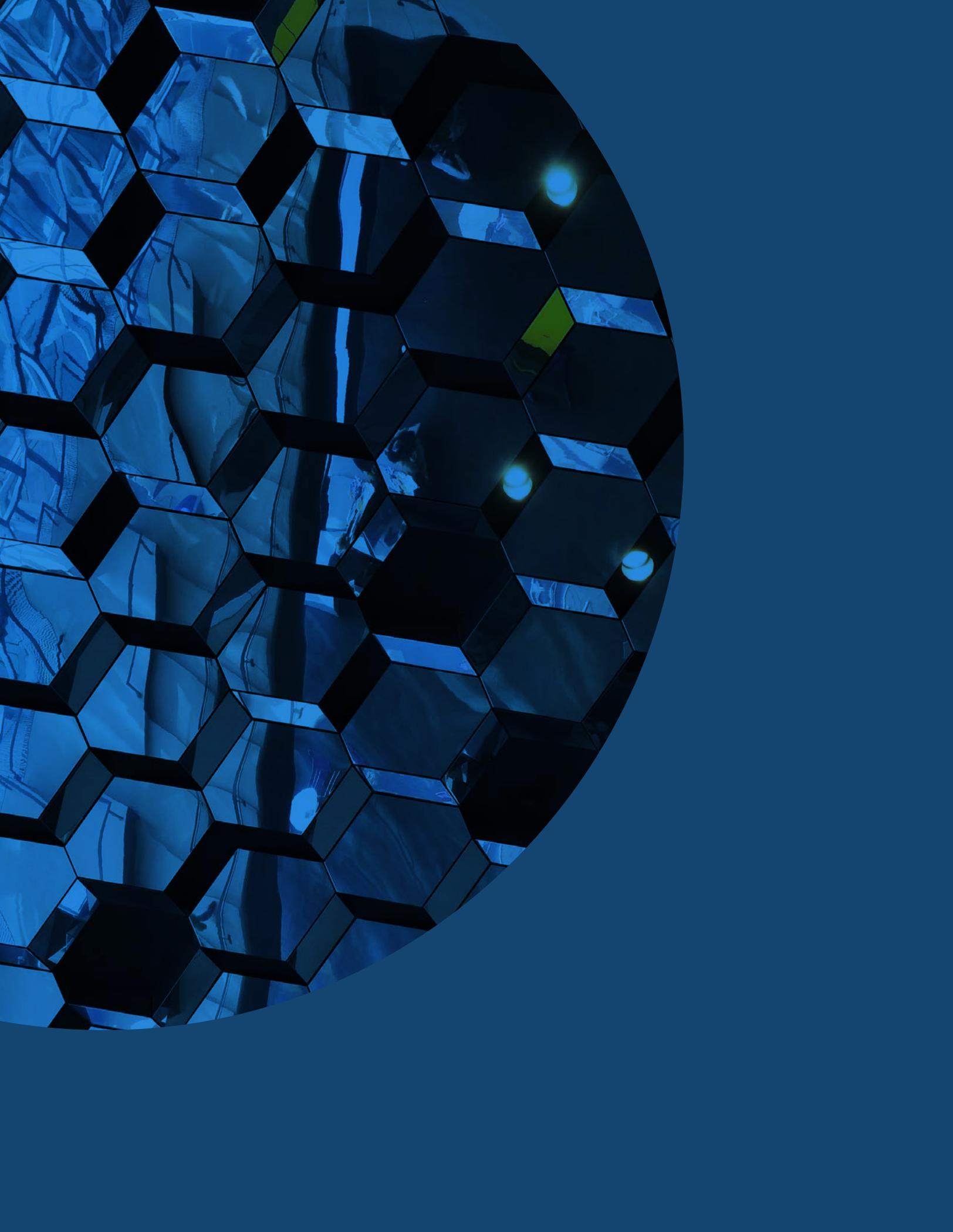


# Antitrust and Sustainability: A Landscape Analysis

By Denise Hearn, Cynthia Hanawalt, and Lisa Sachs



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## ABOUT THE COLUMBIA CENTER ON SUSTAINABLE INVESTMENT

The Columbia Center on Sustainable Investment, a joint Center of Columbia Law School and Columbia Climate School, is an applied research center that works to develop critical understanding, practical approaches, and governance tools for governments, investors, communities, and other stakeholders to maximize the benefits and minimize the potential harms of international investment for sustainable development.

## ABOUT THE SABIN CENTER FOR CLIMATE CHANGE LAW

The Sabin Center is an academic think tank at Columbia Law School that develops legal strategies to fight climate change. The Sabin Center trains students and lawyers in the practice of climate change law and provides the public with resources on key topics in climate law and regulation. It is affiliated with Columbia Climate School, an interdisciplinary academic hub designed to advance new areas of climate inquiry, research, and impact across Columbia University.

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*“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.”*

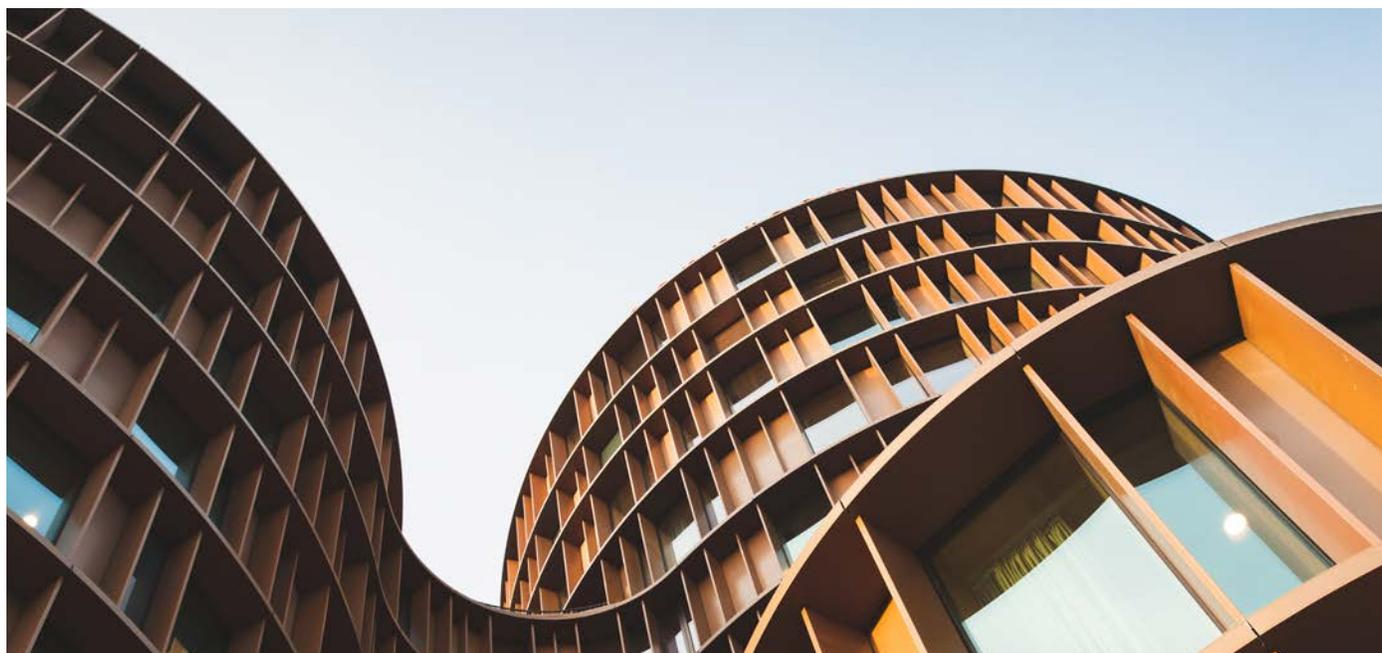
– former Supreme Court Justice Thurgood Marshall<sup>1</sup>

*“We stand now where two roads diverge. But unlike the roads in Robert Frost’s familiar poem, they are not equally fair. The road we have long been traveling is deceptively easy, a smooth superhighway on which we progress with great speed, but at its end lies disaster. The other fork of the road – the one less traveled by – offers our last, our only chance to reach a destination that assures the preservation of the earth.”*

– Rachel Carson<sup>2</sup>

<sup>1</sup> United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

<sup>2</sup> Rachel Carson, *Silent Spring*, Houghton Mifflin, 1962.



## EXECUTIVE SUMMARY

**Competition policy and antitrust law are experiencing a global renaissance. New market realities such as digital market gatekeepers, the financialization of firms, highly concentrated markets, a rising labor movement, industrial policy, and trade wars, among others, are radically reshaping how this policy area is understood and applied.**

Sustainability concerns have also been a driving force for reconstituting antitrust to meet twenty-first century challenges. It is now widely accepted that competition policy – both its aims and its enforcement – has wider societal impacts beyond competition, including effects on democracy, economic inequality, growth and innovation, racial and gender imbalances, privacy, geopolitical implications and more. Its effects on the environment can also no longer be ignored.

Increasingly, private-sector firms say that antitrust is chilling the mobilization of non-state actors to address climate change and other sustainability challenges. Activities such as joint standard-setting, industry-wide competitor collaborations, and information sharing have raised new questions and controversies. Coordinated engagement by investors and financial institutions has become a particular target of politicized attack in the United States, further muddying the waters. These trends have generated confusion among private actors regarding permissible behavior, which has prompted many international competition agencies to issue updated guidelines.

Although a common narrative emphasizes that antitrust law is getting in the way of coordination, antitrust law is, fundamentally, an allocator of coordination rights.<sup>3</sup> It defines what kind of market coordination is pro-social or benign, and where private actor coordination becomes anti-social (for example, cartel behavior). Competition agencies, since their inception, have wrestled with how to define what constitutes pro-social coordination, and how to measure any anti-competitive harms against other social and economic benefits.

For these reasons, competition policy is a profound shaper of markets. Competition enforcers and regulators must grapple with the role that it can play in advancing or hindering sustainability objectives. Various competition agencies define the scope of sustainability considerations differently, but broadly they can include: mitigating environmental impacts, accelerating the energy transition to clean energy, protecting human rights, and advancing worker rights and prosperity.

Vigorous debates about the normative goal of competition policy have renewed urgency. For every position on what antitrust law should accomplish,

3 Sanjukta Paul, “Antitrust As Allocator of Coordination Rights”, UCLA Law Review, 2020. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3337861](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337861)

differences in methodology and technical implementation follow. Biden administration antitrust enforcers are experimenting with a wholesale revival of the antimonopoly origins of antitrust and are exercising long-dormant enforcement authorities, focusing on addressing concentrations of power and protecting the competitive process. Due to both the increasingly politicized nature of the debate in the US, and the Neo-Brandesian belief that ancillary benefits like environmental or social benefits follow from increased market competition, US agencies largely remain silent on sustainability issues. Instead, the US is debating and experimenting with what new goal should replace the longstanding “consumer welfare standard” that has guided antitrust application for more than four decades. The US federated system – whereby states enforce their own antitrust laws parallel to federal law enforcement – creates additional complexity.

***Competition agencies, since their inception, have wrestled with how to define what constitutes pro-social coordination, and how to measure any anti-competitive harms against other social and economic benefits.***

In contrast, Europe is still largely operating under the consumer welfare standard, expanding who is considered a ‘consumer’ (“in market” or “out of market”) while moving to new semantic versions like the ‘citizen welfare standard,’ which allow for a wider set of welfare considerations beyond price or efficiency gains. Compared to the US, the EU, UK, and Dutch agency approaches to sustainability collaborations are more permissive, more experimental, and more oriented around exceptions and safe harbors. European agencies are now directly incorporating environmental and other sustainability concerns into their mandates and updated guidelines. Using the long-standing “balance of harms” approach for sustainability collaborations raises new and substantial challenges of measurement and enforcement.

The anti-ESG (“Environmental, Social, Governance”) narrative battles have also heightened focus on financial institution coalitions such as the Global Financial Alliance for Net Zero (GFANZ), Climate Action 100+, Ceres, and others. In the US, Republican Attorneys General and Congressional representatives have launched investigations for alleged antitrust violations. The claim that coordinated behavior among financial institutions such as banks, asset managers, or insurers is a violation of antitrust, and a “collective boycott” in particular, has dominated headlines, although no lawsuits have

***While the weighing of benefits and harms of these collaborations is not new to competition policy, ‘sustainability gains’ are now becoming the new ‘efficiency gains’ that companies propose as deserving of new regulatory or legislative carve outs.***

been brought to date. As the political pushback has intensified, some major asset managers and insurers have withdrawn from their respective climate alliances.

The rising anti-ESG movement overlaps and intertwines with antitrust concerns but must be parsed closely to differentiate narrative fiction from legal reality. In the US, state-level anti-ESG bills employ “boycott” language but are more concerned with questions of fiduciary duty than antitrust violations. Nevertheless, the coordinated state-level activity means that firm risk from purported antitrust violation investigations is difficult to mitigate, even if federal agencies offered updated guidelines or safe harbors (as other international competition agencies are doing). For this reason, it is nearly impossible to provide a unified US approach to these questions, in contrast to international jurisdictions.

Other industries – like fashion and agriculture – claim that a “first mover disadvantage” afflicts companies pursuing sustainability goals which may entail higher costs. For this reason, they assert that collective action amongst competitors – such as standard-setting and industry association activities, collective purchasing requirements or mandatory standards, information sharing, and others – is an important way to institute needed reforms, and they perceive antitrust as standing in the way of these collaborations. Most competition agencies have long-standing competitor collaboration guidelines to inform businesses about what kinds of collaborations are permissible under the law; there is also existing case law which has provided clarity on various kinds of collaborations. But some collaborations and activities with sustainability objectives continue to raise challenging questions.

Some contend that antitrust’s focus on reducing prices or maximizing output is fundamentally in tension with sustainability goals. Competition agencies now wrestle with what amount of a reduction of competition among firms – if any – should be permissible to obtain certain sustainability benefits. How should agencies assess the benefits and harms of restrictions of competition against consumer or citizen benefits? And does this require legislative change, or simply updated guidelines? Discussions about how sustainability benefits should be quantified, to whom, and over what time horizon are ongoing.



***Incentivizing private actors to align their practices with sustainability and climate goals will require policies and regulations throughout the economy. Antitrust policies and agencies should be a coherent part of this robust policy framework.***

These technical questions absorb much of the European dialogue on “green antitrust.” However, it is worth noting that competition agencies have wrestled with technical questions relating to competitor collaborations for decades. Historically, competitor collaborations have been assessed using the lens of maximizing efficiency, rather than sustainability benefits. So, while the weighing of benefits and harms of these collaborations is not new to competition policy, ‘sustainability gains’ are becoming the new ‘efficiency gains’ that companies propose as deserving of new regulatory or legislative carve outs.

To provide increased clarity on these issues in the US, financial institution coalitions and other non-financial industry collaborations can seek advisory opinions or business reviews from the Department of Justice (DOJ) and the Federal Trade Commission (FTC). They can also request that the FTC use its power to compel information (known as 6(b) authority, from section 6 of the FTC Act) to conduct market studies on critical industries relevant to energy transition or sustainability, which may raise new questions about permissible collaborations. This can help the agency investigate the unique competitive dynamics of a relevant industry, and perhaps yield specific case studies for updated competitor collaboration guidelines which would take sustainability-oriented collaborations into consideration.

Concurrently, the whole-of-government approach to competition policy – instituted under President Biden’s Executive Order on Promoting Competition in the American Economy in July 2021 – provides an opportunity to infuse sustainability considerations through existing interagency collaborations. While the FTC and DOJ are primarily responsible for enforcing the federal antitrust laws, other agencies such as the Department of Transportation, US Department of Agriculture, National Labor Relations Board, and many others also have antitrust authority. And increasingly, the FTC and DOJ have memorandums of understanding (MOUs) with other federal agencies, and often comment on rulemakings, as they intersect with competition concerns. At a time where the antitrust agencies are politically constrained from engaging questions of sustainability directly, they can support other agencies which may consider sustainability considerations in their rulemaking and other regulatory actions.

Ultimately, competition policy and its enforcement agencies are one component of a broad policy framework that shapes private sector activities and their alignment with, or contributions to, climate or other policy objectives. Incentivizing private actors to align their practices with sustainability and climate goals will require policies and regulations throughout the economy. Antitrust policies and agencies should be a coherent part of this robust policy framework.



**1. INTRODUCTION**

# 1A. ANTITRUST AND THE COORDINATION PROBLEM

**The coordination problem – how we produce, distribute, and allocate resources, goods, and capital in society – was previously thought largely resolved through free markets and the mechanism of price. Neoclassical economic theory posits that consumers rationally optimize their choices based on utility, and those individual choices aggregate into the highest social good. Increasingly dire global challenges like climate change, biodiversity loss, and inequality have called these market fundamentalist ideologies into question and have engendered a rethink of how best to catalyze economic coordination at scale.**

Competition policy is a profound shaper of market structure. Antitrust – focused on protecting competition – is often portrayed as getting in the way of needed coordination; however, as Professor Sanjukta Paul of the University of Michigan emphasizes, “the central function of antitrust law is to allocate economic coordination rights.”<sup>4</sup> The questions, then, that antitrust law must answer are: Who should be allowed to coordinate to shape markets? Under what terms? And in whose benefit?

Today, many of the largest global firms function as para-state institutions and are some of the biggest economic actors in the world (far surpassing many nation states). Private firms often act as de facto private regulators, setting the terms and norms of markets. Over the last 50 years, global antitrust enforcement has primarily allocated coordination rights to larger, dominant firms, while harboring more suspicion towards coordination among workers or between smaller firms.<sup>5</sup>

The emergence of stakeholder capitalism, universal ownership theory,<sup>6</sup> a rising labor movement, and an anti-ESG backlash have challenged the corporation and its role in society. Each movement asserts its own theory of

societal organization, and whose stakeholder interests (and coordinated demands) should be foregrounded.

