POLICY AND POLITICS: TWO SIDES OF THE ESG COIN?

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Governments across the globe have adopted different approaches to spur innovative technologies to transition economies towards Net Zero. "Environmental, Social and Governance" ("ESG") is the umbrella term for policies that are adopted by organizations to promote such social and environmental goals. Despite some level of public consensus (admittedly higher in some countries than others) about the need to act on climate change and other environmental and social issues, there is ongoing debate on how antitrust rules should deal with competitor collaborations to promote ESG initiatives. Whilst it is still early days, we can already observe divergent approaches from antitrust authorities across the globe in the face of divided public opinion and political polarization. This article will present a brief overview of the current treatment of ESG collaborations under antitrust rules in the EU, UK, and the U.S. then offer a range of possible approaches open to policymakers and regulators. We reflect below on the need to achieve legitimacy for any steps taken to adopt a more ESG-friendly stance, and on how different approaches may achieve this legitimacy.

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01

IT TAKES A VILLAGE, BUT WHAT ABOUT A VILLAGE OF COMPETITORS?

Governments across the globe have adopted different approaches to spur innovative technologies to transition economies towards Net Zero. "Environmental, Social and Governance" ("ESG") is the umbrella term for policies that are adopted by organizations to promote such social and environmental goals. Despite some level of public consensus (admittedly higher in some countries than others) about the need to act on climate change and other environmental and social issues, there is ongoing debate on how antitrust rules should deal with competitor collaborations to promote ESG initiatives. In the United States for example, on the one hand, pro-ESG Democrats advocate for free enterprise and ingenuity of companies to pursue their Net Zero goals within the bounds of antitrust law, whereas Anti-ESG Republicans characterize the current private-enterprise driven *standard-setting* collaboration as a *tax on democracy* from the *global elites*. Since President Trump's election, various alliances have been formed, dedicated to implementing ESG plans – which those who are skeptical of or opposed to the ESG agenda allege will raise prices, risk retirement funds, and undermine the democratic system of governance.

Whilst it is still early days, we can already observe divergent approaches from antitrust authorities across the globe in the face of divided public opinion and political polarization. Authorities in the EU, UK and Asia (such as the Japan Fair Trade Commission)[2] have started tackling the issue head-on, with some already issuing potentially valuable (draft) guidance on how businesses can lawfully engage in ESG collaborations and circumstances where collaborations generating anti-competitive effects may nevertheless be permissible on efficiency or public benefit grounds. In the U.S., we have not seen much (if any) regulatory or legislative action on a federal scale, whilst a complex patchwork of various state-driven approaches exists.

This article will present a brief overview of the current treatment of ESG collaborations under antitrust rules in the EU, UK, and the U.S. then offer a range of possible approaches open to policymakers and regulators. We reflect below on the need to achieve legitimacy for any steps taken to adopt a more ESG-friendly stance, and on how different approaches may achieve this legitimacy.

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DIVERGENT REGULATORY APPROACHES ACROSS JURISDICTIONS

A. UK and the Netherlands

The UK's Competition and Markets Authority ("UK CMA") and the Netherlands Authority for Consumers and Markets ("Dutch ACM") have positioned themselves as two of the leading antitrust authorities seeking to drive the global debate on how antitrust laws should facilitate legitimate collaborations between businesses to achieve environmental sustainability objectives.

The Dutch ACM was the first authority in Europe to issue detailed draft guidance on the application of antitrust laws to ESG initiatives, releasing its first draft Guidelines on Sustainability Agreements in 2020[3] with a revised draft published in 2021.[4] The UK CMA followed suit by publishing an information sheet for businesses and trade associations in January 2021[5] and, in early 2023, releasing draft guidance

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2 On March 31, 2023, the Japan Fair Trade Commission (the "JFTC") enacted new guidelines to provide a guidance as to how and whether the concept of "sustainability" would impact their regulatory enforcement. See Kaori Yamada et. al., *Japan's new antitrust guidelines on environmental sustainability, including business cooperation*, FRESHFIELDS BRUCKAUS DERINGER OUR THINKING (April 10, 2023), https://www.freshfields.com/en-gb/our-thinking/knowledge/briefing/2023/04/japans-new-antitrust-guidelines-on-environmental-sustainability-including-business-cooperation/.

