Balancing Sustainability and Competition: Evolving Challenges for U.S. Antitrust Authorities in the Green Economy Transition

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Shubhangi Agarwalla
Joshua Sprague Oliveira
As the global community increasingly prioritizes the transition to a green economy, the intersection between environmental sustainability initiatives and antitrust law has emerged as a critical area of concern. This paper examines the evolving challenges and considerations that U.S. antitrust authorities will face if they seek to align competition policy with the broader goals of environmental and social sustainability. The drive towards a greener economy necessitates significant changes in business practices, prompting companies to adopt sustainability measures that often require collaborative efforts. However, such collaborations can conflict with traditional antitrust principles, which are primarily designed to prevent anti-competitive practices and enhance consumer welfare.

There may be tensions between fostering sustainability and maintaining competitive markets. Unilateral sustainability efforts can lead to “first mover” disadvantages, such as higher operational costs and limited market acceptance, deterring ambitious environmental initiatives. Furthermore, the effectiveness of these efforts is often limited unless adopted on a broader scale, leading firms to seek more flexibility to act collectively. While collective action can be beneficial for achieving sustainability goals, it raises significant antitrust concerns, including the risk of collusion and the setting of market standards that could exclude smaller players or stifle innovation.

These concerns come at a time when competition authorities are grappling with several complex issues. These issues include determining the extent to which a reduction in competition should be allowed to achieve sustainability benefits and deciding whether such scenarios might warrant a reinterpretation of what constitutes an antitrust violation. Another set of issues involves the measurement of sustainability benefits: Who benefits, over what timeframe should these benefits be assessed, and how should they be quantified? Moreover, in cases where the benefits of sustainability extend beyond direct consumers to a broader array of stakeholders, there arises a need to further define what “consumer” means within the context of antitrust law. Additionally, there is a need to explore how broader welfare considerations, such as environmental and social impacts, should be integrated into the assessment of consumer welfare.

Competition authorities must consider these issues as they navigate the complex terrain of supporting environmental goals without compromising the competitive integrity of markets. This paper aims to address these challenges by drawing from European regulatory frameworks to accommodate the growing demands of sustainability while safeguarding fair market practices. Through a detailed examination of case studies and existing legal precedents, this paper seeks to contribute to the ongoing discourse on balancing sustainability and competition in the modern economy.

I. The Limitations of Traditional Antitrust Approaches

Traditional antitrust laws are meant to protect competition, primarily in order to benefit consumers by ensuring low prices, high quality, and robust innovation and consumer choice. The
focus on competition, by design, penalizes collaborative efforts among companies that may be essential for achieving sustainability goals. The interaction between sustainability and competition law emerges prominently in the context of “sustainability agreements” initiated by companies. These agreements are often designed to mitigate the negative impacts of business activities on society and the environment and attract consumers who care about sustainability. Examples include industry-wide initiatives where companies may agree to utilize environmentally friendly inputs, joint research and development to innovate less harmful processes, applications of blockchain for better lifecycle transparency, and cooperatives focused on recycling and recovery to promote circular economies.

Sustainability agreements can sometimes conflict with competition law. For instance, discussions within such agreements could lead to price fixing or market allocation under the pretense of environmental goals, leading to higher consumer prices. They may marginalize smaller competitors that cannot afford costly sustainable material or establish industry standards that require substantial investments, potentially creating barriers that exclude smaller firms and startups. Lastly, collective procurement practices where companies collaborate to purchase goods or services in bulk, such as renewable energy, may give the purchasing group significant market power, which could lead to predatory practices or exclusion of competitors if not managed carefully.

In light of these risks, enforcers and policymakers have increased their scrutiny of sustainability agreements. For example, in 2018, several tech giants, including Google, Apple, and Amazon, formed the Renewable Energy Buyers Alliance (REBA) to collectively purchase renewable energy. While the initiative claimed to promote sustainability, it raised antitrust concerns about potential market power and exclusionary practices that could disadvantage smaller players in the renewable energy sector.¹ In 2019, four major automakers (Ford, Volkswagen, Honda, and BMW) reached a voluntary agreement with the state of California to adhere to stricter emissions standards than those proposed by the federal government.² The Trump administration launched an antitrust investigation, that was later dropped, arguing that the agreement might unlawfully restrict competition.³

Some agreements may be desirable despite the risk of reduced competition if they produce substantial environmental benefits. Policymakers could reasonably conclude that these

agreements should be exempted from antitrust scrutiny when the environmental benefits are substantial relative to the reduction in competition. Furthermore, in some cases sustainability goals may actually promote competition in the long run by preserving the possibility of market entry or even the existence of the markets themselves. Yet American antitrust law, as it is currently interpreted, does not allow courts to take sustainability into account as a defense to anticompetitive agreements.