Proponents of universal ownership theory argue that shareholders and shareholder coalitions should have special antitrust accommodation to coordinate on ESG issues which affect their long-term returns.<sup>7</sup> Companies in the same industry, or direct competitors, claim a desire to coordinate on sustainability projects and goals, already receiving special accommodation from many European and Asian antitrust agencies. An uptick in labor organizing in 2022, amidst a longstanding decline in unionization in the US, signals a rising labor movement trying to reassert its right to coordination rights.<sup>8</sup>

Even US federal antitrust enforcers are seeking greater levels of cooperation both domestically and internationally. The DOJ and FTC have signed new memorandums of understanding with other federal agencies with antitrust authority, and a June 2023 public comment period asks for input on how the FTC can better coordinate on cases with state Attorneys General.<sup>9</sup> At the international level, the FTC and DOJ have come under fire from the Chamber of Commerce

4 European Commission. “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, European Commission, June 1, 2023. [https://competition-policy.ec.europa.eu/system/files/2023-06/2023\\_revised\\_horizontal\\_guidelines\\_en\\_0.pdf](https://competition-policy.ec.europa.eu/system/files/2023-06/2023_revised_horizontal_guidelines_en_0.pdf).

5 Ibid

6 Universal ownership theory proposes that investors who own the entire market are exposed to ‘systemic risk’ and are therefore incentivized to have portfolio companies internalize previously ignored externalities that may affect future returns. Institutional investors who see themselves as “universal owners” of the market now exert additional pressure on companies, and indeed entire sectors, to help mitigate environmental and social risks. This raises additional questions regarding what forms of industry collaborations – at both the investor and firm level – are permissible under antitrust law, which we plan to explore in future research.

7 See, for example, the Shareholder Commons website which states, “We believe that our financial system requires fundamental reform to root out practices that prioritize the financial return of individual companies over the health of the systems that support all companies and the human beings they are meant to serve. In order to accomplish this change, it is critical that legislators, regulators, and courts clarify that the impact that companies have on the economy and diversified portfolios is material to most investors, and that laws meant to protect investors recognize that principle.” For this reason, they support “securities and antitrust rules that create safe harbors for collective shareholder action.” <https://theshareholdercommons.com/policy-proposals/>

8 For example, “Only one in ten American workers is now in a union, down from nearly [one in three workers](#) during the heyday of unions back in the 1950s.” From: Greg Rosalsky. “You may have heard of the ‘union boom.’ The numbers tell a different story”, NPR, February 28, 2023. <https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story>

9 Federal Trade Commission, “Commission Seeks Public Comment on Collaboration with State Attorneys General”, Federal Trade Commission, June 7, 2023. <https://www.ftc.gov/news-events/news/press-releases/2023/06/commission-seeks-public-comment-collaboration-state-attorneys-general>

for coordinating with other international competition agencies on “big tech” merger cases.<sup>10</sup>

So, while private firm coordination gets more attention within the sustainability and antitrust debates, and is indeed the focus of this paper, these wider considerations around which system actors should coordinate to set economic conditions are critically important.

The EU,<sup>11</sup> the UK,<sup>12</sup> Japan,<sup>13</sup> and other jurisdictions have moved to incorporate sustainability concerns directly into their agency mandates. Some agencies have provided updated guidelines which include exemptions and safe harbor provisions. Other National Competition Authorities within the EU, like the Bundeskartellamt (or Federal Cartel Office) in Germany, have also issued their own guidance.<sup>14</sup> The most significant legislative change has been the Austrian Cartel Act, which was amended in 2021 to include a sustainability-related exemption to protect “cooperation for the purpose of an eco-sustainable or climate-neutral economy from the cartel prohibition.”<sup>15</sup> Its effects are yet to be fully studied and understood.

“Sustainability” has many definitions. Competition agencies – like the Netherlands Authority for Consumers and Markets (ACM), the European Commission’s Directorate General for Competition (DG COMP), and the UK’s Competition and Markets Authority (CMA) – have issued updated competitor collaboration guidelines which include specific advice on sustainability

collaborations. Each agency has definitional variations of “sustainability” and, therefore, which activities fall in scope. The ACM’s guidelines have wide latitude, defining sustainability agreements as those “aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature.”<sup>16</sup> The EC also has a wide definition of sustainability which encompasses “activities that support economic, environmental and social (including labour and human rights) development.”<sup>17</sup> The UK’s guidelines are narrower in scope, only focusing on environmental-related collaborations, with more permissive exemptions for climate-related collaborations in particular.<sup>18</sup> Their guidance explicitly does not cover biodiversity or living wage concerns.

***The emergence of stakeholder capitalism, universal ownership theory, a rising labor movement, and an anti- ESG backlash have challenged the corporation and its role in society. Each movement asserts its own theory of societal organization, and whose stakeholder interests (and coordinated demands) should be foregrounded.***

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- 10 Sean Heather, “When Cooperation Crosses the Line: Is the Federal Trade Commission working foreign authorities to deny due process?”, Chamber of Commerce, February 23, 2023. <https://www.uschamber.com/finance/antitrust/when-cooperation-crosses-the-line>
- 11 European Commission, *supra* note 4.
- 12 Competition and Markets Authority, “Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements”, Competition and Markets Authority, February 28, 2023. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1139264/Draft\\_Sustainability\\_Guidance\\_document\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document_.pdf)
- 13 Japan Fair Trade Commission, “Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act”, Japan Fair Trade Commission, January 13, 2023. <https://www.jftc.go.jp/en/pressreleases/yearly-2023/January/230118.html> (last visited May 30, 2023).
- 14 See Press Release, German Federal Cartel Office (FCO), “Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives”, Bundeskartellamt, January 18, 2022. [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18\\_01\\_2022\\_Nachhaltigkeit.html?nn=3599398](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html?nn=3599398); and Press Release, German FCO, “Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law”, Bundeskartellamt, January 25, 2022. [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25\\_01\\_2022\\_Agrardialog.html?nn=3599398](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.html?nn=3599398). These press releases provide guidance on the conditions under which sustainability goals in cooperation agreements between competitors may be sufficient to exempt such agreements from the prohibition against anti-competitive agreements.
- 15 Organisation for Economic Co-operation and Development (OECD), “Environmental Considerations in Competition Enforcement – Note by Austria”, OECD December 1, 2021. [https://one.oecd.org/document/DAF/COMP/WD\(2021\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)46/en/pdf)
- 16 The Netherlands Authority for Consumers and Markets, “Draft guidelines ‘Sustainability Agreements’”, Authority for Consumers and Markets, September 7, 2020. <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements>
- 17 The guidelines go on to say, “The notion of sustainability objectives therefore includes, 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.” Section 517.
- 18 UK Competition and Markets Authority, “Closed consultation – Draft guidance on environmental sustainability agreements”, Crown Copyright, February 28, 2023. <https://www.gov.uk/government/consultations/draft-guidance-on-environmental-sustainability-agreements> (last visited May 30, 2023).

Sustainable development must incorporate socially inclusive, and environmentally sustainable, economic development. This means protecting the planet's natural resources (water, air, land, biodiversity), as well as sustainably provisioning critical social needs and services, like decent jobs, living wages, food security, affordable housing, peace and security, education, gender and racial equity, healthcare, and so on.

Sustainability, then, encompasses an enormous range of markets and goals, and competition law and its enforcement agencies must grapple with the role that competition policy can play in advancing or hindering such objectives. The wider the definition of 'sustainability,' the more economic activities fall into purview, potentially enlarging the traditional mandate of the agencies, and inviting inevitable challenges around trade-offs. It also raises questions about what is truly novel or necessary about sustainability-related projects that require new approaches by the agencies. Some contend that antitrust's focus on reducing prices or maximizing output are fundamentally in tension with sustainability goals, and thereby require internalizing long-externalized costs and reducing production.<sup>19</sup> Should this, then, alter the enforcement mandate of competition agencies, or be left to other policy areas to set market guardrails?

There is no monolithic "sustainability law" – sustainability challenges suffuse many areas of law and regulation beyond competition law, including environmental law, trade policy, tax law, industrial policy, and labor laws. Nevertheless, competition policy plays an important role in enforcing against anticompetitive business conduct that harms stakeholders like workers, consumers, and small and medium-sized enterprises.<sup>20</sup>

Current discussions about how antitrust may support sustainability broadly consider:

- areas in which competition – among firms, investors, and even countries<sup>21</sup> – might drive more innovation in sustainability;

***Sustainability, then, encompasses an enormous range of markets and goals, and competition law and its enforcement agencies must grapple with the role that competition policy can play in advancing or hindering such objectives.***

- areas in which collaboration might drive more ambition or impact in sustainability – in other words, instances where acting in concert can enable sustainability gains which would not be otherwise achievable through unilateral action, or not achievable at scale;
- areas in which competitor collaborations or mergers and acquisitions result in concentrations of power – or abuses of dominance – which have an impact on sustainability;
- areas in which consumer preferences for sustainability have an impact on consumer welfare analysis.

Within this debate, ideologies diverge on:

- **Goals / Normative questions:** What should competition law/policy aim to do? What are the boundaries of competition law?
- **Methods** of achieving those goals: What tools can competition agencies use to support those goals?
- **Technical questions:** How best to achieve those outcomes?

While these considerations are not mutually exclusive, they can create divergences of approach. For instance, one might believe that competition law should account for sustainability, but that the best way to promote sustainability is to encourage more competition, which in turn can drive more green innovation. Then, the methodological and technical debate of how to encourage more competition follows: Is it through stronger merger review, through structural presumptions against certain thresholds of market concentration, through structural break-ups of companies, stronger remedies and consent decrees, or some combination of these?

19 John M. Newman, "The Output-Welfare Fallacy: A Modern Antitrust Paradox", 107 Iowa Law Review, June 23, 2021. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3866725](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866725)

20 In her speech, Cardell states that: "There are 3 ways in which I believe the CMA can and should contribute to promoting environmental sustainability and helping accelerate the transition to a net zero economy, as we have set out in our new strategy. First, we can help ensure that markets for sustainable products or services develop in competitive ways. Second, we can help consumers make informed choices about the climate impact of the goods and services they use. Third, we can help ensure that competition law is not an unnecessary barrier to companies seeking to pursue environmental sustainability initiatives." From: Sarah Cardell, "Sustainability – Exploring the possible", United Kingdom Competition and Markets Authority (UK CMA), Speech at the Scottish Competition Forum, January 24, 2023. <https://www.gov.uk/government/speeches/sustainability-exploring-the-possible>.

21 Robinson Meyer, "These Tiffs Over Electric Vehicles Are Not What They Seem", New York Times, April 7, 2023. <https://www.nytimes.com/2023/04/07/opinion/electric-vehicles-europe-trade-wars.html>

Or perhaps one believes that the best way to promote sustainability is to better enable competitor collaborations that raise both the ambition and potential impact of corporate activities. Questions of methods and technical implementation to allow for more prosocial collaboration follow. Should legislation exempt sustainability collaborations from cartel law? Should agencies clarify competitor collaboration guidelines or offer sustainability-related exemptions and safe harbors?

In practice, the agencies try to incorporate a range of tools to accomplish multiple ends. For example, Michelle Meagher and Simon Holmes – UK competition law experts – use a “sword and shield” analogy to claim that competition policy can be used as a “sword” to attack corporate power and unsustainable practices, while “shielding” legitimate collaborations by not impeding sustainability initiatives.<sup>22</sup>

**Normative, Methodological, + Technical questions**

<b>Goals</b>	<ul style="list-style-type: none"> <li>■ Competition, consumer welfare, dispersion of market power, fairness, preservation of democracy, protection of small and medium sized businesses, workers, sustainability considerations, etc.</li> </ul>
<b>Methods</b>	<ul style="list-style-type: none"> <li>■ Legislation, enforcement, rule-making, information collection                             <ul style="list-style-type: none"> <li>• Merger review, consumer protection, policing anti-competitive behavior and unfair methods of competition, doing market studies</li> </ul> </li> <li>■ Whole of government approaches, intra-agency collaboration both domestically and internationally</li> </ul>
<b>Technical implementation</b>	<ul style="list-style-type: none"> <li>■ Guidelines, safe harbors, structural presumptions, definitions on harms and benefits, business reviews and advisory opinions, role of economists, etc.</li> </ul>

The overarching purpose, or normative goal, of antitrust law varies among jurisdictions and is increasingly contested, particularly in the US. Antitrust and competition policy are in a moment of renaissance, not only in the strength of enforcement globally, but also with fierce academic and practitioner debates about how to reconstitute this field to meet 21st century challenges.

The ‘consumer welfare standard,’ which has been the predominant analytical framework for antitrust policy for the last forty years, is largely not concerned with externalities like societal benefit, environmental considerations, market power questions, effects on democracy, privacy, and other impacts. The consumer welfare standard focuses on consumer-specific outcomes – such as price, convenience, or product quality – arguably subjugating a citizen’s identity beneath their consumer identity. It also posits that firm behavior is anticompetitive “only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.”<sup>23</sup> As applied, this has meant that aggregations of market power by large technology firms have been left unaddressed, in addition to other market outcomes like loss of privacy or the erosion of democracy. For this reason, the consumer welfare’s narrow focus has been the subject of widening critique.

New market realities are shuffling long-held assumptions about antitrust, and sustainability is one factor among many driving a partial or wholesale rethink of the field. Additional trends and developments driving the re-formulation of competition policy include:

- Digital markets and new digital gatekeepers
- Artificial intelligence (AI), data, and privacy concerns
- Market concentration concerns
- The rise of private equity
- Financial complexity and the financialization of firms
- Labor movements regaining strength

22 Simon C. Holmes and Michelle Meagher, “A Sustainable Future: how can control of monopoly power play a part?”, SSRN, May 3, 2022. <https://www.ebcam.eu/images/SSRN-id4099796.pdf>

23 Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)

New standards are arising in replacement. Lina Khan, Chairperson of the Federal Trade Commission, and Jonathan Kanter, Assistant Attorney General for the Department of Justice's Antitrust Division, promote the 'competitive process standard,' which focuses on market structure and aims to protect the competitive process itself. This standard, also embraced by former White House Special Advisor on Competition and Technology, Tim Wu, contends that antitrust law should not have to justify its benefits against a singular overarching purpose, but rather should declare bright-line rules to which companies must adhere.<sup>24</sup> More progressive antitrust scholars have advocated for an even broader mandate through their proposed 'effective competition standard,'<sup>25</sup> which aims to protect fairness and challenge concentrations of economic power.<sup>26</sup> Neither of these two proposals explicitly mentions sustainability or environmental considerations.

For every normative position on competition law's purpose – and the factors that it should consider – there may be differences of opinion on desired methods, and how to technically implement those methods to serve that purpose. Therefore, much of the current "green antitrust" discussion sits inside wider debates about antitrust law's purpose, enforcement strategies, and ideological approaches. While Europe continues to operate largely under the consumer welfare paradigm, with sustainability considerations expanding or altering aspects of these theories, the US is reckoning broadly with the consumer welfare paradigm and is actively pursuing alternatives,<sup>27</sup> some of which – like focusing on harms to independent workers – have already found merit in the courts.<sup>28</sup> Sustainability concerns have been less present in US discussions, in part, due to the politicized nature of the debate.

While competitor collaborations – the subject of this paper – are an important area for considering how antitrust law can support or inhibit sustainability, many other areas of antitrust agency authority can take environmental or social goals into consideration. Revamping merger policy to address concentrations of corporate power which may undermine environmental aims is one promising avenue. Additionally, consumer protection mandates can be used to address greenwashing and deceptive marketing, as corporate claims related to sustainability have increased dramatically in recent years.

The below chart shows the US antitrust agency mandates, and where competitor collaborations sit alongside other areas of remit. The highlighted blue sections show where competitor collaboration considerations emerge.

24 Tim Wu, "The Consumer Welfare Standard is Too Tainted", Promarket, April 19, 2023. <https://www.promarket.org/2023/04/19/the-consumer-welfare-standard-is-too-tainted/>

25 Marshall Steinbaum and Maurice E. Stucke, "The Effective Competition Standard: A New Standard for Antitrust", Roosevelt Institute, September 25, 2018. <https://rooseveltinstitute.org/publications/the-effective-competition-standard-a-new-standard-for-antitrust/>. The effective competition standard goes further than the competitive process standard. Concerned with rising corporate concentration and its effects on stakeholders, their proposed standard aims to restore "the primary aim of antitrust laws, namely to protect competition wherever in the economy it has been compromised, including throughout supply chains and in the labor market." They propose legislative amendments to the Sherman and Clayton Acts which incorporate several goals, including: "1) to protect individuals, purchasers, consumers, and producers; 2) to preserve opportunities for competitors; 3) to promote individual autonomy and well-being; and 4) to disperse and de-concentrate private power." Detractors fear this proposal will widen the mandate of the agencies too far, and complicate antitrust analysis in ways that make it very difficult to administer.

26 Eric A. Posner, "Toward a Market Power Standard for Merger Review", Promarket, April 7, 2023. <https://www.promarket.org/2023/04/07/toward-a-market-power-standard-for-merger-review/>.

27 University of Chicago – Booth School of Business, Stigler Center for the Study of the Economy and the State. "2023 Antitrust and Competition Conference - Beyond the Consumer Welfare Standard?", The University of Chicago Booth School of Business, April 20-21, 2023. <https://www.chicagobooth.edu/research/stigler/events/2023-antitrust> (last visited May 30, 2023).

