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ESG Considerations and Antitrust: Why ESG-Focused Efforts Have Little to Fear from Antitrust Law

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I. Executive Summary

This paper explains the basic antitrust standards and methods of analysis that usually apply when companies attempt to develop environmental, social, and governance ("ESG") goals and plans, whether companies do so unilaterally (each single firm, by itself) or collaboratively (via multi-company agreements and associations). General counsel increasingly are asking for such antitrust guidance, and they have good reason to do so, since ESG efforts often involve collaborations between competitors or large firms upon which legal scrutiny already falls for other reasons.

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Virtuous intentions do not immunize companies from antitrust laws. The antitrust laws (as interpreted by courts) assume as their fundamental premise that unfettered competition will lead, in the long run, to "the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress"[2]; therefore, antitrust law applies skepticism to actions that would reduce competition, even if those actions are done, or are claimed to be done, in the service of other important goals. That said, antitrust laws should not be seen as a barrier to the implementation of ESG commitments, provided that firms take reasonable precautions. While companies should seek qualified antitrust counsel for guidance about any specific plans, the following principles should help illustrate that antitrust and sustainability practices can coexist:

- It is axiomatic that antitrust laws are for the "protection of competition, not competitors."[3] Antitrust liability requires actionable harm to be to competition as a whole, not just to a particular one or a few aggrieved firms. So, harms that are speculative or unimportant to competition should not lead to antitrust liability.

- Aside from hardcore cartel conduct such as price fixing (which has no particular relevance to ESG commitments), antitrust liability requires a demonstration of "market power," which in the United States means no lower than a 30% market share threshold, and usually 50% or more. In fact, most recent antitrust enforcement actions of both the European Commission and the United States competition authorities have alleged market shares at or above 70%. Thus, ESG commitments among industry participants with low or moderate market shares have little to fear from antitrust.

- In appropriate contexts, market share safe harbors also may apply at the level of a 30% market share or below for vertical agreements in Europe, and at a 20% market share or below for both vertical and horizontal agreements in the United States.

- When it comes to unilateral conduct, antitrust liability is particularly difficult for plaintiffs to establish. Importantly, a unilateral, unconditional refusal to deal—as might be the case if a purchaser refuses to buy products from suppliers that do not meet a particular ESG profile—is effectively beyond the reach of antitrust law in the United States. It is nearly so in Europe, unless the purchaser has certain "indispensable" and unusual characteristics.

- Antitrust risk is highest when ESG efforts involve collaborative conduct. But for collaborative conduct (again with the exception of cartel conduct), antitrust law applies a reasonableness or balancing standard that is feasible for well-counseled businesses to meet. In addition, not all conduct is alike. Vertical conduct, such as

[2] *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).
[3] *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

a purchaser-vendor agreement, is particularly likely to be found reasonable under such standards. Thus, it will not be inherently suspect for a purchaser to demand that an existing supplier improve the ESG profile of its product.

- Collaborative horizontal conduct, meaning agreements between direct competitors, is where the highest antitrust risk applies. Even here, the risk is manageable and certain collaborations are more risky than others (this paper provides examples by way of a list).

Lastly, this paper briefly discusses the debate about how ESG principles might be used as justifications within existing or new antitrust reasonableness or balancing tests.

The overall message is that while companies implementing ESG commitments should be conscious of antitrust law, they should be confident that antitrust will not stand in the way of ESG efforts that are well justified and carefully implemented.

II. "Unilateral" ESG Efforts — No Significant Antitrust Risk

Antitrust law applies less scrutiny to unilateral conduct than to horizontal conduct, so this paper begins by defining and discussing unilateral conduct as a separate case.

A. Unilateral Conduct Standards

Under the antitrust laws, single-firm conduct analysis is known as analysis of "monopolization" in the United States or "dominance" in the European Union and much of the rest of the world.[4] There are some differences in the U.S. approach versus those of the EU and other jurisdictions but the analysis is far more similar than divergent.[5] There is a global consensus on the starting point for single-firm conduct: that such conduct is unlikely to be problematic unless the firm engaging in the conduct possesses a significant degree of market power.[6] While there is no formal minimum for determining single-firm conduct market power, courts in the United States typically employ no lower than a 30% market share threshold when determining market power,[7] and it is rare for a single firm to be found to possess market power if it has less than 50% of a properly defined antitrust market.[8] In the EU, some national competition authorities bring single-

[4] Unilateral conduct and single firm conduct are the same thing, and monopolization and dominance are equivalent legal terms. Again, this paper uses these terms interchangeably.

