

C O M M E N T S

WHY SUSTAINABILITY NEEDS ANTITRUST

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Federal, state, and local governments are promoting sustainability, including circular economy, recycling, and climate change initiatives. Those initiatives depend on individual efforts and increased collaboration to meet collective goals. Antitrust law, on the other hand, asks whether collaboration among competitors will harm competition.¹

Precisely because the social value of sustainability is widely recognized and promoted by government, individuals and organizations may mistakenly assume that their good intent is an antitrust defense.² That is not true, even if the action advances government environmental and social policies. Antitrust, however, can be a helpful tool in finding the optimum balance among sustainability's goals. Antitrust is designed to prevent joint action by private entities that would harm competition or manipulate markets, thus promoting healthy markets that are a critical component of sustainability.

Authors' Note: The opinions expressed in this Comment are solely those of the authors and do not represent or express the opinion of any client.

1. See, e.g., FEDERAL TRADE COMMISSION & U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §4.2 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.
2. More precisely, there is a divergence among state laws on the role of environmental, social, and corporate governance (ESG), including sustainability, as reflected in state laws that either support or oppose ESG principles. Compare pro-ESG legislation, e.g., An Act to Require the State to Divest Itself of Assets Invested in the Fossil Fuel Industry, L.D. 99, 130th Leg., 1st Spec. Sess. (Me. 2021); An Act Concerning State Retirement and Pension System—Investment Climate Risk—Fiduciary Duties, H.B. 740, 2022 Leg., Reg. Sess. (Md. 2022); An Act Concerning Measures to Promote Reductions in Greenhouse Gas Emissions in Colorado, and in Connection Therewith, Making an Appropriation, S.B. 23-016, 2023 Leg., Reg. Sess. (Colo. 2023), with legislation prohibiting consideration of ESG factors, e.g., An Act to Create the State Government Employee Retirement Protection Act, H.B. 1253, 94th Gen. Assemb. (Ark. 2023); An Act Relating to Government and Corporate Activism, H.B. 3, 2023 Leg., Reg. Sess. (Fla. 2023); An Act Relating to State Contracts With and Investments in Certain Companies That Boycott Energy Companies, S.B. 13, 87th Leg., Reg. Sess. (Tex. 2021).

Current case law and the historical development of U.S. antitrust law provide no “sustainability” exemption.³ Competition officials from the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) testified in 2022 that alignment with sustainability goals creates no antitrust defense.⁴ This has prompted some to claim that “current antitrust law is a barrier to this collaboration,” and in need of alignment with prosocial corporations and their allies.⁵

Sustainability promotes decisions that balance social, environmental, and economic values; antitrust seeks to preserve and promote commercial competition. This Comment argues that antitrust:

- Can help ensure healthy competition in markets relevant to sustainability and avoid harm to competition from standard-setting, certification, and statistical programs that might hinder innovation or unfairly exclude competitors;
- Does not consider whether an action promotes or deters sustainability, nor is that a proper role for competition authorities;

3. See Noah Joshua Phillips, Federal Trade Commission Commissioner, Politics, Markets, and Populism: Antitrust at the Crossroads, Prepared Remarks at the Dartmouth College Thurlow M. Gordon Memorial Lecture 5 (Oct. 27, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598051/phillips_prepared_remarks_dartmouth_final_formatted.pdf.
4. *Oversight of Federal Enforcement of the Antitrust Laws: Hearing Before the U.S. Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights*, 117th Cong. (2022) (statement of Lina Khan, Chair, FTC) (when firms “come to us and try to claim an ESG exemption . . . we have to explain to them clearly that there is no such thing”); *id.* (statement of Jonathan Kanter, Assistant Attorney General, DOJ) (“when firms have substantial power and they use that power to achieve anticompetitive ends, that should be actionable under the antitrust laws”).
5. Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1637-96 (2021); Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 AM. BUS. L.J. 97, 97-144 (2016); Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 23-24 (2004).

- Encompasses reviews of competitor collaborations that need to consider the context and structure of modern markets as part of the analysis, as do sustainability evaluations; and
- Allows meaningful and constructive joint efforts to promote sustainability.

The authors have advised competitor collaborations, often in the form of trade associations, to support environmental, worker health, and sustainability goals. Progress can be made now. These are not aspirations or academic projections, but realistic objectives based on our experience in counseling companies and associations seeking to improve their sustainability and environmental, social, and corporate governance (ESG) performance.

