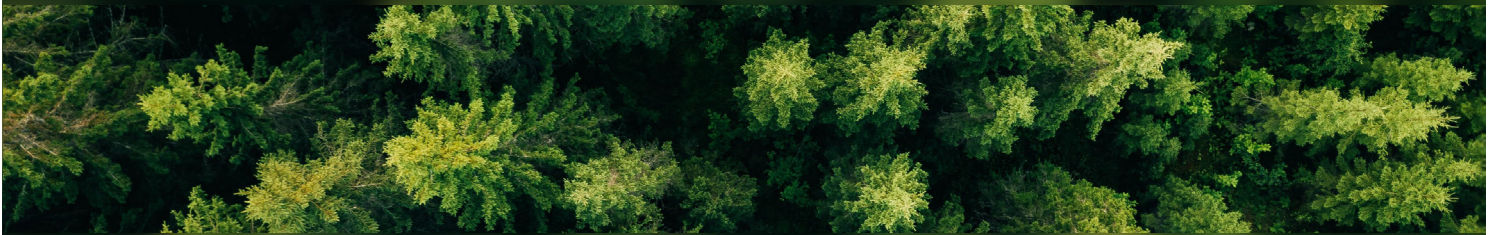


**C L I F F O R D**

**C H A N C E**



**GLOBAL ANTITRUST CHALLENGES FOR INDUSTRY  
CLIMATE ALLIANCES AND COOPERATION ON  
ENVIRONMENTAL SUSTAINABILITY**



## GLOBAL ANTITRUST CHALLENGES FOR INDUSTRY CLIMATE ALLIANCES AND COOPERATION ON ENVIRONMENTAL SUSTAINABILITY

As businesses seek new ways to work together to improve environmental sustainability, navigating diverging approaches to competition law in different jurisdictions is becoming increasingly complex.

Many businesses are aiming to improve the sustainability of their operations, as individual companies, through multi-company collaborations and at an industry-wide level. However, these initiatives need to be conducted in a way that complies with competition law. Competition law generally prohibits agreements between competitors that harm competition and lead to worse outcomes for consumers. It also limits the ability of firms to share competitively sensitive information between each other.

Competition authorities in several jurisdictions have therefore taken steps to ensure that competition law does not bar legitimate cooperation to improve environmental sustainability. These include competition authorities in Australia, the European Union, Italy, Japan the Netherlands and the United Kingdom and involve new guidance and the opportunity for bespoke consultation.

But in the United States, enforcement authorities have generally taken the position that there is no environmental or sustainability exemption to antitrust liability, and a coalition of Attorneys General from Republican states has opened investigations into antitrust questions relating to certain industry climate coalitions.

The diverging approaches taken in different jurisdictions has created compliance challenges for firms and organisations with cross-border activities.

### Background

A significant example of industry collaboration is the UN-sponsored Glasgow Financial Alliance for Net Zero (GFANZ), which was launched at the COP26 climate conference in April 2021 “to coordinate efforts across all sectors of the financial system to accelerate the transition to a net zero global economy”. The GFANZ is made up of eight financial sector-specific alliances which have committed to achieving “net zero” greenhouse gas emissions in their own businesses and are adopting standards and methods for achieving that goal.

Meanwhile, businesses in many other industries have sought to work together to make their industries and supply chains more environmentally sustainable. This cooperation has occurred through trade associations, sustainability forums, joint ventures and other more informal networks.

### Key issues

- Different jurisdictions are taking different approaches to the application of competition law to environmental sustainability agreements
- Competition authorities in the UK, EU, Netherlands, France, Japan and Australia have taken steps to support cooperation for environmental sustainability
- In the US, Republican Attorneys General have alleged that some industry alliance agreements may violate antitrust laws
- Several firms have left the GFANZ industry alliances, with some noting concerns about antitrust risk
- This publication provides an overview of the approach to competition law and sustainability in several key jurisdictions

These efforts have captured the attention of antitrust authorities, in particular in the United States. Beginning in late 2022, a coalition of State Attorneys General have issued investigation demands to participants in the GFANZ-convened Net Zero Banking Alliance, Net Zero Asset Managers Initiative, and Net Zero Insurance Alliance, along with a variety of related actors such as law firms, ratings agencies, and NGOs, seeking information about the alliances' activity. Under this shadow of antitrust enforcement, a number of participants have questioned the compliance risk of membership, and several have left or threatened to leave.