The lack of a sustainability defense may also deter companies from entering sustainability agreements that are not anticompetitive. For example, in September 2023, a group of state attorneys general wrote a letter to members of the Net Zero Alliance, “a global group of Service Providers committed to supporting the goal of global net zero greenhouse gas emissions by 2050 or sooner,” warning them that their membership may violate state and federal antitrust laws. But as Colorado Attorney General Phil Weiser noted in a response, the Net Zero Alliance merely requires that its members commit to a set of general principles, and does not prescribe a specific course of conduct or enforcement mechanism.

II. International Perspectives

In considering the potential conflict between ESG goals and competition law, it can be useful to look outward and contemplate how other jurisdictions have grappled with some of these tensions. Here, we look to and explore three examples: the European Union’s (EU) approach, the United Kingdom’s (UK) approach, and Austria’s approach. These approaches can give a perspective on what has worked elsewhere and can inspire American enforcers and policymakers to borrow aspects of these policies to address the tension between antitrust law and sustainability efforts in the U.S.

A. The European Union

Article 101 of the Treaty on the Functioning of the European Union (TFEU) is the foundation of the EU’s prohibition of collusive agreements. In 2023, the EU’s European Commission adopted new guidelines regarding the applicability of Article 101 to horizontal co-operation agreements. The 2023 guidelines added a new section which pertains specifically to horizontal agreements that pursue sustainability objectives, known as “sustainability agreements.”

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5 Id. at 262-63 (discussing the Supreme Court’s treatment of non-economic considerations in antitrust cases).
8 TFEU Article 101.
The guidelines define “sustainable development” quite broadly. They go beyond the common parlance of equating sustainability with “green” or “eco-friendly,” and include “activities that support economic, environmental and social (including [labor] and human rights) development.”\(^9\) They address three routes by which agreements relating to sustainability may be permitted. These include agreements outside of the scope of Article 101 of the TFEU, sustainability agreements that fall under the Article 101(1) prohibition on anticompetitive agreements (with special attention paid to sustainability standardization agreements), and sustainability agreements that may benefit from the Article 101(3) exemption to agreements prohibited by Article 101(1).

First, the guidelines note that some sustainability agreements fall outside the scope of Article 101. Agreements may fall outside the scope of Article 101 because they are needed to ensure compliance with legally binding international treaties, concern “internal corporate conduct,” facilitate information sharing about unsustainable suppliers, or relate to industry-wide “awareness campaigns” aimed at educating consumers about the environmental impact of their consumption.\(^10\) The EC found that such agreements are generally unlikely to negatively affect competition.\(^11\)

Next, the guidelines address sustainability agreements which may impact competition and therefore fall under Article 101(1). These are agreements under which competitors agree to transition away from unsustainable practices (e.g., fossil fuel use, waste production, poor animal welfare practices, etc.), but negatively affect one or more parameters of competition. As a threshold matter, the guidelines allow condemnation of an agreement without a full competitive effects analysis where the agreement is simply a disguise for a prohibited anticompetitive practice.\(^12\) If a competitive effects analysis is warranted, the guidelines state that the following factors should be taken into account:

- the market power of the parties participating in the agreement
- the degree to which the agreement limits the decision-making independence of the parties in relation to the main parameters of competition; the market coverage of the agreement
- the extent to which commercially sensitive information is exchanged in the context of the agreement

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\(^9\) 2023 O.J. (C 259) 111 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01); They further explain that such efforts can therefore include, “but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.” Id.

\(^10\) 2023 O.J. (C 259) 111-12.

\(^11\) 2023 O.J. (C 259) 112.