[5] The ABA concluded as much in a major study in 2019, *Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards* (2019), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf.

[6] *See* ICN, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws: Recommended Practices* (2007), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_DomMarPower.pdf; Organisation For Economic Co-operation & Development, *Evidentiary Issues in Proving Dominance*, (2006), http://www.oecd.org/competition/abuse/41651328.pdf.

[7] 1 Antitrust Law Developments § 1.B.3.b(1)(c) (8th ed. 2017) [hereinafter ALD 8th].

[8] *See generally* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), at Part 4 "Market Definition," https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#4.

firm cases involving dominant firms with market shares closer to 50 percent, which is the share that triggers a presumption of dominance according to European case law,[9] but more recent enforcement actions of both the United States and the European Commission have alleged market shares at or above 70%.[10] Even if a presumption of market power is applied, the accused company can rebut the presumption by conducting an analysis of the strength of actual competitors, barriers to entry, and countervailing buyer power.

If market power is established, single-firm conduct analysis then examines market impact.[11] The analysis usually proceeds to apply particular tests for particular types of conduct, and only one of these,[12] refusals to deal, has significant relevance to ESG topics (as discussed below). All the conduct tests have some common elements, which include that, under U.S. law, a court will not find a violation unless the conduct at issue has "market-wide" impact, as distinguished from harm to a particular market participant. For example, in a monopoly-maintenance case, the conduct must be "reasonably capable of contributing significantly to a defendant's continued monopoly power,"[13] and in an attempt-to-monopolize case, the conduct must create a "dangerous probability" of propelling the defendant into a dominant position with similar likely effects.[14] European law likewise applies an effects-on-competition test, although EU law is somewhat more likely than U.S. law to infer effects on competition as a whole if there are demonstrable effects to a few important competitors.[15]

Refusals to deal with another company are a special case under single-firm conduct law. When a company makes a unilateral, unconditional refusal to deal, such purely unilateral action does not create significant antitrust risk in the United States. The U.S. Supreme Court has stated that a company (even one that possesses market power) generally does not have a duty to assist any vendor or rival, and a unilateral, unconditional refusal to deal is generally beyond the reach of the antitrust laws.[16] Such a refusal is also unlikely to raise antitrust objections in Europe, although a combination of extreme market power and significant effects could still raise concerns. In the EU, in deference to the dominant firm's qualified prerogative to select its partners and customers, the legal test for liability requires that the refusal involves an "indispensable input" controlled by the dominant firm and that the refusal therefore results in the elimination of "all

[9] *See* Case C-62/86, *AKZO Chemie BV v. Comm'n*, 1991 E.C.R. I-3439, ¶ 60.

[10] *See* Frances Dethmers & Jonathan Blondeel, *EU enforcement policy on abuse of dominance: Some statistics and facts*, 38 E.C.L.R., Issue 4 (2017).

[11] *See generally* the section entitled "Assessing Market Impact," *Differences and Alignment, supra*, at 39-41.

[12] Some of the most common are refusal to deal, margin squeeze, exclusive dealing, loyalty discounts, leveraging and technical tying, and predatory pricing. *See Differences and Alignment, supra,* at 41-60.

[13] *United States v. Microsoft Corp*., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc).

[14] *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 459 (1993) ("We hold that petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize").

[15] *See Differences and Alignment, supra*, at 40-41.

[16] *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004).

effective competition downstream"[17]; in addition, the refusal must cause consumer harm, for example by keeping a new or improved product from the market.[18]

In contrast to the foregoing unconditional refusals, a conditional refusal involving an anticompetitive condition—e.g., "do not trade with my rivals, or I will not trade with you"—is outside the shelter of the foregoing precedent. But most conditional refusals (discussed in more detail below) still would not be considered dangerous to competition in the absence of market power.