We recognize that other countries are taking different approaches, informed by their varying competition laws, market conditions, and histories. However, the probability of new U.S. federal legislation creating a sustainability exemption from antitrust laws is low, and the need to act is increasingly urgent. The logical and expedient approach is for businesses to work together to advance sustainability goals consistent with antitrust considerations. Further, ignoring antitrust may lead to less competition and less innovation in the long term, which is clearly antagonistic to sustainability goals.

I. Introduction

From a macro perspective, both sustainability and antitrust share fundamental conceptual similarities. Both have laudable goals, but neither presents a precise answer to how their goals are best achieved in any particular situation or when past solutions need to be reconsidered for changing circumstances. Sustainability sets more expansive goals for the planet and its people. Antitrust seeks to preserve competition, innovation, and consumer choice through open markets.

Arguably, the benefits believed to arise when antitrust ensures competition are similar to sustainability initiatives that drive continuous improvement from each company. Antitrust can be a helpful tool in finding the optimum balance among sustainability's goals but, to protect the operation of markets that are a critical component of sustainability, antitrust concerns may prevent joint action by private entities that would harm competition or manipulate markets.

Neither sustainability nor antitrust can be explained or understood in a few words; even the opinions of those with depth and experience in these fields may differ. The descriptions of sustainability and antitrust that follow are not definitive, but are presented with the limited purpose of defining a starting point for those not versed in both sustainability and antitrust. Few people are experts in both antitrust and sustainability, but practitioners in both areas need to communicate to properly navigate the relevant legal and policy frameworks in search of common objectives. These descriptions are focused on the interplay between sustainability and antitrust, and the rest of the

Comment discusses the relationship between antitrust and sustainability.

II. Sustainability Promotes Decisions That Balance Social, Environmental, and Economic Values

A common description of sustainability references three pillars: social, environmental, and economic (i.e., people, planet, and prosperity). It should be stressed there is no precise definition of “sustainability.” The report of the United Nations (U.N.) World Commission on Environment and Development (Brundtland Commission), “Our Common Future,” defined “sustainability” as meeting “the needs of the present without compromising the ability of future generations to meet their own needs.”⁶

There is general agreement that the goals of sustainability are central to its description, and these goals include other aspects such as resilience, adaptive capacity, and vulnerability. The circular economy is often mentioned as supporting sustainability, because the circular economy is believed to support a more efficient use of resources, decreased waste, and reduced adverse environmental effects.⁷ The Ellen MacArthur Foundation's description is instructive:

The circular economy is a system where materials never become waste and nature is regenerated. In a circular economy, products and materials are kept in circulation through processes like maintenance, reuse, refurbishment, remanufacture, recycling, and composting. The circular economy tackles climate change and other global challenges, like biodiversity loss, waste, and pollution, by decoupling economic activity from the consumption of finite resources.

The circular economy is based on three principles, driven by design:

- Eliminate waste and pollution
- Circulate products and materials (at their highest value)
- Regenerate nature

In our current economy, we take materials from the Earth, make products from them, and eventually throw them away as waste—the process is linear. In a circular economy less waste is produced in the first place.⁸

6. U.N. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 54 (1987).

7. See U.S. Environmental Protection Agency, *What Is a Circular Economy?*, <https://www.epa.gov/circulareconomy/what-circular-economy> (last updated Dec. 14, 2023).

8. Ellen MacArthur Foundation, *Circular Economy Introduction*, <https://www.ellenmacarthurfoundation.org/topics/circular-economy-introduction/overview> (last visited Apr. 12, 2024).

Sustainability recognizes the tension between the ideals of environmental conservation and universal human welfare, not in the limited sense of antitrust consumer welfare, but in the broader sense of healthy societies, communities, and a reasonable level of prosperity.⁹

A commonly referenced collection of sustainability goals is embodied in the U.N.'s Sustainable Development Goals (SDGs), consisting of 17 interlinked goals designed to serve as a shared blueprint for peace, prosperity, people, and the planet, now and into the future. A list of the 17 SDGs with the short U.N. descriptors follow, with select elaborations from the U.N. website.¹⁰ Whether one is familiar with the SDGs or not, it is instructive for both antitrust and sustainability practitioners to identify sustainability goals that antitrust law can support by restoring or maintaining competitively healthy markets.

Goal 1: No poverty. End poverty in all its forms everywhere.

Goal 2: Zero hunger. End hunger, achieve food security and improved nutrition, and promote sustainable agriculture. This goal “contains recommendations for a fairer and more resilient multilateral trading system, which also applies to food and agricultural markets.”