\(^12\) ¶ 534.
- whether the agreement results in an appreciable increase in price or an appreciable reduction in output, variety, quality or innovation.\textsuperscript{13}

The guidelines define a special procedure for “sustainability standardisation agreements” which it defines as a sub-category of sustainability agreements that require firms along the supply chain to meet certain sustainability metrics.\textsuperscript{14} Sustainability standardization agreements may involve the creation of a label, logo, or brand name indicating that products meet certain sustainability requirements.\textsuperscript{15} They differ from technical standards because they do not usually exist to facilitate interoperability and compatibility, and because they generally specify a goal without requiring firms to use a specific method to achieve that goal.\textsuperscript{16}

There is a risk that sustainability standardization agreements could restrict competition by facilitating price coordination, foreclosing alternative standards, or excluding competitors.\textsuperscript{17} To prevent firms from exploiting sustainability standardization agreements to reduce competition while encouraging such agreements that would improve competition or sustainability, the guidelines set up a soft safe harbor for agreements which are “unlikely to produce appreciable negative effects on competition...”.\textsuperscript{18}

In order to determine if the safe harbor applies, the guidelines put forth six factors which, if met, generally exempts a sustainability standardization agreement otherwise prohibited by Article 101(1). If one or more factors are not met, this is not dispositive, but just requires a more individualized assessment for its competition-restricting nature.

The first factor requires transparency and employs an “all-comers” approach, allowing for any interested competitor to participate in the standard selection process.\textsuperscript{19} The second factor requires the standard not impose compliance obligations on any competitors who opt not to take part.\textsuperscript{20} The third factor requires that, if binding requirements are imposed on those competitors taking part, said competitors are able to hold themselves to higher standards.\textsuperscript{21} The fourth factor prohibits the exchange of any information that is commercially sensitive and not necessary or

\textsuperscript{13} ¶ 535.
\textsuperscript{14} ¶ 539.
\textsuperscript{15} ¶ 541.
\textsuperscript{16} ¶ 543-544.
\textsuperscript{17} ¶ 546.
\textsuperscript{18} 2023 O.J. (L. 259) 115.
\textsuperscript{19} “First, the procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard.” 2023 O.J. (L. 259) 115.
\textsuperscript{20} “Second, the sustainability standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply with the standard.” 2023 O.J. (L. 259) 115.
\textsuperscript{21} “Third, in order to ensure compliance with the standard, binding requirements can be imposed on the participating undertakings, but they must remain free to apply higher sustainability standards.” 2023 O.J. (L. 259) 115.
proportionate to their participation in the standard. The fifth factor requires “effective and non-discriminatory access” to the ultimate result of the standard selection process, including allowing competitors who initially opt not to take part to later participate. Finally, the sixth factor imposes two conditions, one of which the standard must meet. Either prices increases or quality decreases must not result from the standard, or the competitors taking part in the standard cannot have more than 20% of a combined market share of the relevant market.

A sustainability agreement that restricts competition can also benefit from the exemptions provided by Article 101(3). This is allowed so long as the parties show that four cumulative conditions of 101(3) are met. The first of these conditions is efficiency gains: “The first condition of Article 101(3) requires that the agreement contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress.” The guidelines provide a number of examples of what this can include such as “the use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, [or] better quality products.” The second is indispensability, which requires that “the restrictive agreement must not impose restrictions of competition that are not indispensable to the attainment of the benefits generated by the agreement.” The third condition is “Pass-On to Consumers” which “requires that consumers receive a fair share of the claimed benefits.” Finally, the fourth is “No Elimination of Competition”, which requires that “the agreement must not allow the parties the possibility to eliminate competition in respect of a substantial part of the products in question.”

B. The United Kingdom

Also in 2023, the UK’s Competition and Markets Authority approved guidance on “Green Agreements” to provide clarity on what level of cooperation is permissible under UK

