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PERSPECTIVES

ANTITRUST RISKS RELATED TO ESG EFFORTS

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Over the past decade, environmental, social and governance (ESG) concerns have become a hot topic in corporate boardrooms. As concerns about climate change have accelerated, so too have companies' efforts to pursue and invest in ESG goals. ESG refers to a framework of non-financial considerations, such as environmental sustainability, that companies factor into their strategy and investments. Some companies have begun collaborating with others in their industry in furtherance of these considerations. These collaboration efforts run the gamut, from companies entering into agreements to offer greener products or limit emissions, to industry groups and trade associations promulgating standard-setting recommendations to industry players. For example, over 100 banks representing over 40 percent of global banking assets have joined the United Nations (UN)-backed Net-Zero Banking Alliance, pledging to conform their lending and investment practices to target net-zero greenhouse gas emissions by 2050.

Because collective action problems make it challenging for companies to unilaterally engage in ESG efforts without compromising other financial goals, collaboration among competitors within an industry is perhaps a necessary precondition to achieving any significant climate change results. Firms that invest in environmental efforts, such as

lowering emissions, will likely incur costs not shared by their competitors that choose not to invest in similar green efforts. As a result, those competitors may be able to offer consumers lower prices or otherwise gain a competitive advantage over the firm pursuing ESG goals. Collaboration among firms resolves this collective action problem and enables companies to pursue environmentally friendly policies without jeopardising their bottom line.

Many would praise these collaborative efforts to mitigate climate change and promote environmental sustainability. Indeed, investors have become increasingly conscious of environmental concerns and may view such efforts favourably when making investment decisions. But companies should consider their actions carefully before entering into any such collaborations: while their proponents say they produce a net benefit to society, they nonetheless may run afoul of US antitrust laws

prohibiting concerted action between competitors, as enshrined in section 1 of the Sherman Act, which generally prohibits unreasonable restraints on trade that harms competition. And notably, there are no carve outs in US antitrust law for agreements intended to curb climate change or provide other societal benefits. From an antitrust perspective, to paraphrase Lina Khan, chair of the Federal Trade Commission (FTC), pursuing policies to "make the world a better place", is not a shield against liability.

It should come as no surprise that climate collaborations that serve as a pretext for agreements intended to directly impede competition are generally illegal under antitrust law. But even climate collaborations that indirectly impede competition by leading firms to restrict output, set prices or boycott non-ESG compliant actors could arguably be subject to liability under the Sherman Act.

Climate collaborations that do not have the intent of hurting competition, but that indirectly do so, are likely to be subject to the so-called 'rule of reason' test in the US. Under the rule of reason, courts will engage in a fact-intensive analysis that balances the pro-competitive justifications of an agreement among firms against its anti-competitive effects. Notably, an agreement's pro- and anti-competitive effects are analysed with reference to the relevant market in which the firms are operating. For this reason, the legal framework of antitrust law in the US leaves little room for courts to consider the global, prospective benefits of agreements aimed at curbing climate change. Even if such effects could be considered 'pro-competitive' in a sense and may be more aptly thought of as an externality – US antitrust law's narrow focus on the relevant market could preclude courts from considering the universal environmental benefits of climate collaborations. And if an agreement that tends to impede competition lacks any countervailing pro-competitive justifications in the relevant market, it is entirely possible a court could find that the agreement violates the Sherman Act's prohibition on horizontal restraints.

"The potential antitrust risk posed by ESG collaborations should not be taken lightly, but nor should companies altogether eschew collaborations that seek to achieve ESG goals."

The US Congress has not adapted antitrust law to make room for climate collaborations that indirectly hurt competition, leaving such collaborations vulnerable to legal attacks. On the contrary, certain members of Congress have warned that ESG-related agreements may result in antitrust liability. For example, in November 2022, a group of Republican senators sent letters to over 50 of the country's largest law firms. The senators wrote that the law firms should advise their clients of the risks incurred by participating in "climate cartels and other ill-advised ESG schemes" and warned that in the coming years, "Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG".

