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# Recent ESG Antitrust Developments Ahead of the 26th UN Climate Change Conference of the Parties (COP26)

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Having a strong environmental, social and governance ("ESG") proposition has fast moved up the global political and corporate agenda.

Governments are encouraging businesses to be greener and to consider their performance on environmental and other metrics. In turn, ESG is increasingly becoming an integral part of how companies do business. Moving first, however, can come with high upfront costs and present a competitive disadvantage. Those who have not yet taken steps to reduce their carbon footprint may stand to benefit. Conversely, if the first mover is successful, competitors can copy the approach without suffering the same uncertainty by free-riding on another's investment.

The solution to this dilemma could be for rival firms to work together. Businesses may, for example, decide to combine expertise to make products more energy efficient or agree on standards to facilitate recycling and reduce waste. Such coordination can, however, fall foul of antitrust/competition laws, which, among other things, prohibit collusion between competitors. Governments and regulators are increasingly taking steps to address these often competing policy aims, although so far there is no global consensus on the approach to take.

Ahead of the UN's COP26 conference being held in the UK from 31 October to 12 November 2021, this update looks at recent developments in antitrust law that are aimed at encouraging (while policing) business efforts to enhance sustainability and meet environmental goals.

**EU.** The European Commission ("Commission") adopted its "Green Deal" in 2019 putting sustainable development front and centre of European Union ("EU") initiatives with the aim of becoming climate-neutral by 2050. A subsequent Policy Brief in January 2021 details its current approach to the interplay between competition rules and the green transition. It acknowledges that businesses need sustainability-specific guidance in order to self-assess whether they may fall foul of the prohibition of anti-competitive agreements and, if so, whether the sustainability benefits they claim can satisfy the conditions for exemption.

However, sustainability criteria were notably absent from the recently published drafts of the revised EU Regulation and Guidelines governing vertical agreements and restraints (such as those between suppliers and distributors), even though the Commission had consulted on their inclusion. It remains to be seen whether the updated guidelines on horizontal agreements, which govern cooperation between actual or would-be competitors, will provide guidance on sustainability efficiencies. While the Commission recently called the current guidelines insufficient on this point, it is not yet clear if the revised version will tackle how pro-environmental initiatives should be regulated; nor if the Commission intends instead to issue separate comprehensive guidance covering sustainability goals for both vertical and horizontal cooperation.

The Commission is also reviewing how merger control fits with its sustainability push. There is debate on the extent to which environmental aspects are taken into account in the EU's current law and practice, and a recent Policy Brief suggests they will be more readily accepted in future assessments. The Commission has signalled that its revised Notice on Market Definition, expected by the end of this year, may take into account consumer preferences for sustainable products, services and technologies as a differentiating factor. It has also indicated that its new policy of accepting national referrals in below-threshold mergers (known as Article 22 referrals, such as in the recent Illumina/GRAIL merger), adopted in response to "killer acquisitions" in the tech sector, might also be used for "green killer acquisitions"—purchases by established green businesses of nascent competitors innovating in sustainability.

The EU is also looking at better aligning its State-aid regime with its Green Deal industrial policy so as to ensure EU Member States efficiently channel investments into environmentally friendly projects, while disincentivising the protection of polluting investments.

The Commission's proposals follow recent actions by national governments and competition authorities of its Member States. The Dutch competition authority released its first draft sustainability guidelines in 2020 (revised in 2021). In cooperation with the Greek competition authority, it also published a technical report on how sustainability benefits could be quantified in competitive analyses. Other regulators, such as the German and French competition authorities, have also put the issue on their agendas. Most notably, Austria recently became the first EU country to include environmental considerations in its antitrust legislation. The "consumer benefits" exemption from the cartel prohibition, where consumers receive a fair share of the resulting efficiencies, was expanded so that agreements that substantially contribute to an "ecologically sustainable or climate-neutral economy" are deemed to satisfy the test. Interestingly, the accompanying guidance suggests that the environmental benefits do not need to be immediate and do not need to accrue to consumers on the relevant market, but can instead benefit society at large. While such national proposals are a welcome impetus, it will ultimately be up to the EU to harmonise the bloc's approach.