Industry alliances, associations and collaboration are not new, however, and there are well-established practices to guide companies through the diverging requirements among jurisdictions. This briefing identifies these rules of the road and provides more detailed discussion of some key jurisdictions.

## Practical Guidance

Firms and organisations seeking to ensure their environmental sustainability activities comply with competition law should take the following into consideration:

- **Use guidance** – several jurisdictions have published guidance to try to assist companies to cooperate to pursue sustainability goals, whereas others have issued relevant decisions, which should be carefully considered;
- **Engage with competition authorities** – some competition authorities have invited private bilateral consultations where firms are unsure whether proposed conduct complies with competition law, whereas others have more formal public consultations. Companies should consider whether to use these processes in areas of uncertainty;
- **Cross-border considerations** – where cooperation or discussions between firms could extend across borders, the competition law rules applicable in each jurisdiction should be considered;
- **Compliance guidelines** – consider whether internal compliance guidelines should include provisions on discussions with competitors for the purposes of environmental sustainability;
- **Private litigation risk** – where competition authorities publish guidance suggesting a permissive interpretation of the law, be aware that third parties may bring private claims hoping that courts will disagree with the interpretation of the competition authority; and
- **Broader policy considerations** – companies can structure their activities to reduce competition law risks while advancing their sustainability goals.

## Key Jurisdictions

Key information on the application of competition law to environmental sustainability agreements is set out below for Australia, the European Commission, France, Germany, Italy, Japan, the Netherlands, the United Kingdom and the United States.

## AUSTRALIA

It is recognised in Australia that there are times when it is more effective and efficient for parties, including competitors, to work together. For that reason Australia has had a statutory process in place for many years which is now being positioned as the mechanism for managing collaborative or cooperative efforts that have a sustainability purpose. This process is known as “Authorisation”.

### Authorisation

The authorisation process provides a statutory exemption for arrangements or joint conduct that might otherwise breach the competition rules in the *Competition and Consumer Act 2010 (Cth)* (CCA). The process permits the ACCC to consider and objectively evaluate an application made by the relevant parties to the conduct. When considering an application, the Australian Competition and Consumer Commission (ACCC) tests whether the public benefit of what is proposed outweighs any anticompetitive effect (i.e., a net public benefit test). Public benefits are not limited to those that might address market failure or improve economic efficiency, but might include matters such as:

- a reduction in transaction costs, or reducing switch or searching costs;
- a reduction in information asymmetries;
- achieving economies of scale or scope;
- provision of public goods (which might otherwise be at risk); and
- environmental benefits or a reduction in environmental harms.

The ACCC attaches more weight to benefits that flow to the consumer or broader community, and which are sustained over time. Where the benefit is limited, or only accrues to the applicant parties, it will be given less weight.

Where the ACCC is satisfied there is a net public benefit, a determination may be made to Authorise the conduct, although typically for a period of 10 years or less. Parties may seek reauthorisation at the expiry of the term. While the Authorisation is in place, the relevant conduct is protected from enforcement action. Authorisation must be sought before the conduct is commenced and may be granted subject to certain conditions.

### Sustainability

The process is not directed at collaborative conduct that has a sustainability purpose but is applicable to such conduct where a net public benefit can be demonstrated. Sustainability goals may be one element of an application or may be the entire purpose of an application.

### Public process and implications for international conduct

The process, formalised in the CCA, is the subject of comprehensive guidelines published by the ACCC, is public in nature and takes six months. Accordingly, parties who are considering conduct in international jurisdictions which may have an impact on Australia need to consider timing as well as public exposure. A new technology, for example, would be “outed” in the Australian process which involves comprehensive submissions, and a final determination posted to the ACCC’s website. The impacts for timing, transparency, and longevity of the authorisation all present challenges for international collaborative activities with long-term sustainability objectives.