28 Ground-breaking legal precedent involving workers was set in the Simon-Schuster/Penguin Random House proposed merger (which was blocked in late 2022). The DOJ's case focused on the proposed firm having too much power over authors, arguing it would create a monopsony in the "markets for content acquisition." Monopolies have power as sellers, whereas monopsonies have power as buyers in markets. The DOJ case did not focus on downstream harms to consumers (like higher book prices), but was successful, creating new precedent for future monopsony cases.

Mergers and Acquisitions (DOJ & FTC)	Consumer Protection (FTC) <sup>29</sup>	Anti-competitive Behavior (DOJ & FTC)
Premerger notification (under the Hart-Scott-Rodino Act)	Advertising and marketing claims, including deceptive marketing (e.g., greenwashing)	<b>Cartels and invitations to collude</b>
Merger review (horizontal, vertical, and uncategorized mergers) culminating in approvals or challenges	Product safety	<b>Group boycott / refusal to deal</b>
Post-merger monitoring of consent decrees	Policing unfair, deceptive, and fraudulent business practices	<b>Price fixing, market allocation, bid rigging</b>
	Privacy and security	Monopolization, including attempts and conspiracies to monopolize  Unfair methods of competition (Section 5) and single-firm conduct including exclusionary and unfair contracts terms
		Price discrimination (Robinson-Patman Act violations)

Ultimately, the question of how best to incentivize global collaboration, at scale, in ways that advance ecologic and civilizational thriving remains open. Competition policy’s role in bolstering this effort will continue to be contested.

<sup>29</sup> In the US, antitrust and consumer protection law enforcement are institutionally housed together, as complementary tools for achieving the benefit of market competition. The FTC integrates consumer protection and antitrust, whereas the DOJ has a separate consumer protection division that is functionally separate from the antitrust division. Consumer protection is generally viewed as a separate area of law, despite the overlaps in its impact.

## 1B. THE ROLE OF BUSINESSES IN ADDRESSING SUSTAINABILITY

**Businesses are increasingly responding to societal and investor pressure to minimize environmental and social harms and contribute toward societal goals. Some businesses claim they are filling the gaps left by stalled or slow-moving policy action, both nationally and internationally. The International Chamber of Commerce (ICC) report, *How competition policy acts as a barrier to climate action*, puts it this way:**

*“As frequently occurs, when regulation lags behind in driving and promoting change, the private sector has stepped forward and taken action. Rising sustainability concerns have created increasing pressure on businesses to make environment-friendly investments, innovations and purchasing decisions...When all, or most, competitors move together and in the same direction, change will occur. What if such change benefits the environment and society, but at the cost of temporarily reducing competition? How much of a reduction of competition are we ready to accept?”<sup>30</sup>*

While policy can be slow-moving, the ICC claim ignores the ways in which corporate political spending, lobbying, and revolving door dynamics may undermine or forestall regulator’s attempts to bring forward comprehensive reforms. For example, a recent study found a positive correlation between market power and lobbying spend – the more market power a corporation acquires, the more it lobbies. The results suggested a “significant empirical link between increased corporate consolidation and increased corporate political power.”<sup>31</sup>

Our position is that robust, timely government action is the best way to make progress on global sustainability goals; and investors and businesses should not intentionally undermine policy progress. However, private sector actions can also be important – both in addressing regulatory gaps and in shifting norms for what responsible business conduct looks like. In some industries, leading private actors can be ahead of regulatory action in finding solutions, especially when the challenges are cross-border or require new technical

solutions and approaches.

Large corporations have been analogized to keystone species, in that their role in affecting change through their respective industries can cascade throughout the supply chain.<sup>32</sup> Some believe that working with dominant firms on climate or social goals is the fastest and most efficient way to make progress. In this view, larger firms with more capital are better positioned to invest in green technology or sustainability initiatives, and that when large firms address their own negative impacts through their operations and supply chains, the effects can be substantial. It may also be the case that large, multinational firms are better equipped to deal with corruption issues or low social and environmental standards in foreign countries.

Mark Roe, a Law professor at Harvard, has advanced a theory that monopolistic firms – concentrated targets of widening pressure to move beyond profit maximization – can redirect their excess profits from shareholders to stakeholders: to customers, employees, or the public good.<sup>33</sup> This line of reasoning echoes allocative efficiency arguments often used to support the consumer welfare standard, which sidestep other effects from concentrated economic power.

In contrast, others believe that increased competition – and challenges to dominant incumbents – produces the necessary firm incentives to innovate and invest in sustainability-related initiatives.<sup>34</sup> Some research has shown that market concentration proxies are negatively related to widely used corporate social responsibility

30 International Chamber of Commerce (ICC), “How competition policy acts as a barrier to climate action”, ICC, November 10, 2022. <https://iccwbo.org/publication/how-competition-policy-acts-as-a-barrier-to-climate-action/>

31 Reed Showalter, “Democracy for Sale: Examining the Effects of Concentration on Lobbying in the United States”, American Economic Liberties Project, Working Paper Series on Corporate Power No. 10, August 2021. [https://www.economicliberties.us/wp-content/uploads/2021/08/Working-Paper-Series-on-Corporate-Power\\_10\\_Final.pdf](https://www.economicliberties.us/wp-content/uploads/2021/08/Working-Paper-Series-on-Corporate-Power_10_Final.pdf)

32 Marios Iacovides, “Why Aligning Antitrust Policy With Sustainability is a Moral Imperative”, Promarket, March 22, 2022. <https://www.promarket.org/2022/03/22/sustainability-antitrust-policy-anticompetitive-climate-change/>

33 Mark J. Roe, “Corporate Purpose and Corporate Competition”, SSRN, European Corporate Governance Institute – Law Working Paper No. 601/2021), April 6, 2021. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3817788](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817788)

34 Caroline Flammer, “Does product market competition foster corporate social responsibility? Evidence from trade liberalization”, Strategic Management Journal, October 2015. <https://doi.org/10.1002/smj.2307>; and Caroline Flammer, “Does Product Market Competition Foster Corporate Social Responsibility?”, Academy of Management, February 9, 2014. <https://ssrn.com/abstract=2146280>

(CSR) measures, and that firms in more competitive industries have a superior environmental performance, as measured by firm pollution levels.<sup>35</sup>

Recently, two European researchers, Dr. Marios Iacovides and Chris Vrettos, found “ample evidence of an overlap between market dominance and unsustainable business practices”, and that “the wide prevalence of breaches of environmental protection indicate that dominant firms systematically contribute to ecological breakdown.”<sup>36</sup> They contend that this offers an opportunity to adapt competition law to recognize environmental abuses as unfair methods of competition, which would make ecologically destructive firms subject to greater antitrust scrutiny.

Whether the market power of dominant firms should be harnessed to advance climate and social goals – or prevented and challenged through increased regulatory scrutiny or even structural remedies like antitrust breakups – is answered according to differing theories of change. In navigating these ideologies and approaches, various considerations come into play including jurisdictional challenges, the strength of existing environmental, consumer, and worker protection laws, and the speed at which structural remedies can realistically be applied.

***Our position is that robust, timely government action is the best way to make progress on global sustainability goals; and investors and businesses should not intentionally undermine policy progress. However, private sector actions can also be important – both in addressing regulatory gaps and in shifting norms for what responsible business conduct looks like.***

While competition agencies grapple with the size of their role and scope of their remit,<sup>37</sup> there will need to be concurrent shifts across many systems to properly incentivize private actors to align their practices with sustainability and climate goals. These will include: increased liabilities for environmental harms; sector

***Ultimately, a strategy that deploys many tools within the antitrust toolkit – as well as concurrent regulatory changes in other areas – is necessary to harness the full potential of the private sector in addressing sustainability challenges at scale.***

standards for emissions reductions or efficiency; other regulations related to labor rights, data protection, and privacy; incentives and other benefits for prosocial investments and practices; and redefinitions or interpretations of fiduciary duty; among others.<sup>38</sup> All these considerations intersect the more narrow ‘antitrust and sustainability’ problem.

While beyond the scope of this paper, trade policy, geopolitical relations, and international collaboration and competition dynamics also influence the application of antitrust law. Issues of national security and access to critical resources regularly intersect antitrust enforcement considerations. Countries may want to bolster national champions or increase concentration in critical industries to reach economies of scale or network effects that can put them on stronger footing to compete with global rivals.<sup>39</sup> As many industries with sustainability considerations (such as mining, semiconductor production, energy, shipping, agriculture, and so forth) connect to struggles over key global resources and critical minerals, new geopolitical considerations intersect the application of antitrust law.

For the purposes of this landscape mapping, we focus on the existing legal, structural, and political challenges to existing private-sector efforts to mitigate climate change and environmental degradation. Larger questions about social harms, like worker welfare and inequality, are beyond the scope of this initial research, though many of the principles of this analysis would apply to other areas of social policy. There is also robust literature<sup>40</sup> documenting the link between highly concentrated markets and rising inequality, which should inform subsequent research on these topics.

Ultimately, a strategy that deploys many tools within the antitrust toolkit – as well as concurrent regulatory changes in other areas – is necessary to harness the full potential of the private sector in addressing sustainability challenges at scale.

35 Daniel Fernández-Kranz and Juan Santaló, “When Necessity Becomes a Virtue: The Effect of Product Market Competition on Corporate Social Responsibility”, 19 *Journal of Economics and Management Strategy*, June 2007, <https://ssrn.com/abstract=997007>

36 Iacovides, *supra* note 32.

37 Jean Tirole, “Socially Responsible Agencies”, *Competition Law and Policy Debate* 171, April 28, 2023. [https://www.elgaronline.com/view/journals/clpd/7/4/article-p171.xml?tab\\_body=pdf](https://www.elgaronline.com/view/journals/clpd/7/4/article-p171.xml?tab_body=pdf).

38 Denise Hearn, “Probing Our Profit Paradigms”, *Embodied Economics*, December 3, 2021. <https://embodied-economics.ghost.io/probing-our-profit-paradigms-part-1/>.

39 Niharika Mandhana and Newley Purnell, “Modi’s Vision for India Rests On Six Giant Companies: Conglomerates are executing projects with a scale and speed that have eluded India in the past. ‘Era of great concentration’”, *The Wall Street Journal*, June 21, 2023. <https://www.wsj.com/articles/modi-india-economy-reliance-industries-adani-group-tata-d2c4f89e>

40 For example: Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, Columbia Global Reports, November 2018.; Zephyr Teachout, *Break ‘Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money*, Macmillan, July 2020.; Matt Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy*, Simon & Schuster, October 2019.; Jonathan Tepper and Denise Hearn, *The Myth of Capitalism: Monopolies and the Death of Competition*, Wiley, November 2018.



## **2. US ANTITRUST – CURRENT POLITICAL CONTEXT AND CONSTRAINTS**

**While European competition agencies forge ahead with new guidelines regarding competition policy and sustainability, the US remains mostly silent. The current political climate in the US – including increased polarization, the federalist system whereby states have co-jurisdiction to enforce antitrust laws, and conservative efforts to undermine the current FTC and DOJ’s more robust enforcement agenda – mean that the federal agencies are reluctant to engage in sustainability conversations.**

This reluctance is not new: antitrust agencies in the US have had a tepid willingness to acknowledge the link between competition and environmental and social concerns over the past 50 years. In 1977, Mike Pertschuk, the FTC Chair, gave a speech at the New England Antitrust Conference saying that the agency needed to move beyond economic considerations alone, and think about the agency’s effects on environmental issues:

*“Although efficiency considerations are important, they alone should not dictate competition policy. Competition policy must sometimes choose between greater efficiency, which may carry with it the promise of lower prices, and other social objectives, such as the dispersal of power, which may result in marginally higher prices. In 1977, no responsive competition policy can neglect the social and environmental harms produced as unwelcome byproducts of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of marketing-stimulated demands.”<sup>41</sup>*

Though the speech was prescient in many ways, it became notorious as a symbol of enforcement overreach after the consumer welfare standard subsequently attained prominence in antitrust thinking in the late 1970s and early 1980s. It became a cautionary tale, or perhaps an intentional illustration during the Reagan-era, about the dangers of adding non-economic goals to antitrust enforcement.

Robert Bork’s 1978 book *The Antitrust Paradox* laid the intellectual foundation for a revolution in antitrust – away from considerations of competition and market power, towards a structural presumption that large firms were more efficient and provided consumer benefit. The resulting ‘consumer welfare standard’ intellectually captured the administration of antitrust law in the US and abroad. Originating from a desire to make enforcement more “objective” and bring scientific certainty, the role of economists swelled within the application of the law as theories of harm had to increasingly be justified using econometric quantification tools.

Despite attempts to position itself as purely ‘mathematical’ in its analysis, antitrust law, like many other areas of law, has allocative effects across the economy. Swings in interpretation have radically affected market structure, which innovations reach the market, and which stakeholders benefit and lose as a result. It is now widely accepted that competition policy – both its aims and its enforcement – has wider societal impacts, like inequality, effects on democracy, and so forth. Today, its effects on the environment must also be recognized in US antitrust circles.

***Despite attempts to position itself as purely ‘mathematical’ in its analysis, antitrust law, like many other areas of law, has allocative effects across the economy. Swings in interpretation have radically affected market structure, which innovations reach the market, and which stakeholders benefit and lose as a result.***

41 Neil Averitt, MLex US, “Neil Averitt commentary: Let us now remember Michael Pertschuk’s famous speech”, FTC Watch, Mlex US, February 14, 2018. <https://www.mlexwatch.com/articles/3029/print?section=ftcwatch>.

## 2A. ANTITRUST IN THE PRESIDENT BIDEN ADMINISTRATION

**The substance of US federal antitrust enforcement is derived from 3 primary statutes: the Sherman Act of 1890, the Federal Trade Commission Act of 1914, and the Clayton Antitrust Act of 1914. Additional laws, such as the Robinson-Patman Act of 1936, the Celler-Kefauver Merger Act of 1950, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, aimed to close loopholes in the original laws, and gave the agencies expanded authority to police other methods of unfair competition and merger review. While the FTC’s primary statutes are the Clayton Act and the FTC Act, it has enforcement or administrative responsibilities under more than 70 laws.<sup>42</sup>**

Both Trump and Biden Administration antitrust enforcers have stated, or signaled, that there are no particular exemptions from antitrust law for environmental, social, and governance (ESG) considerations. Makan Delrahim, Assistant Attorney General of the Department of Justice Antitrust Division under Trump, once said, “Even laudable ends do not justify collusive means in our chosen system of laws.”<sup>43</sup> His successor, Jonathan Kanter, has stated, “[Even in the ESG context] collusion is anticompetitive...When firms have substantial power and they use that power to achieve anticompetitive ends, that should be actionable under antitrust laws.”<sup>44</sup>

A group of consumer welfare standard opposers, dubbed the Neo-Brandeisians (named after Louis Brandeis, a Supreme Court Justice from 1916 to 1939) received historic appointments at the White House, Department of Justice, and Federal Trade Commission under the Biden Administration. They leapfrogged many Obama-era Democrat antitrust establishment lawyers and pundits, ushering in a new era for antitrust enforcement.

Guided by a plain-text reading of the Sherman and Clayton Acts, Lina Khan and Jonathan Kanter have led an effort to revitalize the dormant power of the agencies. Their ideology focuses on protecting competition, and the competitive process, from abuses of concentration of economic power. This worldview is also presumptively suspicious of monopolies because of the range of social and economic ills that flow from monopoly power. It also desires to return to an emphasis on a ‘rule of law’ approach and a greater focus on the agency’s role as law enforcers.

Discussing this new approach, former White House official Tim Wu “acknowledges that economic activity and competition are highly complex processes involving much that is unknown and unknowable. The [competitive process] standard punishes attacks on competition: it does not aspire to and is not keyed in to the impossibly ambitious task of assessing the full welfare effects of any individual conduct or transaction.”<sup>45</sup> This is in stark contrast to the European approach, which is engaged in expanding consumer or ‘citizen’ welfare analysis – using a “balance of harms” approach – to include sustainability metrics in competition enforcement.

42 See Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-229 (1921), which promotes fair market conduct by animal stockyard owners, dealers, packers, and contractors; Deep Seabed Hard Minerals Act, 30 U.S.C. §§ 1401-1473 (1980), as amended, which allows the FTC to provide recommendations on the antitrust implication of proposed deep-sea mineral extraction licenses; and the Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6201-6422 (1975), as amended, which gives limited exemption to oil and gas companies on voluntary agreements in times of energy shortages.

43 Makan Delrahim, “DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion”, USA Today, September 12, 2019. <https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/>.

44 Jeffrey Martino and Grant Murray, “Prevent Antitrust Laws From Complicating Business Sustainability”, Bloomberg Law, December 16, 2022. <https://news.bloomberglaw.com/us-law-week/prevent-antitrust-laws-from-complicating-business-sustainability>.

