

# When Antitrust's Consumer Welfare Standard And ESG Collide

By **Joshua Sherman** (October 4, 2021)

The consumer welfare standard has been a subject of intense interest and debate recently in the U.S., punctuated by the 19-hour debate session in Congress in late June,[1] the July executive order aimed at promoting competition in the U.S. economy,[2] the Federal Trade Commission's 3-2 vote on Sept. 15 to withdraw its approval of the 2020 Vertical Merger Guidelines[3] and the Sept. 22 memo from the FTC Chair Lina Khan regarding her vision and priorities for the organization.[4]



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Under the consumer welfare standard, firm conduct is analyzed according to whether consumers in a relevant market are harmed.

Often, critics of the consumer welfare standard have focused on industry structure and concentration.[5] Perhaps less discussed is the fact that there exist various types of collaborations among firms that may be interpreted as pro-competitive or anti-competitive depending on how consumer welfare is defined.

This ambiguity is particularly relevant for purposes of evaluating whether agreements related to environmental, social and corporate governance, or ESG, are anti-competitive.

For example, the current standard focuses on the welfare of consumers purchasing the products or services of the companies whose agreements are called into question. However, others may also benefit or be harmed by such agreements.

For instance, firms may agree with each other to mitigate a negative externality such as pollution, thereby benefiting individuals who do not necessarily consume the firms' products or services.

As another example, the current standard is likely to view unfavorably agreements that would sacrifice consumer welfare in the short-term in exchange for enhanced consumer welfare in the long term.

Yet some resource conservation agreements can be characterized as seeking such objectives. The motivation for such agreements can often be framed in terms of the tragedy of the commons, whereby individuals who fail to coordinate their actions deplete a resource to the detriment of future consumption.

Note that ESG-related agreements may also be viewed under a more classical consumer welfare lens in the sense that certain agreements may be interpreted as enhancing the quality of a product or service.

Quality enhancements have been long recognized as a potential component of an efficiency defense for mergers[6] and improved quality is a recognized pro-competitive benefit in the Collaboration Guidelines issued by the FTC and U.S. Department of Justice,[7] but such quality arguments related to ESG objectives have not yet gained traction.

Furthermore, while agreements that almost always tend to raise price are customarily viewed as illegal,[8] typically the objective of such agreements is to achieve a joint increase in profits.

In contrast, an increased focus on ESG by firms raises the likelihood that there exist collaborations among competitors that might lead to an increase in prices and a joint decrease in profits. Such agreements may be the result of firms agreeing on production methods for purposes of meeting certain environmental standards, thereby resulting in higher prices.

Approximately two years ago, the DOJ launched an antitrust investigation of automakers — Bayerische Motoren Werke AG, Ford Motor Company, Honda Motor Company and Volkswagen Group — over a deal with the state of California, which entailed meeting California's fuel efficiency standards. These standards exceeded those proposed by the Trump administration. The investigation was closed in 2020, after finding that no laws were violated.[9]

According to then-Assistant Attorney General for the DOJ Antitrust Division, Makan Delrahim:

A key question in that matter was whether the automakers had actually agreed among one another, as some early indications suggested," and it was ultimately found that "the automakers had not in fact agreed with one another despite joint gatherings and discussions among these competitors.[10]

Yet even if the DOJ had found evidence of an agreement, it is unclear whether such an agreement is anti-competitive. Would the arrangement have resulted in higher profits for automakers, the typical outcome of an anti-competitive agreement? Such an agreement is likely to have imposed higher costs on participants than on those automakers who did not participate.

Indeed, if it is the case that consumers prefer more expensive cars with better fuel efficiency relative to less expensive cars with inferior fuel efficiency, then it may be unilaterally profit-maximizing for all automakers to improve fuel efficiency, thereby obviating the need for any such agreement.

If on the other hand consumers prefer less expensive cars with inferior fuel efficiency, then presumably an agreement would be required to ensure automaker cooperation. Under such a scenario, the consumer welfare standard commonly applied by courts would not account for the societal benefits associated with reducing pollution.

In addition, as noted earlier, antitrust policy does not endorse a short-term sacrifice of consumer welfare in exchange for enhanced consumer welfare in the long term.

