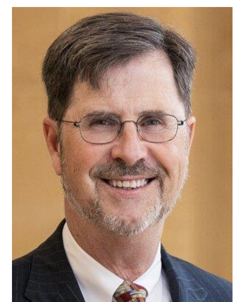
LAW360®

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Navigating Antitrust Considerations In ESG Collaborations

By **Jon Roellke, Christina Renner and Will McEnroe** (July 31, 2024, 5:29 PM EDT)


Jon Roellke

Christina Renner

Will McEnroe

Hotly contested across party lines — and often borders — environmental, social and governance standards were the focus of recent dueling reports by the U.S. House Judiciary Committee.

Despite the deepening debate, what continues to be clear is that collaboration within and among different market sectors is needed to set standards, measure progress, and develop and implement policies that can meet shared sustainability objectives.

And this must all be done within the boundaries of permissible procompetitive collaboration under antitrust laws.

What exactly these boundaries are is a debate that has grown hotter than our planet — especially in the U.S., where the left and right have vastly different views on policy goals and the permissibility of sustainability collaborations. This debate was crystallized in the pair of sharply worded committee reports from the House Judiciary Committee released on June 11.

These reports, and other commentary from enforcement agencies — including, most recently, statements from Amy McFarlane, deputy chief of the Antitrust Bureau at the New York Attorney General's Office — illustrate the deep political divide on climate change. But they also provide insights into how firms may collectively establish ESG standards and goals within the bounds of antitrust laws.

House Judiciary Committee Reports: Highlighting the Partisan Divide

The House Judiciary Committee's majority released an interim staff report on June 11, titled "Climate Control: Exposing the Decarbonization Collusion in Environmental, Social and Governance (ESG) Investing."[1]

The report argues that a coalition of left-wing environmental activists and major financial institutions have colluded to force American companies to decarbonize and reach net-zero emissions. It accuses certain organizations of waging a "war on the American way of life" by pressuring corporations to disclose and reduce carbon emissions, restricting corporate free speech, and raising consumer prices.

The majority report asserts that these actions are the work of a "climate cartel" seeking to eliminate carbon emissions, negatively affecting American consumers while ignoring other global factors such as OPEC+ output reductions, wars and the long-term costs of climate change. The report does not include a legal analysis, but suggests the need for potential legislative reforms.

On the same day, Democratic members of the House Judiciary Committee released a rebuttal report, "Unsustainable and Unoriginal: How the Republicans Borrowed a Bogus Antitrust Theory to Protect Big Oil."[2]

The rebuttal report calls the majority report's investigation misguided and an abuse of oversight authority. It offers an in-depth antitrust analysis, concluding that no antitrust law prevents private investors from collaborating to address climate change risks.

The rebuttal report emphasizes that ESG initiatives are voluntary, respond to investor demand for transparency and do not represent a concerted scheme to achieve unlawful objectives. Instead, such collaborations are commercially sensible, in that they enhance market efficiency, and are subject to rule-of-reason analysis, since the efforts do not intend to raise prices or exclude competitors.

The rebuttal report also highlights the broader benefits of ESG initiatives, such as mitigating climate-related risks and promoting sustainable investment practices.

The dueling federal reports highlight the increasingly sharp political tension over ESG initiatives that permeates an increasingly complex set of red state and blue state legislative efforts.

Climate Risk Collaborations: Not Inherently Anticompetitive

When assessing the legality of standard-setting efforts, antitrust enforcers often apply a rule-of-reason analysis, which weighs procompetitive benefits against any potential anticompetitive effects.

McFarlane suggested in recent remarks that collaborations such as those seen in net-zero alliances would likely fall under the rule-of-reason framework, rather than being considered per se illegal.[3] A rule-of-reason approach allows for a nuanced evaluation of whether the benefits of collaboration, such as improved sustainability and innovation, outweigh the potential harm to competition.

Federal enforcers have been quick to note, however, that ESG is not a talisman against antitrust scrutiny.

In response to questioning by the U.S. Senate Judiciary Committee in 2022, both Federal Trade Commission Chair Lina Khan and Assistant Attorney General Jonathan Kanter emphasized that ESG initiatives do not get a free pass from regulatory scrutiny. Khan noted that parties cannot use ESG commitments as a defense for anticompetitive behavior in merger reviews.