45 Wu, supra note 24.

Kanter and Khan generally contend that increased competition will naturally lead to better social and environmental outcomes. They believe that competition law should consider more than consumer welfare, and that is best achieved by more market competition and deconcentrations of private power. For instance, in a January 2023 speech to Howard University Law School, Kanter advocated for a return to Supreme Court precedent and the congressional mandate as laid out in the Sherman and Clayton Acts as the cleanest path to economic justice:

*“At the Antitrust Division, we aspire to fight for and win economic justice. ...Americans are more than just consumers. Americans are workers, creators, and inventors. Freedom and justice in the economy mean that everyone has a fair opportunity on a level playing field. We all deserve competition for our labor and our ideas.”<sup>46</sup>*

And the White House Executive Order on Promoting Competition in the American Economy references<sup>47</sup> this 1958 Supreme Court ruling:

*“[T]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions... But even were that premise open to question,” the majority wrote, “the policy unequivocally laid down by the Act is competition.”<sup>48</sup>*

Using these guiding principles, the DOJ Antitrust division brought more cases under Section 2 of the Sherman Act (monopolization cases) in 2022 than in the previous 25 years, and, according to Kanter, has initiated the “broadest enforcement program in the history of Section 8 of the Clayton Act” which prohibits interlocking directorates on corporate boards.<sup>49</sup>

Meanwhile, the FTC produced an extensive report<sup>50</sup> as the basis to re-invigorate their Section 5 enforcement ability, which gives the agency broad latitude to police unfair methods of competition. It also announced a proposed rulemaking on banning non-competes across the country.<sup>51</sup> And both agencies are re-writing the merger guidelines, withdrawing previous vertical and horizontal guidelines<sup>52</sup> in favor of combined guidelines. The agencies have claimed credit for more than 26 abandoned mergers under their tenure,<sup>53</sup> and have doubled the average number of complaints against filed merger transactions.<sup>54</sup>

This flurry of antitrust enforcement has provoked a backlash against the agencies and their mandates. Conservative lawmakers and business groups like the Chamber of Commerce are seeking to constrain the existing – let alone more expansive – mandate of the antitrust agencies.

The FTC, in particular, is facing attacks from conservative groups related to 1) its rulemaking and statutory authority 2) its enforcement authority and 3) its general approach and philosophy.

46 Jonathan Kanter, “Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at Howard Law School”, U.S. Department of Justice (DOJ) Antitrust Division, January 12, 2023. <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-howard-law>.

47 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

48 The White House, “Executive Order on Promoting Competition in the American Economy”, The White House, July 9, 2021. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

49 Jonathan Kanter, “Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy”, U.S. Department of Justice (DOJ) Antitrust Division, March 2, 2023. <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone>.

50 Federal Trade Commission (FTC), “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act”, FTC, November 10, 2022. <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>

51 Federal Trade Commission, “FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition”, FTC, January 5, 2023. <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition> (last visited May 30, 2023).

52 Horizontal mergers are mergers between direct competitors which eliminate a competitor from the market. Vertical mergers are mergers or acquisitions of other firms in a company’s supply chain. Traditionally, antitrust differentiated between these and treated them slightly differently, with more scrutiny applied to horizontal mergers. The new approach aims to lessen the differentiation between these ways of accumulating market power through M&A.

53 Leah Nylen and Michelle F. Davis, “US Antitrust Enforcers Are Chilling Big Mergers”, Bloomberg, May 10, 2023. <https://www.bloomberg.com/news/articles/2023-05-10/m-a-deal-pace-slows-as-biden-administration-cracks-down-on-antitrust?sref=q0qR8k34>.

54 Id. “In the 12 months through September, the antitrust agencies filed complaints against a record 13 transactions compared to an average of six per year over the previous five years.”

1. **Rulemaking and Statutory authority:** Conservatives are using the proposed non-compete rulemaking to question the FTC’s statutory authority under the major questions doctrine<sup>55</sup>. In a February 28 Chamber Coalition letter to Congress,<sup>56</sup> the Chamber states: “The FTC lacks the constitutional or statutory authority to issue such a rule and, in attempting to do so, the agency is improperly usurping the role of Congress.”<sup>57</sup> Walmart challenged the constitutionality of the FTC’s authority after the FTC brought a Section 5 case against them,<sup>58</sup> and Microsoft withdrew<sup>59</sup> a similar challenge to FTC constitutionality after being challenged<sup>60</sup> by a public advocacy group.
  2. **Enforcement authority:** There are similar challenges to the FTC’s enforcement authority: for example, the Supreme Court recently decided *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175 (2023). Axon Enterprise manufactures police body-cameras and tasers, and it was the subject of an antitrust investigation by the FTC when it sued to challenge the FTC’s authority. A similar challenge to the SEC’s enforcement abilities appeared in *Securities and Exchange Commission v. Cochran*. On April 14, 2023, the Supreme Court issued a consolidated ruling in these cases, finding that the respondents to an administrative proceeding may raise constitutional claims in federal court prior to exhausting their administrative remedies, signaling an openness for others to further challenge the FTC’s structure and authority. Additionally, the Chamber of Commerce has attacked Khan’s FTC for supposedly going beyond its authority in collaborating with international competition agencies on merger cases,<sup>61</sup> despite a Trump-era MOU between agencies in the US, Canada, UK, New Zealand, and Australia, signed under her predecessor.<sup>62</sup>
  3. **Approach and Philosophy:** Critics also deploy the anti-ESG narrative to discredit the FTC’s enforcement efforts. Republicans have pejoratively labeled any movement away from the consumer welfare standard and previously lax enforcement norms as “ESG.” In December 2022, twelve House Republicans wrote a letter to Chair Khan claiming that the FTC is pursuing a partisan ESG-related agenda, and that they are afraid the new merger guidelines will offer a loophole to prioritize ESG considerations in antitrust. The letter also took issue with the new Section 5 FTC statement, which the GOP claims is “a much broader, more amorphous, reading of Section 5 that can easily be manipulated by the political whims of a majority of the Commission.”<sup>63</sup>
- Understandably, the agencies have been reluctant to engage in any dialogue or debate on ‘green antitrust’ or how antitrust enforcement may aid climate change efforts or broader social goals, as they fight to maintain and reinvigorate their existing agency mandates.

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55 Congressional Research Service. “The Major Questions Doctrine”, Congressional Research Service, November 2, 2022. <https://crsreports.congress.gov/product/pdf/IF/IF12077> (last visited May 30, 2023). The Major Questions Doctrine is a novel court doctrine addressing how much regulatory authority federal government agencies have relative to Congress. If agencies undertake rulemakings of major national significance or of vast ‘economic and political significance’, the action must arguably be supported by clear Congressional authorization.

56 Letter from the U.S. Chamber of Commerce to U.S. Congress, “Coalition Letter to Congress on the FTC’s Proposed Rule on Noncompete Agreements”, U.S. Chamber of Commerce, February 28, 2023. <https://www.uschamber.com/finance/antitrust/coalition-letter-to-congress-on-the-ftcs-proposed-rule-on-non-compete-agreements>.

57 Suzanne P. Clark, “The Chamber of Commerce Will Fight the FTC”, Wall Street Journal, January 22, 2023. <https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656>; and Randy Picker, “The FTC’s Non-Compete Ban Will Force Questions Over the Scope of its Authority”, Promarket, January 11, 2023. <https://www.promarket.org/2023/01/11/the-ftcs-non-compete-ban-will-force-questions-over-the-scope-of-its-authority/>.

58 Alan S. Kaplinsky, “Walmart challenges FTC’s constitutionality in motion to dismiss”, Consumer Finance Monitor, September 7, 2022. <https://www.consumerfinancemonitor.com/2022/09/07/walmart-challenges-ftcs-constitutionality-in-motion-to-dismiss/>.

59 Stephen Totilo, “Exclusive: Microsoft, Activision back off aggressive claim in FTC case”, Axios, January 5, 2023. <https://www.axios.com/2023/01/05/microsoft-activision-ftc-constitution>.

60 American Economic Liberties Project – Press Release, “Microsoft’s Brad Smith is No Different Than Any Other Monopolist”, American Economic Liberties Project, December 23, 2022. <https://www.economicliberties.us/press-release/microsofts-brad-smith-is-no-different-than-any-other-monopolist/>.

61 The Editorial Board, “The FTC’s Antitrust Collusion”, Wall Street Journal, February 3, 2023. <https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-grail-acquisition-a78e03d0>.

62 Federal Trade Commission, “Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities”, FTC, September 2020. <https://www.ftc.gov/legal-library/browse/cooperation-agreements/multilateral-mutual-assistance-cooperation-framework-competition-authorities> (last visited May 30, 2023).

63 Letter from Members of Congress of the United States to Lina Khan, Chairwoman of the FTC, December 5, 2022. <http://fitzgerald.house.gov/sites/evo-subsites/fitzgerald.house.gov/files/evo-media-document/12.5.22-letter-to-ftc-on-sec-5-and-esg-factors-.pdf>.

## 2B. FEDERALIST ANTITRUST SYSTEM – THE ROLE OF STATES

**Various jurisdictions around the world employ a federalist or subnational approach to antitrust policy, including the EU, Australia, and the US. The federated system, whereby states have authority to enforce antitrust law alongside federal agencies, is typically viewed as a strength of the US antitrust system, as it provides wider enforcement coverage. However, increased polarization has complicated compliance obligations and increased the risk for companies as antitrust law is weaponized at the state level.**

In addition to the designated federal agencies responsible for antitrust enforcement in the US, fifty-six attorneys general (of the fifty states, the District of Columbia and five territories) can bring antitrust cases against firms. The states can bring cases under federal antitrust laws, and many states also have their own antitrust and consumer protection laws, sometimes referred to as “Little FTC Acts.” These laws give state attorneys general the broad authority to police anticompetitive conduct, and usually cases allege violations of both state and federal antitrust laws when state AGs sue.<sup>64</sup> Some state antitrust laws – like California’s Cartwright Act – also reach conduct that federal laws cannot. Resource constraints associated with bringing antitrust suits against very large companies often produce multi-state coalitions that bring a single, combined case.

State antitrust laws actually preceded the Sherman Act of 1890: 13 states had competition laws before the Act’s passage. Additionally, many states have constitutions with antimonopoly provisions, going back to the founding of the country. States continue to have an active role in investigating and prosecuting anti-competitive behavior. According to antitrust law expert Stephen D. Houck, “The states have come to be regarded as a significant feature of the institutional antitrust enforcement landscape in this country.”<sup>65</sup>

The relationship between state and federal enforcers has waxed and waned over time, but states can act as an important counterbalance to changing ideological perspectives at the federal level, and vice versa.<sup>66</sup> Despite increasing polarization, state AGs have cooperated across partisan lines in bringing landmark antitrust cases against large technology companies in recent years<sup>67</sup>; however, the divergence on ESG-related issues is growing wider, which we cover further in Section 4b1.

64 Section 4C of the Clayton Act includes state authority to bring antitrust cases for citizens of that state (for consumer protection) and allows states to bring antitrust cases as purchasers of goods and services (e.g., bid rigging claims). State attorneys general can bring cases individually, or as a multi-state group, and can bring both civil and criminal cases.

65 Stephen D. Houck, “Transition Report: The State of State Antitrust Enforcement”, 2009. <https://static1.squarespace.com/static/577e9d93b3db2b9290cd7005/t/5a04a3b853450afe16fb4291/1510253498807/Houck-AntitrustEnforcement-2009.pdf>

66 Ibid.

67 Examples of bipartisan US State antitrust cases against big tech: a coalition of 36 state AGs led by Colorado (including Puerto Rico and Guam) against Google Search – Colorado Attorney General, States’ Complaint against Google LLC, <https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf> (last visited May 30, 2023).; a coalition of 9 states, led by Texas, against Google Ad Tech – Texas Attorney General, States’ Complaint against Google LLC, [https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216\\_1%20Complaint%20\(Redacted\).pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf) (last visited May 30, 2023).; and a 48 state co-sponsored case against Facebook – New York State Attorney General, States’ Complaint against Facebook, Inc. [https://ag.ny.gov/sites/default/files/state\\_of\\_new\\_york\\_et\\_al.\\_v.\\_facebook\\_inc.\\_-filed\\_public\\_complaint\\_12.11.2020.pdf](https://ag.ny.gov/sites/default/files/state_of_new_york_et_al._v._facebook_inc._-filed_public_complaint_12.11.2020.pdf) (last visited May 30, 2023).



### **3. ANTITRUST'S TREATMENT OF COMPETITOR COLLABORATIONS**

## 3A. NEW SUSTAINABILITY QUESTIONS

**A central question in antitrust is: What forms of collaboration are pro-social, and which are anti-social (or anti-competitive). Collaboration is permitted, provided it does not tip into cartel or collusive behavior. Typically, agreements which do not appreciably restrict competition, and which have no effect on price or output, fall outside the scope of competition agency scrutiny. However, sustainability concerns have raised new challenges to established antitrust norms.**

As global governments have coalesced around collective climate goals, ratified in the Paris Agreement, Europe and other jurisdictions are attempting to align their competition policy regimes with international treaties and national environmental strategies. In the recently confirmed European horizontal cooperation agreement guidelines,<sup>68</sup> the EC clarifies that agreements which require compliance with legally binding international treaties related to sustainability fall outside of scrutiny.<sup>69</sup>

However, the more challenging questions emerge when sustainability-related efforts among competitors may have an impact on price or output. A core argument in favor of rethinking existing paradigms is that many sustainably produced projects require increased production costs or the internalization of previously unaccounted for environmental or social externalities. Firms argue that they have a “first mover” disadvantage if they pursue projects on their own, or that there is limited effectiveness if a firm acts unilaterally. Therefore, firms desire more flexibility to act in concert.

For this reason, international competition agencies are contending with these questions:

- How should **sustainability benefits** be quantified, to whom, and over what time horizon? What level of benefit will justify any associated harms?
  - If the consumer welfare standard is maintained, how should regulators define the consumer when sustainability benefits might accrue to wider groups of ‘out of product market’ consumers?
    - Should benefits accrue to future consumers, potential consumers, current consumers, or public welfare generally?
  - There is also the question of how ‘welfare’ is defined, and which wider considerations beyond price should be considered and quantified.
- **Price externalities** – what level of coordinated price increases – if any – are regulators and enforcers willing to permit? Price fixing (both in selling and buying) has historically been considered a *per se* (or inherently illegal) violation of antitrust law (referred to as ‘by object’ in the EU); however, some allowances for coordinated increases in price from sustainability initiatives have made it into new EU guidelines.
  - In non-US jurisdictions, discussions on a consumer’s ‘willingness to pay’ for sustainability benefits is a part of the exercise of balancing consumer harms and benefits.
- What amount of a **reduction in competition** among firms – if any – should be permissible to gain certain sustainability benefits? In what instances are the agencies willing to re-interpret antitrust violations in light of sustainability benefits, if any? And does this require legislative change, or simply updated guidelines?
- Are these competitor agreements **indispensable** to achieving sustainability gains, or can the sustainability benefits be achieved by unilateral firm action?

68 European Commission, *supra* note 4.

69 European Commission, *supra* note 4. Examples listed include: “compliance with fundamental social rights or prohibitions on the use of child labour, the logging of certain types of tropical wood or the use of certain pollutants...Such agreements may be an appropriate measure to enable undertakings to implement their sustainability due diligence obligations under national or EU law and can also form part of wider industry cooperation schemes or multi-stakeholder initiatives to identify, mitigate and prevent adverse sustainability impacts in their value chains or their sector.”



While these considerations are complex, it is worth noting that competition agencies have wrestled with technical questions relating to competitor collaborations for decades. Historically, when collaborations restricted competition, they were evaluated by weighing the anti-competitive effects against any pro-competitive benefits. The pro-competitive benefits have, under the consumer welfare standard, typically been measured in efficiency gains, which are said to be passed onto the consumer by way of lower prices (in theory).<sup>70</sup> Purported efficiency gains have also come under increasing scrutiny.<sup>71</sup> So, while the weighing of benefits and harms of these collaborations is not new to competition policy, ‘sustainability gains’ are now becoming the new ‘efficiency gains’ that companies propose as deserving of new regulatory or legislative carve outs.

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70 John Kwoka, a competition policy expert, analyzed over 3000 US mergers and found that when mergers led to six or fewer significant competitors, prices rose in nearly 95% of cases. And on average, post-merger prices increased 4.3%. See: John Kwoka. “U.S. antitrust and competition policy amid the new merger wave,” Washington Center for Equitable Growth, July 27, 2017. <http://equitablegrowth.org/report/u-s-merger-policy-amid-the-new-merger-wave/>

71 Canada’s Competition law, as an example, has an efficiencies defense and business justification rule which allows anti-competitive behavior if the benefits from efficiency gains can be proven during merger review or during investigations of otherwise illegal competitor collaborations. Many groups, including the current and former Commissioners of Competition, have called for it to be removed from the law.

## 3B. SUSTAINABILITY-RELATED COMPETITOR COLLABORATIONS: THE UK'S APPROACH

**As companies face increasing pressure to collaborate with industry partners to address sustainability challenges, questions of the details surrounding permissible competitor collaborations have become more salient. Collaborations can include: joint standard-setting (“standardization”) and voluntary agreements, group purchasing or production agreements, joint research and development (R&D), joint ventures, and information or data sharing, among others.**

Guidelines for competitor collaborations have been in effect for decades, and there is precedent to inform more difficult cases. In different jurisdictions, existing competitor collaboration guidelines provide safe harbors for instances where firms have a relatively small market share (20% in the US guidelines, 10%, 15%, or 20% in the UK guidelines depending on the type of collaboration, and 20% in the EU for certain types of agreements).<sup>72</sup>

In the last year, both the UK CMA and EU DG Comp have issued updated guidelines to specifically address sustainability-related collaborations. However, the US competitor collaboration guidelines have not been updated since 2000, and they make no explicit mention of sustainability or environmental factors for consideration.

To better understand how competition agencies are evaluating various tradeoffs, we cover the CMA guidelines here as an illustration. The CMA has stated that it takes a three-pronged approach to thinking about its mandate, and how it can support sustainability:

1. Encouraging competition in new markets like electric vehicle charging, residential energy options like heat pumps or improved insulation. The agency believes that encouraging firms to compete will spur innovation and benefit consumers.
2. Ensuring that customers have accurate information about the products and services they purchase by policing greenwashing.
3. Giving clarity to businesses about what kinds of collaborations are permissible under the law, which may potentially run afoul of the law, and which collaborations restrict competition, but will be exempted from legal action if the sustainability benefits outweigh the anti-competitive harms.<sup>73</sup>

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<sup>72</sup> European Commission, *supra* note 4.