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22 “Fourth, the parties to the sustainability standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard.” 2023 O.J. (L. 259) 115.
23 “Fifth, effective and non-discriminatory access to the outcome of the standard-setting process must be ensured. This includes allowing effective and non-discriminatory access to the requirements and conditions for using the agreed label, logo or brand name, and allowing undertakings that have not participated in the process of developing the standard to adopt the standard at a later stage.” 2023 O.J. (L. 259) 115.
24 “Sixth, the sustainability standard must satisfy at least one of the following two conditions: (a) The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned; (b) The combined market share of the participating undertakings must not exceed 20% on any relevant market affected by the standard.” 2023 O.J. (L. 259) 116.
25 2023 O.J. (L. 259) 117. “In essence, it requires that the agreement contributes to objective efficiencies, understood in broad terms, encompassing not only reductions in production and distribution costs but also increases in product variety and quality, improvements in production or distribution processes, and increases in innovation.” Id.
26 2023 O.J. (L. 259) 117.
27 2023 O.J. (L. 259) 119.
28 2023 O.J. (L. 259) 122.
competition laws when pursuing green goals. The guidance broadly applies to environmental sustainability agreements (ESAs), which “capture[] agreements between competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment or assist with the transition towards environmental sustainability.” This includes “agreements aimed at, for example, improving air or water quality, conserving biodiversity and natural habitats, or promoting the sustainable use of raw materials.” Within the category of ESAs, there are also climate change agreements. These, as the name suggests, are ESAs that set out to combat aspects of climate change. Further, there are mixed agreements which are ESAs that both seek to combat aspects of climate change and address some other environmental issue.

The approach here differs from that of the EU’s, as it is narrower in scope. As seen above, the EU’s guidance defines “sustainability” very broadly. It includes within this definition other aspects of economic and social development, such as improving labor conditions and human rights, rather than focusing exclusively on environmental initiatives. The UK, however, restricts the ability to apply this to “broader societal objectives.” The guidance only provides the exception for environmental sustainability agreements.

The guidance starts out by providing several different types of agreements which are unlikely to raise competition concerns and therefore not likely to fall within the prohibition under Chapter 1 of the UK’s Competition Act 1998. They also identify a number of agreements which could raise competition concerns, including:

- ESAs with the “object” of restricting competition
- ESAs which include ancillary restraints

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29 Green Agreements Guidance: Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Environmental Sustainability Agreements, Competition & Markets Authority p. 9 (Oct. 12, 2023) https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf
30 Green Agreements Guidance p. 9.
31 “Such agreements will typically reduce the negative externalities arising from greenhouse gases, such as carbon dioxide and methane, emitted from the production, distribution or consumption of goods and services.” Green Agreements Guidance p. 10.
32 Green Agreements Guidance p. 9.
33 These include: Non-appreciable agreements, agreements which do not affect the main parameters of competition, agreements to do something jointly which none of the parties could do individually, cooperation required by law, pooling information about suppliers or customers, creation of industry standards, phasing out / withdrawal of non-sustainable products or processes, industry-wide environmental targets, agreements between shareholders to vote for promoting corporate policies that pursue environmental sustainability. Green Agreements Guidance p. 12–20.
34 Agreements which restrict competition by “object” are ones which generally involve “price fixing, market or customer allocation, limitations of output or limitations of quality or innovation.” Green Agreements Guidance p. 22.
35 These are agreements that contain “restrictions necessary and proportionate to a permitted environmental sustainability agreement.” Green Agreements Guidance p. 22.
• ESAs which include collective withdrawal\textsuperscript{36}
• ESAs which have the effect, but not object, of restricting competition\textsuperscript{37}

Finally, the guidance outlines how the exemptions for agreements which are prohibited for restricting competition work. Generally, to qualify, an ESA must be shown to meet the following conditions:

1) the agreement must contribute to certain benefits, namely improving production or distribution or contribute to promoting technical or economic progress;
2) the agreement and any restrictions of competition within the agreement must be indispensable to the achievement of those benefits;
3) consumers must receive a fair share of the benefits; and
4) the agreement must not eliminate competition in respect of a substantial part of the products concerned.

However, as was mentioned previously, there are two subsets within the broader category of ESAs. “Climate change agreements” must meet the same four conditions as a general ESA but with a slightly modified analysis. “[I]n considering condition 3, the need for consumers to have a fair share of the agreement’s climate change benefits, the CMA considers that a more permissive approach is appropriate in assessing who are the relevant consumers.”\textsuperscript{38} Mixed agreements, alternatively, are subject to a mixed analysis: The climate change benefits are assessed under the alternate analysis of condition three, while any other benefits are assessed under the general approach.

