Clients&FriendsMemo

ESG Risks of Antitrust Enforcement and Liability

***"Hell is paved with good intentions."* (Samuel Johnson); *"Good intentions pave many roads. Not all of them lead to Hell."* (Neal Shusterman)**

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Business enterprises are under pressure the world over to develop and adopt policies that promote social, environmental and governance ("ESG") goals. ESG is a broad label, covering issues that include, among others, Environmental (environmental sustainability; climate sensitivity in products and supply chains), Social (inclusion and diversity), and Governance (board equity and diversity; executive compensation). Many ESG goals and policies are undoubtably laudable from a societal standpoint. Yet, perhaps surprisingly, legislators and antitrust enforcers in the United States and Europe have raised concerns that conduct associated with industry collaborations (particularly climate-related) could be challenged under antitrust laws.

Earlier this month five United States Senators, including the Ranking Members of the Senate Judiciary Committee (Charles Grassley), and of the Subcommittee on Competition Policy, Antitrust and Consumer Rights (Mike Lee), wrote to the ESG practice leaders of more than 50 large U.S. law firms advising each firm of its "duty to fully inform clients of the risks they incur by participating in climate cartels and other ill-advised ESG schemes." The letter goes on to warn that the "ESG movement attempts to weaponize corporations to reshape society in ways that Americans would never endorse at the ballot box. Of particular concern is the collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs...." Holding aside that the letter may just as readily be read to "weaponize" antitrust law in furtherance of the Senators' obvious hostility to at least certain ESG initiatives, the Senators' shot across the bow warrants consideration of the relationship between applicable antitrust laws and industry activity.

Similarly, in a March op-ed in the Wall Street Journal, Arizona Attorney General Mark Brnovich, referring to various financial institution climate initiatives such as the Glasgow Financial Alliance for Net Zero, accused "big banks and money managers" of the "biggest antitrust violation in history" by allegedly coordinating policies to "choke off investment in energy." And long before "ESG" was even a recognizable acronym, the FTC in 1984 challenged as anticompetitive a group of car

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dealerships in Detroit that came together to eliminate Sunday and weekday evening hours of operation in order to allow a greater work-life balance for dealership employees.

In Europe, the European Commission (the antitrust arm of the EU) recently conducted a dawn raid on several fashion houses that were reportedly focusing on their consideration of developing joint rules aimed at creating a more equitable industry and one that reduced environmental waste and carbon emissions. However, the ongoing inquiry raises issues about whether the firms in question were in fact banding together to agree to conduct that might result in raising prices, reducing output and possibly harming emerging rival firms in the industry.

How do all these programs intended to promote the public good theoretically run the risk of triggering potentially crippling antitrust treble-damage actions and fines or possibly even criminal liability? There are two relevant provisions of antitrust law, Sections 1 and 2 of the Sherman Act. Section 1 forbids “contracts, combinations and conspiracies” that unreasonably restrain trade. The operative concept for purposes of potential ESG liability is that a violation of Section 1 must be predicated on concerted action. That is, a Section 1 violation requires an agreement among two or more actors. Businesses that enter into collaboration agreements, even if under the banner of good faith ESG reform, nonetheless run the risk of Section 1 scrutiny. This does not mean that these industrywide efforts at ESG reform violate the antitrust laws. But it does mean that such activity should be carried out in conformity with antitrust risk mitigating safeguards, such as filtering the kinds of information that may be shared among competitors or relying on benchmarking protocols that conform to Federal Trade Commission and Department of Justice guidelines. In particular, parties to an ESG collaboration should take care to avoid sharing competitively sensitive nonpublic information, including information on current or future pricing and marketing or sales plans. In trying to share industry best practices guidance, for example, proper benchmarking protocols with aggregated, anonymized information can help inform industry participants while shielding specific confidential data that may be risky to share among competitors.

Single-firm conduct to promote a given ESG policy is likely safe from antitrust scrutiny unless the unilateral conduct may be challenged under Section 2, which forbids monopolization. While being a monopoly is not by itself unlawful, the wielding of market power by a monopolist may be an antitrust violation.

In sum, whether or not meritorious, a new reality is that legislators and antitrust enforcement agencies have begun to claim that anticompetitive harm can flow from ESG-focused industry collaborations. Firms considering engaging in industry groups to promote ESG policies, or firms that may be considered to possess power in some local or national market for a good or service that are considering ESG policies, are well advised to work closely with antitrust counsel before proceeding with their plans. Particular “landmines” to avoid include: 1) reaching agreements as opposed to developing consensus goals, and 2) sharing current pricing or future pricing plans.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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