B. Examples and Analysis of Single-Firm ESG Efforts

If a company decides by itself to adopt ESG policies, this action is unilateral. If a company decides by itself to refuse to do business with another company because that other firm does not employ good ESG practices, this action, too, is unilateral. Such purely unilateral action does not create significant antitrust risk, due to the almost unfettered right of a company to refuse to deal without conditions, as explained above.

In our experience, ESG and antitrust counseling questions in the unilateral context most often arise when a company does want to place conditions, such as stating explicitly that it will reconsider a refusal to deal if a vendor implements particular ESG policies, or providing discounts or financial incentives for partners that are conditional on meeting particular ESG benchmarks. Such conditions, in theory, could cause an antitrust enforcer to conduct an in-depth antitrust analysis, which it would do by examining the legitimacy of the condition (does the condition genuinely reflect an ESG goal?) and the market impact (does the condition exclude other companies from an important percentage of the overall market, or otherwise affect competition overall for the worse? are consumers likely to be harmed?). While such an inquiry is theoretically possible, it is made unlikely by the threshold requirement of market power: few single firms are likely to have such a large presence that their imposition of ESG conditions potentially would damage competition in a market as a whole.

As an illustration, imagine a major cloud internet storage provider whose key inputs are the purchase of computer servers, building space for server farms, and electrical power. If the storage provider implements an ESG policy stating that it will refuse to purchase servers that are not ethically produced, building space that does not use green-building materials, or power that is non-renewable, would there be any antitrust risk? The first step should be to consider market

[17] *See* Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungsund Zeitschriftenverlag GmbH* & Co. KG, 1998 E.C.R. I-7791, ¶¶ 38, 41, 45. The indispensability requirement aims at ensuring that the dominant firm is not forced to share the fruit of its investments with its current or potential competitors simply because it could be more difficult for those competitors to develop their own upstream input. Thus, in addition to protecting the dominant firm's own incentives, this requirement also is intended to provide incentives for competitors to invest and innovate. The Microsoft case clarified that the refusal need only eliminate all "effective competition," not all competition in the market. Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3619, ¶¶ 229, 563.

[18] *See* Joined Cases C-241/91 P & C-242/91 P, *Radio Telefis Eirann & Indep. Television Pubs. v. Comm'n*, 1995 ECR I-743, ¶ 54. Preventing the appearance of a new or improved product is unnecessary for the requisite consumer harm. The Court of First Instance held that Microsoft's withholding of interoperability information could have limited "technical development to the prejudice of consumers" and hence infringe Article 102. Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3619, ¶¶ 647–65.

power, and this first step usually will end the inquiry in the company's favor. Our research suggests that even the largest household-name cloud storage providers in the United States have only single-digit shares of the purchase of servers nationally, or of building space or electrical power on a regional or metropolitan area level (if the geographic market should be defined that narrowly). Accordingly, antitrust risk appears implausible under this scenario.

III. "Collaborative" ESG Efforts — Risk versus "Reasonableness"

Collaborative conduct—meaning, agreements and similar multi-firm efforts—is traditionally the greatest focus of antitrust law. But not all collaborations are equally suspect; to the contrary, most collaborations are competition-enhancing or at least competitively benign. This field of analysis is tremendously broad, encompassing the smallest bilateral agreements to the largest mergers, joint ventures, and industry-wide standards development efforts. Accordingly, it is helpful to break it up by category and by general rules. An obvious but useful observation is that the fewer firms are involved, the lower the risk generally applies, and the more firms are involved, the greater the risk due to the likelihood that they represent greater combined market power.

This paper does not cover mergers specifically, although the principles mentioned here apply equally to mergers. This paper covers the basic standards of non-merger collaborative conduct; the use of market share safe harbors; the important difference between analysis of vertical versus horizontal agreements; and brief analysis of particular types of collaborative ESG conduct that the authors most commonly have observed.