Goal 3: Good health and well-being. Ensure healthy lives and promote well-being for all at all ages. Includes “stepped-up . . . product development and access to health technologies for low- and middle-income countries.”

Goal 4: Quality education. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.

Goal 5: Gender equality. Achieve gender equality and empower all women and girls.

Goal 6: Clean water and sanitation. Ensure access to water and sanitation for all.

Goal 7: Affordable and clean energy. Ensure access to affordable, reliable, sustainable, and modern energy.

Goal 8: Decent work and economic growth. Promote inclusive and sustainable economic growth, employment, and decent work for all.

Goal 9: Industry, innovation, and infrastructure. Build resilient infrastructure, promote sustainable industrialization, and foster innovation. Includes “more flexible research and development incentives to foster innovation and trade.”

Goal 10: Reduced inequalities. Reduce inequality within and among countries. Includes “resilient multilateral trading system.”

Goal 11: Sustainable cities and communities. Make cities inclusive, safe, resilient, and sustainable.

Goal 12: Responsible consumption and production. Ensure sustainable consumption and production patterns.

Goal 13: Climate action. Take urgent action to combat climate change and its impacts.

Goal 14: Life below water. Conserve and sustainably use the oceans, seas, and marine resources.

Goal 15: Life on land. Sustainably manage forests, combat desertification, halt and reverse land degradation, and halt biodiversity loss.

Goal 16: Peace, justice, and strong institutions. Promote just, peaceful, and inclusive societies.

Goal 17: Partnerships for the goals. Revitalize the global partnership for sustainable development. Includes mobilization of financial resources from diverse sources, including the private sector, for sustainable development (SDG 17.3); suggests improved access to and transfer of science, technology, and innovation for developing countries (SDGs 17.6 and 17.7); calls for a fairer and more resilient multilateral trading system as part of the governance of the global economy (SDG 17.10); and proposes better governance of the global economy in general (SDGs 17.13, 17.14, and 17.16) and beyond gross domestic product metrics (SDG 17.17), while public-private partnerships are particularly promoted (SDG 17.17).

We will return to the question of how sustainability and antitrust are connected after describing antitrust.

III. Antitrust Seeks to Preserve and Promote Competition in the Market

In *Northern Pacific Railway Co. v. United States*,¹¹ the U.S. Supreme Court described the goals and purposes of the antitrust laws as:

9. See Tom Kuhlman & John Farrington, *What Is Sustainability?*, 2 SUSTAINABILITY 3436, 3436-48 (2010); see also Ben Purvis et al., *Three Pillars of Sustainability: In Search of Conceptual Origins*, 14 SUSTAINABILITY SCI. 681, 681-95 (2019).

10. See U.N., *Sustainable Development Goals (SDGs)*, <https://www.un.org/en/common-agenda/sustainable-development-goals> (last visited Apr. 12, 2024). See also U.N., *Our Common Agenda*, <https://www.un.org/en/common-agenda> (last visited Apr. 12, 2024) (outlining the Secretary-General's vision for the future of global cooperation).

11. 356 U.S. 1, 4-5 (1958).

- a comprehensive charter of economic liberty,
- preserving free and unfettered competition as a rule of trade,
- viewing competition as yielding the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, and
- supporting an environment conducive to the preservation of our democratic, political, and social institutions.

Two esteemed antitrust professors wrote: “The main goal of U.S. antitrust laws is to stop anticompetitive private conduct that is not otherwise effectively controlled or constrained [by the market or by government].”¹² This formulation can help guide a discussion of the relationship between antitrust and sustainability and other governmental action.

A “very short” 30-page summary from a 2023 textbook sponsored by the Antitrust Law Section of the American Bar Association observes:

The antitrust statutes confer on courts and enforcement agencies a specific set of functions, of which the most important are: (1) prohibiting and remedying anticompetitive agreements; (2) prohibiting and remedying certain kinds of anticompetitive conduct by businesses with significant market power; and (3) prohibiting and remedying anticompetitive mergers and acquisitions.

What unifies antitrust is its fundamental concern with two organizing ideas: “competition,” on the one hand, by which we mean something like “the process of rivalry between suppliers, or between purchasers, to be chosen as trading partners” and “market (or monopoly) power,” on the other, by which we mean something like “the ability of a supplier or purchaser to impose less desirable terms (price, quality, etc.) on trading partners by virtue of a lack of competitive pressure.”

