

US Antitrust Regulators Should Foster Climate Collaboration

By **Ben Steinberg and Adam Mendel** (April 13, 2021)

The Biden administration has pledged to fight climate change using every available policy tool.[1] One overlooked tool it can deploy right now is antitrust law — specifically, by issuing new guidelines to regulate, and potentially unleash, environmental collaboration among rival businesses.

Unlike in Europe, where green antitrust guidelines are already being drafted, there has been little effort in the U.S. to clarify how antitrust law should apply to joint climate change initiatives, forcing businesses to navigate a legal gray area.

Because antitrust law generally prohibits competitors from coordinating price-related conduct, climate change pacts that increase costs or decrease output can pose antitrust risks, and it is unclear whether environmental benefits can serve as a defense.[2]

Recognizing that this legal uncertainty may be restraining beneficial green initiatives, competition authorities in several European countries are working to clarify when environmental pacts raise antitrust concerns and when they do not — a process that is gaining steam across the continent.

In the Netherlands, regulators have proposed a controversial new standard that would give businesses unusual leniency by permitting sustainability agreements when "the benefits for society as a whole outweigh the disadvantages of any restriction of competition." [3] In January, the U.K.'s competition authority took the less aggressive step of clarifying which types of sustainability agreements qualify for legal exemptions and which do not, while recommending do's and don'ts for setting green industry standards.[4]

Similar efforts to update competition guidelines are underway in Germany, France and Greece,[5] and authorities in Finland, Poland, Sweden, Portugal and Bulgaria have asked the European Commission to adopt a more flexible approach toward environmental collaboration.[6]

As Margarida Matos Rosa, president of Portugal's Competition Authority, recently stated, "Openness and guidance to stakeholders may be the key to avoid businesses shying away from sustainability initiatives. ... [W]e may need to effectively communicate the leeway that already exists in our competition framework regarding sustainability initiatives." [7]

The EU's energy commissioner, Kadri Simson, has similarly opined that "competition policy has a significant role to play to ensure an efficient green transition." [8]

Not only have U.S. authorities not followed Europe's lead, but as of late, they have only added to the state of uncertainty. In 2019, under the Trump administration, the U.S. Department of Justice launched an antitrust investigation into whether a fuel emissions agreement between automakers and the state of California constituted an illegal cartel.[9]

While the investigation was widely criticized, it signaled that even state-sanctioned efforts to curb climate change can attract antitrust scrutiny. This has left U.S. businesses with little



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incentive to risk uniting around environmental goals, something many businesses already disfavor.

U.S. antitrust enforcers can now work to change that. Under the Biden administration, the DOJ or the Federal Trade Commission can develop new guidelines to clarify when eco-friendly collaborations raise antitrust concerns, and when they do not.

Doing so will not guarantee that any rival businesses will cooperate — most likely still would not. But clarifying where the law stands would at least open the door to private climate change initiatives at a time when enacting meaningful climate change legislation seems unlikely.

And there are growing indications that some businesses may be interested in working together. A range of European firms, including several that operate in the U.S., have said they would like to pursue collaborative green solutions, but are wary of taking action without clearer legal guidance.[10]

Nowhere is that wariness greater than in the U.S., where efforts to harmonize competition and climate policy are virtually nonexistent, and thus several years behind where they stand in Europe. Making matters worse, it is unclear whether U.S. courts can even consider environmental benefits in antitrust cases, as courts generally have refused to consider social welfare defenses to collusion.[11]

If that precedent were applied across the board to all cases of environmental coordination, it could set the U.S. apart from Europe, where more flexible balancing tests are now being considered. All of this has restrained any real push toward private environmental collaboration in the U.S., and deepened the divide between the U.S. and European regulatory landscapes.

If that divide widens, and the U.S. fails to clarify the law, while Europe gives businesses a path forward, it could create a bifurcated legal environment in which multinational companies cooperate in Europe, but not in the U.S. — or one in which they do not cooperate anywhere, due to the risk of cross-border enforcement.

The DOJ and the FTC already have the tools to prevent that. Both agencies have a history of issuing new antitrust guidelines to address new antitrust issues.

In just the last decade, for example, they have published new antitrust guidelines related to healthcare, human resources, intellectual property, cybersecurity, natural disasters, state regulatory boards and COVID-19.[12] The agencies should take similar action now with respect to environmental coordination — an issue of equal if not greater importance.

