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ASIA COMPETITION E-BULLETIN

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ESG collaboration and competition law: change on the horizon?

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Businesses around the world are increasingly looking towards strengthening their environmental, social and governance (**ESG**) performance. In doing so, many businesses may seek to collaborate with their peers, for example through setting industry standards in relation to certain ESG issues or cooperating to tackle key risks in their sector.

While competition law compliance may not be the first thing that springs to mind for businesses considering their ESG initiatives, it is important to bear in mind that any collaboration or cooperation between competing businesses must be carefully considered to avoid breaching competition law. This has been a particular issue surrounding "sustainability agreements" relating to environmental issues, but can equally be applied to other arrangements relating to social and governance issues as well, such as agreements relating to equal pay initiatives.

Many businesses have expressed concern that competition law inhibits or prevents them from taking certain steps to benchmark and improve their ESG performance at an industry level; at the same time, a number of competition law regulators are catching onto this growing apprehension and are preparing a response. In this e-bulletin, we summarise the recent developments on this issue, and those that remain on the horizon.

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Where are we now?

Agreements between undertakings that distort or restrict competition are prohibited by most competition law regimes around the world, including Article 101 of the Treaty on the Functioning of the EU (**TFEU**) and Article 13 of China's Anti-Monopoly Law (**AML**). Whilst in many cases, agreements to collaborate on ESG initiatives will not breach the

prohibition, in practice, it can be difficult for businesses to draw a clear line between the types of collaboration on ESG that are acceptable, and those that are not. This is because, in most jurisdictions, businesses must "self-assess" any cooperation to determine whether it is or could be anti-competitive.

The risk is also an ongoing one for businesses, because even a competition compliant agreement could be used to facilitate the anti-competitive behaviour of employees when put in practice. The key risk is in exchanging competitively sensitive information, such as in discussions relating to setting industry standards relating to ESG objectives. The exchange of competitively sensitive information is a breach in and of itself under many regimes, or may be viewed as contributing towards cartel conduct, such as volume restrictions or price fixing. For example, the European Commission is currently investigating several car manufacturers for alleged restricting competition on emission cleaning technology, which arose in the context of otherwise legitimate discussions over technical and safety standards.

Most competition law regimes outline an exemption for agreements that generate benefits which outweigh the negative effects of restricting competition (in Europe, this is Article 101(3) TFEU, and in China, this is Article 15 of the AML). However, the focus of such exemptions has typically been on *economic* benefits, such as increased efficiency and lowered prices. Therefore, it is less clear that businesses can rely on the exemptions solely on the basis of ESG benefits generated by the cooperation.

In short, there is currently significant uncertainty on the application of competition law to ESG collaboration.

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Competition regulators take a stance

To date, the European Commission (**EC**) (which in many ways leads the global conversation on sustainability and the environment) has not taken clear steps to address the potential competition law risks arising from ESG collaboration.

Following a consultation in late 2020 specifically on the issue of how competition law and sustainability policies work together, the EC has yet to formulate any proposals for concrete policy changes, although it is expected to do so later this year. For further insights into the consultation and the EC's subsequent conference, please refer to our earlier briefings here and here respectively. The EC has also remarked that the goal of competition law is "to promote and protect effective competition in markets", and that "[c]ompetition policy is not in the lead when it comes to fighting climate change and protecting the environment. There are better, much more effective ways, such as regulation and taxation."

On the other hand, a number of competition law regulators from EU member states have taken a much bolder stance on the issue. In particular, the Dutch Authority for Consumers and Markets (the **ACM**) has been at the forefront of these developments, issuing a detailed guidance paper in July 2020 on how competition law will be applied to sustainability agreements. The paper first describes various types of sustainability agreements that are considered acceptable on the basis that they are unlikely to give rise to any restriction of competition, as well as agreements which are likely to deliver benefits that offset any restriction of competition that could arise. The ACM then discusses its enforcement policy, noting in particular that for any agreements that are published, and which appear to have followed the ACM's guidance in good faith, the ACM will not seek to impose fines even if such agreements are ultimately found to be incompatible with competition law.

Greece's Competition Commission has followed in the footsteps of the ACM with a working paper in September 2020, promising to draft new guidelines that will support businesses entering into sustainability collaboration arrangements. The Greek authority also proposes to include environmental benefits and sustainability objectives as part of their substantive assessment in competition law cases.

The UK's Competition and Markets Authority (**CMA**) has also published guidance specifically on the application of competition law to sustainability agreements, although it takes a slightly more reserved approach and simply outlines the ways in which competition law may apply in these circumstances. For more discussion on the CMA's guidelines, please refer to our earlier briefing here.

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Changes on the horizon

With sustainability so high on the agenda of businesses and governments alike, competition law regulators around the world will increasingly be setting their minds to the intersection of competition law and ESG. The EC, in particular, is widely expected to address sustainability collaboration agreements in its long-awaited revisions to the Horizontal Cooperation Guidelines, and other jurisdictions will likely follow suit.

These changes will likely become increasingly necessary in order for the competition regime to keep pace with the EC's other initiatives and developments. For example, in its recommendations to the EC in relation to its forthcoming mandatory ESG due diligence legislation, the European Parliament's Legal Affairs Committee has proposed that provisions should be included to encourage "cooperation", "collaboration" and "coordination" between undertakings in a sector. If the EC takes up these recommendations, we anticipate that substantial new guidance will be necessary to clarify the interplay between competition law and these proposals. For more discussion on the Legal Affairs Committee's draft report, please refer to our earlier briefing here.

Even in the absence of concrete guidelines, the greater prominence of ESG issues means that competition authorities are likely to be more willing to engage with businesses on resolving thorny questions. The European Commission, for example, has indicated that it may be prepared to issue "comfort letters" approving certain types of coordination as pro-competitive (as it was similarly prepared to do in response to COVID-19).

For businesses, this will be welcome news, as it removes the tension that currently exists between collaboration and compliance. In the meantime, it remains essential to bear in mind the common competition law pitfalls when engaging and collaborating with competitors, particularly in exchanging competitively sensitive information and entering into anti-competitive horizontal cooperation arrangements.

To find out more about competition law and ESG collaboration, please contact our experts listed below.

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