Antitrust touches very deep normative questions: that is, questions about what we should do or what it would be best to do. Our instincts about antitrust rules and practices will depend, in part, on what else we think about trading, markets, freedom, power, welfare, and the relationship between law and economics.¹³

Regardless of how antitrust is characterized, the fundamental antitrust question for evaluating any action or proposed action is whether it will harm competition. Antitrust does not seek to protect individual companies, but looks at

the overall competitive health of the market. Applying this perspective in relation to sustainability is discussed in the next part.

IV. The Relationship Between Antitrust and Sustainability

A. Antitrust Can Promote Healthy Competition in Markets Relevant to Sustainability

Long before the terms “sustainability” or “circular economy” were coined, antitrust was used to address certain market segments such as recycling, a form of resource recovery. Given all the governmental and public support for increasing recycling, it is not surprising that companies lose sight of the fact that good intentions are not a defense. We need to be reminded, for example, that antitrust laws have been enforced for more than 70 years to protect competition, including in recycling markets, and to attack agreements hindering innovation. Four examples are instructive:

- Monopolization charges upheld based on a manufacturer hindering recycling. In a legendary 1945 decision, Alcoa was found guilty of monopolizing the aluminum market through pricing and practices intended to discourage the use of recycled aluminum.¹⁴
- Divestiture required to correct dominance in specialized recycling facilities (1979 lead recycling plants).¹⁵
- Waste Management Inc. acquisition deemed an illegal attempt to gain large market share in trash collection market.¹⁶
- DOJ sued a joint venture of major U.S. automobile manufacturers for suppressing innovation in environmental protection technology to reduce tailpipe emissions (1970).¹⁷ The action was settled through a consent decree enjoining the defendants from engaging in the allegedly illegal conduct.

The International Developments and Comments Task Force of the Section of Antitrust Law produced a report in 2021 titled “Sustainability and Competition Law.”¹⁸ This

12. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTI-TRUST LAW* (4th ed. 2023).

13. DANIEL FRANCIS & CHRISTOPHER JON SPRIGMAN, *ANTI-TRUST: PRINCIPLES, CASES, AND MATERIALS 1* (2023). The authors note that “antitrust has nothing to do with ‘trust’ in the everyday sense,” but refers to a form of business organization that combines separate corporate entities. *Id.* at 1 n.1.

14. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). This Supreme Court case was certified to the U.S. Court of Appeals for the Second Circuit because no quorum of six Supreme Court justices was eligible to participate in the case.

15. *RSR Corp. v. Federal Trade Comm’n*, 602 F.2d 1317 (9th Cir. 1979) (requiring sale of three of four acquired lead recycling plants).

16. *United States v. Waste Mgmt., Inc.*, 743 F.2d 976 (2d Cir. 1984).

17. *United States v. Automobile Mfrs. Ass’n*, 307 F. Supp. 617 (C.D. Cal. 1970); *United States v. Motor Vehicle Mfrs. Ass’n of U.S.*, 643 F.2d 644 (9th Cir. 1981).

18. AMERICAN BAR ASSOCIATION ANTI-TRUST LAW SECTION, *SUSTAINABILITY AND COMPETITION LAW: REPORT OF THE INTERNATIONAL DEVELOPMENTS*

long history rests on the application of general antitrust principles to each specific case. But these cases did not trigger the development of specialized economic models or government antitrust guidance addressing recycling, sustainability, or circular markets.

B. Antitrust Seeks to Avoid Harm to Competition From Standard-Setting, Certification, and Statistical Programs

We live in an interconnected world for which standards, certification programs, and information sharing are essential. Antitrust problems can arise when standards, certification programs, or information collection (statistical programs) become a device for price-fixing, restraining output, chilling innovation, creating boycotts, or unreasonably excluding competitors from the market. Sustainability programs and related efforts to create definitions, standards, certification programs, and databases to support collaboration and advancement need to consider antitrust implications at the outset of the program's design. Sustainability programs themselves need to be resilient to withstand antitrust scrutiny should companies or antitrust enforcers challenge the sustainability programs' effects on competition.