In addition to new guidelines, the agencies could also fast-track their review of environmental initiatives under the FTC's staff advisory opinion and DOJ's business review protocols, much like they did with collaborations related to COVID-19.[13] Offering businesses expedited, case-specific feedback would help businesses mitigate risks — while helping the agencies better understand what types of green collaborations are actually being considered, and thus where to focus future guidance.

The agencies could also go further and develop specialized procedures or taskforces specifically dedicated to environmental coordination, another approach they have used in the past to address emerging antitrust issues.[14]

Regardless of which path the agencies choose, they ultimately will need to balance the benefits of green initiatives with the risk that they could be used to disguise cartel activity. That risk is very real.

Cartel members have long sought to exploit flexibility in the antitrust laws to illegal ends, and greater flexibility can prompt firms that are otherwise compliant to push, and at times cross, the line. Any new guidance should thus carefully safeguard enforcers' and private parties' ability to prosecute anticompetitive conduct while limiting flexibility, if any, to where it is most necessary.

Striking the right balance no doubt poses challenges. But given the current state of inaction, even initial steps to clarify the law would be a welcome development.

If the Biden administration is serious about tackling climate change, one important step it can take right now is to begin the process of clarifying how antitrust law applies to private green collaboration. Such guidance is no substitute for meaningful climate change legislation, but it offers real upside, and is necessary to keep the U.S. on pace with Europe. It may be a small step, but it is long overdue.

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[1] Lisa Friedman, A 'Nerve Center' for Climate in the Biden White House, N.Y. Times, Jan. 21, 2021, <https://www.nytimes.com/2021/01/19/climate/biden-climate-change.html>.

[2] See Ben Steinberg and Adam Mendel, Unintended Consequences: How a DOJ Antitrust Investigation Could Exacerbate Global Warming, Nat'L L.J., Dec. 17, 2019, <https://www.law.com/nationallawjournal/2019/12/17/unintended-consequences-how-a-doj-antitrust-investigation-could-exacerbate-global-warming/>.

[3] Andrew Boyce and Arezki Yaiche, Comment: Dutch Leniency on Sustainability Rules Help Companies, But Divides Authorities, mlex.com, Aug. 21, 2020, available at <https://content.mlex.com/#/content/1215052>.

[4] Environmental Sustainability Agreements and Competition Law, U.K. Competition & Markets Authority, Jan. 27, 2021, available at <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>.

[5] Andrew Boyce and Giulia Bedini, Comment: Green Wave to Hit EU Competition Policy in 2021, mlex.com, Dec. 22, 2020, available at <https://content.mlex.com/#/content/1249466>.

[6] Competition Policy and the Green Deal, https://ec.europa.eu/competition/information/green_deal/index_en.html (last visited Feb. 19, 2021).

[7] Andrew Boyce, Companies Eyeing Cooperation Need 'Guidance' from Antitrust Enforcers,

Portuguese Regulator Says, mlex.com, Feb. 4, 2021, available at <https://content.mlex.com/#/content/1262475>.

[8] Giulia Bedini, Clean-Energy Innovations Need Support from EU Competition Policy, Policymakers Say , mlex.com, Feb. 4, 2021, available at <https://content.mlex.com/#/content/1262447>.

[9] Hiroko Tabuchi and Coral Davenport, Justice Dept. Investigates California Emissions Pact That Embarrassed Trump, N.Y. Times, Sept. 6, 2019, <https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html>.

[10] Andrew Boyce, Sustainability Agreements Need Clearer Antitrust Exemptions, say BASF, Ahold Delhaize, Others, mlex.com, March 31, 2020, available at <https://content.mlex.com/#/content/1175349>.

[11] See, e.g., Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 462 (1986) (rejecting "quality of care" justifications"); Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 695 (1978) (rejecting "public safety" justifications).

[12] FTC Guidance Documents, <https://www.ftc.gov/enforcement/guidance> (last visited Feb. 18, 2021); Dep't of Justice Antitrust Division Guidelines & Policy Statements, <https://www.justice.gov/atr/guidelines-and-policy-statements-0>) (last visited Feb. 18, 2021).

[13] FTC and Dep't of Justice, Joint Statement Regarding COVID-19, Dep't of Justice, March 2020, available at <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

[14] See, e.g., Patricia Galvan and Krisha Cerilli, What's in a Name? Ask the Technology Enforcement Division, FTC, Oct. 16, 2019, available at <https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division>.