Additionally, in December 2022, a group of members of the House of Representatives sent a letter to two members of the steering committee of the Climate Action 100+, an investor-led initiative aimed at incentivising the largest corporate emitters of greenhouse gases to take necessary action on climate change. In the letter, they wrote that the group "seems to work like a cartel" and requested information about conduct the group engaged in on the basis that it may violate US antitrust law. This scrutiny continues: in late April, the attorney general of Louisiana opened an investigation into the Climate Action 100+.

Companies thus face the quandary of how to undertake collective action to combat climate change, action that is arguably societally beneficial and desirable to many investors, such as members of the Climate Action 100+, without subjecting themselves to antitrust risk. Jurisdictions outside of the US have taken a more proactive approach to negotiating this conflict. Some European countries have explicitly instructed that parties can defend agreements aimed at benefitting the environment by pointing to the broad benefits these agreements have on consumers across the country. As a result, companies in these jurisdictions can steer clear of antitrust liability without proving that the agreement has substantial benefits for consumers in the relevant market.

One of the first countries to make this change was Austria. In September 2021, Austria revised its competition law to expressly acknowledge that sustainability is a valid justification for agreements that might otherwise run afoul of the country's antitrust law, which permits only those agreements resulting in consumers enjoying a fair share of the benefit. Specifically, the revised law clarifies that consumers are "deemed to enjoy a fair share of the benefits" resulting from an agreement if "those benefits contribute substantially to an ecologically sustainable or climate-neutral economy". This revision solved the previously challenging issue

of proving consumer benefits in the context of agreements advancing environmental concerns.

Similarly, in February 2023, the UK's Competition and Markets Authority (CMA) published draft guidance aimed at ensuring that "competition law does not impede legitimate collaboration between business that is necessary to the promotion or protection of environmental sustainability". The guidance takes a similar approach to that of the Austrian legislature: it provides that for climate change agreements, parties can prove benefit to consumers by "taking into account the totality of the benefits […] arising from the agreement, rather than apportioning those benefits between consumers within the market affected by the agreement and those in other markets". Thus, in the case of an agreement between delivery companies to switch to electric vehicles, the parties can prove that consumers enjoy a "fair share" of the agreement's benefits by referencing the broader benefits of decreased carbon dioxide emissions to all UK consumers.

Companies operating in the US without the benefit of such guidance can nonetheless take common sense steps to mitigate potential antitrust risks. First, companies should seek advice from counsel before entering any ESG agreements, as this is an evolving landscape. Second, companies and other industry participants should design and commit to industry standards with antitrust risk in mind. For instance, industry groups could opt for voluntary and non-binding codes of conduct rather than mandatory standards that all members must abide by. Companies should carefully scrutinise any mandatory industry standards before pledging their commitment and avoid participating in industry groups that have not had their protocol vetted by antitrust counsel. Third, ESG agreements that share or expose sensitive competitor information present greater risk and should be scrutinised more carefully. One such example is agreements involving audits of competitors or other parties in the supply chain, as well as agreements involving the exchange of sensitive information such as price, cost, production levels, business plans or employee wages. If such information must be shared, doing so in an aggregated, anonymised form may help mitigate antitrust risk. Finally, firms should be especially careful about engaging in group boycotts of consumers or competitors, such as refusing to deal with suppliers that do not comply with certain ESG standards.

On the other hand, certain practices are unlikely to raise antitrust concerns. Issuing unilateral statements on corporate ESG goals rather than entering into agreements with competitors is the surest way to steer clear of antitrust risk. There is also little risk associated with lobbying the government for greener regulations and industry requirements, as such petitioning activity is shielded

from antitrust liability under the Noerr-Pennington doctrine. Finally, the Antitrust Guidelines for Collaborations Among Competitors, authored by the FTC and the Department of Justice (DOJ), provides a safe harbour for collaboration among competitors that collectively hold no more than 20 percent of the relevant market. Under this safe harbour, the FTC and DOJ will not, absent extraordinary circumstances, challenge agreements that would require a detailed market analysis to prove the agreement's anti-competitive effects.

The potential antitrust risk posed by ESG collaborations should not be taken lightly, but nor should companies altogether eschew collaborations that seek to achieve ESG goals. By balancing potential collective action opportunities against the attendant antitrust risks, companies can adopt strategies that serve current stakeholders, potential investors and the environment. R&C

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