."[37]

IV. GETTING TO GREEN: SEEKING GUIDANCE FROM THE EC

As set out above, the EU Horizontal Guidelines do offer genuine new paths to Sustainability Agreements that comply with EU competition rules. However, companies may be reluctant to rely on them due to their novelty and the relative lack of sufficiently concrete conditions for their application.

To help companies overcome this reluctance, the EU Horizontal Guidelines explicitly mention that the EC is committed to providing informal guidance on sustainability initiatives under the EC's Informal Guidance Notice,[38] which gives companies the opportunity to obtain a guidance letter from the EC as to whether their conduct is compliant with EU competition rules.[39] This is an encouraging statement by the EC for companies seeking to enter into ambitious Sustainability Agreements or enter into industry alliances, giving them an opportunity to seek clarity and comfort on whether the initiatives would comply with EU competition rules.

V. THE GLOBAL CONTEXT

Despite the relaxation at the EU level, there remains significant uncertainty for Sustainability Agreements that are global in scope, and companies considering them must deal with either lack of specific guidance in a majority of jurisdictions or even an express anti-ESG push from certain politicians and enforcers in the U.S.

33 EU Horizontal Guidelines, *supra* note 7, at 582-589.

34 *Id.*, at 584.

35 *Id.*

36 *Id.*, at 586.

37 *Id.* at 589.

38 EC Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the TFEU that arise in individual cases (guidance letters).

39 EU Horizontal Guidelines, *supra* note 7, at 515.

The EC's sustainability ambition has so far not been matched by any other competition agency, save perhaps the UK CMA, which adopted its "*Green Agreements Guidance*"[40] (the "CMA Green Guidance") in October 2023. The CMA Green Guidance is heavily inspired by the EU Horizontal Guidelines, with a few important differences:

First, the CMA Green Guidance only focuses on one subcategory of sustainability agreements with environmental purposes, i.e. not to agreements pursuing a social objective.[41]

Second, even though the CMA Green Guidance has a narrower material scope than the EU Horizontal Guidelines,[42] it is more permissive with respect to "*climate change agreements*," which are agreements that contribute to combating climate change.[43] For these, the CMA is prepared to take "*into account the totality of the climate change benefits to all UK consumers arising from the agreement, rather than apportioning those climate change benefits between consumers within the market affected by the agreement and those in other markets*" in the context of "fair share" assessment.[44]

In a similar manner as the EC, the CMA adopts an "open-door policy" allowing businesses considering entering into an environmental sustainability agreement to approach it for informal guidance in case of uncertainty. The CMA Green Guidance notes that the CMA "*does not expect to take enforcement action in relation to an agreement which was discussed with the CMA in advance under the open-door policy and where the CMA did not raise concerns (or where any concerns that were raised by the CMA have been addressed by the parties*)," except if the parties withheld "*relevant information from the CMA which would have made a material difference to its initial assessment under the open-door policy*."[45]

Competition agencies in Japan and Singapore have also issued guidance on sustainability collaborations, or are in the process of doing so. Competition law rules in other jurisdictions (e.g. Australia and New Zealand) already allow antitrust agencies to approve collaborations pursuing sustainability aims if they are in the public interest or to exempt these efforts based on the absence of significant impact on competition and existence of consumer benefits (e.g. Mainland China). However, the EU and UK approaches remain the most permissive globally.

In the U.S., the situation is far from uniform. On the one hand, federal antitrust agencies have not indicated that pursuing sustainability collaborations is an enforcement priority, while making clear that such collaborations are not exempted from antitrust laws.[46] On the other hand, some members of Congress and state attorney generals have advocated for greater antitrust scrutiny of industry-wide sustainability initiatives and have launched investigations.[47] To add to the complexity, individual states take a spectrum of positions, which means that even if the federal antitrust agencies take a pro-sustainability stance, the risk of investigation by the states adds uncertainty to, and disincentivizes, sustainability collaborations.

VI. CONCLUSION

Despite not going as far as many may have hoped, the EU does offer new opportunities for companies that want to enter into ambitious sustainability collaborations with their competitors.

Whether companies take advantage of them remains to be seen, not only because of the novelty and untested nature of some of the approaches set out in the EU Horizontal Guidelines, but also because of the lack of alignment at a global level, which is a concern with respect

40 CMA, *Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements*, October 12, 2023, CMA 185.

41 "*Agreements which pursue broader social objectives (for example, improving working conditions) are outside the scope of this guidance*" (Id., at 2.3.). However, this Guidance nonetheless confirms that other parts of the Guidance on Horizontal Agreements may be relevant for such agreement, as well as some sections of the Green Agreements Guidance which may help in terms of self-assessment.

42 CMA, *supra* note 41, at 2.1. and 2.2.

43 *Id.*, at 2.4-2.5.

44 *Id.*, at 6.4.

45 *Id.*, at 7.13.

46 Press release, Federal Trade Commission, FTC Chair Lina M. Khan Testifies Before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights (September 20, 2022).

47 For example, in November 2023, the U.S. House of Representatives Judiciary Committee issued subpoenas for documents and communications to As You Sow and the Glasgow Financial Alliance for Net Zero, claiming that such initiatives "*appear to facilitate collusion that may violate U.S. antitrust laws.*" See Press Release, Chairman Jordan Subpoenas As You Sow and GFANZ in ESG Investigation (November 1, 2023).

to any collaborations whose effects go beyond the EU market. Unfortunately, those are exactly the collaborations that are likely to result in the most meaningful sustainability benefits.

These challenges notwithstanding, companies would be ill advised to refrain from genuine sustainability collaborations or scale back their much-needed ambition—not only because that may be suboptimal given the severity of climate change and other environmental threats facing humanity, but also because it may not be in their long-term economic interest. The reality is that a lack of express guidance or politically motivated anti-sustainability clamoring does not equate to genuine competition concerns that may result in a liability finding by an enforcement agency or a court. With careful consideration, proper advice, and, if needed, engaging with competition authorities for guidance, there is abundant scope and opportunity for companies to collaborate in pursuit of meaningful sustainability objectives.

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