
Antitrust and Sustainability: What Actions Should Firms Take in a World Without Clear Rules?

by Anne Catherine Faye; Analysis Group, Inc.

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Anne Catherine Faye

In recent years, investors, consumers, and other stakeholders have increasingly demanded that companies commit, clearly and publicly, to environmental sustainability goals. Yet guidance on how to fulfill these commitments in the US is often either scarce or unclear, and difficult questions persist along a number of axes. How should greenhouse gas (GHG) emissions be measured and reported? Can federal and state guidelines on these efforts be harmonized? Can firms act together to advance sustainability goals without running afoul of antitrust laws?

These questions remain top of mind – not only for antitrust practitioners but for policymakers as well. Some of them were at the center of [a combative hearing](#) of the House Judiciary Subcommittee on the Administrative State, Regulatory Reform, and Antitrust on June 12, 2024, which featured testimony from members of a climate investment initiative. The hearing resulted in conflicting staff reports from the two sides of the political aisle on how, and even whether, firms should participate in group initiatives to combat environmental concerns. These high-profile clashes continue to highlight the need for clear guidance on how environmental sustainability goals and commitments ought to be accomplished.

This article grew out of a panel discussion that I moderated at the “2023 Antitrust and Sustainability: Friends or Foes?” conference convened by the American Bar Association (ABA) Antitrust Law Section at Howard University in October 2023. The panelists – my Analysis Group colleague Judy Chang, also at the Harvard Kennedy School; Sarah Flanagan of Intel; Stacey Halliday of Arnold & Porter; Denise Hearn of the Columbia Center on Sustainable Investment; and Peggy Otum of WilmerHale – explored a wide array of topics centered around the above-mentioned questions. After setting the stage by talking about companies’ pursuit of sustainability goals, we discussed what strategies they could employ to achieve those goals in situations where clear guidance and rules related to collaborations among competitors in this context are lacking, as well as how to quantify and measure progress. All the participants offered their own opinions on these matters, not those of their institutions, their employers, or the Antitrust Law Section.

I am deeply grateful to Fiona Schaeffer, the Section’s chair, for her efforts to highlight the importance of these issues. I’m also grateful to the members of this distinguished all-female panel for the thorough and multifaceted discussion that gave rise to the article that follows.

Anne Catherine Faye: Our topic today is how firms should navigate the legal, business, and regulatory ecosystem in which they must operate to pursue sustainability goals. This is a complex topic, but one thing that’s clear is that these are measures that shareholders and consumers clearly want.

Sarah Flanagan: I agree, Anne Catherine. Certainly, there is a strong desire for sustainability – clear benchmarks, transparent reporting. But there’s also what you might call anti-ESG rhetoric, which is also putting pressure on the business community to pull in the other direction.

Peggy Otum: I think that’s true, although my sense is that even in the midst of a backlash against ESG, most companies are pretty strongly inclined to adhere to their environmental goals, in large part because of their shareholders’ strong commitment to sustainability.

So the question, as Sarah mentioned, is how to implement that. I work with companies on this, and in a lot of cases, the way that you do it is by incorporating a lot of best principles and practices from the government. To take one example: For companies that are looking at environmental justice reviews, a lot of our analysis comes from EJSscreen, which is a first step for a company identifying what the environmental impacts are in the communities in which they operate.

Ms. Faye: The question of how to assess environmental impact brings us to the fact that different states have enacted very different approaches to climate. From your work, Stacey, can you describe some of the challenges that companies and their legal teams may face in making sense of these divergent regulatory approaches?

Stacey Halliday: You've also got varying approaches at the federal level. For example, the Department of Energy (DOE) is looking at environmental justice in one way, the Environmental Protection Agency (EPA) is looking at it in another way. And the Securities and Exchange Commission (SEC) is looking at ESG reporting and disclosure through a lens related to shareholders. And, as you mention, you have states that are all defining these terms in different ways.

This reminds me of the adage that what gets measured gets managed. This is an unprecedented time, but I worry that we're running the risk of getting bogged down in figuring out how to measure things.

Ms. Faye: Judy, those questions of measuring and assessing emissions and compliance standards must have resonance for you, given your work as former undersecretary of energy and climate solutions for Massachusetts.

Judy Chang: Absolutely. These certainly are complex issues, and similar to those I dealt with while working in state government. Massachusetts is required, by statute, to reduce GHG emissions by a certain amount, by a certain date. So, what the state does is, essentially, draw a circle around the state and ask: What level of GHG emissions arises out of the transportation sector within the state's boundary? What level comes from the building sector? It gets complex when we get to the power sector because our power grids are interstate, with lots of transactions that do not stop at the state borders.

I should mention our approach to the building sector, since that sector is responsible for such a large proportion of GHG emissions. Massachusetts has set new building codes to increase buildings' efficiency and reduce their emissions. However, by far the larger share of emissions comes from existing buildings. The amount of money required to retrofit existing buildings for energy efficiency is much more than what federal or state governments can provide. This is where there's an opportunity to create a multiplicative effect – using public dollars to attract private investments in our infrastructure that would significantly curb energy consumption and emissions.

Ms. Faye: That idea of cooperation brings us back around to the antitrust theme: whether firms that are competitors can collaborate to address sustainability challenges. Denise, how should we approach this complex question?

Denise Hearn: Let me start by making a philosophical point. There is this narrative that antitrust law stands as an obstacle to collaboration. Actually, though, the question that antitrust law seeks to answer is: Who should collaborate, and for what purposes? There are companies that collaborate all the time; the question is whether the collaboration is pro-social or antisocial.

And the antitrust laws are meant to help us define what constitutes antisocial collaboration – cartels, collusion, conspiracies that fix or drive up prices for consumers or drive down wages for the workforce. They're also meant to also help us understand what is pro-social and permissible. Take, as an example, industry standards on environment:

If firms want to come together and set benchmarks around environmental standards, sometimes that's permissible. So, it seems to me that the opportunities for collaboration in this sphere may not be quite as limited as they're sometimes presented as being.

Ms. Faye: I think it's also worth considering the consequences of a regime in which no collaboration is possible. It seems that there could be a first-mover disadvantage: A firm that opts to, for example, invest in greener technology may well face higher costs than its rivals in the absence of a common set of standards.

Ms. Hearn: This is a really challenging problem. And it's a perpetual human problem, which is that we live on one planet – and we live in a commons, which is very difficult to govern. I think there are many instances in which, if a firm moves individually, it's not going to be as powerful as a situation in which firms could take action collectively. And yes, it may be more expensive for them in the near term.

But I also think we must be careful about the types of exemptions that we allow for these types of collaborations, and we should be clear that antitrust law alone will not solve these challenges. We will need concurrent movements across other areas of policy, law, and even economic thinking to get us to a place where firms can collaborate in a pro-social way that doesn't also undermine stakeholder interests.

Ms. Otum: I think there's a real need for guidance here. I can tell you that I've had clients who are reticent about discussing sustainability with their industry competitors, and the risk makes it easier, in many situations, to pull back from even having the dialogue. So, it would be helpful to have some direction from regulators to help companies do that.

Ms. Faye: I'd like to close by asking each of you for a point that you hope the audience will take away from our discussion. Could we start with you, Peggy?

Ms. Otum: I'd like to emphasize what we've just been discussing: There is some existing latitude under the antitrust laws for companies to collaborate on climate issues. Figuring out the scope of that latitude, perhaps with the help of agency guidance, should be a priority for the antitrust community.

Ms. Flanagan: I agree with that, Peggy. I'd add that because there isn't total clarity on these issues, and because the issues are complex both in the US and beyond its borders, this is an instance in which it's very important to have clear legal guidance.

Ms. Halliday: Building on that, I want to stress that when we're talking about ESG and sustainability, these are factors that are integral to companies' thinking about risk and opportunity. To me, that represents not only a challenge but a great opportunity for the antitrust community to get involved in, on both the law and the economics sides.

Ms. Chang: Thinking about the regulatory aspects of this discussion, I'd like to emphasize that it will take a combination of public and private parties working together to really address these issues. I also would like to point out that both companies and regulators need to better understand how collaborations for sustainability efforts might affect consumers. We should take care to quantify the costs and benefits of these efforts, for the companies and for society at large. The more accurately we do so, the better.

Ms. Faye: Denise, we'll give you the last word.

Ms. Hearn: Even though there's uncertainty surrounding some of these topics, I think that there's an opportunity to meaningfully craft policy, antitrust enforcement, and sustainability initiatives in ways that embed many of the values we've discussed here. I don't think we should wait for the next crisis to do so; we should be proactive and make the most of that opportunity.

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