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The Crossroads of ESG Collaboration and Competition Law

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I. 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 organizations.

India is also moving steadily towards developing guidelines and regulations on ESG. For instance, a listed company's board report is required to make disclosures on conservation of energy, and recently the Securities and Exchange Board of India ("SEBI") also revamped the "Business Responsibility Report" to further strengthen the ESG disclosure regime. To seek specific and standardized disclosures, the regulator has introduced a sustainability disclosure norm, "Business Responsibility and Sustainability Reporting" ("BRSR") which will act as a single comprehensive source of non-financial sustainability information for all business stakeholders. It is aligned with the nine principles of National Guidelines for Responsible Business Conduct and is mandatory for the top 1,000 listed companies by market capitalization to annually disclose ESG related information from the current financial year (i.e. FY 2022-23). In January 2022, SEBI had further released a discussion paper to streamline companies' ESG ratings by standardization of symbols and scales for ESG ratings.

While 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 arises is whether there could be a potential conflict between competition law and increasing ESG initiatives by companies, and in particular collaboration between companies.

II. Position in India

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

There is no explicit provision relating to sustainability under the Competition Act, 2002 ("Act") or indeed even under the Competition (Amendment) Bill, 2022. The question then is how and to what extent the existing framework for approving mergers or analyzing anti-competitive agreements can accommodate ESG initiatives. We believe that the existing framework is broad enough to enable the Competition Commission of India ("CCI") to consider the effects of ESG initiatives as part of their overall assessment. For instance, in case of mergers, ESG efforts can be covered under factors such as promotion of, or relative advantage by way of contribution to, economic development, innovation and whether the benefits of the merger would outweigh any potential adverse Impact. Similarly, when analyzing anti-competitive agreements, regard to ESG efforts could be given when considering technical, scientific, and economic developments or accrual of benefits to customers. It could also be considered whether due weightage can be given to ESG efforts when evaluating the exemption accorded by the Act to efficiency increasing joint ventures between competitors in a manner similar to

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consideration given to cooperation in research or standardization.

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, or if a dominant enterprise imposes any anti-competitive restrictions on any upstream or downstream entity in the supply chain, 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 as for instance has been done by SEBI. We have attempted to draw a parallel in terms of the position in other jurisdictions in this regard in the next section.

III. Position in Other Jurisdictions

Competition authorities of the Netherlands, Greece and the United Kingdom were the first few regulators to have issued detailed guidance[2] on the interplay between competition law and sustainability agreements/collaborations among 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 ("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.[3] 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 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

[2] While 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.

[3] These entered into force on January 1, 2023.

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 penalized (except for Daimler which received 100 percent leniency for disclosing the cartel).

Prior to this, in a cartel case involving detergent manufacturers (Unilever, Proctor & Gamble, Henkel), the parties had extended the defense of implementation of an environmental initiative concerning laundry detergents (which, *inter alia*, led to coordinated price increases). The defense was, however, not accepted and the EC imposed penalties on the manufacturers (except for Henkel which received 100 percent 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 way they may be assessed.

IV. Conclusion

On balance, agreements/arrangements involving any potential collaboration from a sustainability perspective need to be assessed on a case-by-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.