<sup>73</sup> Dr. Michael Grenfell, “Can we protect the environment and keep the benefits of competition?”, *Economic Impact*, March 15, 2023. <https://impact.economist.com/sustainability/resilience-and-adaptation/can-we-protect-the-environment-and-keep-the-benefits-of-competition>

The below chart from UK law firm Shepherd and Wedderburn LLP is a helpful summary of the guidance the CMA has provided.<sup>74</sup>

1 – Agreements unlikely to breach	2 – Agreements that may breach	3 – Agreements that would breach, but capable of exemption
<p>The CMA considers that agreements which are unlikely to infringe the Chapter 1 prohibition include agreements to phase out unsustainable inputs (such as moving to more environmentally friendly packaging), so long as there is no appreciable increase in pricing. Other more benign examples unlikely to raise concerns include joint awareness campaigns on environmental issues, or joint industry training funds – so long as the main parameters of competition are unaffected (i.e. price, choice, quality or innovation).</p>	<p>The clear examples here from the CMA focus on agreements which will likely breach the prohibition 'by object' (i.e. simply their existence is problematic). The obvious example is an agreement between competitors on the price at which they will sell products meeting an agreed environmental sustainability standard. On the other hand, some agreements might be problematic 'by effect' – e.g. in the case of an agreement to introduce a new sustainability labelling system, whether other businesses are able to take advantage of the system on non-discriminatory terms.</p>	<p>The CMA sets out some examples of where an agreement would likely infringe the Chapter 1 prohibition, but sets out its thinking in terms of the Section 9(1) exemption criteria. For instance, an agreement amongst furniture producers to only import and use sustainable timber in their products – but where this would significantly increase furniture prices. In such circumstances the benefit of higher sustainability might 'offset' the dis-benefit of increased cost to consumers. The CMA does make clear however, that any potential benefits must be clearly evidenced.</p>

For sustainability agreements which restrict competition the guidance includes four necessary factors:

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.”

These are nearly identical to existing EU Article 101(3) guidance, which lays out the same four conditions for exemptions which restrict competition.<sup>75</sup>

However, the UK guidelines are even more permissive for climate-change related agreements. And most notably, the CMA has also shifted its posture to create an ‘open door’ policy so that firms can bring their proposed agreements forward and receive additional advice or guidance from the agency. In these instances, the agency will not issue fines for agreements that were discussed with them ahead of time, and which did not raise competition concerns.

Some want the guidance to go further, by issuing block exemptions for sustainability agreements altogether,<sup>76</sup> or to provide similar exemptions for biodiversity agreements, which are currently excluded. Others have raised the possibility of amending the law to specifically mention sustainability agreements. The guidelines are set to be finalized later this year.

74 Gordon Downie, John Grady, Scott Rodger, Euan Murphy, and Ashley French, “UK: CMA Signals More Flexibility For Sustainability Agreements – Back To The Future?”, Shepherd and Wedderburn, March 17, 2023. <https://shepwedd.com/knowledge/cma-signals-more-flexibility-sustainability-agreements-back-future>

75 European Commission, “Exempted agreements (Article 101(3) TFEU)”, European Commission, June 10, 2017. [https://ec.europa.eu/competition/antitrust/legislation/art101\\_3\\_en.html](https://ec.europa.eu/competition/antitrust/legislation/art101_3_en.html)

76 Downie et al., supra note 74.

## 3C. FIRM RISK – VIOLATION PENALTIES

**Competitor collaborations face antitrust risk under Section 1 and 2 of the Sherman Act (agreements in restraint of trade; monopolization and attempts to monopolize), as well as Section 5 of the FTC Act (unfair methods of competition). The DOJ Antitrust Division (DOJ ATR) is a law enforcement agency which predominantly deals with cases related to monopolization and anti-competitive behavior. It can administer criminal penalties. The FTC, on the other hand, is both law enforcer and regulator, with rule-making authority. The FTC only has the authority to issue civil penalties, but it has a criminal liaison unit which refers cases to other prosecutors and agencies with criminal jurisdiction.<sup>77</sup>**

Some cartel behavior is treated as *per se* illegal and criminal under Section 1 of the Sherman Act. Examples of *per se* violations are: price fixing, bid rigging, boycotts, or market allocation schemes. Sherman Act criminal penalties can include up to \$100 million for a corporation and \$1 million for an individual, along with up to 10 years in prison. In certain cases, the maximum fine can be increased to twice the amount the conspirators gained from the illegal scheme or twice the money lost by the victims, if either of those amounts is over \$100 million.<sup>78</sup> In addition, the Clayton Act (1914) gives the victims of bid-rigging or price-fixing schemes the ability to seek civil recovery up to three times the amount of damages suffered (treble damages).

Applied fines for a Sherman Act Section 1 violation have not yet exceeded \$1 billion in the US. The largest fine applied by the Justice Department Antitrust Division was \$925 million, after Citibank Group pleaded guilty to manipulating foreign exchange rates in 2017.<sup>79</sup> Barclays and JPMorgan Chase & Co. were also fined \$650 million and \$550 million, respectively. All other fines for Section 1 violations were \$500 million or less. For the largest companies, fines such as these are often seen as a cost of doing business and do not dramatically affect corporate valuations.

In 2021, the DOJ Antitrust Division brought cases attempting to create new precedent that wage fixing and no poach agreements are also *per se* illegal violations of the Sherman Act, but these actions have struggled in the courts with multiple appeals.

Section 2 of the Sherman Act, dealing with monopolization, attempted monopolization, and conspiracies to monopolize, can also be prosecuted criminally. In contrast with Section 1 violations, criminal prosecutions of Section 2 violations have been dormant for decades – since the late 1970s.<sup>80</sup> In October 2022, the DOJ Antitrust Division brought and resolved its first criminal violation case of Section 2 in nearly 50 years in *United States v. Zito* in which a paving company president pleaded guilty to attempting to monopolize the market for publicly-funded highway crack-sealing services in Montana and Wyoming.<sup>81</sup> This case indicates, alongside public statements, that current leadership at both the DOJ and FTC desires to revive criminal prosecutions for violations.

77 Federal Trade Commission, “FTC’s Bureau of Consumer Protection Issues Criminal Liaison Unit Report Detailing Efforts to Ensure Wrongdoers Face Accountability”, FTC, January 30, 2023. <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftcs-bureau-consumer-protection-issues-criminal-liaison-unit-report-detailing-efforts-ensure>

78 Federal Trade Commission, “Guide to Antitrust Laws”, FTC. <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited May 30, 2023).

79 Department of Justice, “Sherman Act Violations Resulting In Criminal Fines & Penalties Of \$10 Million Or More”, U.S. Department of Justice Antitrust Division, February 3, 2022. <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more> (last visited May 30, 2023).

80 Andre Gerevola, “The Return of Criminal Sanctions for Violating Section 2 of the Sherman Act”, Arnold & Porter Advisory, March 9, 2022. <https://www.arnoldporter.com/en/perspectives/advisories/2022/03/criminal-sanctions-for-section-2>

81 Carsten Reichel, “US DOJ files first criminal charge under Sherman Act Section 2 in nearly 50 years”, Norton Rose Fulbright, November 2022. <https://www.nortonrosefulbright.com/en-us/knowledge/publications/14f4c7e7/us-doj-files-first-criminal-charge-under-sherman-act-section-2-in-nearly-50-years>. In March 2023, Nathan Zito was sentenced to six-months house arrest, three years of probation, and a \$27,000 fine. See: Mike Scarcella, “Rare criminal antitrust case results in probation, not prison”, Reuters, March 30, 2023. <https://www.reuters.com/legal/government/rare-criminal-antitrust-case-results-probation-not-prison-2023-03-30/>

In practice, most competitor collaborations are evaluated under a *rule of reason* analysis – which looks at the specific facts of each case to determine whether the conduct ‘unreasonably’ restrained trade. In *rule of reason* cases, the agencies will often take into consideration: market definition, market share and market power, evidence of anticompetitive harm, coercion (e.g., mandatory enforcement of industry association standards), exclusion (if one or more firms may be excluded from an initiative or qualification), and other relevant factors when determining whether the activity is illegal.<sup>82</sup> Given these opportunities to present favorable evidence, and that the burden of proof rests with the plaintiff, it is typically difficult for plaintiffs (which can be government entities or private parties<sup>83</sup>) to win *rule of reason* cases.

Guidance from the US competitor collaboration guidelines asks whether the collaboration is necessary to achieve certain efficiency-enhancing procompetitive benefits.<sup>84</sup> Under the existing guidance, the agencies state that they will analyze cases under the *rule of reason* when collaborations “benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation.”<sup>85</sup> The guidelines express a supportive approach to efficiency-enhancing collaborations, stating that they “typically combine...significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately.”<sup>86</sup> In other words, there is a structural presumption that collaborations between competitors, especially with low market shares, are typically benign or beneficial for consumers. While a focus on efficiency gains is out of step with the approach of current agency leadership, they have not yet issued updated guidelines, and have made no public signals that they plan to do so.

82 Id at 7. “The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”

83 According to the FTC’s website, the majority of antitrust lawsuits originate from private parties – businesses or individuals seeking damages for antitrust violations – which they can bring under the Sherman or Clayton act, as well as state antitrust laws. See: <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers>

84 See FTC and DOJ, Antitrust Guidelines for Collaborations Among Competitors, 4 (2000).

85 Ibid.

86 Ibid.



**4. FINANCIAL  
INSTITUTION  
COALITIONS  
AND CLIMATE  
COMMITMENTS**

## 4A. FINANCIAL INSTITUTIONS UNDER FIRE FROM PROGRESSIVES AND CONSERVATIVES

**Despite a proliferation of corporate net-zero pledges, new financial alliances, and other such private-sector efforts to achieve ‘net zero’ greenhouse gas emissions, global emissions have continued rising, and reached an all-time high in 2022.<sup>87</sup>**

Global efforts to engage financial institutions in the race to ‘net zero’ have intensified in recent years. Financial institutions (banks, asset managers, insurers, asset owners, and so forth), have been criticized for continuing to finance or support new fossil fuel projects in the face of the urgent need to transition to a low-carbon economy.<sup>88</sup> The IPCC report is clear that aligning with the Paris Agreement means no financing of fossil fuel (oil, gas and coal) exploration or expansion, and that some projects must be decommissioned before the end of their useful lifetime (known as “stranded assets”).

In response, financial actors have made pledges to align their investment strategies with the Paris Agreement. The most significant collective pledge has been the Glasgow Financial Alliance for Net Zero (GFANZ)<sup>89</sup> started by former central banker, Mark Carney. The alliance represents 550 members across 50 jurisdictions, according to a November 2022 progress report, and supports seven different sub-alliances, including:

- The Net Zero Banking Alliance, with a collective \$72 trillion in financial assets
- The Net Zero Asset Managers initiative, with \$66 trillion in assets under management
- The Net Zero Asset Owner Alliance, with \$11 trillion

- The Paris Aligned Asset Owners, with \$3.3 trillion
- The Net Zero Insurance Alliance with \$700 billion<sup>90</sup>
- The Net Zero Financial Service Providers Alliance with 23 member firms
- The Net Zero Investment Consultants Initiative with 10 member firms<sup>91</sup>

As these alliances and other financial sector networks, coalitions and initiatives gained traction, pushback from conservative, pro-fossil fuel groups intensified. Organizations such as GFANZ and some of its sub-alliances like NZAM, NZIA, and NZBA as well as other investor coalitions like Climate Action 100+ and Ceres have all received investigative letters from US Republican state Attorneys General and Congressional Representatives, alleging potential antitrust violations.

US Republicans began arguing that financial sector coalitions, aimed at addressing climate change, were akin to an industry boycott and that asset managers and banks were engaged in a collusive effort to “starve” oil and gas companies of capital,<sup>92</sup> raising energy prices on consumers. C. Boyden Gray, a lawyer and former U.S. Ambassador to the European Union, called these actions “invitations to collude on a boycott of a critical segment of the U.S. economy” which would invite “billions of dollars in antitrust liability.”<sup>93</sup>

87 International Energy Agency, “CO2 Emissions in 2022”, International Energy Agency, March 2023. <https://www.iea.org/reports/co2-emissions-in-2022> (last visited May 30, 2023).

88 Lisa Sachs, Nora Mardirossian, and Perrine Toledano, “Finance for Zero: Redefining Financial-Sector Action to Achieve Global Climate Goals,” Columbia Center on Sustainable Investment, June 2023. <https://ccsi.columbia.edu/finance-for-zero>

89 Glasgow Financial Alliance for Net Zero (GFANZ), “Glasgow Financial Alliance for Net Zero”, GFANZ, 2023. <https://www.gfanzero.com/> (last visited May 30, 2023).

90 The recent departure of Munich Re, a German re-insurer, Zurich Re, and Hanover Re from the Net Zero Insurers Alliance has revived calls for clarified guidance from regulators. “In our view, the opportunities to pursue decarbonisation goals in a collective approach among insurers worldwide without exposing ourselves to material antitrust risks are so limited that it is more effective to pursue our climate ambition to reduce global warming individually,” Joachim Wenning, CEO of Munich Re, stated. From: Munich Re, “Munich Re discontinues NZIA membership”, Munich Re, March 31, 2023. <https://www.munichre.com/en/company/media-relations/media-information-and-corporate-news/media-information/2023/media-release-2023-03-31.html>

91 GFANZ, “2022 Progress Report”, GFANZ, 2022. <https://assets.bbhub.io/company/sites/63/2022/10/GFANZ-2022-Progress-Report.pdf> (last visited May 30, 2023).

92 Clayland Boyden Gray, “Banks’ Energy Boycott Is an Antitrust Problem”, Wall Street Journal, July 14, 2020. <https://www.wsj.com/articles/banks-energy-boycott-is-an-antitrust-problem-11594746486>

93 Ibid.

Arkansas senator Tom Cotton wrote to BlackRock in July 2022 over its involvement in Climate Action 100+, arguing that its “anti-drilling coercion threatens our national security, hurts Americans struggling to buy a tank of gas, and appears to violate antitrust laws.”<sup>94</sup> And the Arizona state AG went as far as arguing that ESG in general – a difficult generalization to make, in light of the varied use cases and meanings of the term ESG<sup>95</sup> – is an antitrust violation.<sup>96</sup>

This pushback continues even though asset managers like BlackRock, Vanguard, and State Street remain in the top five financiers of fossil fuel industries globally, and many other GFANZ-member banks continue to extend capital to new fossil fuel projects.<sup>97</sup> Notably, the wider anti-ESG campaign has been revealed to be heavily financed by the oil and gas lobby, demonstrating the political machine behind these arguments.<sup>98</sup>

As the rhetoric increased in intensity, financial institutions responded. Whether truly concerned about liability or the risk of further investigations, or a convenient excuse to renege on climate commitments, various GFANZ members threatened to pull out of their respective alliances due to the fear of breaching antitrust law. In response, in October 2022, GFANZ dropped<sup>99</sup> the UN partnership Race to Zero requirements which had required members to “phase out development, financing and facilitation of new unabated fossil fuel assets, including coal, in line with science-based scenarios.”<sup>100</sup>

Nevertheless, Vanguard made global news when it pulled out of GFANZ in December 2022, stating “we have decided to withdraw from NZAM so that we can provide the clarity our investors desire about the role of index funds and about how we think about material risks, including climate-related risks—and to make clear that Vanguard speaks independently on matters of importance to our investors.”<sup>101</sup> While not mentioning antitrust liability directly, the emphasis on independence seemed to reference those concerns.