\textbf{C. Austria}

Finally, we turn to the approach that Austria has taken in their efforts to address the tension between antitrust law and sustainability efforts. Austria amended their Federal Cartel Act

\textsuperscript{36}“An example of this is an environmental sustainability agreement that involves a group of competing purchasers agreeing only to purchase from suppliers that sell sustainable products and those suppliers operate at a different level of the market to the purchasers.” Green Agreements Guidance p. 24.

\textsuperscript{37}These are more complex than ESAs which have the object of restricting competition. Rather than the restriction being laid out in the agreement, determining whether an agreement has the effect of restricting competition requires looking to several factors. These include: “The market coverage of the agreement”, “Whether the businesses participating in the agreement, individually or collectively, have market power in the relevant market(s) affected by the agreement”, “The extent to which the agreement constrains the freedom of action of the parties”, “The ability for non-parties to participate”, “Whether or not the agreement involves the exchange of competitively sensitive information between the parties that is not necessary for the performance of the agreement”, and “Whether the agreement is likely to lead to an appreciable increase in price or reduction in output, product variety, quality or innovation.” Green Agreements Guidance p. 26.

\textsuperscript{38}The general analysis under condition three for a non-climate change ESA requires the consumers receiving a “fair share of the benefits” must be consumers within the market the agreement relates to; if consumers in other markets are benefiting, that is irrelevant. The more permissive approach under condition three for climate change agreements allows the consideration of “the totality of the climate change benefits to all UK consumers arising from the agreement.” (emphasis added). Green Agreements Guidance p. 37–38.
in 2021, and in 2022 they followed this up with guidelines on how this amendment applies to sustainability cooperation agreements. Section 2 of the Austrian Federal Cartel Act is an analog to the TFEU’s Article 101(3), providing exemptions to the law’s ban on cartels, so long as certain conditions are met.

The statutory language provides that an exemption is available for “[c]artels which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits . . . .” Further these must not “a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. . ..”39 The amended statutory language clarifies that “contribut[ing] substantially to an ecologically sustainable or climate-neutral economy” can give rise to the benefits in question.40 In fact, the guidelines explain that this “fair share” of the benefits to consumers is presumed where there is substantial ecological sustainability or climate-neutral economical contributions.

The guidelines further explain that the “exemption is limited to specific types of sustainability goals, namely a contribution to ecological sustainability (particularly including transition to a circular economy, the prevention and reduction of environmental damage, the protection and restoration of biodiversity and ecosystems, and the sustainable use and protection of water resources) or a climate-neutral economy.”41

The exemption here allows for an otherwise competition-restricting agreement to move forward if it meets the following conditions:

- The agreement leads to efficiency gains in the form of overall social welfare.42
- The efficiency gains contribute to an ecologically-sustainable or climate-neutral economy.43
- Such contribution is ‘substantial’ in the sense that the efficiencies must compensate for the restriction of competition.44
- The restriction of competition is indispensable in order to achieve the efficiency gains.45

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40 Federal Cartel Act 2005, §2(1).
42 Ersbøll & Naydenova.
43 Ersbøll & Naydenova.
44 Ersbøll & Naydenova. “This assessment requires comparing the positive environmental benefits of the cooperation against the restrictive effects in qualitative and/or quantitative terms. In some cases, qualitative efficiency gains will need to be translated into approximate monetary amounts to allow comparing against the restrictive effects of the cooperation, e.g. on pricing. The Guidelines recognise the complexity of this assessment, and provide some guidance on the type of analysis and data that are acceptable, but remains to be seen how this will work in practice.” Id.
45 Ersbøll & Naydenova.
• The coopetition does not result in the elimination of competition for a substantial part of the products but possibilities remain for residual competition.\textsuperscript{46}

The aforementioned presumption diverges from the traditional analysis, which required a separate consideration of the “fair share of benefits accruing to consumers” aspect. In order to demonstrate that presumption is proper, cartels need to show that their, “agreement brings about an original contribution to environmental sustainability goals.” It is also this presumption that makes the Austrian approach unique in the context of this paper. It allows for a more expansive approach to be taken, as cartels can meet a key requirement of the exemption just by showing that they are making original and significant contributions to environmental sustainability.

