(l-r) Anna Pletcher, Kelse Moen, Molly Shuminer, and Emme Tyler of O'Melveny & Myers. Courtesy photos

COMMENTARY

Are Sustainability and Competition Truly Incompatible?

Because competitor collaboration creates the risk of antitrust liability, industries may have to thread the needle between advancing social values and avoiding criminal or civil antitrust liability.

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Antitrust

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From investing to fashion, companies in many industries have embraced environmental, social, and governance (ESG) standards. In doing so, these companies have increasingly prioritized sustainability and positive community impact, in addition to generating profits.

Recently, some companies have been working with competitors to achieve ESG-related goals. For example, three prominent investment firms—BlackRock, Vanguard and State Street—joined the Net Zero Asset Managers initiative, which aims for a net-zero greenhouse gas emissions goal by 2050 (though Vanguard recently left). The Council of Fashion Designers of America has adopted a similar pledge. Additionally, fashion industry leaders have proposed that the industry adopt changes to reduce unsold inventory, by limiting sale periods, changing season lengths and overhauling the fashion calendar.

Despite these good intentions, competitors using ESGs to set goals and measure achievements has generated significant debate and concern about antitrust issues. Generally, businesses enjoy wide latitude to define their purposes and unilaterally act to achieve their goals. But a rise in industrywide coordination has unwittingly pushed ESGs into the antitrust space.

Because competitor collaboration (even in pursuit of worthy goals) creates the risk of antitrust liability, industries may have to thread the needle between advancing social values and avoiding criminal or civil antitrust liability. Importantly, social and political activities, the focus of many ESGs, are not immune from antitrust liability, even if they are motivated by noncommercial considerations.

U.S. antitrust laws prohibit certain types of agreements among competitors. Some agreements, including those to fix prices or restrict output, are considered so manifestly anticompetitive that they are deemed illegal without any individualized analysis of their effects. Others—such as agreements to share information, set standards for products or services, or limit competition as part of a larger cooperative arrangement—are scrutinized under the rule of reason, a more fact-intensive analysis. The key question in a rule of reason analysis is whether pro-competitive justifications, which benefit consumers, ultimately outweigh the agreement's anti-competitive effects.

At one end of the spectrum, agreements affecting price or output, even if crafted with benign intent, create a high risk of antitrust liability. Consider fashion industry leaders' proposal to limit sale periods. Even if its objective is to reduce waste, this measure would require designers to agree to restrict output

—a per se antitrust violation.

At the other end of the spectrum, agreements to engage in pure advocacy pose little risk. For example, investment firms might fund a marketing campaign to raise awareness about human rights abuses. Or they might form a trade association to lobby legislators for new laws. Under the First Amendment and the Noerr-Pennington doctrine, these actions would be considered protected. The firms could face antitrust risk, however, if they worked together to affect prices or output or jointly urged consumers to boycott suppliers that do not pay fair wages.

While companies may be able to avoid per se violations, they should be wary of agreements that could create liability under the rule of reason. For example, fashion designers committed to human rights might agree on standards for fair working conditions, such as setting minimum wages and maximum hours for overseas factory workers. If the designers agree to work only with suppliers who meet those conditions, the designers could be subject to antitrust liability for agreeing to restrict competition—effectively, an agreement to boycott noncompliant suppliers.

Companies should also proceed cautiously concerning agreements to share information. Consider a group of fashion designers who want to share information about the fabrics they use with a third-party trade association, which could then compile the data and share an industrywide summary with the designers. The designers could consult this information to moderate their purchasing to prevent depleting scarce resources.

The designers face a lower risk of liability if the summary includes only industry-level information and only data regarding past purchasing. However, if the summary identified individual companies and detailed their purchasing plans, the designers would face a higher risk of liability: That type of information could enable them to coordinate and effectively agree to restrict their future purchasing.

Given the impending collision between ESGs and antitrust law and the legal uncertainty, what's next? The European Union (EU), the United Kingdom and Japan have all proposed or issued guidance for businesses utilizing ESGs. The EU will allow companies to submit proposed agreements for consideration and advisory opinions. Japan's proposed guidance analyzes 75 different scenarios and identifies conduct more or less likely to create antitrust liability.

Any other solutions would provide little, if any, legal certainty. The Department of Justice or the Federal Trade Commission could issue guidance on how they will analyze ESGs under federal law—but that guidance could be rescinded by a new administration or the agencies themselves if their priorities change. Moreover, any federal guidance would not limit companies' potential liability under state competition laws. States could also offer interpretive guidance, but this would not eliminate legal uncertainty; in fact, for companies operating in multiple states, it might compound the problem because they would have to comply with multiple and potentially conflicting laws.

For now, asset managers, fashion designers, and other businesses should tread lightly. ESG-related antitrust litigation is all but guaranteed, so we inevitably will find out whether sustainability and competition are truly incompatible.

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