Simultaneously, Blackrock distanced itself from the narrative of controlling capital allocation to energy industries. In Blackrock CEO Larry Fink’s March 2023 letter to investors, he stated “it is for governments to make policy and enact legislation, and not for companies, including asset managers, to be the environmental police.”<sup>102</sup> And Blackrock’s 2030 Net Zero statement stated, “Our role is to help [our clients] navigate investment risks and opportunities, not to engineer a specific decarbonization outcome in the real economy. The money we manage is not our own – it belongs to our clients, many of whom make their own asset allocation and portfolio construction decisions.”<sup>103</sup>

The Net Zero Insurance Alliance has perhaps been the most affected, as many of its members – including a majority of its founding signatories – left the alliance following pushback from US Republicans. Swiss Re, Munich Re, Hannover Re, AXA, Allianz, and SCOR are among the firms that have left.<sup>104</sup>

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- 94 Tom Cotton, “Cotton Demands Answers From Blackrock About Involvement With Climate Action 100+, Potential Antitrust Violations” Tom Cotton Senator for Arkansas, July 14, 2022. <https://www.cotton.senate.gov/news/press-releases/cotton-demands-answers-from-blackrock-about-involvement-with-climate-action-100-potential-antitrust-violations> (last visited May 30, 2023).
- 95 Denise Hearn, “ESG’s Many Sharpshooters”, Embodied Economics, March 23, 2023. <https://embodied-economics.ghost.io/esgs-many-sharpshooters/>
- 96 Mark Brnovich, “ESG May Be an Antitrust Violation”, Wall Street Journal, March 6, 2022. <https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807>
- 97 Truzaar Dordi, Sebastian A. Gehricke, Alain Naef, and Olaf Weber, “Ten financial actors can accelerate a transition away from fossil fuels”, Environmental Innovation and Societal Transitions, Volume 44, September 2022. <https://doi.org/10.1016/j.eist.2022.05.006>
- 98 See: Saul Elbien. “Documents reveal how fossil fuel industry created, pushed anti-ESG campaign”, The Hill, May 18, 2023. <https://thehill.com/policy/equilibrium-sustainability/4010800-documents-fossil-fuel-anti-esg-campaign/>; and: “Documented, Dark Money Group Weaponizes State Treasurers in Attacks on Climate Policy”, Documented, August 5, 2022. <https://documented.net/investigations/dark-money-group-weaponizes-state-treasurers-in-attacks-on-climate-policy> (last visited May 30, 2023).
- 99 GFANZ, “GFANZ Launches Critical Resources for Financial Institutions to Convert Net-Zero Ambitions to Actions, Calls on G20 Governments to Close Climate Policy Gap”, GFANZ, November 1, 2022. <https://www.gfanzero.com/press/gfanz-launches-critical-resources-for-financial-institutions-to-convert-their-net-zero-ambition-into-action/> (last visited May 30, 2023).
- 100 Mark Segal, “Mark Carney-led GFANZ Drops Requirement for Race to Zero Commitment for Members”, ESG Today, October 28, 2022. <https://www.esgtoday.com/mark-carney-led-gfanz-drops-requirement-for-race-to-zero-commitment/>
- 101 Vanguard, “An update on Vanguard’s engagement with the Net Zero Asset Managers initiative (NZAM)”, Vanguard, December 7, 2022. <https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/update-on-nzam-engagement.html>
- 102 Larry Fink, “Larry Fink’s Annual Chairman’s Letter to Investors”, BlackRock, September 30, 2022. <https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter>
- 103 BlackRock, “BlackRock’s 2030 net zero statement”, BlackRock, 2021. <https://www.blackrock.com/corporate/about-us/our-2021-sustainability-update/2030-net-zero-statement> (last visited May 30, 2023).
- 104 Tommy Wilkes, Alexander Hübner and Tom Sims, “Insurers flee climate alliance after ESG backlash in the U.S.”, Reuters, May 26, 2023. <https://www.reuters.com/business/allianz-decides-leave-net-zero-insurance-alliance-2023-05-25/>



Thus far, there have not been any U.S. court decisions finding antitrust violations in connection with climate pledges. The closest analogy is a 2019 antitrust investigation by the Trump-era Justice Department into four automakers that reached an agreement with the state of California on tailpipe emissions standards. DOJ officials announced a concern that the agreement between California and the four companies – Ford Motor Co., Honda Motor Co., BMW AG, and Volkswagen AG – to follow emissions standards higher than those

proposed by the Trump administration could restrict competition, in violation of federal competition law, by limiting the types of vehicles offered to consumers. Justice Department lawyers closed that investigation a year after it was announced, acknowledging that the automakers had not broken any laws. This case was largely seen as illegitimate by antitrust practitioners, and there was a subsequent inspector general investigation into its impropriety.

## 4B. HOW LEGITIMATE ARE WEAPONIZED ANTITRUST CLAIMS?

Given the flurry of investigative letters, legislative campaigns, and bombastic op-eds, it is useful to disentangle three conversations happening at the intersection of antitrust and ESG:

- Republican Attorneys General conducting antitrust investigations of banks, investor coalitions, and asset managers regarding ESG or net-zero considerations. These investigations allege violations of fiduciary duty, or that alliances constitute a ‘collective boycott’ in violation of antitrust law (however, no antitrust lawsuits have been filed as of July 1, 2023);
- The Republican-led anti-ESG bills proliferating at the state-level, which posit that ESG-related strategies, including climate-related strategies, constitute a breach of fiduciary duties. Some of these bills use ‘boycott’ language, but they are more about fiduciary duty debates than about antitrust;
- Competitor collaborations among companies focused on sustainability or ESG projects (which are covered in Section 5 of this report).

Each of these distinct areas have slightly different antitrust considerations.

It is also worth noting that the term “boycott” is quickly becoming political shorthand for a range of business decisions that would not be considered antitrust boycotts under traditional legal principles, and it is therefore necessary to distinguish between narrative and legal reality.

### 4b1. Republican AG Investigations into Financial Institution Coalition “Boycotts”

Republican AGs have initiated various antitrust investigations into coalitions of financial institutions and investors under the guise of consumer protection. Regarding climate or ESG-related coalitions, it is useful to distinguish between industry associations (with either voluntary or mandatory standards, which we cover in greater detail in Section 5a) and group boycotts.

#### Industry Associations

Industry associations have always faced scrutiny under federal and state antitrust laws: These groups are designed to facilitate communication among competitors, and thus by their very nature invoke the specter of potential antitrust violations. Competitor coordination runs contrary to the broad goals of antitrust law to deliver competitive prices while ensuring that businesses operate at high levels of quality and efficiency.

Robust antitrust case law has developed to guide the behavior of trade associations and standard-setting organizations, however there is little which deals with financiers directly. When professional associations have been found to violate antitrust laws, it is often because the conduct in question veers too closely to cartel behavior. Permissible behavior typically involves coordinated action far outside pricing mechanisms.

*It is also worth noting that the term “boycott” is quickly becoming political shorthand for a range of business decisions that would not be considered antitrust boycotts under traditional legal principles, and it is therefore necessary to distinguish between narrative and legal reality.*

#### Group Boycotts

In the case of financial institution coalitions, standards-setting efforts – which are often protected and encouraged under antitrust law – are not akin to a boycott or an effort to starve an industry of capital. Industries often move away from one input and toward another, and collective decisions on investment direction happen ubiquitously both through standard-setting bodies and through semi-organic coordination. As an example, pledges and cohorts to invest in artificial intelligence (AI) are not an effort to starve older technologies of capital; they are simply the recognition of shifting market dynamics.

Mere ‘parallel conduct’ is not a violation of antitrust statutes. The law distinguishes between impermissible active coordination and independent conduct that runs

in a similar direction. Industries constantly evolve, and it is not considered a boycott when producers and consumers move toward innovation – from a horse-and-buggy to cars. This trend is evident with changing market dynamics around energy sources, as renewables such as solar and wind have steadily come down in cost and increased their efficiency.

Furthermore, financial institutions have a fiduciary duty to act in the best interests of their clients, shareholders, or beneficiaries, and to consider long-term market trends. As the UN Principles for Responsible Investment (UN PRI), “Fiduciary duty in the 21st century” project emphasizes, the integration of ESG factors – including climate considerations – is a requirement of financial institutions’ fiduciary duty.<sup>105</sup> As investment in the oil and gas industry carries increasing financial and regulatory risk, the impacts of climate change could create a *de facto* collective boycott that would not warrant antitrust scrutiny to the extent the parallel conduct has arisen from market forces and not collusive action.

However, climate or ESG-related coalitions have been accused of “boycotting” oil and gas or coal companies by causing financial institutions to restrict capital, debt, or insurance provision to the fossil fuel industry. As discussed above, no such disinvestment boycott exists. Membership is voluntary, and financing decisions are taken on an individual firm level basis. Indeed, many firms continue to finance new fossil fuel projects. The more interesting question is, what if the financial institution coalitions actually did engage in a boycott?

A “collective boycott” such as this – known as a concerted refusal to deal – could theoretically raise antitrust concerns. The Colgate doctrine,<sup>106</sup> a longstanding Supreme Court precedent, gives companies the right to unilaterally decide not to do business with another company without triggering antitrust laws, provided the refusal is not an exclusionary strategy to acquire or maintain a monopoly. Unilateral decisions to disinvest in specific companies or industries do not typically face antitrust risk, however concerted action is judged more harshly by antitrust laws.

***In the case of financial institution coalitions, standards- setting efforts – which are often protected and encouraged under antitrust law – are not akin to a boycott or an effort to starve an industry of capital. Industries often move away from one input and toward another, and collective decisions on investment direction happen ubiquitously both through standard- setting bodies and through semi-organic coordination.***

Collective boycotts occur when two or more competitors agree to refuse to deal with a particular customer or supplier (usually in an attempt to drive them out of business or force a change in practices).<sup>107</sup> Collective boycotts are considered anti-competitive because they reduce the number of potential suppliers or customers in a market, which can lead to higher prices, reduced innovation, and reduced consumer choice. Such refusals to deal are evaluated under the *rule of reason* analysis, a balancing test that requires an examination of the unique facts of the case.

There is no existing case precedent for a group of competing financial firms that decide to refuse financing to a specific industry or set of companies. Critically, financiers do not compete directly with their financed entities, and therefore do not fit traditional notions of economic boycotts.

For this reason, it is unclear how Republican AGs would build a case of this kind, and how a collective boycott case of this kind would be treated by US federal or state courts. In the specific case of a group of banks refusing to supply capital to new coal or oil projects, various factors would likely be taken into consideration, including: market definition, whether the financial institutions have significant market control over the provisioning of finance, whether new entrants were prevented from entering the market, and other relevant market analysis.

For *rule of reason* cases, the burden of proof rests with the plaintiff, and these complaints rarely succeed: the courts want to see clear market power, and it must be coupled with negative ramifications from exercising that power, such as barriers to entry, raised prices, or lower innovation.<sup>108</sup>

105 UN Principles for Responsible Investment (PRI), “Fiduciary duty in the 21st century final report”, PRI, October 22, 2019. <https://www.unpri.org/fiduciary-duty/fiduciary-duty-in-the-21st-century-final-report/4998.article> (last visited May 30, 2023).

106 United States v. Colgate & Co., 250 U.S. 300 (1919).

107 European Commission Staff Working Document, Guidance on restrictions of competition ‘by object’ for the purpose of defining which agreements may benefit from the De Minimis Notice, (C 2014).

108 To bring a group boycott case in the US, the firms would likely need to maintain at least ~60% market collective share, which signals durable market power, and makes a case more likely to succeed. In this case, if 60% or more of capital – or capital providers – had an agreement, that would be enough to form a colorable antitrust case against the group. The question is: do these groups collectively control a monopoly share of the capital? However, another definitional question might arise: are investors buying stock or selling capital? Thresholds for buyer power are much lower than seller power, typically ~30% compared with ~60% market share. If courts decided that investors were buying stocks from companies, instead of provisioning / selling capital, there might be a lower threshold upon which to bring a monopolization / monopsonization case. On market definition, there might be niche markets depending on how widely markets are defined. For example, are there particularly dirty coal projects or shale oil projects that are the subject of investigation? Perhaps a smaller group of financial institutions which finance these industries could have market power depending on how small or large the market is defined.

Despite the weak antitrust grounds for a case of this kind, the specter of antitrust litigation can still have a chilling effect.<sup>109</sup> Companies do not typically have the appetite for a lengthy and visible litigation process. Europe has a “loser pays” system, in which the plaintiff pays the legal fees if they lose – this helps deter frivolous suits. The US legal system has no such deterrent, unless the case is clearly in bad faith.

### Political vs. Economic Boycotts

Investment firms – alongside all other private firms – are permitted to undertake joint marketing or awareness campaigns regarding environmental or human rights issues under antitrust law. They may also form trade associations to jointly lobby for legislative changes or new laws. These actions are protected under the *Noerr-Pennington* doctrine and the First Amendment, though they may still be found illegal if firms act in concert to fix markets outside of the political advocacy process.

Competitors may also agree to boycott a particular company or industry without violating antitrust laws when the boycott is intended to effectuate political change, as in the passage of a law or in spurring regulatory action. Economic boycotts intended to spur sustainability-related legislative change could potentially be exempted from antitrust law under the *Noerr-Pennington* exemption, although this has not yet been tested in the courts. This approach could also bolster arguments that the climate-related financial institutions are primarily attempting to impose a political agenda, making it a less appealing approach. Additionally, financial institutions will prefer to use materiality and fiduciary duty arguments to justify their business decisions.

## 4b2. Anti-ESG Laws in US States

The increasing polarization of states and ‘anti-ESG’ measures have significantly muddied the waters for

firms. As discussed above, Republican officials in many fossil-fuel dependent states have used a variety of legal maneuvers and pressure campaigns to oppose even the reference to environmental or social factors in investment decisions. In addition to the investigations discussed above, a 21-state coalition is objecting to the proposed SEC rules that would require increased disclosure with respect to ESG investment practices,<sup>110</sup> and a 24-state coalition is objecting to proposed disclosures regarding climate-related financial risk.<sup>111</sup>

Several Republican states have passed “Anti-ESG” laws, which instruct state pension funds not to consider ESG factors in their risk assessments of investment opportunities, or which seek to punish companies that offer investment products that exclude funding to fossil fuel companies.<sup>112</sup>

Some of the bills borrow the language of “boycotting” to target asset managers or banks doing business with state governmental entities. These anti-boycott bills target financial institutions that are perceived as disfavoring certain industries, like oil and gas, or firearms, due to “ESG considerations.” They essentially try to boycott the purported boycotters. It is worth re-emphasizing that the deployment of this usage of “boycott” has little to do with how antitrust law treats commercial boycotts.

These laws claim to emphasize fiduciary obligations to focus on pecuniary factors in investment decision-making, despite arguments from financial professionals that the use of ESG factors can enhance their risk-return analysis. In 2023, conservative states have proposed over 150 anti-ESG bills, compared with 39 in 2022, and only a handful in 2021.<sup>113</sup> Over 25 have become law, though many more have been defeated based on objections ranging from fiduciary duty arguments to the increased borrowing costs imposed by the bills. Numerous<sup>114</sup> studies<sup>115</sup> have been released that suggest these state boycott measures will result in millions of dollars in losses for taxpayers and pensioners.

109 International Chamber of Commerce, *supra* note 30.

110 Letter from Patrick Morrissey, Attorney General of West Virginia, to Secretary Vanessa A. Countryman, August 16, 2022. <https://ago.wv.gov/Documents/2022.08.16%20ESG%20Funds%20Comment.pdf>

111 Letter from Patrick Morrissey, Attorney General of West Virginia to Secretary Vanessa A. Countryman, June 15, 2022. <https://www.sec.gov/comments/s7-10-22/s71022-20131409-301574.pdf>

112 Mitchell Ferman, “Texas bans local, state government entities from doing business with firms that “boycott” fossil fuels”, Texas Tribune, August 24, 2022. <https://www.texastribune.org/2022/08/24/texas-boycott-companies-fossil-fuels/>; and “Kentucky Senate passes bill aimed at energy boycotts”, AP News, March 8, 2022. <https://apnews.com/article/business-boycotts-kentucky-state-governments-david-yates-8e3688ac714e43990ed0849110708b0c>

113 Ross Kerber, “Business fights back as Republican state lawmakers push anti-ESG agenda”, Reuters, April 24, 2023. <https://www.reuters.com/business/sustainable-business/business-fights-back-republican-state-lawmakers-push-anti-esg-agenda-2023-04-22/>

114 Daniel Garrett and Ivan Ivanov, “Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies”, Jacobs Levy Equity Management Center for Quantitative Financial Research Paper, May 30, 2022. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4123366](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366)

115 ESI Econsult Solutions Inc., “ESG Boycott Legislation in States: Municipal Bond Market Impact”, Ceres, January 12, 2023. <https://www.ceres.org/news-center/press-releases/new-research-shows-legislation-boycott-esg-may-cost-state-taxpayers-700>



**5. OTHER TYPES  
OF COMPETITOR  
COLLABORATIONS**

**A wider, and more complex, set of considerations comes into view when evaluating competitor collaborations across all industries (not simply financial institutions). More than 700 of the largest 2,000 publicly traded companies now have net zero commitments,<sup>116</sup> and efforts to evaluate, measure, and address emissions – including Scope 3 emissions – are gaining traction. Firms are increasingly looking to integrate environmental considerations into their core business strategy.**

As previously stated, competitor agreements which do not negatively affect parameters of competition – such as price, quantity, quality, choice, or innovation – are free

from antitrust concerns. Those which do are evaluated on a case-by-case basis, and we provide some examples and analysis of such activities below.

## 5A. STANDARD-SETTING AND INDUSTRY ASSOCIATIONS

**Industries have long come together in associations to do joint standard-setting (whether voluntary or mandatory) or to share information. Standard-setting organizations and voluntary industry standards broadly maintain a safe harbor from antitrust scrutiny.<sup>117</sup> The Supreme Court has held that companies involved in trade associations do not represent an illegal restraint of trade.<sup>118</sup>**

Typically, industry associations doing standard-setting steer well clear of antitrust scrutiny when initiatives are voluntary, non-exclusionary of rival firms (do not foreclose market access), and firms are free to meet the agreed upon standards on their own terms. Antitrust law also prohibits the sharing of competitively sensitive information.

Despite latitude for business associations, the European guidelines identify that sustainability standards can limit competition in three primary ways: through “price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors.”<sup>119</sup> As various sustainability standards proliferate, these competition concerns will remain.

However, some have argued that voluntary, non-exclusionary standards with no enforceability have limited effectiveness from a sustainability perspective.<sup>120</sup> While voluntary agreements tend to raise fewer antitrust risks, they tend to be implemented in a piecemeal fashion, and companies can reject or drop out of such agreements at any time. For these reasons, activists both within and outside of industries have advocated for stronger mandatory industry standards.<sup>121</sup>

116 John Goddard, “Why Companies Aren’t Living Up to Their Climate Pledges”, Harvard Business Review, August 11, 2022. <https://hbr.org/2022/08/why-companies-arent-living-up-to-their-climate-pledges>.

117 It is worth nothing that when economic effects result from competitor collaborations, these are treated equally under antitrust law whether there is a formal trade association (or membership group responsible for a decision), or whether the firms agree among themselves without a formal structure.

118 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567 n.12 (2007).

119 European Commission, supra note 4.

120 MSI Integrity, “Not Fit for Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, MSI Integrity, July 2020. <https://www.msi-integrity.org/not-fit-for-purpose/>.