A. Basic Standard: "Rule of Reason," "Effects Balancing," and the Difference between "Vertical" and "Horizontal" Agreements

The antitrust laws apply one of two standards to collaborative conduct, depending on the conduct at issue. Under the first standard, known as the "rule of reason" in the United States, if a collaboration causes a "restraint" of competition, the collaborators must demonstrate a legitimate procompetitive justification for the restraint. If they do so, then an objecting party must show that the restraint is not reasonably necessary to achieve the restraint's objectives or that the collaborators' justification is a mere pretext for some other, anticompetitive motivation. The final step is to evaluate the restraint's overall reasonableness, for which market power and market impact is important—collaborators with little market share are unlikely to impact a competitive market, and thus their burden to show reasonableness may be less than those of collaborators whose conduct impacts a market significantly.[19] The European Union applies a similar "effects balancing test" under Article 101(3) of the Treaty on the Functioning of the European Union. While businesses often find the vagueness of the rule of reason or effects balancing test to be frustrating, in practice these standards tend to be lenient, with credit given to reasonable business judgments and a tie going to the defense. Most business collaborations are analyzed under these standards, and have no difficulty being upheld under them.

[19] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

For an agreement to create or enhance market power, the parties to that agreement must have "the ability to raise prices above those that would be charged in a competitive market."[20] A low market share usually will preclude a finding of market power, whereas a high market share indicates the possibility that market power exists.

The second standard applicable to collaborative conduct is "per se" treatment (in the United States) or restriction of competition "by object" (in the EU), which identifies conduct that is considered to be automatically unreasonable and therefore automatically illegal. Per se or by object conduct includes group boycotts and hardcore cartel actions such as price fixing, bid rigging, and the allocation of customers or geographic areas between rivals. Courts and antitrust enforcers believe that such conduct is so unlikely to have efficiency benefits that it can be condemned without any need for a balancing of justifications versus harmful effects; no justifications are permitted. Such conduct also is subject to the most severe penalties, often including criminal sanctions.

Note that an "agreement" in the antitrust sense may be written or oral, explicit or tacit. Similar to the test under contract law, the test for an agreement under antitrust requires only the exchange of consideration (which is not necessarily financial) and a meeting of the minds. The form of the agreement does not drive the substantive analysis.

The nature of the relationship between parties to an agreement is an important factor in whether an agreement may be condemned as unreasonable. Agreements between companies that are direct competitors, typically at the same level of the supply chain, are "horizontal agreements." An obvious example is a joint venture between two competitors, but horizontal agreements also include more nuanced collaborations such as standard setting or codes of conduct promulgated by an industry group of competitors. In contrast, agreements between firms at different levels in the supply chain are "vertical agreements." For example, an agreement through which a coffee producer sources coffee beans from a plantation is a vertical agreement. Under the antitrust laws, horizontal agreements are generally more suspect than vertical agreements because the number of subjects for legitimate, procompetitive coordination is fewer between rivals than between parties in a vertical relationship.

B. Market Share Safe Harbors

As mentioned above, courts in the U.S. typically employ no lower than a 30% market share threshold when determining market power.[21] The joint U.S. Federal Trade Commission (the "FTC") and U.S. Department of Justice (the "DOJ") Antitrust Division *Antitrust Guidelines for Collaborations Among Competitors* establish an "antitrust safety zone" or enforcement safe harbor, within which "absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than 20% of each relevant market in which competition may be affected."[22] Similarly, the European Commission's *Guidelines on Vertical Restraints* establish a

[20] *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.38 (1984).
[21] ALD 8th, § 1.B.3.b(1)(c).
[22] U.S. Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 4.2 (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-

safe harbor for vertical agreements that do not contain blacklisted or excluded restrictions when "the supplier's and the buyer's market share is each 30% or less."[23] Note that the U.S. safe harbor applies to all agreements, whereas the EU safe harbor applies only to vertical agreements.

C. Vertical ESG Conduct — Lower Risk, but Beware "Ancillary Conditions"

Vertical ESG conduct, in the authors' experience, usually consists of attempting to persuade other companies in a supply chain to implement the same ESG policies as the originating company. Two examples will illustrate how antitrust law may apply in this context.

