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Expert Q&A on Antitrust Issues with ESG Collaborations

by Practical Law Antitrust

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An expert Q&A with Joshua Shapiro of Thompson Hine LLP on the antitrust risks of environmental, social and governance (ESG) collaborations, the current views of the Antitrust Division of the Department of Justice and the Federal Trade Commission on ESG collaborations, and best practices for advising clients.

Given mounting concerns over sustainability, climate change and social justice, public and private corporations have been under increasing pressure from investors and key stakeholders over the last several years to implement environmental, social and governance (ESG) criteria when identifying material risks and growth opportunities. The federal government has joined the chorus too; President Biden has identified ESG as an administration priority. ESG rulemaking by federal agencies is already in progress, for example, the SEC has proposed ESG-related disclosures for public companies.

Even though companies employing ESG criteria may be pursuing results that are consistent with and indeed encouraged by current public policy, ESG activities that involve collaboration among competitors may still give rise to antitrust risk. As then-Assistant Attorney General Makan Delrahim put it, "[t]he loftiest of purported motivations do not excuse anti-competitive collusion among rivals" (see Makan Delrahim, DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion, USA Today (Sept. 12, 2019)). Accordingly, companies need to be aware of potential antitrust pitfalls regarding ESG.

What antitrust risks do potential ESG collaborations raise?

ESG collaborations with competitors can be procompetitive or perhaps competitively neutral. However, it is critical to remember that traditional antitrust principles regarding competitor interactions apply, even if ESG is the driving force behind the collaboration.

Any collaboration with a competitor, whether on a bilateral basis or through an industry group, has the potential to violate the antitrust laws. An agreement among companies to fix prices or restrict output could be challenged as a per se violation of Section 1 of the Sherman Act, meaning it is so inherently anticompetitive that there can be no justification. Per se violations can even result in criminal penalties, including imprisonment. The fact that companies may be agreeing on prices or premiums of newly-rolled out "green" products or agreeing to sunset less-environmentally friendly products provides no safe harbor.

Even if an ESG collaboration does not involve an explicit agreement relating to price or output, a competitor collaboration could be deemed unlawful if it increases the ability or incentive of firms to raise prices or reduce output, quality, service, or innovation. For example, in 2020, the Antitrust Division of the Department of Justice (DOJ) launched a probe against several automakers relating to an agreement with the State of California to adhere to emission standards that were stricter than those being sought by the federal government at the time. Although the investigation was dropped, the DOJ's inquiry focused on whether the agreement restricted competition by potentially limiting the types of cars and trucks that would be offered to consumers (see Reuters: U.S. ends antitrust probe of four automakers over California emissions deal (Feb. 7, 2020)).

How will the antitrust agencies evaluate ESG collaborations? Are there risks of per se treatment?

The US antitrust agencies already have a blueprint for how to evaluate competitor collaborations. In April 2000, the Federal Trade Commission (FTC) and DOJ's jointly issued the Antitrust Guidelines for Collaborations Among Competitors, which generally applies to all industries and competitor collaborations, so it is unlikely that either the FTC or DOJ will treat ESG initiatives differently than other competitor collaborations. While most ESG collaborations will be evaluated under the less restrictive rule of reason, which balances the procompetitive benefits against the anticompetitive harms, ESG collaborations potentially could be per se unlawful if they give rise to agreements that fix prices or output, rig bids, or share or allocate markets.

Do you expect ESG collaborations to be an important area of focus for the DOJ and FTC under the current administration?

While I do not think that the DOJ or FTC will specifically target ESG initiatives as the DOJ did during the Trump administration, for example in challenging automakers regarding an agreement to adhere to higher emissions standards, the fact that ESG is becoming an increasing focus of private industry likely will lead to more ESG collaborations among competitors over the coming years. Any competitor collaboration brings antitrust risk and therefore the possibility of (and opportunity for) scrutiny by the antitrust regulators.

What role do you see companies' ESG policies having in merger review?

It has been reported that the FTC has started asking some merging parties about how proposed deals would affect their current ESG policies. This is consistent with the recent push by the antitrust agencies under the Biden administration to explore new standards under which to assess harm to competition, potentially moving away from the traditional consumer welfare standard. There is no indication today, however, that ESG will play a significant role in merger reviews going forward, and it is unclear how if at all the FTC has used details regarding ESG in its decision making process so far. Moreover, it is important to note that, Jonathan Kanter, the Assistant Attorney General for the Antitrust Division, stated in his Senate confirmation hearings that ESG concerns were not relevant if not related to competition.

If, however, a company has used ESG collaborations as a means to facilitate collusion on price or output, it is possible that this effort could be uncovered during a merger investigation. Antitrust enforcers pay careful attention to the documents produced by the parties in merger investigations, particularly those that involve any direct or indirect communications between competitors. Indeed, in recent years, the Antitrust Division has brought several civil and criminal prosecutions for anticompetitive conduct that was exposed from documents produced in a response to a Second Request. Beyond criminal exposure for the merging parties, these investigations led to very costly and time-consuming follow-on class action lawsuits. All this underscores the need for parties (through their counsel) to pay special attention to any potential document productions to the government that involve communications with competitors and consider whether those communications are problematic.

How are you advising your clients to approach ESG collaborations?

As with any potential competitor collaboration, companies should seek antitrust guidance before proceeding. First and foremost, as a guiding principle, companies should always act independently when setting their pricing or output strategies and making competitive decisions. Nevertheless, there are several steps that can be taken to mitigate the antitrust risk associated with an ESG collaboration:

- Before meeting with competitors:
  - prepare a written agenda that was pre-approved by antitrust counsel;
  - stick to the agenda;
  - record accurate meeting minutes, avoid any informal or "side" meetings among the participating companies (or any subset of those); and
  - if practicable, include counsel in any meetings among competitors.
- Avoid exchanging or discussing any competitively sensitive information (such as prices, volumes, cost details, strategic or marketing plans, plans for product development or product withdrawal, or customer and supplier information) without approval to do so in advance by antitrust counsel.
- To the extent an industry group is involved in standard setting or ESG "certification," it is important to ensure that the standard or certification adopted by the group does not discriminate against, exclude, or damage other competitors.

For more on these topics generally, see Practice Notes:

- Competitor Collaborations in the US.
- Information Exchanges Among Competitors (Non-Merger).
- Antitrust Risks in Standard-Setting Organizations.