The ACCC is currently considering an application for Authorisation made by leading Australian supermarkets for an industry-led taskforce to engage in a return-to-store soft plastics recovery programme facilitating the collection and processing of soft plastics into durable recycled plastic products.

Interim Authorisation has been granted for conduct that is narrower than the conduct for which Authorisation was sought and only for a period of 12 months while the ACCC considers the scope of its final determination.

## EUROPEAN COMMISSION

Sustainable development is a core principle of the Treaty on European Union, and the European Commission (EC) treats the European Green Deal and the United Nations' sustainable development goals as priorities. Sustainability objectives are defined broadly to capture economic, social and environmental goals, including addressing climate change, reducing pollution, and limiting the use of natural resources.

The EC's recently revised Horizontal Cooperation Guidelines include a new chapter on sustainability agreements, which is designed to help companies to self-assess whether a sustainability initiative between competitors is compatible with EU competition law. The Guidelines provide non-exhaustive illustrative examples of sustainability agreements that are likely to fall outside the scope of the prohibition on anticompetitive horizontal agreements, such as (i) those that aim solely to ensure compliance with international treaties and laws that are not fully implemented or enforced; (ii) agreements that solely concern companies' internal corporate conduct; (iii) agreements to set up a database of information on suppliers with (un)sustainable value chains or practices; or (iv) agreements relating to industry-wide awareness campaigns.

The EC also provides a framework for the assessment of sustainability standardisation agreements. The Guidelines introduce a "soft safe harbour" from which standardisation agreements can benefit if they are created through a transparent and open procedure, are voluntary, do not involve exchange of competitively sensitive information beyond what is not necessary, and either (a) do not lead to a significant increase in price or decrease in choice of products, or (b) the businesses participating have a combined share of 20% or less. A sustainability standardisation agreement falling outside of this "safe soft harbour" will require a case-by-case assessment, and the Guidelines provide some steers on how to assess whether an agreement meets the four cumulative conditions in Article 101(3) for consumer benefits to outweigh anticompetitive effects:

- i. *efficiency gains* – could include less pollution or cleaner production, and need to be objective, concrete and verifiable;
- ii. *indispensably* – the obligations imposed must not go beyond what is necessary;
- iii. *pass on to consumers* – benefits from the sustainability agreement should outweigh the harm, so that the overall effect on consumers of the products in question is at least neutral. The benefits must accrue (directly or indirectly) to the consumers of the products in question through (a) individual use benefits (e.g., lower price or better quality), (b) non-use value benefits resulting from the consumers' altruistic choice to appreciate the impact of their sustainable consumption (e.g., by paying a higher price for washing-up liquid which contaminates water less than alternatives); or (c) collective benefits (e.g., drivers purchasing less polluting fuel if there is a significant overlap between them and the beneficiaries of cleaner air).
- iv. *no elimination of competition* – parties to an agreement will need to continue to compete on at least one key aspect of competition, such as price, quality or variety.

While companies primarily need to self-assess whether their conduct is compatible with EU competition law, the EC is open to provide guidance regarding novel or unresolved questions on individual agreements.

Other forms of cooperation relating to sustainability continue to be covered by the relevant chapter of the Guidelines, e.g., for R&D agreements.

**“The revised rules on horizontal agreements provide clear guidance to help businesses assess the compatibility of their cooperation agreements with our competition rules. Including joint sustainability initiatives. This up-to-date guidance is a key tool to push forward the green and digital transitions.”**

- **Margrethe Vestager**  
European Commissioner  
for Competition

## FRANCE

The French Competition Authority (the FCA) has identified sustainable development as one of its policy priorities and has publicly highlighted its commitment to the ecological transition in all aspects of its work. For that purpose, the FCA set up an internal sustainable development network in 2019 with the aim of increasing its expertise on sustainable development considerations and strengthening its relationships with key actors in this area.

### Antitrust

In markets where the environmental performance of a product or service has become an important parameter of competition, the FCA focuses on detecting anticompetitive practices between competitors that could reduce innovation and have a detrimental impact on the achievement of sustainable development. Notably, in the floor coverings cartel case, the FCA considered that the agreement between three leading manufacturers of hard-wearing floor coverings not to communicate the individual environmental performance of their respective products to their customers may have disincentivised the manufacturers from innovating and improving the technical environmental performance of their products, thus restricting competition between their products based on their environmental characteristics.