If a purchasing company demands that its supplier accept the purchaser's ESG commitments, the demand is a unilateral action but the resulting agreement is a vertical action, made between the purchaser and the supplier.[24] This is the simplest type of vertical agreement. While vertical agreements are, in principle, analyzed under the same rule of reason standard as are horizontal agreements, in practice vertical agreements face less antitrust scrutiny because there typically is no competition between the parties and therefore no risk of restricting competition between them. Accordingly, if a purchaser can articulate reasonable justifications for imposing such ESG commitments and those commitments are reasonably tailored to the justifications, a purchaser's use of ESG commitments with suppliers is unlikely to cause antitrust liability. Market share safe harbors may apply here as well.

Next, imagine that the company in the paragraph above again demands that its supplier accept ESG commitments, but this time also demands that the supplier refrain from selling to any other purchasers that do not implement ESG commitments. Here again, the resulting agreement is a vertical action; however, this time the agreement contains an "ancillary condition"—a condition additional to the core subject of the ESG commitments with regard to the purchasers' own products.

Ancillary conditions complicate the antitrust analysis because the antitrust balancing test must be applied not only to the ESG commitments in this example but also to the ancillary conditions. The ancillary conditions in this example qualify as a "restraint of trade" (the supplier cannot trade with a non-ESG-compliant firm)[25]; therefore, the antitrust analysis would ask whether the purchaser[26] has a legitimate business justification for demanding that its suppliers not work

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venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [hereinafter *Collaborations Among Competitors*]. "The safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied." *Id.*

[23] Guidelines on Vertical Restraints, 2010 O.J. (C 130) 23.

[24] Assuming that this is a typical purchaser-supplier relationship, where the supplier does not compete with the purchaser. If the supplier also competes with the purchaser, this could be a "dual distribution" context with both vertical and horizontal elements to the analysis. *See generally*, ALD 8th § 1.D.1(b)(4).

[25] This vertical agreement normally would not be described as a "boycott" because the concept of "boycott" usually describes a horizontal agreement, or at least one that targets a particular other competitor by name ("Alpha Corporation"), not a concept or class of companies ("sellers who do not employ good ESG practices").

[26] Technically, all parties to an agreement face potential liability for conduct involving an agreement, if that agreement is found to be unlawful under the antitrust laws. *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *aff'd on other grounds*, 202 U.S. 390 (1906) (establishing joint

with other purchasers. The parties could avoid such an inquiry if the market share safe harbors mentioned above apply—in other words, if the supplier's and the buyer's market share is each 30% or less (in the EU) or collectively 20% or less (in the United States)—but otherwise, ancillary conditions inject an additional element of review and risk.

It seems likely that many companies wishing to require ESG commitments will be able to shelter under the market share safe harbors. Those that exceed a market share safe harbor, however, may wish to simplify their risk profiles by using simple ESG-committed agreements, as in the former example, rather than agreements with ancillary conditions, as in the latter.

D. Horizontal ESG Conduct — Risk Considerations and Safeguards

Since horizontal conduct by definition involves collaboration between competitors, concerns about the elimination of competition are highest in this area. In the United States, horizontal collaborations may still benefit from the 20% market share safe harbor; however, note that the European Union's 30% vertical agreement market share safe harbor would not apply because, of course, such collaborations are not vertical. If no safe harbor applies, then the lawfulness of any resulting restraint will be judged by the balancing test standards mentioned above.

Collaboration and competition are not inherently at odds with each other. While some collaborations can restrain competition, many are neutral in their impact and some are procompetitive. Recognizing this, courts and enforcement agencies applying the antitrust laws tend to apply differing levels of scrutiny to different types of conduct, such that we can (albeit only roughly) divide conduct into lower- and higher-risk types.

1. Collaborations Unlikely to Raise Antitrust Concern

Discussing and Exchanging Best Practices. Companies may want to discuss their experiences with adopting and implementing ESG principles. These discussions might cover an array of topics, such as which provisions are most effective or most difficult to implement, how to implement the provisions most efficiently into daily operations, or where they are finding gaps that need improvement. Such topics do not raise antitrust concerns provided that the parties do not share "competitively sensitive information."[27] (But see "Information Sharing," below.)