III. Lessons for U.S. Enforcers

As U.S. antitrust authorities navigate the intersection between competition policy and sustainability goals, they can draw valuable lessons from international approaches. By examining the regulatory frameworks and guidelines in the EU, the UK, and Austria, U.S. enforcers can better understand how to balance promoting environmental and social sustainability with maintaining competitive markets. This section summarizes key elements of these international examples, such as exemptions or safe harbors, presumptions, balancing considerations, and the scope of permissible agreements. These elements have the potential to facilitate the adoption of environmentally beneficial practices while mitigating antitrust risks, and raise a number of considerations for U.S. enforcers moving forward.

The first thing to note is that each of the three approaches makes some sort of antitrust exemption for certain agreements that are designed to promote sustainability. In the United States, traditional antitrust analysis focuses on consumer welfare, often defined by price, quality, innovation, and choice. Integrating sustainability into this framework will require a broader view, considering benefits like improved public health and environmental quality, which may not be immediately reflected in consumer prices.

A. Types of Agreement

Seen throughout the different approaches are varying types of agreements which can be used to undertake sustainability efforts. Different types of sustainability agreements present varying levels of risk and benefit, necessitating tailored regulatory approaches. One such type is Sustainability Standardization Agreements. These agreements set industry standards for sustainability practices, such as emissions reduction or sustainable sourcing. While they can drive significant environmental progress, they also risk facilitating collusion or excluding smaller competitors. Safe harbors can mitigate these risks by ensuring standards are developed transparently and inclusively. Another is Environmental Sustainability Agreements (ESAs). Broader than standardization agreements, ESAs encompass any collaboration aimed at reducing environmental impact. These agreements must be carefully assessed to ensure they do not unduly

\textsuperscript{46}Ersbøll & Naydenova.
restrict competition while delivering genuine sustainability benefits. Further, there are Climate Change Agreements. Focused specifically on combating climate change, these agreements often involve large-scale commitments to reduce greenhouse gas emissions. Given the urgency of climate action, these agreements may warrant more lenient antitrust scrutiny, provided they demonstrate substantial and verifiable environmental benefits. Finally, there are Mixed Agreements: These agreements address multiple sustainability objectives, such as climate change and biodiversity conservation. They require a nuanced analysis to balance the different benefits and potential competitive impacts.

B. Disguised Collusion

Regulators must be vigilant against agreements that use sustainability as a pretext for anti-competitive behavior. Authorities need to differentiate between genuine sustainability efforts and agreements that merely disguise anti-competitive practices, such as price fixing or market allocation. Rigorous scrutiny and clear criteria can help identify and prevent such abuses. Each of the three approaches above provide this, laying out in their own ways how agreements are to be evaluated and what is to be looked for. While they are similar in many aspects, each has their own intricacies, providing varying examples for U.S. enforcers to look to.

C. Scope of Excepted Agreements

Finally, the scope of permissible sustainability agreements varies significantly between jurisdictions, offering different models for U.S. enforcers. The EU adopts an expansive definition of sustainability, including economic, environmental, and social objectives. This broad approach allows for a wide range of agreements but requires robust safeguards to prevent anti-competitive outcomes. The UK focuses more narrowly on environmental sustainability, excluding broader social objectives. This narrower scope simplifies enforcement but may overlook important sustainability initiatives that encompass social and economic dimensions.

IV. Conclusion

The rapidly evolving landscape of the green transition is quickly finding a challenge in antitrust law. As firms look to take steps to benefit consumers across virtually all industries in the U.S., there are groups looking to stymie these efforts by leveraging the anti-competitive principles of antitrust law. Such perversion of antitrust law should not be permitted, especially where the goals of these firms are in line with much of the reasoning at the heart of these antitrust principles. However, the guidance and regulations in this space have not caught up to addressing this tension.

As enforcers in the U.S. are faced with addressing this tension, they have ample resources to look to, especially when looking abroad. Enforcers in the EU, UK, and Austria have all gone forward with providing guidance to best allow for certain green transition and sustainability efforts which may otherwise be prohibited by antitrust laws. These all vary in many aspects but are ultimately very similar. In being able to effectively address these problems, U.S. enforcers can
glean a lot from the approaches taken internationally and the vital considerations they raise, from the types and scope of agreements to be excepted to the best methods for evaluating these agreements to ensure an exception is proper. U.S. enforcers should act based on these lessons, so that U.S. firms can gain the same level of legal clarity that international enforcers have provided, allowing for greater efficacy in U.S. firms’ sustainability efforts.