121 Columbia Center on Sustainable Investment, supra note 88.

## 5a1. Mandatory Standards

Mandatory standards are an important component of competitor sustainability agreements, as they can substantially increase environmental impact across an entire industry. The International Chamber of Commerce report – which is said to represent real scenarios that businesses are facing, but which are anonymized or generalized for the purposes of the report – offers the following example relating to more sustainable base materials or inputs to production:

- “Road pollution is caused by emissions as well as fine particles from tyres and brakes.
- Industry successfully creates an alternative material for tyres and brakes which vastly reduces the amount of fine particles “emitted”.
- This alternative is significantly more expensive but the cost could be significantly reduced if adopted by all manufacturers.
- Industry wants to agree that all new tyres and brakes manufactured will only use the new material.
- This will increase all manufacturers’ costs (at least in the short term) and each manufacturer is free to decide whether and how to pass on the price increase.”<sup>122</sup>

This kind of mandatory standard would typically not violate antitrust law unless the manufacturers agreed to a fixed purchase price of the input or raw material that makes manufacturing more expensive, or if they collectively agree to raise prices on consumers to pay for the more expensive material, which would constitute price fixing.

Still, without those elements, a mandatory standard of this kind may still be evaluated by antitrust agencies under a *rule of reason* analysis, and the agencies would need to identify the market benefits both to direct consumers, or a wider definition of consumers that are out-of-market. To lessen antitrust risk in instances of mandatory standards, companies should be free to exceed the set standards, to compete against other industry members (including on non-price related aspects of competition) and should continue to make business decisions independently.

The European Commission’s June 2023 Horizontal Guidelines provide a ‘soft safe harbour’ for sustainability ‘standardisation’ agreements, provided six conditions<sup>123</sup> are met (including no *significant* increases in price), which implies there is room for some small price increases resulting from such standards. This is unique for an agency to permit. The guidelines also later state that “in cases where a sustainability standardisation agreement is likely to lead to a significant increase in price or reduction in output, product variety, quality or innovation, the agreement may nonetheless fulfil the conditions of Article 101(3)” – which details the existing block exemptions. These exemptions rely on a demonstration of efficiency gains, of which a “fair share” are passed on to consumers. This language, seems to leave room for significant, coordinated increases in price to be exempted from prosecution, which could lead to abuses.

***To lessen antitrust risk in instances of mandatory standards, companies should be free to exceed the set standards, to compete against other industry members (including on non-price related aspects of competition) and should continue to make business decisions independently.***

122 International Chamber of Commerce, *supra* note 30.

123 “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.

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.

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.

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.

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.

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.” [https://competition-policy.ec.europa.eu/system/files/2023-06/2023\\_revised\\_horizontal\\_guidelines\\_en\\_0.pdf](https://competition-policy.ec.europa.eu/system/files/2023-06/2023_revised_horizontal_guidelines_en_0.pdf).

A European case from 2000 demonstrated these price and sustainability trade-offs resulting from an output restriction by an industry association. The European Commission permitted the use of a mandatory agreement among household machine manufacturers to phase out less efficient washing machines, water-heaters and dishwashers, despite it corresponding with higher prices for consumers. In the “CECED”<sup>124</sup> agreement, participants were required to stop producing and importing certain domestic washing machines that belonged to specified energy efficiency classes.<sup>125</sup> Participants were also required to contribute data on their respective weighted energy consumption data.

Despite the anti-competitive aspects of the arrangement, the European Commission allowed this agreement on the basis that the energy savings to individual consumers outweighed the higher cost of the appliances; notably, the Commission also cited environmental considerations in its final ruling. The Commitment was approved by the EC in 2000 and remained valid until the end of 2001. Since then, the participants have not been bound to comply with the commitment, but findings show that the transformation of the market has been permanent. This EU case law also helpfully distinguished between industry standards and group boycotts, which usually involve an effort by competitors to eliminate another competitor, as we discuss next.

***The Allied Tube & Conduit v. Indian Head case helped distinguish between standard-setting and boycotts. The case demonstrated that when an industry is evolving to the use of better technologies and codifying that in an industry standard, it is not problematic. However, anticompetitive behavior arises when an entrenched player uses its power within a standard-setting process to keep out new entrants.***

## 5a2. Collective Pressure / Boycott Applied to Polluters

Another example of a sustainability-related collaboration is when a trade association wants to force suppliers to use a less polluting technique in their manufacturing process. In this case, the less toxic technique has a higher cost than the alternative. Trade association members want to agree not to buy from any suppliers who use the polluting technique as a way to compel changes throughout the supply chain.

This could be viewed as a group boycott, which would be evaluated under a *rule of reason* analysis, weighing the procompetitive benefits against the anti-competitive harms of such an agreement. If the participating companies unilaterally passed on price increases from increased supply costs, this would lessen their risk, however, this may not necessarily be enough to shield companies from liability.

The *Allied Tube & Conduit v. Indian Head*<sup>126</sup> case helped distinguish between standard-setting and boycotts. The case demonstrated that when an industry is evolving to the use of better technologies and codifying that in an industry standard, it is not problematic. However, anticompetitive behavior arises when an entrenched player uses its power within a standard-setting process to keep out new entrants. This case found that a firm had abused its power in the standard-setting process, and that was anti-competitive, although the resulting standard itself was not (as it was a result of changing market dynamics).<sup>127</sup>

The same logic could potentially apply to an industry association pursuing more environmentally-friendly manufacturing inputs.

124 “CECED” stands for the “Conseil Européen de la Construction d’appareils Domestiques” or, the “European Committee of Domestic Equipment Manufacturers.”

125 Commission Decision 2000/475/EC of 24 January 1999 (CECED I: Washing Machines); Commission Decision 2001/C 250/03 of 8 September 2001 (CECED II: Water Heaters); Commission Decision 2001/C 250/02 of 8 September 2001 (CECED III: Dishwashers).

126 *Allied Tube & Conduit v. Indian Head*, 486 U.S. 492 (1988).

127 The National Fire Protection Association (a private organization) (“NFPA”) sets and publishes product standards and codes related to fire protection. Its National Electrical Code (“Code”) establishes requirements for the design and installation of electrical wiring systems. The Code is routinely adopted into law by a substantial number of state and local governments and is widely adopted as setting acceptable standards by private product-certification laboratories, insurance underwriters, electrical inspectors, contractors, and distributors. The Code used to permit the use of electrical conduit made of steel. Indian Head proposed to include plastic conduit as a type of approved conduit in the 1981 edition of the Code. This was approved by an NFPA panel and was scheduled for consideration at the 1980 annual meeting, for adoption by simple majority. Allied Tube, the largest producer of steel conduits, concerned about the competitive threat posed by the plastic conduit to its products, worked with other steel conduit manufacturers to block the approval of the use of plastic conduits in the 1981 Code. Indian Head filed suit against Allied Tube, alleging that the latter restrained trade in the electrical conduit space, in violation of Section 1 of the Sherman Act. The jury verdict found that Allied Tube had unreasonably restrained trade in violation of antitrust laws by colluding with decision makers who have similar economic interests to influence private standard-setting.



*As competition authorities with consumer protection mandates increase their efforts to halt deceptive environmental claims by companies, new considerations will emerge regarding the ability of industry-led groups to set appropriate environmental or broader sustainability standards.*

### 5a3. Standard-setting Organizations and Greenwashing

While standard-setting organizations have come under antitrust scrutiny for competition-related concerns in the past, they are now also facing accusations of deceptive marketing and greenwashing. Currently in Canada, two standard-setting organizations responsible for standards on sustainable forestry are being investigated by the Competition Bureau. A consortium of environmental groups claim that the Sustainability Forestry Initiative's (SFI) 'sustainable' logging certification is 'misleading' and 'false' because it "allows clearcutting, spraying of toxic chemicals, and logging in the primary habitat of threatened species such as caribou and spotted owl."<sup>128</sup>

The second industry alliance to face greenwashing charges is the Pathways Alliance – a group of oil sands producers collaborating on strategies to cut greenhouse gas emissions. Pathways Alliance is also being investigated by the Competition Bureau for its "Let's clear the air" advertising campaign, in which the companies claimed to be on track to achieve net-zero emissions by 2050, despite their increasing fossil fuel extraction and production.

As competition authorities with consumer protection mandates increase their efforts to halt deceptive environmental claims by companies, new considerations will emerge regarding the ability of industry-led groups to set appropriate environmental or broader sustainability standards. This may provide new case precedent on this aspect of competitor collaborations.

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<sup>128</sup> Dina Ni, "Competition Bureau launches investigation into greenwashing complaint against North America's largest forest certification scheme", Greenpeace, January 31, 2023. <https://www.greenpeace.org/canada/en/press-release/57244/competition-bureau-launches-investigation-into-greenwashing-complaint-against-north-americas-largest-forest-certification-scheme/>

## 5B. GROUP BUYER POWER / PURCHASING AGREEMENTS

**Some businesses have claimed that, in certain cases, sponsoring upstream sustainability can only happen through exercising joint buyer power or group purchasing agreements.**

The ICC report provides the following example: in the agricultural sector, to advance regenerative farming techniques at scale, a minimum number of farms need to participate in a given initiative – whether it relates to soil erosion, reducing the need for fertilizers, or changing livestock feed. No one company can purchase all of the crops or outputs from a large number of farms, and so competing purchasers want to collectively support farms with financial incentives or technical support to deploy more sustainable techniques.

The ICC report claims it is necessary in this example for the competitors to agree how much each party will buy and from which farm, and that “it might even be necessary to agree upon a common price in order to convince the farms to join the programme,” but that “there will be no agreement as to how any increased costs are passed on to customers and no more exchange of commercially sensitive information than is strictly necessary.”<sup>129</sup>

Enforcers and regulators will need to parse the issues closely. Will the joint purchasing of dominant buyers drive the prices down below a competitive level for farmers? If regenerative or sustainable farming techniques are more expensive, will the farmers and the purchasers agree to collective price increases on goods? If they did, this would typically be seen as price fixing and potential cartel behavior, and competition agencies would need to balance the negative effects of higher consumer prices against the purported sustainability benefits of any particular program.

One antitrust lawyer interviewed for this analysis said, “When it comes to sustainability, the joint purchasing activity is about making higher prices more viable, rather than using buyer power to drive down prices.” This, again, raises the question of who will pay to internalize higher costs associated with changing to more sustainable methods or products. Is it consumers? Producers? Retailers? Shareholders? And under what conditions should a higher cost be tolerated?

However, there may be other ways of incentivizing upstream sustainability without direct competitor agreements. Initiatives like Frontier<sup>130</sup> and the First Movers Coalition<sup>131</sup> are using the mechanism of an advance market commitment by aggregating both purchasing commitments and purchase pledges, respectively, to stimulate the market for these types of schemes. This arrangement could potentially address the desire to sponsor upstream sustainability without needing to specify a common price among competitors. Frontier aggregates purchasing commitments from companies for carbon removal credits, in which deals are negotiated through a third-party intermediary instead of directly among competitors. This may help avoid direct price-fixing issues typically resulting from joint purchasing.

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129 International Chamber of Commerce, *supra* note 30.

130 Frontier, <https://frontierclimate.com/> (last visited May 30, 2023).

131 First Movers Coalition, <https://www.weforum.org/first-movers-coalition> (last visited May 30, 2023).

## 5C. INFORMATION SHARING

**Firms should avoid sharing confidential or proprietary information with their competitors (prices, marketing or product plans, profit, or cost details). However, some sustainability-related projects may require new forms of information sharing.**

For example, in 2006, the Fair Factories Clearinghouse (“FFC”) requested a business review for a proposal to operate a joint database for member companies in the apparel industry to collect and voluntarily share information about workplace conditions in manufacturing facilities around the globe. The purpose of the database was to help companies monitor labor practices in their supply chains by exchanging information related to “child labor, forced labor, wages and hours, health and safety, workers’ rights, and related issues” so as to eliminate the use of “sweatshop” suppliers, and to ensure their suppliers were in compliance with international laws and universally-recognized workplace standards. Though the project raised theoretical antitrust concerns, the DOJ cleared this project because participation was voluntary, and the member businesses would only have access to aggregated competitor wage and hour information in the database. All members also had to agree to signing an antitrust policy statement, saying they would operate within the boundaries of the law, and outside antitrust counsel was present at all meetings.<sup>132</sup>

In the updated EU guidelines, the following is listed as an information exchange which may be exempt from antitrust scrutiny, given its potential pro-competitive / efficiency-enhancing benefits: “Pooling data on producers supplying sustainable products or producers using sustainable production processes may help undertakings fulfil their sustainability obligations under EU or national law.”<sup>133</sup>

***Increases in vast data pools, vertically integrated with compute resources and software, make policies on data sharing, interoperability, and privacy paramount as new market reality concerns.***

The ICC report names two forms of information sharing projects with sustainability considerations. The first involves horizontal data sharing for energy saving purposes:

- “Big Data and artificial intelligence applications are more and more used to optimise system performance to make networks as sustainable and cost-efficient as possible.
- The data transmitted by smart meters is used for the targeted implementation of energy efficiency solutions, such as the application of standby mode to limit energy consumption when traffic is slowed down.
- Sharing this data among network operators would allow for large energy savings, but would also require competitors to share some competitively sensitive information which could potentially reduce competition among them.”<sup>134</sup>

Without knowing more details on this specific example, it is difficult to assess. While data sharing among incumbent firms may make operations more efficient, it may also serve to shore up existing moats while failing to make that data accessible, portable, and interoperable with both consumers or other third-party providers.<sup>135</sup> As the ability to process data requires increasing compute resources, available mostly to the largest players, market power considerations as well as who else may have access to such data – aside from competing firms – should be considered.

132 Thomas O. Barnett, “Response To Fair Factories Clearinghouse’s Request For Business Review Letter”, U.S. Department of Justice Antitrust Division, January 9, 2017. <https://www.justice.gov/atr/response-fair-factories-clearinghouses-request-business-review-letter> (last visited May 30, 2023).

133 European Commission, supra note 4.

134 International Chamber of Commerce, supra note 30.

135 For example, the Mission Data report “DEACTIVATED: How Electric Utilities Turned Off the Data-Sharing Features of 14 Million Smart Meters” discusses how the real-time data-sharing capabilities on federally funded smart meters have been deactivated by dominant utilities companies: “Despite 89.7% of federally funded meters having real-time access capabilities, today only 2.9% are enabled. This means information that should be readily available to consumers is deliberately withheld.” From: [http://www.missiondata.io/s/Deactivated\\_white\\_paper.pdf](http://www.missiondata.io/s/Deactivated_white_paper.pdf) (last visited May 30, 2023). See also: Mission Data, “Reports”, [www.missiondata.io/reports](http://www.missiondata.io/reports) (last visited May 30, 2023).

The second ICC example involves horizontal data pooling across different sectors:

- “Data centres, cloud services and connectivity account for a large part of the environmental footprint of the information technology sector.
- Agreements among competitors to share some B2B data and infrastructures and the creation of large data pools enabling Big Data analytics and machine learning would result in substantial energy savings and reduce carbon emissions, at the potential risk however of reducing competition among them.”<sup>136</sup>

Currently, Amazon, Microsoft, and Google (Alphabet), account for two thirds of all cloud infrastructure revenue. The top 8 firms account for 80% of all global revenue.<sup>137</sup> In this example, data sharing among competitors may produce some sustainability benefits, but again would likely serve to enhance the existing moats of dominant firms, while potentially weakening the bargaining position of their B2B customers.

Amazon and Walmart have already been using AI to negotiate contract terms with suppliers, touting the ability to gain price concessions. Since introducing the program in early 2021 (during the Covid-19 pandemic), Walmart claims it saves about 3% on contracts handled through its software. An article outlining the initiative states, “the company is using the tool to squeeze savings from contracts that might not be big enough to justify taking up much—if any—of a procurement manager’s time. [The] software can haggle over a wide range of sticking points, including discounts, payment

terms and prices for individual products. ...Suppliers cede profit in at least some of the negotiations, but [the software provider] says they can get concessions such as better payment terms and longer contracts in return.”<sup>138</sup>

In April 2023, the DOJ, FTC, CFPB, and Equal Employment Opportunity Commission issued a joint statement on their commitment to police unfair uses of automated systems and AI, citing the potential for data and datasets to lead to discriminatory behavior.<sup>139</sup>

Additionally, current US enforcers recently rescinded three healthcare-related guidelines<sup>140</sup> which provided safe harbors related to competitively-sensitive data sharing. Some think it reflects a broader stance on information sharing, regardless of industry. Principal Deputy Doha Mekki said:

*“The safety zones were written at a time when information was shared in manila envelopes and through fax machines. Today, data is shared, analyzed, and used in ways that would be unrecognizable decades ago. We must account for these changes as we consider how best to enforce the antitrust laws.”*<sup>141</sup>

Increases in vast data pools, vertically integrated with compute resources and software, make policies on data sharing, interoperability, and privacy paramount as new market reality concerns. It remains to be seen how the US agencies will attempt to account for competitor collaborations related to information sharing more broadly, which would potentially impact sustainability-related collaborations.