A natural forum for such discussions is an industry association or standard-setting organization. The antitrust laws do not prohibit collaborations in such forums, provided that appropriate safeguards are followed. Note that the Federal Trade Commission has published a web page, "Spotlight on Trade Associations," which discusses examples of topics that are innocuous and others that firms should avoid, and provides guidance on how to share information safely while avoiding undue risk of violating antitrust laws.[28]

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and several liability, which subsequently became the settled law of antitrust damages in the United States). In a purchaser/seller vendor context such as this, however, scrutiny generally falls most heavily on the purchaser.

[27] See definition in "Information Sharing," below.

[28] Fed. Trade Comm'n, *Spotlight on Trade Associations*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade (last visited Feb. 20, 2022). While the

Optional, Non-Exclusive Codes of Conduct. Collective statements and codes of conduct may recommend that multiple competitors implement and comply with a baseline standard of ESG commitments, or even a standard above any required by law or regulation. This may help mitigate participating companies' concerns about the possibility of being undercut on price by non-compliant firms who face lower costs, should meeting the standards result in increased compliance costs.[29]

Promulgating industry codes of conduct or joining in a collective statement should not raise antitrust concerns so long as members ensure that (i) participation is voluntary and non-binding, (ii) each participant has the ability determine its own path to compliance, (iii) membership does not involve intrusive rival-to-rival auditing of compliance, (iv) participants do not share competitively sensitive information, and (v) the question of enforcement and penalties is left to government officials.

For example, a group of major power consumers might release a statement saying that members of the collaboration commit to contracting with renewable power suppliers for a given percentage of their consumption. If each participant can determine its own path to realizing such an objective and members are not allowed to penalize one another, so that the only enforcement mechanism is reputational, then the collaboration is unlikely to significantly harm competition. Companies should, however, avoid crossing the line into a group boycott of any particular vendor or rival.

Certification Standards. Creating a certification process is a way further to formalize the aspirational goals of a code of conduct or collective statement. For example, an industry group may establish standards for measuring and awarding a seal of approval to "ESG compliant" companies. As a threshold matter, it is critical that participation in the certification process is voluntary and non-exclusive of other certifications. Having the option to opt out of a particular certification process or to partake in more than one minimizes the potential for anticompetitive effects.

A key antitrust danger is that certified companies could deny certification unjustifiably to a competitor in order to restrict that competitor's ability to compete against the certified companies.[30] This danger can be avoided if the participation criteria are transparent, access to the standard is on the basis of reasonable and non-discriminatory criteria, and certification is awarded objectively—particularly if the ultimate arbiter is an independent third party.

Petitioning the Government**.** Most activities involving petitioning of the government and its agencies, filing and defending lawsuits or regulatory claims, and other use of judicial or administrative processes—even in collaboration with competitors or for explicitly anticompetitive purposes—enjoy immunity from the U.S. antitrust laws under the *Noerr-Pennington* doctrine, so long as any anticompetitive effects flow from the resulting actions of the government, not from the

EC has not issued specific guidance for trade associations, its *Guidelines on Vertical Restraints* apply in this context. *See generally* Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1.

[29] In countries suffering from weak legal systems or inadequate law enforcement, compliance pledges may be especially important.

[30] *See Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (the plaintiff alleged such a theory of harm).

direct conduct of the private parties.[31] Collective actions by industry participants can play an important role in clarifying existing law and in working with governments to craft laws that are efficient and enforceable, and antitrust policy does not prevent rivals from jointly discussing clarifications or changes to laws. In fact, trade associations routinely engage in these types of lobbying efforts. In the EU, collaborations among competitors are subject to the competition rules but enforcement efforts never have been applied to collective government petitioning in the absence of independent, private anticompetitive actions.

2. Collaborations Likely to Draw Increased Scrutiny

Hardcore Cartel Conduct. So-called "hardcore" cartel conduct includes price fixing, bid rigging, and customer or territory allocation. Such agreements are considered to be "the supreme evil of antitrust."[32] Unlike other agreements and collaborations discussed in this chapter, cartel conduct is *per se* illegal, meaning it is conclusively presumed to be unreasonable and no inquiry is made into potential procompetitive effects. Cartel conduct is subject to stiff penalties, including criminal sanctions. Any legitimate competitor collaborations discussed in this chapter must not be used as cover or sham for hardcore cartel conduct.