In July 2021, the FCA included an environmental criterion as a parameter for assessing the seriousness of an infringement in its revised procedural notice on the setting of fines, meaning that anticompetitive practices that have a harmful effect on sustainable development may be considered as more serious and thus subject to heavier fines in the future. As a result, when setting the fines in September 2021 for anticompetitive practices in the road transport sector, the FCA took into account that the anticompetitive practices impeded efforts to improve the environmental efficiency of the sector. In this context, the FCA is also considering whether the seriousness of an infringement can – to the contrary – be nuanced when a company's practices are likely to have had a positive impact on the objective of sustainable development.

Finally, the FCA has stated that – in cases in which the analysis is not straightforward – it is willing to provide guidance to any companies wishing to establish cooperation agreements pursuing sustainability objectives with their competitors. In this context, the FCA has announced that it is considering the publication of its own guidelines equivalent to those recently published by the EC in relation to the assessment of horizontal agreements pursuing sustainability objectives

### Sector Inquiry and advisory work

The FCA has issued several sectoral reports and advisory opinions in recent years (e.g., in relation to the circular economy) and announced the launch of studies on the land passenger transport sector as well as on the electric vehicle charging station market, describing it as an opportunity to support a market that is currently developing.

## GERMANY

The German Federal Cartel Office (German FCO) has not yet released guidelines regarding the treatment of cooperations between competitors with sustainability objectives, including climate protection. The German competition law does not provide any specific references to sustainability objectives for assessing cooperation between competitors. However, as an EU authority, the German FCO analyses German cooperation and initiatives not only from a German law perspective but also under EU law.

### Decisions by German FCO

In recent years, the German FCO issued several decisions that provide insights into its view on cooperation for the purposes of environmental sustainability from a competition law perspective. However, German courts have not made decisions in this area from a competition law perspective.

#### *Meat Production: Initiative for Animal Welfare*

In 2014, the German FCO analysed the Initiative for Animal Welfare and subsequently provided continued guidance. The initiative concerns an agreement between the agricultural, meat production and food retail sectors to reward livestock owners for improving breeding conditions by charging buyers a compulsory premium payable to the farmers. The German FCO stated that the binding nature of the premium would mean that it would constitute a hardcore restriction that would be prohibited by competition law.

#### *Bananas: Wages for Workers*

The German FCO also considered an initiative launched by the German retail sector and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH to introduce living wages in the banana sector. This involved voluntary commitments by participants to introduce progressive percentage rate increases for living wages in the private label sector. The core objective of the Pilot Project was to jointly introduce responsible procurement practices and develop processes to monitor transparent wages. No information on procurement prices, other costs, production volumes or margins was exchanged. The German FCO therefore concluded that this did not amount to an infringement of competition law for price fixing.

#### *Milk Production: Wages for Local Farmers*

The German FCO also considered a financing project aimed at sharing the risks and burdens of the agricultural transformation processes in the milk production sector. It was based on a jointly agreed index-based price mark-up that was binding upon its participants. The German FCO considered that this breached German and EU competition law and it was not able to benefit from an exemption. It considered that the project neither directly nor indirectly aimed at a higher standard of sustainability, but instead constituted a sector-wide pricing collusion based on individual cost developments. Higher wages for farmers as such would not contribute to protecting the environment, reducing the use of pesticides or animal welfare.

**“Competition law is flexible enough to support sustainability initiatives especially in setting common standards while making sure that the conditions are fair and transparent. But there are also limits to this. Cooperations have to genuinely improve sustainability and must not only aim to increase the margins of a few companies.”**

**- Andreas Mundt**  
President of the German FCO



## ITALY

The Italian Competition Authority (ICA) recognises the importance of its role in reducing the environmental impact of economic activities to enable Italy to achieve goals which it has committed to at an international level.

In July 2021, the ICA set up a special task force to study possible intersections and synergies between competition and environmental sustainability.

However, thus far the ICA has adopted a cautious approach and has not issued guidance to enable companies to self-assess whether their activities to promote environmental protection are in breach of Italian competition law. The ICA has chosen to focus on its intervention priorities, seeking to foster competition in the markets that may have an important impact on environmental sustainability.

The ICA considers that promoting environmental protection and fostering competition are not incompatible. Competition can serve as a complementary tool for achieving sustainability goals by ensuring innovation and market development in the interest of the consumer.

In 2021 and 2022, the ICA carried out many investigations seeking to identify and sanction infringements such as exclusionary conduct by dominant players in key markets for the development of recycling. The final goal is to increase the production of recycled inputs for Italian companies to reduce the use of raw materials.

The ICA has also used its consumer protection powers to prevent misleading descriptions of products and services which claim to have green credentials. It has therefore taken a strong stance against potential “green washing”.

The European Commission’s Guidelines on Horizontal Agreements, which include greater guidance on environmental sustainability, may also have an impact on the ICA’s enforcement activity in the future.

**“Safeguarding competition and environmental sustainability often have aspects of strong complementarity, as also shown by the 2022 interventions, which concerned potentially exclusionary conduct in the recycling of waste electrical and electronic equipment, as well as in the recycling of polyethylene waste goods. In both cases, the Authority accepted and made binding the commitments submitted by the parties.”**

- **Roberto Rustichelli**  
President of the Italian  
Competition Authority

## **JAPAN**

On 31 March 2023, the Japan Fair Trade Commission (JFTC) published guidelines the “Green Guidelines” concerning the activities of enterprises, etc., toward the realisation of a green society under the Antimonopoly Act (the JAMA).

The Green Guidelines declare that the activities of enterprises toward realising a green society are unlikely to pose problems under the JAMA most of the time. According to the JFTC this is because, in many cases, the activities of enterprises focused on achieving a green society are not intended to restrain fair and free competition among them. Instead, they have pro-competitive effects such as creating new technologies and superior products expected to contribute to the interests of consumers through, among other things, reducing greenhouse gas emissions.

However, if enterprises’ activities have solely anti-competitive effects, restraining fair and free competition by imposing restraints on the prices, quantities and technologies of individual enterprises, such activities pose problems under the JAMA, even where they are nominally aimed at contributing to achieving a green society.

The Green Guidelines set out more than 70 examples of conduct which does not raise competitive law issues, and, conversely, conduct which does raise competitive law issues.

For example, in most cases the establishment of voluntary standards, such as the unification of specifications, by a trade association for the purpose of reducing greenhouse gas emissions would be permissible. However, this could be an issue if such voluntary standards are discriminatory or restrict specific forms of competition.

The Green Guidelines also indicate that joint research and development (R&D) of a technology to reduce greenhouse gas emissions where it is difficult for a single company to conduct R&D alone would be permissible.

In terms of joint data collection, the Green Guidelines provide that commercially sensitive information such as supply capacity could be shared between ‘clean’ team members of competitors (which should not include sales team members of each company) subject to strict data management within the ‘clean’ team.

The JFTC has also established a consultation window to provide advice on whether the specific activities that operators intend to carry out pose any problems under the JAMA.

### **Syndicated loans case study**

The JFTC’s response to public comments on the draft guidelines included a scenario based on syndicated loans. The JFTC assessed whether there would be competition law concerns with a loan covenant that stated: “if the borrower cannot achieve a target of reducing greenhouse gas emissions, the borrower’s use of the power generation facilities will be restricted”. It commented that, in general, this could be considered as a group boycott; however, it would possibly be permitted if imposed for social and public purposes and it was expected to promote competition.

The JFTC stated that the above covenant would not by itself automatically be considered an “act abusing a superior bargaining position” which is prohibited under the JAMA. However, even if the transaction serves the social and public purpose of reducing greenhouse gas emissions, a business operator should not take advantage of its superiority over the other party to impose a reduction in greenhouse gas emissions. If the superior operator sets a price unilaterally – for instance, not taking into account the cost burden for the other party – such operator’s action could be considered an “act abusing a superior bargaining position”.

## NETHERLANDS

In 2021, the Dutch Authority for Consumers and Markets (ACM) published its second draft version of the Guidelines on Sustainability Agreements (the Guidelines), providing guidance to companies on how to design sustainability agreements that comply with competition law. These agreements, also known as cooperation agreements or green agreements, are voluntary arrangements among companies aimed at achieving environmental or social objectives. They often involve collaboration to reduce carbon emissions, promote energy efficiency, or implement sustainable production practices.

The Guidelines emphasise the importance of assessing whether the sustainability benefits outweigh any potential competition concerns. The ACM makes this assessment on a case-by-case basis, taking account of factors such as the contribution to sustainability objectives, the level at which users of the products in question are allowed a fair share of those benefits, the necessity of cooperation and the potential anti-competitive effects. Companies are also able to receive guidance from the ACM on the legality of their sustainability agreements to encourage compliance and facilitate certainty.

### Recent examples of sustainability agreements

Shell and TotalEnergies received approval on the collaboration on a carbon storage project. The cooperation would restrict competition between the two undertakings to a small extent, but the ACM weighed that project's climate benefits were sufficiently important to outweigh the potential restriction. Another example is when the ACM allowed garden retail centres to collectively stop procuring damaging pesticides, (temporarily) excluding manufacturers of certain products containing substances that are harmful to humans, animals and the environment. There were no issues with these arrangements as long as they were open, transparent and included a due process.

This does not mean every sustainability argument is accepted by the ACM; the acquisition of waste processor AEB by AVR was recently blocked. The sustainability arguments given had to be legally implemented in any event even without the transaction being executed. Therefore, the ACM argued that the cooperation was not necessary for achieving the sustainability benefits.

### Outlook

The Netherlands recognises the importance of integrating sustainability consideration into competition policy. Through its lenient approach and the publication of the Guidelines, the ACM aims to encourage the adoption of sustainability agreements while ensuring compliance with competition law.

The Netherlands has increasingly recognised the importance of addressing sustainability challenges and promoting environmentally friendly practices. The ACM has taken steps to accommodate sustainability agreements, acknowledging their potential benefits while ensuring they comply with competition law.

## UNITED KINGDOM

In February 2023, the UK's Competition and Markets Authority (CMA) published draft guidance on how the UK's prohibition of anti-competitive agreements (the Chapter I Prohibition) applies to environmental sustainability agreements (the Draft Guidance).

If finalised, the Draft Guidance will apply to "environmental sustainability agreements", which are defined as agreements or concerted practices aimed at assessing, preventing, reducing and/or mitigating the adverse impact of economic activities on environmental sustainability. A subset of environmental sustainability agreements referred to as "climate change agreements" (*i.e.*, environmental sustainability agreements which contribute towards the UK's binding climate change targets under domestic or international law) would benefit from a more permissive application of the exemption criteria under Section 9(1) of the Competition Act 1998 (the Chapter I Exemption), reducing the likelihood that they are found to infringe the Chapter I Prohibition. The Draft Guidance also provides a non-exhaustive list of potential climate change agreements, which includes agreements "not to provide support such as financing or insurance to fossil fuel producers".

The Draft Guidance seeks to delineate between agreements that (i) are unlikely to infringe the Chapter I Prohibition, (ii) could infringe the Chapter I Prohibition, and (iii) could benefit from the Chapter I Exemption (but would otherwise infringe the Chapter I Prohibition) and provides several helpful examples to inform how different types of agreements should be categorised.

The CMA includes categories of environmental sustainability agreements which are unlikely to infringe the Chapter I Prohibition. This includes: (i) agreements which do not affect the main parameters of competition; (ii) agreements to do something jointly which none of the parties could do individually; (iii) cooperation between competitors that is required by law (not merely encouraged); (iv) pooling information on the environmental sustainability credentials of suppliers or customers; and (v) the creation of industry standards aimed at improving sustainability.

In particular, the Draft Guidance states that industry standards aimed at making products or processes more sustainable are unlikely to restrict competition if certain criteria are met – including that the standards are transparent, voluntary, enable participation by third parties and only impose minimum (not maximum) standards. Where parties agree not to go beyond certain sustainability standards, the Draft Guidance warns that the arrangement is likely to restrict competition, but that the restriction could be justified if the parties can argue it is necessary to the parties' incentives and focus their efforts on implementing the agreement.