3 *Sustainability Agreements – Opportunities Within Competition Law* (Autoriteit Consument & Markt, Draft Government Guidelines, 2020), https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

4 *Sustainability Agreements – Opportunities Within Competition Law* (Autoriteit Consument & Markt, Draft Government Guidelines, 2021) https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf.

5 *Environmental Sustainability Agreements and Competition Law*, Competition & Markets Authority (Jan. 27, 2021), https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law.

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on the application of the prohibition on anticompetitive agreements to environmental sustainability agreements.[6]

Both authorities' draft guidance provide much needed clarity on the types of collaborations that would not typically raise antitrust concerns (e.g. joint lobbying efforts or collaborations that do not affect parameters of competition between firms) and those that do but can nevertheless benefit from existing legal exemptions on the basis that they generate sufficient public benefits that outweigh any anti-competitive effects. However, it is in the latter sphere that the Dutch ACM and the UK CMA have put their heads above the regulatory parapet.

The conventional competition law wisdom (at least in the EU and the UK) is that anticompetitive agreements should only be exempt if the consumers who bear the costs (e.g. increase in price or reduction in product quality, choice or innovation) receive a "fair share" of the benefits resulting from it. Under this approach, ESG benefits could only be taken into account if the value that the relevant consumers place on them (e.g. as demonstrated by their willingness to pay higher prices for sustainable products) fully compensates those same consumers for competitive harms suffered. This may present a challenge for some ESG agreements where ESG benefits are typically enjoyed by a much broader group of consumers than those affected by the conduct, and the cost-benefit analysis may fail to stack up if the benefits assessment is limited to the narrower class of affected consumers – at least partly because negative externalities, including costs for future generations, are not generally reflected in pricing decisions. Here, the UK CMA has given clear signals that it is prepared to take into account benefits to the totality of UK consumers, albeit only in relation to agreements that contribute to the UK's binding climate change targets.[7] The Dutch ACM is prepared to go even further and apply this more permissive treatment to a broad range of agreements which reduce "environmental damage," not just those that relate to climate change but also including, for example, agreements to stem biodiversity loss. This puts both the UK and the Netherlands currently in a different position from some other regulators in Europe, most notably the European Commission, as well as the U.S. Agencies.

B. Austria

Unlike the UK and the Netherlands, where antitrust authorities have found footholds within the existing antitrust law framework to take broader sustainability (or climate change, in the UK) benefits into account, the Austrian legislature has formally addressed this issue by introducing a "sustainability exemption" to its cartel laws in September 2021. The new exemption does away with the need to prove the "fair share to consumers" criterion for collaborations that "significantly contributes to an ecologically sustainable and climate neutral economy." The exemption only applies to agreements focused on Austria and excludes those that affect trade between EU member states (which are governed by EU antitrust laws).

"This puts both the UK and the Netherlands currently in a different position from some other regulators in Europe, most notably the European Commission, as well as the U.S. Agencies

C. EU

The European Commission is also seeking to play a leading role in the ESG and antitrust debate. In 2022, it released detailed draft guidelines for sustainability agreements, which (much like the UK CMA and Dutch ACM guidelines) provides helpful guidance on how to keep competitor ESG collaborations on the right side of the line. The draft guidelines do envisage that sustainability-related agreements can provide cognizable benefits. However, unlike the UK CMA and the Dutch ACM, the European Commission is currently not ready to take the step of permitting in-market consumer harms to be offset by "out-of-market" sustainability benefits.[8] Instead, under its draft guidelines, the European Commission envisages considering "collective benefits" enjoyed by a larger group of beneficiaries (for example, environmental benefits enjoyed by the general public) if there is a *substantial overlap* between those beneficiaries and consumers in the affected market – a requirement that will at least sometimes be more difficult to meet in practice for ESG agreements. This approach reflects the traditional philosophy that consumers should be fully compensated for competitive harms suffered in the relevant markets, and so does not take account of benefits generated for any wider class of consumers. That said, the fact that the European Commission has issued draft guidelines and has indicated its willingness to