***Group Boycotts or Concerted Refusals to Deal*.** These are agreements among competitors not to do business with another firm (including a supplier or purchaser) or to limit or circumscribe the terms of doing business with another firm. For example, a group of smartphone manufacturers might agree with each other not to purchase computer chips from a particular chip producer suspected of polluting its environment.[33] Group boycotts also may arise in the context of membership in trade associations or standard-setting organizations. For example, that same group of smartphone manufacturers might be part of a trade association and refuse membership to competing manufacturers who do not implement ESG commitments into their own supply chains or who engage with non-ESG-compliant suppliers. Such actions may be found to be unreasonable, particularly if membership in the trade association provides benefits critical to competition.

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[31] *See E.R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). This so-called doctrine is found in a line of federal court precedent and rooted in the United States Constitution's First Amendment, which protects the "right . . . to petition the Government for a redress of grievances" against infringement. U.S. CONST. amend I. The cases hold that antitrust law does not apply to activities of parties seeking governmental action, even where the parties have anticompetitive motives. The key facts that confer *Noerr-Pennington* immunity are that the anticompetitive effects must result from the government action itself. If the anticompetitive effects flow from the private parties' acts independently of government acts, no immunity applies. Thus, lobbying for a law that imposes industry-wide railroad rate increases would be immune but having the railroads fix prices first, and then lobby later, would not be immune.

[32] *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

[33] In January 2022, the Net Zero Insurance Alliance, a group of insurance companies pledging to eliminate greenhouse gas emissions from their underwriting businesses, was forced to limit the scope of their collaboration after being warned that a proposal to include a commitment to exit coal insurance as part of the terms of group membership may run afoul of antitrust laws. *See* Alistair Marsh, *Net-Zero Insurers Uncover New Climate Adversary in Antitrust Law*, Bloomberg News (Jan. 19, 2022), https://www.bloomberg.com/news/articles/2022-01-19/net-zero-insurance-coal-exit-plans-impeded-by-antitrust-law.

Joint Purchasing Arrangements. Smaller companies typically agree to joint purchasing arrangements as a way to increase purchasing power and lower costs by achieving economies of scale. Most such arrangements are procompetitive for these reasons and do not raise antitrust concerns. In the context of the ESG commitments, a group of buyers may decide to purchase goods from one or a few ESG-compliant suppliers via a joint purchasing agreement. This might give buyers comfort that their supplies are ethically sourced, provide more checks on compliance, and give buyers more leverage to ensure a particular supplier meets preferred standards. Participants should be mindful that such agreements, while they may serve procompetitive purposes, may draw antitrust scrutiny if they result in monopsony power (meaning the ability of the purchasing group to force suppliers to lower their prices below competitive levels) or facilitate collusion. The 20% U.S. market share safe harbor would apply here. The 30% EU market share safe harbor also may apply here, but only to vertical aspects of the agreement.

Information Sharing. Competitors often have legitimate business justifications for sharing information with each other, and likely will do so in furtherance of the collaborations discussed in this chapter. However, competitors should be very careful about whether or how to share "competitively sensitive information" because doing so may facilitate collusion or harm competition. Competitively sensitive information is any information of Competitor A that is not public or well-known, which, if learned by Competitor B, would allow it to predict A's pricing or output strategies or influence the competitive decisions of either party, particularly when the information increases their likelihood of engaging in parallel conduct or otherwise individually or collectively reducing the intensity of their competition (e.g., tend to cause them to compete less vigorously on price). Information concerning price, output, costs, or strategic planning is generally considered competitively sensitive when shared between competitors.[34] Collaborations related to adoption and implementation of ESG commitments should not, and likely need not, involve the exchange of competitively sensitive information. To the extent that companies do feel the need to share such information, it should be (i) historical, meaning generally a few months old depending on the industry; (ii) aggregated and anonymous, such that no individual firm's data is identifiable; and (iii) exchanged through a neutral third party, such as a trade association, so that no direct competitor receives another's raw, non-anonymous, identifiable and sensitive data. For instance, competitors should not share company-specific cost, margin, or volume information when discussing best practices or the effect of ESG commitments on their business. Similarly, businesses should not share forward-looking business plans as part of their efforts to develop a code of conduct or standards.