The Draft Guidance states that the CMA would not take enforcement action against environmental sustainability agreements that clearly correspond to the principles and examples set out in the Draft Guidance. It also establishes an "open-door policy" whereby parties would be encouraged to approach the CMA for informal guidance on actual or contemplated environmental sustainability agreements. Where the CMA does not raise competition concerns in response to an initiative that was discussed with the CMA, the Draft Guidance provides that the CMA would not issue fines.

**“There can be few, if any, bigger challenges facing our economy and our society than climate change. That’s why, in our new strategy, we have prioritised action to accelerate the UK’s transition to a net zero economy.”**

**- Sarah Cardell**  
CEO, UK Competition and Markets Authority

## UNITED STATES

### Industry Initiatives as Collaborative Conduct

Under US antitrust law, anticompetitive agreements among competitors are generally illegal even when they advance a virtuous cause. This principle originated in a 1941 Supreme Court case involving intellectual property piracy. In *Fashion Originators' Guild of America v. FTC*, the Court found *per se* illegal a horizontal agreement among independent fashion designers to boycott distributors who sold pirated copies of their designs.

More recently, in a matter during the Trump Administration involving vehicle emissions the Antitrust Division investigated the legality of individual agreements between major auto manufacturers and the State of California to support fuel efficiency and emissions standards. The Division stated that its concern was that the agreements amounted to a pact among automakers not to make larger, less efficient cars. The Administration noted that it was “normal for antitrust enforcers to be concerned about such agreements between competitors within an industry” – including for “well-intentioned goals” or “politically popular ends.” After five months of investigation, the Division closed the matter without comment, apparently because (1) the agreements were with the State of California and not among the automakers; (2) the agreements may have been legal under the state-action immunity doctrine, which insulates conduct allowed by state policy and supervised by the state, and (3) the agreements with California did not prevent automakers from competing with each other in multiple ways.

### Collaborative Conduct under the Antitrust Laws

Certain Republican-controlled states, often referred to as “Red States”, are scrutinising climate alliances, focusing on whether participating companies have “*agreed*” or “*colluded*” to decline to do business with or provide finance to fossil fuel companies. Red states have targeted two sector alliances under GFANZ: the Net Zero Asset Managers and the Net Zero Banking Alliance. In joining these sector alliances, members sign sector-specific “Commitment Statements,” which include commitments to transition clients and portfolios to align with pathways to “net zero” emissions by 2050 or sooner and setting five-year intermediate targets. These and other criteria have been a focus of Red State allegations of collusion and fossil fuel boycotts.

### Antitrust Risk Mitigation Strategies for ESG Collaborations

The cardinal rule for participants in industry coalitions is to make independent competitive decisions. The Antitrust Division addressed one such coalition over a decade ago involving a group of colleges and universities pursuing “collaborative social responsibility initiatives” that sought to promote fair wages and working conditions among their licensed apparel suppliers. Acting on a request for a Business Review Letter from the Worker Rights Consortium, the Division determined that the programme was unlikely to have anticompetitive effects because it was optional for each school and licensee, was unlikely to have a substantial effect on licensing competition among participating schools or competition for apparel sales, and involved only a “tiny portion” of the labour market. Significantly, the Division also noted that the collaboration could facilitate competition in a new area, by providing assurances that certified apparel was produced using fair labor standards.

### Antitrust Guidelines for Collaborations Among Competitors

- In their *Antitrust Guidelines for Collaborations Among Competitors*, the DOJ and FTC recognise that collaboration among competitors can often be benign or pro-competitive.
- To determine the legality of competitor agreements, these guidelines focus on the purpose of the collaboration, preservation of independent decision-making, limits on sharing confidential information, and the impact on relevant markets.
- The FTC’s “*Spotlight on Trade Associations*” similarly notes the potential pro-competitive effects of certain industry-level activities such as establishing safety and interoperability standards, and representing members before legislatures and government agencies, when undertaken with adequate safeguards.

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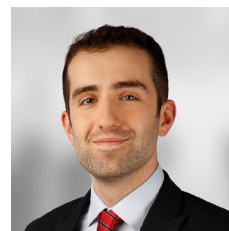
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