Standard-setting may promote competition by improving choice and product interchangeability. But standards may also suppress competition or technology. Similarly, even a well-developed and acceptable standard may, over time, begin to stifle competition if it does not allow for technological and other market developments. The Supreme Court aptly summarized this in *Allied Tube*:

Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard setting associations have traditionally been objects of antitrust scrutiny. When, however, private associations promulgate safety standards based on the merits of objective expert judgements and through procedures that prevent the standard setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most courts to apply rule-of-reason analysis to product standard-setting by private associations.¹⁹

The statements in the 1988 *Allied Tube* decision echo those made two generations earlier in *Maple Flooring*.²⁰ Unless standard-setting constitutes price-fixing, courts generally evaluate standard-setting under the rule of rea-

son.²¹ The rule-of-reason analysis means that the courts will look at all the circumstances in each case to determine whether competition has been harmed.²²

U.S. antitrust law takes a relatively permissive approach to information exchanges, analyzing such arrangements under the rule of reason. The facts and circumstances surrounding the information exchange are important. Generally, information exchanges are more likely to be condemned when they involve frequent sharing of granular, current, or forward-looking competitively sensitive information, such as price, output, cost, or business strategies. The level of industry consolidation can elevate the antitrust risk associated with information exchanges. The primary question is whether the information exchange facilitates collusion or market manipulation.

This introduction to standards, certification programs, and information-sharing is intended to sensitize readers to criteria that need to be considered in sustainability program design and implementation. It is an active area for standards development organizations and other stakeholders.²³

C. Antitrust Does Not Consider Whether an Action Promotes or Deters Sustainability

There is historical support for reading the antitrust laws as "concerned about the economic impact that impediments to competition posed, not simply the bigness of companies," meaning that size alone does not offend the antitrust laws.²⁴ Even considering its populist roots, however, the historical development of U.S. antitrust law provides no "sustainability" defense or exemption.

Thus, an agreement among raw materials suppliers to decline to sell to companies that make "less sustainable" products, or an agreement among retailers to switch to particular packaging or products, could be challenged as a conspiracy in restraint of trade. Antitrust does not prevent a company from taking those actions independently. Rather, antitrust targets joint action or abuse of monopoly power that harms competition. Stated more directly, antitrust does not have tools to assess whether an action harms or improves the environment or public health, be it clearcutting, overgrazing, tobacco, firearms, lead-coated pottery, or dangerous consumer products. Antitrust examines the competitive functioning of the markets that produce those materials.

Even if private parties wanted to act based on sustainability principles, and federal antitrust enforcers agreed to waive enforcement, those agencies and individuals would

AND COMMENTS TASK FORCE (2021), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/august-2021/comments-82621-greece.pdf.

19. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (citations omitted).

20. *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563 (1925).

21. See *Allied Tube*, 486 U.S. at 500; see also *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988).

22. Justice Louis Brandeis' description of the rule of reason in *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 244 (1918), remains instructive today: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

23. See, e.g., ASTM International, *ASTM Sustainability Reference Database*, <https://www.astm.org/get-involved/technical-committees/other-programs-services/sustainability-reference.html> (last visited Apr. 12, 2024).

24. See Phillips, *supra* note 3.

likely run afoul of the major questions doctrine in *West Virginia v. Environmental Protection Agency* (2022).²⁵ Antitrust, as we know it today, is a product of judicial interpretation and is highly influenced by prevailing economic theory and the current views of political leaders. As the Court stated in *West Virginia*, precedent teaches that there are “extraordinary cases” in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer this authority.²⁶

Assume, for discussion, that antitrust enforcers, the courts, or private entities are inclined to apply the antitrust laws through the lens of sustainability. How would the government or courts assure that their application of the antitrust laws in a particular case supports sustainability’s core concepts of optimum social, environmental, and economic welfare, particularly without an agreed-upon definition of “sustainability”? Assume that a group of companies agrees to make “more sustainable products” by switching to certain alternative materials viewed as less toxic and to improve production efficiencies, thereby lowering consumer prices. Sounds great, right?

But it is not enough to answer the sustainability question. What if the new materials were produced by forced labor or child labor? What if the new materials were heavier and increased transportation fuel consumption or used significantly more electric power to produce? What if the new materials would consume a significant amount of a rare earth element, whose availability would be threatened? These questions and others need to be assessed and weighed before a sustainability benefit can be demonstrated and, in an integrated sustainability and antitrust review, before the merits of any defense or exception for likely harm to competition can be considered. This is precisely because decisions about what products or activities are “sustainable”—or more precisely “more sustainable”—than some other alternatives necessarily involve trade offs and judgment calls.

In contrast to specific claims of environmental or consumer benefit, sustainability claims are expansive, meaning that broad sustainability claims are difficult to substantiate. The FTC views broad sustainability claims as likely to be false or deceptive under its guidelines for environmental claims, which are part of the Commission’s truth-in-advertising efforts.²⁷ The FTC does not ban or restrict specific

claims as part of an effort to advance behavior. Apart from the potential constitutional limitations, the FTC’s role in furthering truth in advertising is grounded in its authority under §5 of the FTC Act, and is designed to help consumers make informed choices and to ensure a level playing field among competitors who are all expected to play by fair advertising rules.