However, as McFarlane pointed out in her recent remarks, whether an ESG commitment can qualify as a remedy for anticompetitive concerns in the merger context is distinct from whether collaborative ESG efforts pass antitrust muster in the standard-setting context.

Competitor Collaboration Guidelines: A Path to Procompetitive and Prosocial Outcomes

During a June event, McFarlane addressed concerns regarding potential antitrust violations in standard-

setting collaborations on ESG goals. According to the New York Attorney General's Office, such collaborations are not unprecedented, and firms and antitrust lawyers can establish frameworks to avoid legal pitfalls while achieving procompetitive and socially beneficial outcomes.

To find the appropriate balance, McFarlane highlighted the joint U.S. Department of Justice and Federal Trade Commission competitor collaboration guidelines issued in 2000.[4] These guidelines offer a valuable analytical framework, outlining principles for evaluating agreements among competitors, providing an analytical structure for assessing potential antitrust concerns, and identifying safety zones that, if adhered to, may reduce the risk of antitrust scrutiny.

Although the current administration is unlikely to strictly adhere to the safety zones outlined in the guidelines, the broader principles and analytical frameworks remain relevant and can serve as helpful building blocks for structuring cooperative ESG efforts. Notably, the guidelines acknowledge the potential benefits of collaboration, and delineate circumstances where combined efforts are less likely to raise antitrust concerns.

Key factors assessed under the guidelines include whether an agreement could be characterized as per se illegal, the nature and purpose of the agreement, whether the agreement limits independent decision making, the size and market power of the parties involved, and the type of information shared within the collaborative effort.

By adhering to guardrails and guidance set out in the guidelines, companies can navigate the complexities of ESG standard-setting without necessarily running afoul of antitrust laws — although they may still face significant litigation risk.

Comparing the U.S. Approach With the EU and U.K. Approach

The intersection of ESG and antitrust law presents a complex landscape requiring careful balancing and considerations. But what makes the topic even more difficult is the differing approaches between the U.S., the European Union and the U.K.

In the U.S., there is no exemption from the antitrust laws for ESG initiatives, and enforcers have explicitly stated that they will not hesitate to take action against collaborations they deem anticompetitive.

The U.S.' cautious approach errs on the side of scrutiny, even in the context of ESG goals. Conversely, the EU and the U.K. have adopted more lenient approaches, actively encouraging ESG collaborations and providing guidance to avoid antitrust concerns.

The EU recently introduced a new section on sustainability agreements in its regulations recognizing their potential procompetitive benefits.[5] Some member state antitrust agencies have also taken a more lenient approach to competitor collaborations, and some have published specific guidance — e.g., the Netherlands, Austria and Germany.[6]

The European Commission's Horizontal Guidelines give four examples of agreements unlikely to run afoul of competition law:

- Agreements aimed solely at ensuring compliance with requirements and prohibitions in legally binding international agreements that are not fully implemented or enforced by the member state;
- Agreements concerning the internal corporate conduct of companies, and not their business activity;
- Agreements setting up databases with general information on suppliers that follow sustainable practices, if these do not prohibit or oblige parties to purchase products from such suppliers; and
- Agreements to organize industrywide awareness campaigns on environmental and other impacts of consumption, if they do not amount to joint advertising.

The guidelines also create a "soft safe harbor" for sustainability standardization agreements, subject to certain conditions. However, all other agreements are subject to classic antitrust rules.

Similarly, the U.K.'s Competition and Markets Authority published its Green Agreements Guidance in October 2023, following extensive stakeholder consultation.[7] This U.K. guidance provides insight into how the CMA intends to apply competition law to environmental sustainability agreements, defined as those "aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment or assist with the transition towards environmental sustainability."

While "environmental sustainability" includes improvements to air quality and the conservation of biodiversity, agreements that pursue wider eco-societal objectives are not covered.

Notably, the guidance states that the CMA will not enforce competition law against those environmental sustainability agreements that "reduce the negative externalities arising from greenhouse gases," referred to as "climate change agreements." The guidance provides a framework for assessing such climate change agreements, considering the impact on competition and market dynamics, and offers an open-door policy for businesses seeking informal guidance to navigate potential legal pitfalls.