6 *Draft Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Environmental Sustainability Agreements* (Competitions & Markets Authority, Draft Government Guidelines CMA177, 2023), [hereinafter *CMA Draft Guidance*] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document__.pdf.

7 *Id*. at 25-26.

8 Charley Connor, *Vestager Unwilling to Consider Out-of-Market Sustainability Benefits*, GCR (February 3, 2022), https://globalcompetitionreview.com/article/vestager-unwilling-consider-out-of-market-sustainability-benefits.

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engage constructively with parties on a case-by-case basis, is nevertheless a positive contribution to the pro-ESG movement. Final guidelines from the European Commission are expected to be published in June 2023.

D. U.S.

U.S. Federal Antitrust Authorities: In the United States, ESG and antitrust guidance has not explicitly developed at the same pace as in the EU or the UK, either as a matter of policy or rhetoric. U.S. antitrust laws do not yet provide a clear-cut framework to account for potential welfare-enhancing ESG benefits on a broader scale. The federal antitrust agencies, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") have insisted that ESG-related conduct must be assessed within the traditional antitrust framework[9]– pegged squarely to the consumer welfare standard— measuring competitive effects by price, output, innovation, quality, among other factors.[10] The consumer welfare standard evaluates business conduct and mergers by whether they harm consumers in any relevant market without necessarily considering wider – out of market – benefits. In the United States the prevailing view of both the FTC and the DOJ is that the *public interest* is best served by maintaining rigorous and effective competition, and ESG benefits cannot save an agreement that negatively affects competition.[11]

However, that is not to say that antitrust laws cannot facilitate pro-competitive collaborations. Antitrust laws can play a role in promoting industry collaborations in some instances – such as by offering guidance on joint ventures or standard-developing institutions. For example, the National Cooperative Research and Production Act of 1993 ("NCRPA")[12] is designed to promote innovation, facilitate trade, and strengthen competitiveness by allowing private entities to submit notifications to the DOJ, and receive guidance on the applicability of the antitrust laws toward joint efforts. Though it is possible to obtain informal guidance through DOJ and FTC *guidance letters*, those routes – as well as the NCPRA – have arguably been underutilized in relation to ESG-related efforts.

> *"However, that is not to say that antitrust laws cannot facilitate pro-competitive collaborations*

The policy polarization on both ends of the spectrum has allowed what some are calling the "weaponization of antitrust laws" to emerge to fill the vacuum of clear consensus on policy or societal objectives. This is not, of course, the first time commentators have pointed to potential political motivations behind the use of antitrust laws to prevent certain economic activity – for example, some have alleged similar uses of antitrust law for political ends in the cannabis industry,[13] certain merger control enforcement actions during the Trump era, via the California emissions standard

9 See Lina Khan, *ESG Won't Stop the FTC*, WALL STREET JOURNAL (Dec. 21, 2022), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135 noting, "The antitrust laws don't permit us to turn a blind eye to an illegal *deal just because the parties commit to some unrelated social benefit* [emphasis added]**.** The laws we enforce are explicit: They prohibit mergers that "may substantially lessen competition or tend to create a monopoly." They don't ask us to pick between good and bad monopolies. Our statutory mandate is to halt a lessening of competition "in any line of commerce." So we can't act as deal makers, allowing reduced competition in one market in exchange for some unrelated commitment or benefit in another." Note, although a merger-specific reference, this approach broadly reflects the philosophical approach to vigorous antitrust enforcement generally.