**UK**. As the UK prepares to host 200 nations in Glasgow for the UN's COP26 climate conference, sustainable development is among the government's top priorities. Supporting decarbonisation is stated to be one of the Competition and Markets Authority's ("CMA") key strategic aims for the year ahead. In early 2021, the CMA published a high-level overview to help businesses understand the application of competition rules to sustainability agreements. While this largely repeats the status quo, it is a helpful summary of possible avenues for cooperation under the existing rules in, for example, shared research and development and technology licensing agreements. Further guidance in the context of vertical (*e.g.*, supply/ distribution) and horizontal cooperation agreements is expected, together with a broader review of competition law tools, including merger control, to support the UK's "net zero" pledge. It is hoped that this guidance will include sufficient detail to give self-assessing businesses the certainty they need to move forward.

**Rest of World**. As the EU and the UK work to give credit for sustainable development in their competition regimes, other major jurisdictions are lagging behind. China, whose Anti-Monopoly Law has long exempted restrictive agreements if they produce sufficient environmental benefits, has recently produced guidance that actually makes exemption more difficult to obtain. The United States, whose antitrust doctrine remains squarely centered on preventing rising prices for consumers, may also be slower to allow non-financial considerations to inform competitive assessments. However, two Federal Trade Commission ("FTC") Commissioners, including the newly appointed Chair Lina Khan, have called for the re-examination of existing standards underlying U.S. antitrust law and advocated consideration of social factors, such as racial justice, climate change and income inequality, when analysing a potential transaction under the antitrust laws. Recent experience indicates that the FTC has begun asking parties about ESG-related factors during the investigation of proposed transactions. Although the U.S. antitrust agencies have not formalised consideration of these types of factors, other federal agencies have taken steps. The Department of Labor is in the process of repealing a Trump-era rule limiting ESG investments by pension plan fiduciaries,[1] while the Securities and Exchanges Commission recently established a Climate and ESG Taskforce. U.S. President Biden has issued Executive Order 14030, which calls for a "government-wide" strategy to assess climate-related financial risks. In order to meet the administration's ambitious climate goals, antitrust in the US will likely take note.

[1] *See* Debevoise Debrief: Pause and Refresh? DOL Delays Enforcement of Regulations on ESG Investments for ERISA Plans: https://www.debevoise.com/insights/publications/2021/03/pause-and-refresh.

**Conclusion.** Despite their enthusiasm for ESG-relevant considerations, EU, national and UK authorities have pledged to remain alert to "greenwashing" in the context of competition law, i.e. the practice of invoking environmental benefits to mask anticompetitive effects. As the Commission acknowledges, competition policy must retain its focus on vigorous enforcement to foster effective competition and this will ultimately drive companies to innovate and operate sustainably. The EU's recent €857 million fine on German automakers for restricting competition in emission cleaning is a case in point about "*how legitimate technical cooperation went wrong*", and demonstrates that the Commission will continue to tackle cartels regardless of whether sustainable aims are—allegedly—pursued.

Overall though, it is clear that competition policymakers are taking note of sustainability, with more detailed guidance expected in the months ahead. Both policy and enforcement will need to adapt as sustainability considerations are becoming enshrined as a matter of policy across different areas of law. Moving forward, businesses should be on notice that competition authorities will look more closely at agreements and mergers that may harm ESG innovation. Conversely, environmental benefits may be more readily accepted by regulators in future competitive assessments.

While the debate continues, policymakers setting a consistent and clearly articulated legal framework is key to give businesses the comfort they need and to support sustainable ESG innovation.

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Please do not hesitate to contact us with any questions.

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