The burden of proof rests on businesses wishing to rely on the exemption, which must exercise care and caution in describing and quantifying the anticipated benefits of an agreement to avoid the risk of greenwashing.

While the CMA guidance is nonbinding, businesses seeking — and complying with — informal guidance from the CMA will receive protection from enforcement actions and fines, including protection for directors from disqualification orders. Such protection will not, however, insulate those companies against potential actions for damages from third parties — e.g., competitors, consumers or suppliers — alleging that an agreement is anticompetitive and caused them harm.

Divergent approaches across jurisdictions may create challenges for companies operating in multiple regions, necessitating careful navigation of varying regulations and guidelines.

Antitrust Considerations for Firms Engaging in ESG Collaborations

Document procompetitive justifications.

Clearly document the procompetitive benefits, including for consumers, of an ESG initiative to support its legality and align its work to stay focused on such benefits.

Establish information exchange guidelines and protocols.

Implement robust guidelines and protocols to prevent the exchange of competitively sensitive information.

Standards or recommended practices should be voluntary and nonbinding.

Preserve the autonomy of participating entities in their business operations and decisions to avoid collusion. In other words, all ESG efforts should be voluntary and nonbinding.

This means that whether, and to what extent, a competitor chooses to adopt or implement any particular standard or practice should be a unilateral and independent decision that the competitor should make for itself, guided by its own independent economic and other interests and in service of its customers.

Preserve independent decision making.

Without further antitrust guidance, competitors should not make commitments to each other about (1) the procurement or investment decisions they may make, (2) the counterparties with whom they may choose to conduct business, or (3) the terms and conditions under which they may do so.

Avoid exclusivity and market allocation.

Ensure that collaborations are open to all interested parties, and avoid exclusive dealings or market allocations that could reduce competition.

Follow established guidelines.

Adhere to the DOJ-FTC competitor collaboration guidelines, and ensure compliance with policies to avoid antitrust violations.

Monitor compliance regularly.

Conduct periodic reviews, and maintain records to ensure adherence to antitrust guidelines and policies.

Next Steps

The intersection of ESG goals and antitrust laws presents a complex challenge for firms and their counsel. By establishing clear frameworks for collaboration, adhering to established guidelines and carefully considering the competitive implications of their actions, companies can work toward achieving their sustainability objectives while mitigating legal risks.

Jon Roellke, Christina Renner and Will McEnroe are partners at Morgan Lewis & Bockius LLP.

Morgan Lewis partner Leonidas Theodosiou and associate John Ceccio contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Staff of H. Comm. on the Judiciary, 118th Cong., Report on Climate Control: Exposing the Decarbonization Collusion in Environmental, Social and Governance (ESG) Investing (2024), https://democrats-judiciary.house.gov/uploadedfiles/2024.06.11_final_esg_report.pdf.

[2] H. Comm. on the Judiciary, 118th Cong., Climate Control: Exposing the Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing (2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-06-11%20Climate%20Control%20-%20Exposing%20the%20Decarbonization%20Collusion%20in%20Environmental%2C%20Social%2C%20and%20Governance%20(ESG)%20Investing.pdf.

[3] Chris May, ESG standard-setting can be pro-competitive, pro-social, New York antitrust enforcer says, MLex (June 20, 2024), https://content.mlex.com/#/content/1571859/esg-standard-setting-can-be-pro-competitive-pro-social-new-york-antitrust-enforcer-says.

[4] Federal Trade Commission & U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[5] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:5.

[6] See, e.g., Netherlands (https://www.acm.nl/en/publications/businesses-can-collaborate-order-achieve-sustainability-goals), Austria (https://www.bwb.gv.at/fileadmin/user_upload/Leitlinien_zur_Anwendung_von____2_Abs_1_KartG_auf_Nachhaltigkeitskooperationen__Nachhaltigkeits-LL__final.pdf); Germany's latest FCO decision in Plant Tray (https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/08_05_2024_Plant_Tray.html).

[7] Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (2023), https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf.