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By David B. Schwartz, Julia Catala Marty Darren Ray, & Lucille Valadou | Bryan Cave Leighton Paisner LLP

Edited by Justin Stewart-Teitelbaum & Angela Landry

Unsustainable Differences in Antitrust Treatment of Sustainability Agreements: 2025 Likely to Bring Significant Changes to How the U.S. and the EU Analyze Sustainability Issues

By David B. Schwartz, Julia Catala Marty Darren Ray, & Lucille Valadou[1]

As companies examine their sustainability priorities in 2025, they should be aware of a large and growing rift in the priorities of competition authorities on both sides of the Atlantic. In the U.S., the return of the Trump Administration heralds skepticism that sustainability agreements are pro-competitive. Indeed, as evidenced by two examples from the previous Trump and Biden administrations, companies prioritizing sustainability issues should get ready for U.S. government inquiries that instrumentalize antitrust law against pro-sustainability groups. In contrast, within the EU, the recent appointment of Teresa Ribera as the new head of European Commission Policy, entrusted with the role of "*Executive Vice President for a Clean, Just and Competitive Transition*," emphasizes the will to strengthen the position's mission beyond competition to include environmental policy. Her remit therefore promises to be devoted to sustainability, pursuing efforts launched in recent years to encourage companies to collaborate on developing sustainability agreements. However, this should not be taken as a blank check by companies, as competition authorities no longer hesitate to penalize anti-competitive agreements related to sustainable development or to the environment.

I. In the U.S.: The Likely Return of Government Investigations Based on Political Disagreements with Sustainability Efforts

In the U.S., standard American antitrust principles apply to sustainability issues. However, the Republican party—which will control the Presidency and both houses of Congress through at least 2026—has shown a remarkable degree of hostility to sustainability priorities, especially if they are seen as in conflict with President Trump's priorities. Two recent examples show how the U.S. government could pursue antitrust investigations of questionable merit for the larger goal of discouraging sustainability efforts.

A. Investigation Against Automakers During President Trump's First Term

Initially, during President Trump's first term, the DOJ's Antitrust Division launched an investigation against automakers that entered into a fuel standard agreement with a California state regulatory agency. According to a DOJ Office of Inspector General (OIG) preliminary report issued in July 2024 but not previously reported on, the goal of this agreement was for the car companies "to abide by vehicle emissions standards that were more stringent than proposed federal standards,

[1] *David B. Schwartz is a Partner in BCLP's Antitrust and Competition Practice Group and a former Lead Investigative Attorney at the U.S. Federal Trade Commission. He has extensive experience handling complex antitrust and competition matters, including healthcare enforcement, pharmaceutical pricing, provider consolidation, private equity acquisitions, and Medicare Modernization Act patent settlements.*

Julie Catala Marty is a Partner in BCLP's Competition and Distribution team, specializing in merger control, foreign direct investment, antitrust litigation, and regulatory matters before French and European authorities.

Darren Ray is a member of BCLP's Business & Commercial Disputes Practice Group and contributes to the Antitrust & Competition Practice Group, handling antitrust matters and representing pro bono clients.

Lucille Valadou, is an Associate in BCLP's Competition and Distribution team in Paris.

but less stringent than existing [California] standards." This agreement ran afoul of President Trump's priorities, and he issued several social media posts criticizing the automobile manufacturers for following the new California standards. The next day, the DOJ Antitrust Division opened a preliminary investigation into the automakers, ostensibly raising "questions about whether [the automobile manufacturers] were engaging in anticompetitive behavior by agreeing to restrict production." In particular, the DOJ Antitrust Division "sent letters to the automakers informing them of a potential violation of antitrust laws and inviting them to meet with the Antitrust Division staff," followed shortly by the Antitrust Division sending Civil Investigative Demands (CIDs) to each car company. Ultimately, however, the investigation was closed without further action.

The OIG conducted a preliminary review into the opening of this investigation after concerns were expressed over improper political influence. The OIG's preliminary review pointed to multiple suspicious facts. For example, in late July—several weeks before President Trump issued his tweets—internal emails reported that "[t]he President expressed displeasure" that the car manufacturers had entered into agreements with the California agency and wanted the U.S. government to "think[] creatively about what [we] can do to counter some latebreaking machinations by certain states and car companies." Moreover, senior staff in other parts of the DOJ asked the DOJ Antitrust Division whether there was "anything that might be considered in the very near-term" to counter those who allegedly want "to stick a finger in the eye of the President and his policy judgments." And once President Trump sent his tweets, the DOJ Antitrust Division made the "highly unusual" decision to ask a non-litigating section of the Antitrust Division to open the investigation based solely on a "'preliminary sketch' of the relevant issues."

Most important was the fact that the automobile manufacturers likely had three strong defenses to any claim of anticompetitive activity, which were largely ignored in sending out CIDs to the automobile manufacturers. In particular, the manufacturers' actions were likely protected by the state action doctrine, the *Noerr-Pennington* doctrine, and the political exemption doctrine. While each doctrine differs in their particulars, all three protect the ability of private companies to work with or lobby state governments to engage in conduct that, if done privately, might be considered anticompetitive. Notably, others in the DOJ Antitrust Division viewed these as "powerful" and "very real defenses that would ultimately preclude enforcement."

Ultimately, the DOJ OIG's preliminary review concluded that there was "insufficient evidence of improper political influence in the Antitrust Division's decision to initiate a preliminary investigation." That preliminary conclusion, however, is at best incomplete. The OIG preliminary report never grapples with the manufacturers' defenses. For example, the OIG preliminary report does not evaluate the strength of the defenses, but rather notes that there was an internal difference of opinion in the Antitrust Division about a separate product design defense. Simply put, the preliminary report does not address the odd timing, going back weeks before the President's tweets, combined with the manufacturers' strong defenses.

Whether one agrees with the OIG's preliminary report's conclusions or not, it is cold comfort for companies that had to endure a federal government investigation based on, at best, questionable grounds. This example tells a cautionary tale for any company that seeks to achieve sustainability priorities that differ from the Republican majority's desires.

B. Pushback from Republican Lawmakers Under the Biden Administration

This example from the end of the first Trump administration is not the only one: under President Biden, Republican lawmakers remained focused on possible antitrust violations involving sustainability initiatives. In December 2024, the U.S. House Judiciary Committee released an interim report accusing various investors of engaging in a "sustainability shakedown" and forming a "climate cartel." These concerns date back to 2022, when Republican members of the House Judiciary Committee sent a letter to a member of the sustainability group Climate Action 100+. The letter claimed that Climate Action 100+ "seems to function like a cartel, facilitating collusion to push ESG goals in a way that may be anticompetitive." Similarly, Republican Senators sent letters urging large law firms to "fully inform clients of the risk they incur by participating in climate cartels and other ill-advised ESG schemes." Ultimately, the House Judiciary Committee's investigation used letters and subpoenas to obtain and review over 275,000 documents, comprising over 2.5 million pages of non-public information, plus five depositions and transcribed interviews.

Because this information is non-public, it is difficult to evaluate the merits of the Judiciary Committee's claims that these sustainability priorities were unlawfully collusive. In the Judiciary Committee's interim report, committee staff argue that actions such as partnering with shareholder activists, voting to replace board members, and receiving funding from state pension funds and European investment firms amounts to "collusion." The same report briefly argues that these agreements are sufficient to demonstrate more than just mere lawful parallel action. However, the report does not engage with the similar defenses available to the members of the alleged "cartel" discussed above.

Once again, the merits of the investigation likely matter less than the investigation's existence and length. This increased Congressional scrutiny, combined with public criticism of the lack of an executive branch investigation, is a likely harbinger of additional antitrust investigations and enforcement efforts. Companies should be aware that even if their sustainability actions are protected by well-established antitrust doctrines, that may not protect them from searching government probes. Companies should consider all potential defenses at their disposal, including declaratory judgment actions, defamation claims, or other efforts to have the defenses heard by a neutral decisionmaker at the earliest opportunity.

II. In the EU: Further Integration of Sustainability Considerations into Competition Policy and Competition Law Enforcement

In stark contrast to developments in the U.S., EU competition policy both supports and complements the EU's Green Deal ambitions (a set of policies aimed at achieving climate neutrality by 2050), which will continue to be implemented under Teresa Ribera's leadership. However, EU competition law does not merely serve as a tool to support companies aiming to pursue sustainable projects; it also penalizes anti-competitive practices that undermine sustainability. This approach embodies a "carrot and stick" policy, to borrow the words of Benoît Coeuré, the President of the French Competition Authority (the FCA).

A. Competition Law as a Tool to Support Companies Pursuing Sustainable Development Objectives

In recent years, sustainability and environmental considerations have been increasingly incorporated into European competition tools, as illustrated by the multiplication of guidelines on sustainability agreements. The aim is to ensure that European competition laws do not hinder the adoption of

environmentally beneficial projects and to address companies' concerns about potentially breaching competition law when collaborating to enhance sustainability in their sector.

At the EU level, the European Commission's horizontal guidelines handed down in 2023 now include a Chapter fully devoted to the evaluation of agreements pursuing sustainability objectives. These guidelines provide companies with a precise framework to help them self-assess the compatibility of their initiative with antitrust rules. The guidelines include in particular a "safe harbour" for standardization agreements meeting certain conditions.

At the national level, several national competition authorities took one step further and recently introduced "open door" policies, allowing companies to request informal guidance on proposed sustainability initiatives. This is the case of the United Kingdom's Competition and Markets Authority (the CMA) and the Dutch competition authority (the ACM), but also, since May 2024, of the FCA, as part of its commitment to sustainable development as defined in its 2024-2025 roadmap.

Henceforth, any undertaking or association of undertakings that wishes to engage in unilateral or collective conduct—including agreements between competitors—likely to fall within the scope of competition law may submit a request for informal guidance to the General Rapporteur of the FCA if the project (i) is at an appropriate stage of development, (ii) pursues one or several sustainability objectives (e.g. addressing climate change, preserving natural resources, reducing pollution), (iii) has a potential impact on all or part of mainland France and the overseas territories, and (iv) presents a competition law issue, which cannot be easily answered by applying the principle of self-assessment. If the General Rapporteur considers that the planned project is compatible with competition rules, he issues an informal guidance letter, which may include conditions or adjustments if necessary. The main advantage of this procedure is to provide the parties with legal certainty, with the General Rapporteur committing not to initiate any legal proceedings against the cooperation submitted, provided that the project is carried out under the described circumstances and complies with the specified conditions or adjustments.

To date, two informal guidance letters have been issued. The first one relates to a request, submitted by two professional organizations representing operators in the animal nutrition sector, and concerns a draft guide that provides a standardized methodology for calculating products' environmental footprint. As part of his assessment, the General Rapporteur makes several recommendations and concludes that if the draft guide is adopted as described, and the recommendations are taken into account, there would be no ground for opening an investigation or referring the matter to the FCA. The recommendations concern (i) the limitation of the exchange of sensitive information to what is necessary and proportionate for the preparation, implementation, adoption and modification of the guide; (ii) the voluntary and non-exclusive nature of the methodology which should allow the operators to go further; and (iii) the need for scientifically-sound methodology and data. second informal guidance letter concerns the creation, by an association, of a system for the collective financing of the additional costs and risks associated with the agro-ecological transition of agricultural holdings. The General Rapporteur draws the association's attention to the fact that several elements of the project and options under consideration raise competition risks and makes recommendations, some of which are similar to those issued in the first letter.

B. Competition Law as a Tool to Punish Anti-Competitive Practices Harmful to Sustainability:

Punishing Cartels Involving a Parameter of Competition Related to Sustainable Development or to the Environment

European competition authorities now recognize that sustainability can be a parameter of competition, given its growing significance to consumers. This development is reflected in two ways. Firstly, the Commission now considers parameters beyond price, including sustainability, resource efficiency, and product durability, when defining the relevant market. Secondly, competition authorities penalize cartels between competitors that involve parameters related to sustainability or environmental factors.

The European Commission set the ball rolling in July 2021 by fining five German car manufacturers for restricting competition in emission reduction for new diesel cars. The Commission found that several competing car manufacturers had held regular technical meetings to avoid or delay the introduction of a less polluting technology for cleaning the exhaust gases emitted by new diesel cars, even though this technology was available, and thus avoided competing on an innovative production method that would go beyond what was required by the relevant legislation.

In late December 2023, the FCA followed in the Commission's footsteps by issuing the Bisphenol A (BPA) decision, its first case penalizing practices exclusively related to a non-classical parameter of competition. This decision therefore differs from the FCA's previous decision-making practice and from the "Floor Covering Case". In that case, the FCA fined three companies and their trade association for colluding on an environmental parameter by agreeing not to advertise the environmental performance of their products. However, this anti-competitive practice constituted only one component of a broader cartel, which also involved price-fixing and the exchange of sensitive information.

The practices outlined in the BPA decision involved the alleged implementation, by 14 professional associations and their members (a total of 101 companies), of a complex cartel aimed at restricting communication on the presence or absence of BPA in food containers, in the context of the adoption of a 2012 French law banning the use of BPA in all food containers by January 2015. According to the decision, the practices were implemented during a transitional phase, during which cans with and without BPA were simultaneously placed on the market, allowing existing stocks to be depleted. This case brought up questions regarding the boundary between lawful "non-pricing" discussions that occur within professional associations, particularly within the context of a new legislative framework, and those regarding the interaction between competition and consumer law. Ultimately, the FCA only fined 3 professional associations and 11 companies in their capacity as members of those associations, and the decision is subject to appeal. The fact remains, however, that this BPA decision marks a shift in the FCA's decision-making practice, which considered that the communication on the presence or absence of BPA in food containers constituted a parameter of competition as the parties involved were fully aware of the importance of such information for the consumers. This is the first time the FCA has penalized practices related to a purely environmental competitive parameter.

III. Conclusion

Federal enforcement agencies are, during President Trump's second term, likely to look at sustainability agreements with a higher level of scrutiny for the purpose of discouraging efforts that contradict President Trump's priorities. Companies should consider the cost of

government investigations when considering entering into sustainability agreements. Importantly, these considerations should be taken into account notwithstanding the company's belief that it would be able to successfully argue any defenses. Conversely, while sustainability projects are and will continue to be encouraged among companies in the EU, companies must be mindful of the risk of sanctions in cases of collusion involving environmental competition parameters. They should be particularly cautious when participating in professional associations where such issues are likely to be discussed.