In practice, governments rarely act based on a comprehensive sustainability analysis. Rather, discrete steps are taken in each area, be it environmental (climate change and pollution prevention), societal (health care and civil rights), or economic (ban products produced from cheap forced labor). This is also a product of government agencies having differing powers as conferred by constitutional or legislative authorization.

D. Antitrust Economics and Circular Economy Analysis

To better frame this question for those not familiar with the antitrust approach, relevant markets are created as an analytical method or constructed for competition analysis.²⁸ A relevant market typically has two dimensions: a product dimension and a geographic dimension.

A relevant product market consists of all products (or services) that are close substitutes for one another. A much-cited Supreme Court case held that this included “industry or public recognition of . . . the product’s peculiar characteristics and uses including a consideration of functional and economic substitutability, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”²⁹ A basic product market inquiry is finding all products that compete or may compete with each other in the market.

A relevant geographic market is a geographic area within which the relevant products are sold and for which the competitive conditions are sufficiently alike. While the protocols for market definition have been argued for decades, market definition is the first step in judicial analysis and litigation.³⁰

25. 597 U.S. 697, 52 ELR 20077 (2022).

26. *Id.* at 4.

27. The FTC does not ban or restrict specific claims as part of an effort to advance behavior. See FTC, *Green Guides*, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> (last visited Apr. 12, 2024); see also FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260 (2012). In May 2023, the FTC held a public workshop to examine recyclable claims as part of its review of the Guides for the Use of Environmental Marketing Claims (“Green Guides”). The workshop was split into three panels, discussing current trends, consumer perception, and potential updates to the Commission’s current guidance on recyclable claims. The workshops did not address the treatment of agreements among competitors to avoid making recyclable or other specific claims. *Talking Trash at the FTC: Recyclable Claims and the Green Guides*, FTC (May 23,

2023), <https://www.ftc.gov/news-events/events/2023/05/talking-trash-ftc-recyclable-claims-green-guides>. See also Carolyn Kennedy, “Sustainable Fashion’s True Colors: A Proposal for ‘Restyling’ the FTC Green Guides,” 53 ELR 10751 (Sept. 2023), <https://www.elr.info/articles/elr-articles/sustainable-fashion-true-colors-proposal-restyling-ftc-green-guides>.

28. AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION, ANTITRUST LAW DEVELOPMENTS 603 (9th ed. 2022).

29. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

30. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 (2018) (“Without a definition of [the] market there is no way to measure [the defendant’s] ability to lessen or destroy competition.” (alterations in original)). See, e.g., Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 129 (2007); David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293, 293-345 (2020). David Glasner and Sean Sullivan conclude that “there is no meaningful natural market, relevant markets are just analytic constructs. . . . [that] can be defined only with respect to particular theories of anticompetitive harm. . . .” and multiple relevant markets can and should be defined to aid antitrust analysis. *Id.* at 345.

It is uncertain whether antitrust economic analysis has been developed to address the additional complexities of sustainability, particularly a circular economy's extended chain of commerce that incorporates post-use material recovery, recycling, and the products made from recycled materials, be it mechanical recycling or advanced recycling (biological, chemical, or pyrolysis). A commonly referenced graphic of the circular economy is shown in Figure 1 (next page).³¹ The “butterfly” diagram presents major components, with the goals of reducing negative externalities and systematic leakage appearing at the bottom of the document. In this context, systematic leakage refers to waste that does not enter the local waste management system or is not otherwise captured.

In theory, antitrust should consider all relevant markets when evaluating whether an action or event is anticompetitive. In practice, antitrust analysis, by both lawyers and economists, is usually more constrained and horizontally focused, which ignores upstream and downstream consequences throughout the supply chain. Historically, the courts have been reluctant to look expansively. While antitrust analysis considers efficiencies, the creation of efficiencies outside the relevant market are not considered; they are “out-of-market” efficiencies.³²

That analytical task gets more complicated when one must account for effects on multiple markets ranging from companies gathering materials for recycling, to recyclers, companies producing goods from recycled materials, and related distribution, logistic, and intellectual property factors. For example, the raw materials suppliers for recyclers are often local governments managing residential and commercial waste operations, or private industrial waste management arrangements. Whether or how antitrust would ensure a competitively priced supply for recyclers is an open question, given the police powers delegated to state and local governments,³³ and those authorities acting contractually through private parties.