It is important to keep in mind that the relationship between parties affects whether information is competitively sensitive. While certain information may be competitively sensitive as between two competitors, that same information may be not competitively sensitive to share with suppliers as part of the vertical relationship. Regulatory authorities recognize this distinction.

[34] *Collaborations Among Competitors, supra*, § 3.31(b). This list is not exhaustive because the scope of competitively sensitive information varies by industry.

IV. Ongoing Debate: What to do with "Out of Market" Business Justifications?

What happens if—when conducting the balancing tests described above—the potential harms are suffered by a different group of consumers or individuals than the group who benefits? This question is the subject of a vigorous current debate. For example, there may be calls for sustainability benefits that primarily go to one group of people (e.g., lowered pollution near a computer hardware factory in Asia) while the costs are borne by an entirely different group (e.g., computer laptop consumers in the United States). Such "out of market" benefits traditionally are not recognized by antitrust law, but have particular relevance to broad efforts to address ESG issues. In February 2022, EU Competition Commissioner Margrethe Vestager said she is "not ready" to accept out of market sustainability benefits, but on this point, the Competition Commission faces pushback from EU member state competition authorities.[35]

At a broader level, the Organisation for Economic Co-operation and Development ("OECD") Competition Committee hosted a series of roundtable forums with antitrust authorities in February 2021 to discuss how antitrust laws interact with the United Nations sustainable development goals. The discussions examined potential conflicts between antitrust law and ESG goals, how antitrust authorities can account for sustainability goals in existing legal frameworks, and what improvements to antitrust laws would further sustainability goals.[36]

As of this writing in March 2022, perhaps the best discussion of ESG, antitrust, balancing tests, and out of market benefits is the Dutch Authority for Consumers and Markets ("ACM") *Second Draft Version: Guidelines on Sustainability Agreements – Opportunities within Competition Law* (Jan. 26, 2021).[37] In the ACM's summary:

> Agreements between undertakings can help, in an effective manner, towards the realization of public sustainability objectives. Furthermore, these agreements can broaden the support for the efforts that are needed to realize such objectives. The draft version of the Guidelines on Sustainability Agreements explains the application of competition law to sustainability agreements between undertakings. The Guidelines show the opportunities that market participants have for making sustainability agreements, but also where competition law draws the line.

At 25 pages, the ACM's *Guidelines* are too long to summarize here, but they are recommended reading. The Hellenic Competition Commission (the main competition authority in Greece) also recently hosted a forum and published a *Competition Law & Sustainability Staff Discussion* Paper analyzing the convergences and conflicts between sustainable ESG development and competition law.[38]

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[35] *See* Charley Connor, *Vestager Unwilling to Consider Out-of-Market Sustainability Benefits*, Glob. Competition Rev. (Feb. 3, 2022), https://globalcompetitionreview.com/european-commission/vestager-unwilling-consider-out-of-market-sustainability-benefits.

[36] *Sustainability and Competition*, OECD Competition Committee Discussion Paper (2020), https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf.

[37] Available in English at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[38] *Competition Law and Sustainability,* Hellenic Competition Comm'n, https://www.epant.gr/en/enimerosi/competition-law-sustainability.html (last visited Feb. 20, 2022). The

As of the publication of this paper, the foregoing debate is still in a development stage. Companies adopting ESG commitments should monitor the discussion, as it has the potential to affect the application of antitrust laws and perhaps other laws as well.

paper sets forth a number of suggestions to better reconcile competition law with sustainability objectives, including issuing general guidelines regarding when companies can collaborate to attain sustainability objectives, developing a competition law sustainability "sandbox" in which companies can work together on new approaches to meet sustainability goals in a competition law safe harbor, and the formation of an "advice unit," comprised of a variety of regulatory authorities, to provide informal consultation on proposed sustainability-related innovations.