As an example, while the DOJ approved joint harvesting agreements among members of fish harvesting cooperatives fishing Alaskan pollack, it did not appear to address the dynamic element often associated with the tragedy of the commons — the possibility that reducing output in a given period would lead to the ultimate preservation of fish stocks.[11]

Competition policy will also surely intersect with the European Union's objective to achieve climate neutrality by 2050.[12] Agreements that restrict competition are prohibited under Article 101(1) of the Treaty on the Functioning of the European Union unless they generate efficiencies according to Article 101(3) of the treaty.[13]

Horizontal block exemptions exempt certain agreements from this prohibition.[14] In particular, horizontal block exemptions define certain research and development and

specialization agreements that can be considered more beneficial than harmful, and are therefore allowed under antitrust rules.[15]

Such agreements are now attracting increased attention from policymakers in the EU. As part of public consultation for the current review of the horizontal block exemptions, sustainability agreements were noted by some respondents as an area where guidance was lacking.[16] Respondents also suggested that sustainability agreements deserve a specific section in the European Commission guidelines on horizontal cooperation agreements.[17]

When asked to specify any major trends or developments that affected the application of the horizontal block exemptions and the horizontal cooperation agreements, the most important development according to respondents was climate change and the associated environmental and sustainability goals, a clear sign that ESG is now on the radar of competition policymakers in the EU.[18]

Along these lines, some have already voiced the opinion that the Biden administration should begin the process of clarifying how antitrust law applies to private green collaboration in order to keep the U.S. on pace with the EU.[19]

ESG-related collaboration among firms raises different types of questions than those commonly debated between the Chicago and New Brandeis schools of antitrust, noting that such questions also extend more generally to other types of collaborations among firms.

Along these lines, the consumer welfare standard itself may also benefit from further clarity from policymakers as antitrust policy goals are being reevaluated both in the U.S. and in the EU.

*Update: This article has been updated to include additional information about the author's professional affiliations.*

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[1] "Democrats and Republicans form odd alliances during tech antitrust debate," Lauren Feiner, CNBC, June 24, 2021 (<https://www.cnbc.com/2021/06/24/-big-tech-antitrust-debate-odd-alliances-form-and-party-fractures-show.html>).

[2] "Executive Order on Promoting Competition in the American Economy," July 9, 2021 (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>).

[3] "Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary," September 15, 2021 (<https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>).

[4] "Vision and Priorities for the FTC," Lina M. Khan, September 22, 2021 ([https://www.ftc.gov/system/files/documents/public\\_statements/1596664/agency\\_priorities\\_memo\\_from\\_chair\\_lina\\_m\\_khan\\_9-22-21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf)).

[5] More generally, consumer welfare has also been questioned relative to other measures of welfare (for example, see Jonathan M. Jacobson, "Another Take on the Relevant Welfare Standard for Antitrust," *Antitrust Source*, Aug. 2015).

[6] Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, August 2010, p. 29.

[7] Antitrust Guidelines for Collaborations Among Competitors, Federal Trade Commission and the U.S. Department of Justice, April 2000, p. 8.

[8] *Ibid.*

[9] See <https://www.reuters.com/article/us-autos-emissions-antitrust/u-s-ends-antitrust-probe-of-four-automakers-over-california-emissions-deal-idUSKBN2012NP>.

[10] Letter from Makan Delrahim to the Honorable Jerrold Nadler, Chairman, and the Honorable Jim Jordan, Ranking Member, Committee on the Judiciary, U.S. House of Representatives, July 1, 2020, pp. 6-7.

[11] Letter from Assistant Attorney General Joel I. Klein to Joseph M. Sullivan, August 9, 2000.

[12] See [https://ec.europa.eu/clima/policies/strategies/2050\\_en](https://ec.europa.eu/clima/policies/strategies/2050_en).

[13] See [https://ec.europa.eu/competition-policy/public-consultations/2019-hbers\\_en](https://ec.europa.eu/competition-policy/public-consultations/2019-hbers_en).

[14] *Ibid.*

[15] See [https://ec.europa.eu/competition-policy/antitrust/legislation/horizontal-block-exemptions\\_en](https://ec.europa.eu/competition-policy/antitrust/legislation/horizontal-block-exemptions_en).

[16] "Factual summary of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements," p. 5 (found at [https://ec.europa.eu/competition-policy/public-consultations/2019-hbers\\_en](https://ec.europa.eu/competition-policy/public-consultations/2019-hbers_en)).

[17] *Ibid.*, p. 8.

[18] *Ibid.*, p. 16.

[19] Ben Steinberg and Adam Mendel, "US Antitrust Regulators Should Foster Climate Collaboration," April 13, 2021, *Law360*.