How will antitrust assess horizontal competition between polymer producers and recyclers, whose product is the recycled form of the same polymer and whose customers may be the same? Is this the same market or is it different based on advertising directed at retail consumers, with the use of recycled materials in consumer products a perceived competitive advantage? And is recyclability the best envi-

ronmental choice if recycling infrastructure is limited and climate burdens of collection and transport are considered?

A circular economy may create vertical acquisition pressure on materials suppliers faced with lower demand. Product producers may seek to be early adopters and acquire a competitive advantage by collaborating or merging with sources of recycled materials and learning how to incorporate recycle efficiently and effectively into existing products. With limited recycle available, some product producers may fear being disadvantaged by the lack of available recycled materials. And with both the best of intentions and maximal technological ability to act on sustainability and circularity goals, neither antitrust nor sustainability policies are equipped to eliminate the human behavior that generates waste and litter that evade the solid waste management system, a broader societal challenge. Antitrust practitioners, academics, and policymakers would be well-advised to work through these issues with support from those versed in sustainability and the circular economy.

V. Modern Markets, Antitrust, and Sustainability

Modern markets rest on two pillars. The first is the legal and institutional framework established by government. These include:

- Business organizations, such as corporations, with limited liability for owners,
- Money (i.e., currency),
- Securities and insurance market regulation,
- Roads and ports,
- Support for trade among states and nations,
- Buying goods and services from private undertakings,³⁴
- Addressing significant negative externalities (i.e., market failures), such as environmental pollution, and
- Business law, including competition laws, and courts to enforce the law and contract rights.

The second pillar of modern markets is the moral or ethical framework arising from society. Like most human relationships, long-term business relationships are based on trust. The ethical framework includes:

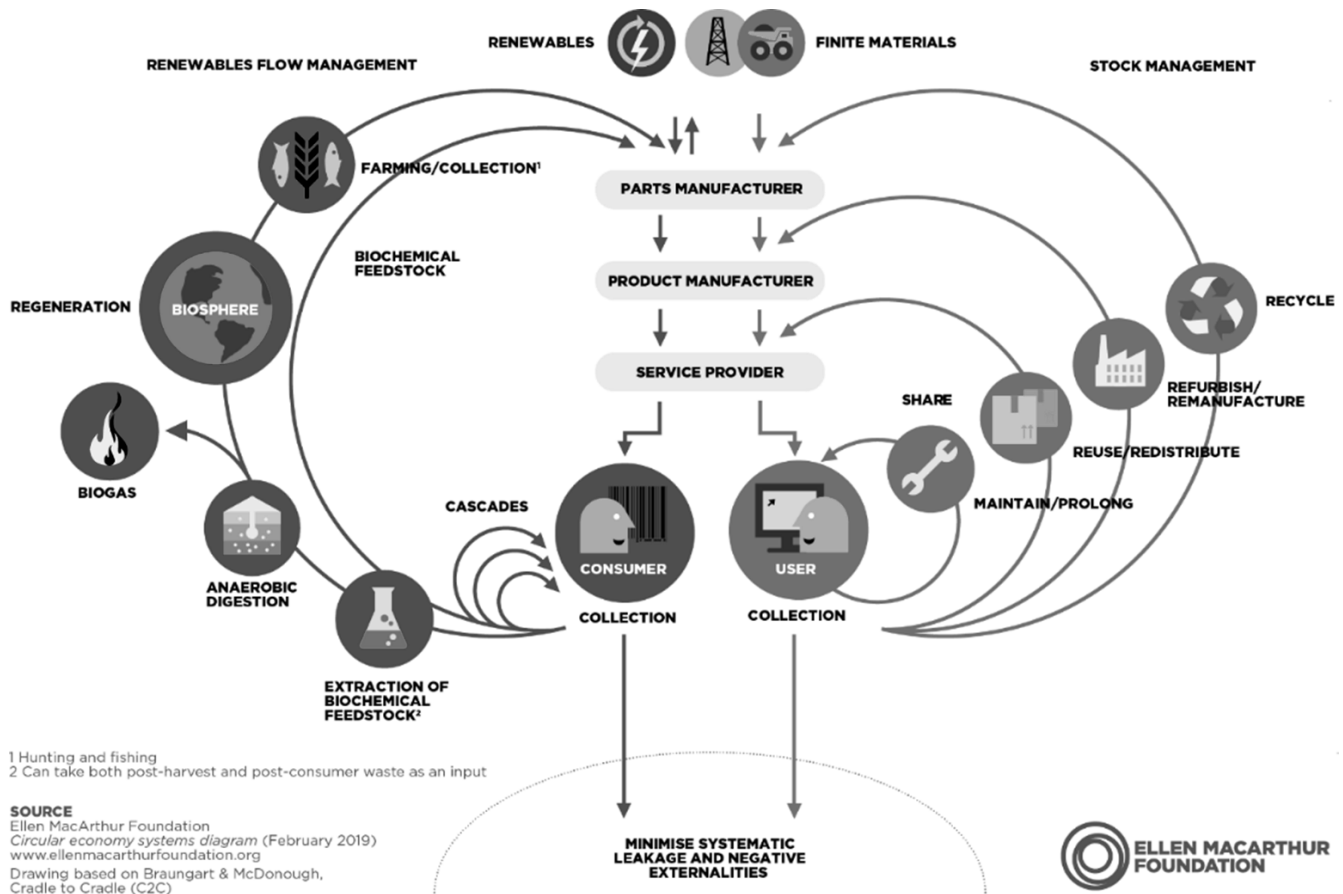
31. Ellen MacArthur Foundation, *The Butterfly Diagram: Visualising the Circular Economy*, <https://www.ellenmacarthurfoundation.org/circular-economy-diagram> (last visited Apr. 12, 2024).

32. John M. Yun, *Reevaluating Out-of-Market Efficiencies in Antitrust*, 54 ARIZ. STATE L.J. 1261, 1265 (2022) (“The principal [of “out-of-market” efficiencies] emerged in the Supreme Court’s *Philadelphia National Bank (PNB)* decision, which set the precedent—at least for horizontal mergers—that efficiencies are disqualified if they are not in the same ‘relevant market’ as the alleged harm.”) (citing *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963)).

33. The police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants. The police power is firmly rooted in the Tenth Amendment of the U.S. Constitution, which reserves to the states powers not delegated to the federal government.

34. U.K. OFFICE OF FAIR TRADING, *GOVERNMENT IN MARKETS: WHY COMPETITION MATTERS—A GUIDE FOR POLICY MAKERS* (2009), <https://assets.publishing.service.gov.uk/media/5a7c0d5240f0b645ba3c666a/OFT1113.pdf> (providing original text adopted as guidance by the U.K. Competition and Markets Authority, which is unamended and does not reflect developments in case law, legislation, or practice since its original publication); U.K. Competition and Markets Authority, *Guidance: Government in Markets: OFT1113*, <https://www.gov.uk/government/publications/government-in-markets> (last visited Apr. 12, 2024).

Figure 1. The Circular Economy



- Individual effort and responsibility,
- Independence based on ownership,
- Self-discipline,
- Sense of justice,
- Honesty,
- Fairness,
- Respect for human dignity, and
- The responsibility of planning one’s life—prudence, daring, calculation, and saving.³⁵

Sustainability efforts also depend on both the societal and governmental pillars of modern markets. While rarely mentioned, these societal and governmental aspects of modern markets merit consideration from sustainability and antitrust perspectives when developing policies and, particularly, when the goal seeks to change business and societal behavior.

VI. Conclusion

Sustainability and antitrust have laudable goals, but neither precisely answers how the goals are best achieved in any particular situation or identifies when past solutions need to be reconsidered for changing circumstances. Sustainability sets more expansive goals for the planet and its people, while antitrust seeks to preserve competition, innovation, and consumer choice. But the 17 U.N. SDGs contain many touchpoints that antitrust supports, particularly economic welfare.

Antitrust is designed to prevent joint action by private entities that would harm competition or manipulate markets, thus promoting healthy markets that are a critical component of sustainability, but can help find the optimum balance among sustainability’s goals. Sustainability and the transition to a circular economy will create challenges for antitrust analysis by increasing the complexity of the existing chain of commerce. Antitrust is not an enemy of sustainability goals, but an essential companion to maintain modern markets that support competition-driven efficiencies and innovation, which promote consumer choice and freedom of truthful commercial communications.

35. See, e.g., WILHELM RÖPKE, *A HUMANE ECONOMY: THE SOCIAL FRAMEWORK OF THE FREE MARKET* 125-26 (3d ed. 1998); Tihámér Tóth, *Is There a Vatican School for Competition Policy?*, 46 *Loy. U. L.J.* 583 (2015).