136 International Chamber of Commerce, *supra* note 30.

137 Felix Richter, “Big Three Dominate the Global Cloud Market”, Statista, April 28, 2023. <https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/>

138 Daniela Sirtori-Cortina and Brendan Case, “Walmart Is Using AI to Negotiate the Best Price With Some Vendors”, Bloomberg, April 26, 2023. <https://www.bloomberg.com/news/articles/2023-04-26/walmart-uses-pactum-ai-tools-to-handle-vendor-negotiations>

139 Rohit Chopra, Kristen Clarke, Charlotte A. Burrows, and Lina M. Khan, “Joint Statement from the Bureau of Consumer Financial Protection, DOJ Civil Rights Division, U.S. Equal Employment Opportunity Commission, and FTC on Enforcement Efforts Against Discrimination and Bias in Automated Systems”. (<https://www.dwt.com/-/media/files/blogs/artificial-intelligence-law-advisor/2023/eoecrftccfpbaijointstatementfinal.pdf?la=en&rev=48dcf764e19242cab6379768cbd6c2bc&hash=B2EB1EB0ABBE14E08400CA95DEB35F2A>)

140 Department of Justice, “Justice Department Withdraws Outdated Enforcement Policy Statements”, U.S. Department of Justice Office of Public Affairs, February 3, 2023. <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements>

141 Doha Mekki, “Principal Deputy Assistant Attorney General, Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023”, U.S. Department of Justice Office of Public Affairs, February 2, 2023. <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0>

## 5D. TECHNICAL DEVELOPMENT, JOINT VENTURES, R&D

**Many other types of competitor collaborations – such as technical development, joint ventures, and research and development – are covered under the existing DOJ guidelines. We do not address those substantially in this analysis.**

However, it is worth noting that in 2021, the European Commission found car manufacturers Daimler, BMW, and the Volkswagen group (comprised of Volkswagen, Audi, and Porsche) liable for breaching EU antitrust rules by colluding on technical developments in diesel engines. The car manufacturers all possessed the technology to reduce harmful emissions beyond what was legally required under EU emission standards, but for over five years, the car manufacturers – during regular meetings – agreed to avoid competition in the area of nitrogen oxide cleaning, as the technology radically reduced emissions, but also lowered the

performance of their profitable combustion engines. The manufacturers were fined a total of EUR 875M (\$1B). Daimler did not pay a fine because it was the first to alert the competition agency of the collusion. This case was significant because it was the first in the EU which considered how a technical development collaboration actually “spilled over” into a collusion not to compete, which led to worse environmental outcomes. It was the first time the EC prosecuted technical development collaborations as cartel behavior, using a restriction of innovation theory to demonstrate harm.



**6. AVENUES FOR CLARIFICATION**

**As evident from the variety of commercial scenarios which address evolving sustainability needs, and the case-specific standards applied by the courts, there are limited circumstances where legal certainty is available. This section recommends some potential pathways for businesses seeking clarification on sustainability-related competitor collaborations.**

## 6A. REQUEST THAT THE FTC CONDUCT MARKET STUDIES

**The FTC has authority under Section 6(b) of the FTC Act to conduct studies on specific industries, and to compel information from companies. The FTC could conduct one or multiple market studies on critical new markets related to the energy transition (or other sustainability-related industries) to ensure they operate on competitive terms, and to see where issues of competitor collaborations emerge in context. This would allow the agency to surface case-studies in specific industries which grapple with the nuances of restrictions of competition against sustainability benefits. The EU has taken this approach, and also released updated competitor collaboration guidelines specifically for the agriculture industry, which enforcers felt had unique sectoral challenges that were difficult to address with the broad competitor collaboration guidelines.**

Increasingly, global agencies are using market studies to better understand the changing nature of critical sustainability-related industries. The agencies should also regularly be conducting horizon-scanning exercises to anticipate anti-competitive concerns in critical industries related to energy transition and sustainability (deep sea mining for rare earth minerals, heat pumps, EV charging stations, and others).

As Sarah Cardell, the UK's Competition and Markets Authority Chief Executive, said in a January 2023 speech, "How will this market develop? Strong competition and the right regulatory framework will be required, and that's why we conducted a market study into EV charging, which led to a set of recommendations on how governments can enable the market to work more effectively, now and in the future. That's not a diversion from the work of a competition authority. It's a core part of doing our job."<sup>142</sup>

The French competition authority also recently opened market studies on EV charging infrastructure and land passenger travel. And in the US, more than 200 rooftop solar companies and advocacy organizations requested that the FTC conduct a market study of utilities companies, which they claimed were stymying commercial and residential retrofitting attempts.<sup>143</sup>

The FTC can share information it has compelled from firms with other regulatory and enforcement agencies. And sometimes, when it serves the public interest, can make portions of their 6(b) studies public. These studies can have wide impact, as other regulatory agencies and public advocacy organizations can utilize the information and research gleaned when considering wider sectoral regulation in combination with robust competition enforcement.

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<sup>142</sup> Cardell, *supra* note 20.

<sup>143</sup> Letter from 239 consumer, antimonopoly advocates, public interest and environmental organizations, and rooftop solar companies to FTC Chairwoman Lina Khan on investigation of electricity utility's practices that impede renewable energy competition, June 14, 2022. <https://www.biologicaldiversity.org/programs/energy-justice/pdfs/FTC-Petition-Re-Utilities-2022-05-16.pdf>. See also: Emily Pontecorvo, "Utility monopolies are hurting rooftop solar. Can antitrust lawsuits rein them in?", *Grist*, February 18, 2022. <https://grist.org/energy/utility-monopolies-are-hurting-rooftop-solar-can-antitrust-lawsuits-rein-them-in/>

## 6B. ADVISORY OPINIONS AND BUSINESS REVIEWS

**A group of companies – or an investor coalition – could request an advisory opinion or business review from the FTC or DOJ on a sustainability-related competitor collaboration. Agencies say they can typically provide opinions within 60 days. These advisory opinions could also offer opportunities to provide clear examples where competitor collaborations do not run afoul of antitrust law and could be used as examples in updated competitor collaboration guidelines. However, these reviews are not legally binding at the federal or state level, so they only offer a certain amount of comfort to parties who wish to undertake them, and therefore would provide only an interim step towards longer-term clarity for firms in the US.**

The UK's CMA now offers an open-door policy for businesses to receive informal guidance on proposed environmental sustainability agreements. It also states that companies which discuss their proposals with the CMA ahead of time (where there are no significant competition concerns) will not be fined. The Dutch ACM has gone further to say that it is not necessary for companies to quantify the potential sustainability

benefits in every case, and that they will not fine companies which try to follow their sustainability guidelines “in good faith” even if they later take a different view on the legality of their agreements.<sup>144</sup> While these approaches can be debated, they show willingness from the agencies to clarify permissible behavior for firms, so they can no longer claim that the fear of antitrust is ‘chilling’ necessary collaborations.

## 6C. CLARIFIED COMPETITOR COLLABORATION GUIDELINES

**Updated competitor collaborations guidelines offer the most clarity for firms. Interested parties could write a letter to the FTC and DOJ requesting clarified competitor collaboration guidelines (last updated in 2000), which explicitly mention sustainability agreements (or use examples of permissible sustainability-related collaborations, perhaps garnered through advisory opinions).**

Businesses could also request that the agencies better align their strategies with other jurisdictions internationally under the International Competition Network (ICN) or clarify why current Biden agency enforcers may take a different approach than other international agencies.

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<sup>144</sup> Autoriteit Consument & Markt, “Sustainability agreements: Opportunities within competition law (Draft Guidelines)” Autoriteit Consument & Markt, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf> (last visited May 30, 2023).



**7. US STRATEGY FOR  
CONSIDERATION:  
WHOLE-OF-  
GOVERNMENT  
APPROACH TO  
COMPETITION (AND  
SUSTAINABILITY)**

**At a time when the federal antitrust agencies are politically constrained or unwilling to discuss sustainability concerns directly, it may be useful to look to other strategies that already have political support and broad buy-in from other federal agencies. The Whole-of-Government Approach offers an opportunity to advance deeper integration of sustainability concerns in the administration of antitrust law.**

## 7A. BIDEN’S EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY

**In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy.<sup>145</sup> The order established a historic whole-of-government approach to competition policy, recognizing the sweeping problem of consolidation across industries in the United States.**

The Order established a White House Competition Council,<sup>146</sup> led by the Assistant to the President for Economic Policy (then: Tim Wu) and Director of the National Economic Council, who acts as Chair. The heads of many government agencies are included on the council. The Order catalyzed 72 initiatives by more than a dozen federal agencies, including a requirement for some agencies to report on how competition issues affect their industry.

The Order also called on the Department of Justice and Federal Trade Commission to enforce antitrust laws vigorously, and to potentially challenge prior bad mergers that were approved under previous administrations. It also affirms that America’s geopolitical policy stance regarding foreign monopolies and cartels is “not the tolerance of domestic monopolization, but rather the promotion of competition and innovation by firms small and large, at home and worldwide.”<sup>147</sup>

The Assistant Attorney General of Antitrust at the Department of Justice, Jonathan Kanter, explains how the agency has embraced and built upon this executive order:

*“The Department is eager to help other federal departments and agencies win cases targeting anticompetitive conduct that violates industry-specific statutes, including through direct litigation support and by formalizing our cooperation in MOUs. We call the new initiative Antitrust Enforcement for All-of-Government. Our cooperation through this initiative could transform our approach to competition policy and law enforcement. We plan to work collaboratively with partner agencies to ensure that competition issues are thoroughly considered, and pursued, under all of the statutes that promote competition in the economy.”<sup>148</sup>*

This new collaboration between antitrust agencies and other federal agencies is an opportunity for sustainability-related goals to manifest at the intersection of competition policy and other industries.

<sup>145</sup> Executive Order No. 14036, 80 Fed. Reg. 36,987, July 9, 2021.

<sup>146</sup> The White House, “White House Competition Council”, The White House. <https://www.whitehouse.gov/competition/> (last visited May 30, 2023).

<sup>147</sup> Ibid.

<sup>148</sup> Jonathan Kanter, “Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section”, U.S. Department of Justice Office of Public Affairs, January 24, 2022. [https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york#\\_ftnref7](https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york#_ftnref7)



Take, for example, the March 2023 report “More and Better Choices for Farmers: Promoting Fair Competition and Innovation in Seeds and Other Agricultural Inputs,” released by the US Department of Agriculture (USDA), in consultation with the Patent and Trademark Office (USPTO), the Department of Justice Antitrust Division, and the Federal Trade Commission. The report discussed competition dynamics in the seed industry, detailing its cross-over effects on systems resiliency, sustainability, and environmental protection.<sup>149</sup> In 2022, the DOJ and USDA also initiated the “Farmer Fairness” complaint portal if farmers “suspect a violation of the Packers and Stockyards Act or any other Federal law governing fair and competitive marketing and contract growing of livestock and poultry.”<sup>150</sup>

Other initiatives, like the Right to Repair movement,<sup>151</sup> were also encouraged with the executive order. This campaign fights for a consumer’s right to repair their purchased products – either themselves or at a third-party repair shop. Right to Repair helps reduce waste and counter the planned obsolescence of some consumer products. The executive order encouraged the FTC to use its authority to police “unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment.”

In January 2023, farmers and independent contractors won the right to repair their John Deere agricultural equipment.<sup>152</sup> And Apple similarly announced the right for consumers and third-party repair shops after facing regulatory pressure. Many states are passing right to repair legislation, but the executive order called on the FTC to create a country-wide repair rulemaking, which has yet to be introduced.

These are only a few examples of how the whole-of-government approach to competition, crystallized by the July 2021 Executive Order, has shown concurrent sustainability benefits and harbors the potential to go even further.

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149 U.S. Department of Agriculture (USDA), “Promoting Fair Competition and Innovation in Seeds and Other Agricultural Input Industries”, USDA. <https://www.ams.usda.gov/about-ams/fair-competitive-seed> (last visited May 30, 2023).

150 USDA, “Farmer Fairness”, USDA. <https://www.usda.gov/farmerfairness> (last visited May 30, 2023).

151 The Repair Association, <https://www.repair.org/> (last visited May 30, 2023).

152 Monica Miller, “US farmers win right to repair John Deere equipment”, BBC, January 9, 2023. <https://www.bbc.com/news/business-64206913>

## 7B. OTHER FEDERAL AGENCIES WITH ANTITRUST AUTHORITY

**Often, federal agencies work together to administrate and enforce their respective policy areas. The DOJ does not have rulemaking authority for competition regulations, but it often weighs in on the rulemaking processes of other federal agencies or files amicus briefs in other federal agency cases. The DOJ can also file comments on proposed state and federal legislation. And the Department of Justice has a number of interagency MOUs with other federal agencies.**<sup>153</sup>

In addition, many other federal agencies enjoy joint or concurrent statutory authority with the DOJ and FTC, and have the authority to enforce various aspects of antitrust law.

Some examples include:

- US Department of Agriculture (USDA) – the USDA is considering broader interpretations of “unfair methods of competition” under the Packers and Stockyard Act, a specific agricultural antitrust law, to help eliminate unfair, discriminatory, or deceptive practices in the livestock, meat, and poultry industries while also reducing economic uncertainty for smaller farms and increasing their access to retail markets. This was also called for in the executive order.<sup>154</sup>
- The Federal Energy Regulatory Commission (FERC) oversees mergers and regulates electricity generation products.
- The National Oceanic and Atmospheric Administration is involved in antitrust review of ocean thermal energy conversion facilities.
- The USDA has also proposed a new rule on meat labeling, so that “Product of USA” labels can only apply to animals which are “born, raised, slaughtered and processed in the United States” instead of only slaughtered or meat that has been repackaged in the US.<sup>155</sup>

<sup>153</sup> Department of Justice, “Interagency Memoranda of Understanding”, U.S. Department of Justice Antitrust Division. <https://www.justice.gov/atr/interagency-memoranda-understanding> (last visited May 30, 2023).

<sup>154</sup> Executive Order No. 14036 provides:

“The Secretary of Agriculture shall:

to address the unfair treatment of farmers and improve conditions of competition in the markets for their products, consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act to strengthen the Department of Agriculture’s regulations concerning unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences, advantages, prejudices, or disadvantages, with the purpose of furthering the vigorous implementation of the law established by the Congress in 1921 and fortified by amendments. [...] (C) measures to enhance price discovery, increase transparency, and improve the functioning of the cattle and other livestock markets; (D) enhanced tools, including any new legislative authorities needed, to protect whistleblowers, monitor agricultural markets, and enforce relevant laws;

(E) any investments or other support that could bolster competition within highly concentrated agricultural markets; and

(F) any other means that the Secretary of Agriculture deems appropriate; [...]

to improve farmers’ and smaller food processors’ access to retail markets, not later than 300 days after the date of this order, in consultation with the Chair of the FTC, submit a report to the Chair of the White House Competition Council, on the effect of retail concentration and retailers’ practices on the conditions of competition in the food industries, including any practices that may violate the Federal Trade Commission Act, the Robinson-Patman Act (Public Law 74-692, 49 Stat. 1526, 15 U.S.C. 13 et seq.), or other relevant laws, and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises; and

to help ensure that the intellectual property system, while incentivizing innovation, does not also unnecessarily reduce competition in seed and other input markets beyond that reasonably contemplated by the Patent Act (see 35 U.S.C. 100 et seq. and 7 U.S.C. 2321 et seq.), in consultation with the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, submit a report to the Chair of the White House Competition Council, enumerating and describing any relevant concerns of the Department of Agriculture and strategies for addressing those concerns across intellectual property, antitrust, and other relevant laws.”

<sup>155</sup> Jonel Aleccia, “Made in the USA? Proposed rule clarifies grocery meat labels”, ABC News, March 6, 2023. <https://abcnews.go.com/Business/wireStory/made-usa-proposed-rule-clarifies-grocery-meat-labels-97657745>

*While updated competitor collaboration guidelines with sustainability provisions may be difficult to achieve in the US, the expanded remit and integration of competition concerns across federal agencies could be a way to target industry-specific sustainability-related concerns.*

- The Department of Transport can police unfair and deceptive practices, unfair methods of competition, approve international air route antitrust exemptions, and oversees the air, rail, and trucking industries.
  - The DOT has independent merger review authority and can block mergers for reasons other than anti-competitive concerns under a public interest standard, which is broader than antitrust standards for merger cases. This has recently been seen with the DOT investigating the JetBlue-Spirit merger under a public interest standard.<sup>156</sup>
- The Federal Communications Commission (FCC) shares merger oversight with the DOJ under a public interest standard.

While updated competitor collaboration guidelines with sustainability provisions may be difficult to achieve in the US, the expanded remit and integration of competition concerns across federal agencies could be a way to target industry-specific sustainability-related concerns. For example, meat and poultry producers have outsized greenhouse gas emissions and have been linked to environmental degradation and water pollution. Advocates could potentially ask for an investigation or a new rulemaking by the USDA, under the Packers and Stockyard Act, arguing that environmental degradation is an ‘unfair method of competition.’ The DOJ and FTC could work in collaboration with the USDA, in this example, to either bring a case or issue rulemakings. This is only one example of what might be possible as the full range of antitrust impacts on sustainability efforts comes into view.

<sup>156</sup> Leah Nylen, “JetBlue-Spirit DOT Action Paused Until Antitrust Suit Is Decided”, Bloomberg, March 13, 2023. <https://www.bloomberg.com/news/articles/2023-03-13/jetblue-spirit-action-by-dot-paused-until-antitrust-suit-is-decided>

# CONCLUSION

As we have hopefully demonstrated in this report, governments and regulatory agencies should be the primary actors setting global sustainability thresholds and guardrails. Antitrust is a critically important contributor, as it sets market terms and allocates market power, including the power to collaborate. Private actions are important secondary tools for achieving global sustainability goals, and antitrust agencies must continue to provide clarity on what kinds of private-sector collaborations are pro-social and which undermine the public good.

As antitrust law faces wholly new market realities, it can look to its early history for philosophical inspiration and guiding principles. Antitrust law, and its application, involves all aspects of market structure – not only those aspects which affect us as consumers, but also those which concern our rights as citizens. In the words of Supreme Court Justice Louis D. Brandeis, “The only title in our democracy superior to that of President is the title of citizen.”

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