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Antitrust and ESG

As boards continue to evaluate how environmental, social and governance ("ESG") considerations factor into corporate operations, some lawmakers and regulators have raised potential antitrust concerns about coordinated efforts. For example, several U.S. Senators sent letters to law firms admonishing them to advise clients of increased congressional scrutiny of "institutionalized antitrust violations being committed in the name of ESG." And, a group of state attorneys general inquired whether an investor-driven initiative on climate risks called Climate Action 100+ implicates antitrust laws. FTC Chair Lina Khan opined last month in The Wall Street Journal that ESG benefits are no defense for otherwise illegal mergers.

As we have previously explained (most recently here), a board's decision to take account of ESG factors is neither a corporate charitable activity nor anticompetitive. Quite the opposite. It reflects a business judgment that taking account of ESG matters, such as long-term sustainability, can create value and reduce risk for all company stakeholders. Some regulators in the United States have recognized that ESG considerations and antitrust principles are not in conflict. For example, a recent letter signed by seventeen state AGs argues that mutual support of climate policies by investment fund managers does not violate the Sherman Act. Antitrust regulators in the United Kingdom and the European Union, moreover, have offered specific guidance on applying antitrust laws to sustainability agreements and similar multi-firm conduct. As these regulators correctly recognize, in most circumstances, antitrust principles should not be a serious impediment to incorporating ESG into decision-making that is otherwise in the corporate interest.

Other than in rare circumstances, antitrust law is generally concerned with collaborative behavior between competing firms and negative effects on consumers. Companies seeking to take action to align themselves better with customer or market preferences, reduce their carbon footprint, choose suppliers who are themselves more sustainable (and thus reliable in the long term), be responsive to investor priorities, or otherwise take account of ESG factors, all in the interest of creating long-term value, generally have wide liberty in implementing such single-firm policies.

Collaborative conduct motivated by ESG considerations should not, and need not, generally run afoul of core antitrust prohibitions, such as price fixing, bid rigging, boycotts, or market allocation schemes that give rise to "per se" illegality under the antitrust laws—meaning that courts would deem such behavior illegal without analyzing market effects. Non-core collaborative conduct is analyzed under the so-called "rule of reason," also called the "effects balancing test" in Europe, where the proposed conduct is analyzed for its purposes and effects and is not generally illegal unless the effects on competition outweigh its procompetitive benefits. While some collaboration in connection with ESG matters could, in theory, have incidental effects on competition, for the most part, initiatives such as sharing best practices, setting voluntary standards or nonexclusive certifications, and sharing information that is not competitively sensitive, are not likely to run afoul of antitrust laws when subjected to a reasonableness standard. This is particularly the case where there is no coercion (*e.g.*, enforcement of standards by members) or exclusion (where some firms may be excluded from an initiative or qualification), especially in the absence of market power.

Antitrust enforcers are correct that there is no antitrust exemption for activities related to ESG matters; however, this is far from tantamount to saying that any multi-firm matter wholly or partly informed by ESG goals are violations, and there does not appear to be any Biden Administration agenda specifically targeting these activities for enforcement. Companies should not be deterred from incorporating ESG considerations within the long-term value framework we have long counseled, and pursuing the resulting business agendas in sensible ways. In doing so, however, given the heightened politicization and scrutiny of ESG generally and currently aggressive antitrust regimes in the United States and abroad, companies should continue to account for relevant antitrust and other regulatory frameworks when considering ESG matters, especially for any contemplated multi-firm collaborations, and to seek appropriate advice.

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