10 See Christine S. Wilson, Commissioner, U.S. Fed. Trade Com'n, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get*, keynote address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019): "the Agencies do not consider non-competition factors in their antitrust analysis." The Agencies have learned that, while such considerations "may be appropriate policy objectives and worthy goals overall … integrating their consideration into a competition analysis … can lead to poor outcomes to the detriment of both businesses and consumers." Instead, the Agencies focus on ensuring competition that benefits consumers, and they leave other policies to other parts of government that may be specifically charged with or better placed to consider such objectives. *Id*. at p.3

11 See *Public Interest Considerations in Merger Control* 5 (OECD, Working Paper No. 3 on Co-operation and Enforcement, 2016), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/1606public_interest_merger-us.pdf.

12 15 U.S.C. §§ 4301-06.

13 "In 2020, former Acting Chief of Staff to the U.S. Assistant Attorney General for the Antitrust Division, testified in front of Congress that the Division investigated ten cannabis mergers and the California/automakers emissions agreements, based on political pressure from Attorney General Bill Barr- rather than concerns about harm to competition. See Bill Baer *Opinion | Think the DOJ's Antitrust Division is Immune From Political Meddling? Think Again.*, WALL STREET JOURNAL (June 24, 2020), https://www.washingtonpost.com/opinions/2020/06/24/think-dojs-antitrust-division-is-immune-political-meddling-think-again/.

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investigations, and via the current *techlash*'[14] In at least some cases, it may be said that the alleged weaponization of antitrust is arguably a means to an end of signaling and enacting certain social and economic messages and objectives– rather than being strictly related to driving antitrust-related outcomes.[15]

State Antitrust Enforcers: Unlike the federal regulatory environment it is apparent that State Antitrust enforcers and statehouses are pursuing ESG-related agendas, but in very divergent ways. In anti-ESG circles, which tend toward Republican-controlled states, State AGs have sent letters to members of the Net Zero Alliances concerning *the legality* of commitments to collaborate with asset owners and insurers toward shared missions to achieve sustainability metrics.[16] Texas and Florida have pulled out of pensions funds invested in ESG – and this year, over 7 states have passed state anti-ESG legislation into law, with state legislatures filing nearly 99 bills aimed at restricting ESG business practices, up from 39 in 2022.[17] The NYC pension fund has also seen its first anti-ESG class-action litigation concerning its decision to divest its portfolio from fossil fuel funds.[18] On the other hand, pro-ESG statehouses (such as New York, Massachusetts, and Vermont) are pushing legislative efforts in the complete opposite direction, including requiring pension funds to divest interests in fossil fuel assets.[19]

03

WHERE TO FROM HERE?

One conclusion to be drawn from the above is that, if a more pro-ESG stance from antitrust authorities is to emerge, this has to be built on a platform of legitimacy. That is, any authority (or other actor) seeking to advance a pro-ESG tilted approach is likely to have to advance reasoning as to why the approach is built on appropriately strong public policy foundations that have embedded legitimacy given their democratic mandate or which otherwise reflect a sufficient public consensus.

A. Legislatively Led Approach to Incorporating ESG into Antitrust Assessments

The role of the private sector to promote ESG initiatives, and whether those costs should be borne by consumers or shareholders, remains a polarizing issue, even in jurisdictions with overwhelming public support for climate change action. In a Congressional hearing on ESG as recent as May 10th, several State Attorneys General emphasized that the current private-sector led approach amounted to a democratic capture.[20] Another common objection is that mandatory ESG laws and regulations requiring firms to change their practices to reduce their ESG impact is more effective

14 "The AT&T/Time Warner merger is one of three antitrust decisions made during the Trump administration that could be characterized as "pro-Fox," alongside Disney/21st Century Fox and Sinclair Broadcasting Group/Tribune Media Company." See Becky Chao, *Preventing the Politization of Antitrust Enforcement*, NEW AMERICA (May 9, 2019), https://www.newamerica.org/weekly/preventing-politicization-antitrust-enforcement/.

15 According to AAG Delrahim, the Antitrust Division was confronted with the question of whether the policy aims of effective antitrust enforcement (i.e. preservation of market conditions that will lead to lower prices and higher output, quality, and innovation) are inconsistent with the DOJ's other obligations to enforce the Controlled Substances Act and other federal regulations of cannabis.

16 See Kane Wells, *Republican AGs Pen Critical Letter to NIZA Members Conveying "Legal Concerns,"* REINSURANCE NEWS (May 18, 2023) https://www.reinsurancene.ws/republican-ags-pen-critical-letter-to-nzia-members-conveying-legal-concerns/, and see Letter from State AGs to the Net Zero Asset Owner Alliance (Mar. 30, 2023) (available at https://www.legalbluebook.com/bluebook/v21/rules/17-unpublished-and-forthcoming-sources/17-2-unpublished-materials#b-320043).

17 "This year state legislators, chiefly Republicans, have filed roughly 99 bills aimed at restricting the rise of ESG business practices, up from 39 in 2022, according to law firm Morgan Lewis. As of April 3, seven of the bills had been enacted into law, 20 were effectively dead, and 72 were still pending." See Ross Kerber, *Business Fights Back as Republican State Lawmakers Push Anti-ESG Agenda*, REUTERS (Apr. 24, 2023), https://www.reuters.com/business/sustainable-business/business-fights-back-republican-state-lawmakers-push-anti-esg-agenda-2023-04-22/.

18 See Saijel Kishan & Martin Z Braun, *NYC Pension Funds Are Sued for Cutting Fossil-Fuel Stakes*, BLOOMBERG (May 12, 2023), https://www.bloomberg.com/news/articles/2023-05-12/nyc-pension-funds-are-sued-for-cutting-fossil-fuel-stake#xj4y7vzkg.

19 For example, "Democrats have also filed far-reaching bills such as a pair in California to require companies to disclose greenhouse gas emissions and for state pension funds to divest fossil fuel stocks… This month in Kansas, legislators softened language in a Republican bill aimed at limiting the use of ESG in investment decisions to address concern it would cost $3.6 billion over 10 years in lower pension system returns." See Kerber, *supra* note 17.

20 Undermining the U.S. system of government, "unelected Elites are making policy decisions outside of democratic processes. Groups like Climate Action +100 and Net Zero Banking Alliance require their members to coordinate on business activity to meet ESG standards not otherwise required by law this private coordination is designed to accomplish what could not be done through normal Democratic processes or the free market ESG requires companies to forego otherwise profitable economic transactions to achieve woke social policy." ESG Part I: An Examination of Environmental, Social, and Governance Practices with Attorneys General: Hearing Before the U.S. House Comm. on Oversight and Accountability, 117th Cong. (2023).

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to drive change, and removes the need for potentially anticompetitive private sector collaborations. However, such forms of *command and control* regimes come with significant drawbacks, including that they are often the outcome of significant political compromise, regulatory standards globally are typically slow to be adopted and limited in geographical reach, and can be poorly implemented and inconsistent between jurisdictions.

In this politically charged climate where there are differing views on the role (if any) of antitrust in promoting ESG initiatives, any new (or adapted) antitrust law or regulatory frameworks would have the most political legitimacy if reform were legislatively-led, so resting on the democratic mandate of the legislature.

Arguably, the most radical approach in a legislatively-led scenario would be to legislate a new public interest standard, similar to that historically applied in some merger control regimes.[21] While a public interest standard would have the benefit of flexibility and evolve to reflect changing political, social and cultural norms (as well as being comfortably broad enough to bring sustainability goals into cognizance), it has the drawback of being highly uncertain and practically very challenging. Assuming that agencies would be left to determine the public interest status of an agreement or transaction, having officials making policy decisions as to what is in the *public interest* would itself potentially lack political legitimacy and would risk inconsistent applications of the law. Judicial interpretation of whether conduct is in the "public interest" is also fraught with difficulty, with some judges likely to adopt an overly deferential approach to the regulatory or administrative decision maker at first instance to avoid the perception of judicial overreach, while others may have to wrestle with difficult policy choices potentially better left to the legislature, neither of which is ideal.

An alternative approach is to retain the primacy of the consumer welfare standard but codify a broader range of non-economic factors which may be taken into account as part of the assessment. As noted above, this is the approach adopted in Austria where the legislature has formally introduced a sustainability exemption to Austrian cartel laws, albeit the exemption is strictly limited to ecological sustainability and contribution to a climate neutral economy rather than a broader range of ESG factors. A codified list of public interest factors has the benefit of greater clarity and predictability than an amorphous "public interest" test. The South African merger control regime also provides a helpful example, where in addition to competition effects, a merger must also be assessed by reference to a list of statutory public interest factors, which include impacts on employment and increasing the spread of ownership amongst historically disadvantaged persons. It would be open to legislatures to do the same for sustainability-led factors.

B. Agency-led Re-understanding of the Relevant Test

In the absence of (sufficient) legislative-led reform, an agency-led approach is also possible. Without the democratic underpinning of a legislatively-led reform, it is arguably more challenging for an antitrust authority to demonstrate sufficient legitimacy for its steps. However, the approaches of some authorities do bear analysis on how they are thinking about this.

First, the example of the CMA is striking. It visibly seeks to achieve legitimacy for the change described above (extending the category of cognizable beneficiaries for benefits arising from climate change agreements) by explaining that its approach is driven by (*inter alia*):

> "the exceptional nature of the harms posed by climate change (and therefore the exceptional nature of the benefits to consumers from combating or mitigating climate change or its impact); climate change represents a special category of threat that sets it apart and requires a different approach to the pass-on criteria. This reflects the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into."

It thus rests its approach on two sources of legitimacy: first, the "degree of public concern" – that is the degree of consensus that exists (or is said to exist) that this is an appropriate public policy good to pursue (arguably akin to the way in which traditional approaches to antitrust are underpinned by a consensus on the value of competition for consumers). Notably, the CMA has not sought to change its approach for sustainability agreements more broadly – perhaps reflecting a lower degree of consensus beyond climate change. Second, the UK's binding international commitments, a source of law that stems ultimately from the government's democratic mandate.

> ***In the absence of (sufficient) legislative-led reform, an agency-led approach is also possible***

21 For example, mergers in the UK were historically reviewed subject to a public interest test under the Fair Trading Act 1973, until the Enterprise Act 2002 came into force and codified an economics-based competition test subject to public interest interventions on limited grounds (including media plurality, financial system stability and public health emergencies).

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Another alternative would be to make such a change part of a more wholesale re-understanding of the purpose or role of competition law and policy, resting on a more general social reimagining of that role and purpose. When the Biden Administration's Executive Order on Competition was introduced, some commentators suggested a new school of thought – the Neo-Brandeisian — was taking control of U.S. antitrust enforcement. The Neo-Brandeisian approach advocates for the adoption of a new legal standard asserted by its supporters to be "better" reflective of the social and political purposes of the antitrust statutes – such as embracing the concept of *total welfare*. Such a concept might well give space for a more progressive approach to ESG-related agreements.

Despite the gradual shift in enforcement to focus on labor markets, producers, and non-price metrics – we have yet to observe U.S. antitrust agencies embracing broader social factors – and it is likely to remain this way. An impediment to such a change is the lack of consensus on the legitimacy of this approach – it remains a view vocally put by some in the antitrust debate, and equally vocally resisted by others. In these circumstances, using a broader reimagining of antitrust to introduce a more progressive approach to sustainability may well lead simply to concerns about administrative overreach and exacerbate the political battles about both antitrust and sustainability.

C. Change by Stealth

Even if antitrust authorities are reluctant to publicly announce any formal change in interpretation of the legal standard to promote ESG collaborations, another option would be to enforce antitrust rules more leniently in given cases involving genuine pro-ESG collaborations.

Both the UK CMA and the Dutch ACM have indicated that they are prepared to stay their hand in relation to enforcement against businesses who "genuinely try to do the right thing"[22] (as well as the CMA's specific change in approach for climate change related agreements). Subject to some caveats, both authorities have also indicated that they will not issue fines against businesses who have obtained informal comfort from the authorities on their proposed collaboration, even if their conduct later crosses the line. In contrast, as explained above, the European Commission has not publicly announced any relaxation of enforcement against ESG collaboration, but it has signaled the need for vigorous enforcement of antitrust laws in order to drive competition and innovation and support the green transition.[23] It remains to be seen whether the European Commission will apply the rules more leniently in cases where parties have made a genuine and good faith attempt to comply with its guidance.

In the U.S., despite the DOJ and FTC publicly stating that there is *no antitrust exemption* for ESG measures, we have not (yet) seen enforcement against ESG collaborations from either agency that we might have expected under a Republican-led anti-ESG administration. Indeed, the high-profile investigations into climate groups affiliated with the Climate Action 100+ and Net Zero Asset Management network have been investigated by House Republicans and a number of Republican State Attorneys General, not the U.S. federal antitrust agencies who may perceive such collaborations as consistent with existing antitrust law and Biden-administration policy objectives.

If there were a change in enforcement practice in any jurisdiction, this might be dubbed (perhaps unfairly) "change by stealth." There is always some leeway for authorities to determine where their enforcement priorities lie (which, depending on the jurisdiction, may be more or less led by political guidance or direction): this is recognized as being within their reasonable sphere of authority, and thus may be deemed to be within the bounds of legitimacy. Furthermore, to the extent that existing antitrust norms are not disturbed by any shift in enforcement priorities, this may be easier to fit within a sufficient social consensus, rather than explicitly adopting a novel reimagining of antitrust. Nonetheless, given that this approach relies essentially on administrative discretion in a given case, it may fail to give sufficient certainty to market actors making that "good faith" attempt to pursue sustainability within the boundaries of antitrust rules.

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22 *CMA Draft Guidance, supra* note 6, at 28.

23 See Margrethe Vestager, Executive Vice President, Eur. Comm'n, U.S. Fed. Trade Com'n, *Competition Policy in Support of the Green Deal*, keynote speech at the 25th IBA Competition Conference, delivered by Inge Bernaerts, Director, DG Competition (Sept. 10, 2021): "It's the need to compete that pushes companies to do more to meet consumers' needs, and use less costly resources – changing business models, for instance, or investing in green innovation. And so [we] need to support the green transition by enforcing our rules more vigorously than ever." (available at https://competition-policy.ec.europa.eu/consumers/green-gazette/competition-policy_en). See also Richard Pepper, Fiona Beattie & Andrew Morrison, *Environmental Sustainability And Competition Law In Europe - Where Are We Now?*, LEXOLOGY (October 15, 2021), https://www.lexology.com/library/detail.aspx?g=ebb545c7-e9c5-4b6d-8a5a-eada863b752d.

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CONCLUSION

The multitude of approaches across jurisdictions towards ESG collaborations reflects the policy and political quagmire in which legislatures and regulators find themselves as they define the role that antitrust laws should play in promoting (or potentially being weaponized to hinder) ESG goals. The lack of political consensus about who should pay for climate action has paralyzed legislatures in many jurisdictions, leaving antitrust regulators walking the tightrope of executing their fundamental mandate – to enforce antitrust laws to maximize consumer welfare – and facilitating private sector action to tackle the biggest existential crisis of our time. Transparency and predictability for businesses is critical if they are to take the steps that government and society more broadly are increasingly expecting them to take. While, as we have explained, there are numerous routes open to agencies and legislators to build a pro-ESG approach in a way that has the necessary legitimacy, there currently is no international consensus on the best way to do so. Building that consensus internationally might be a good first step.

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