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GREY MATTERS

The Crossroads of ESG collaboration and Competition Law

December 2022

A. Background

Responsible investment is reshaping business models across the world and Environmental, Social and Governance (***ESG***) performance and agendas of companies are increasingly becoming key factors for investors in mergers and acquisitions.

ESG is also an item of priority for various regulators around the world who are trying to ensure that businesses incorporate responsible practices in their organisations.

Whilst Governments that are working towards combatting climate change necessitate contributions on many different fronts, corporations, in particular, play a crucial role in accelerating the sustainability movement. However, the manner in which companies operate in the market in furtherance of their sustainability objectives, particularly vis-à-vis their interaction and / or "collaboration" with competitors or even during mergers, could potentially come under the ambit of competition law (which requires them to compete with one another in the market). The question that therefore arises is whether there could be a potential conflict between increasing ESG initiatives by, and collaboration between, companies and competition law.

B. Position in India

The sustainability movement has not yet gained significant momentum in India from an antitrust perspective.

Whilst there might not be an explicit provision relating to sustainability agreements under the Competition Act, 2002 or indeed even the Competition (Amendment) Bill, 2022, at present, the existing framework for approving mergers or analyzing anti-competitive agreements is, we believe, broad enough to enable the Competition Commission of India (the ***CCI***) to consider the effects of ESG initiatives as part of their overall assessment. These factors include, for instance, promotion of, or relative advantage by way of contribution to, economic development, innovation and, in case of mergers, whether the benefits of the merger would outweigh any potential adverse Impact.

Based on the above, a question that therefore arises is whether there could potentially be any leeway for parties that may enter into agreements with their competitors which are genuinely aimed at fulfilling ESG initiatives? Based on our informal discussions with the CCI, we understand that they are starting to lay more emphasis on sustainability as a pro-competitive factor, and that their preference is for parties to bring up any ESG initiatives or improvements in ESG practices of the parties as a result of the merger in their merger filings.

The next step for the CCI should be to come out with detailed guidance around the interplay between ESG and competition law. We have attempted to draw a parallel in terms of the position in other jurisdictions in this regard in the next section.

C. Position in other jurisdictions

Competition authorities of the Netherlands, Greece and the United Kingdom were the first few regulators to have issued detailed guidance[1] on the interplay between competition law and sustainability agreements / collaborations amongst competitors on ESG initiatives. With a view to help businesses better understand such interplay and identify possible areas where issues may arise, these authorities have through their guidance, *inter alia*, elaborated on the key legal considerations while setting standards, genuineness of sustainability claims, and potential exemptions.

Similarly, the European Commission (the ***EC***), in line with the European Green Deal, has recently published guidance on the assessment of sustainability agreements as part of its revised Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union (***TFEU***) to horizontal co-operation agreements.[2] The draft Guidelines define sustainability agreements as any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives (including not just environmental initiatives, but also social objectives), irrespective of the form of co-operation.

As an overarching principle, not all sustainability agreements are captured within the TFEU – if an agreement does not affect the parameters of competition such as price, quality, quantity, choice or innovation, it would typically not raise

[1] Whilst the competition authorities of Netherlands and United Kingdom have issued guidelines on sustainability and competition law, Greece's competition authority has issued a discussion paper in this regard. The competition authorities of Netherlands and Greece have also published a 'technical report on sustainability and competition' that they had jointly commissioned to facilitate the competitive assessment of sustainability agreements.

[2] These will enter into force on 1 January 2023.

any competition concerns and should therefore not be caught under the TFEU. Examples of such agreements include agreements concerning internal corporate conduct, industry-wide campaigns, and agreements to create databases containing information about sustainable suppliers or distributors.

Where such agreements do affect one or more parameters of competition, they may need to be assessed appropriately under the TFEU. In such a case, the onus will lie on the parties to provide evidence and facts demonstrating that the agreement does indeed promote sustainability and is not being used to disguise an 'anti-competitive agreement' *per se*. The justifications which are applicable otherwise would apply to such agreements as well. For instance, efficiency gains arising from the agreement, indispensability of the restriction(s), benefits being passed-on to consumers, and no elimination of competition. However, how these are to be evaluated or quantified in the context of sustainability goals (which affect the public at large) is unclear.

In July 2021, the EC observed that certain car manufacturers (Daimler, BMW and Volkswagen group) colluded on limiting technical development in the area of nitrogen oxide cleaning for new passenger diesel cars. The manufacturers held regular meetings to develop emissions control systems which were required to meet the regulatory requirements on emission cleaning. However, as part of their meetings, they also decided not to compete on exploiting the full potential of one of the systems. They agreed on the tank sizes and estimated consumption of the diesel exhaust fluid (known as 'AdBlue') which was injected into the exhaust gas stream as part of the emission control system and exchanged commercially sensitive information on these elements. According to the EC, this amounted to restricting competition on product characteristics relevant for consumers and constituted an infringement in the form a limitation of technical development. The car manufacturers were consequently penalised (except for Daimler which received 100% leniency for disclosing the cartel).

Whilst there have been significant developments on this front in the EU, there is no separate guidance in the United States on the treatment of sustainability agreements under competition law.

Overall, the approach adopted by most competition authorities largely appears to be to position sustainability agreements within the existing framework of the law, with additional guidance on the manner in which they may be assessed.

D. Conclusion

On balance, agreements / arrangements involving any potential collaboration from a sustainability perspective need to be assessed on a case-to-case basis. In the absence of any specific ESG related guidance, agreements on ESG collaboration between competitors should be carefully reviewed to ensure that they do not give rise to any issues from a competition law perspective.

It would also be helpful for the CCI to consider initiating a study in this regard and to formally develop guidance on the treatment of

sustainability agreements from a competition perspective.

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