HERBERT SMITH FREEHILLS

AVOIDING BREACHES OF COMPETITION LAW WHEN COLLABORATING ON ESG INITIATIVES

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Legal Briefings

*When collaborating with other industry participants on your next environmental, social or governance ("**ESG**") initiative, it is important to remember competition law and the need to avoid sharing competitively sensitive information.*

INTRODUCTION

Companies are increasingly scrutinised in relation to their ESG initiatives and this has led to more collaboration between competitors with the common goal of avoiding the adverse impact their operations and supply chain arrangements can have on the environment and society.

While collaboration towards these objectives is welcome it can give rise to risks in a competition law context, particularly if it involves the sharing of competitively sensitive information.

In this article, we explore the type of collaboration that is permissible under competition law, and the key areas of risk for companies seeking to cooperate with their competitors in ESG initiatives.

KEY AREAS OF COMPETITION RISK

An anticompetitive agreement between competitors, for example to fix prices or allocate markets, is recognised as a serious infringement of competition law in all major competition law systems.

Globally, many competition authorities consider that even the exchange or flow of competitively sensitive information between competitors amounts to a serious infringement of competition law (even in the absence of any agreement on present or future conduct).

The rules in this area are particularly strict – in some jurisdictions (e.g. the EU) even the mere receipt of competitively sensitive information is enough to amount to a serious infringement. The penalties for breaching competition law can be severe, including high fines for the companies involved and in some jurisdictions (e.g. UK, Australia) even fines and imprisonment for individuals.

SCOPE FOR LEGITIMATE COLLABORATION AMONGST COMPETITORS

Competition law recognises that it may, in certain circumstances, be legitimate for competitors to collaborate and discuss matters that are of general importance to an industry, for example health & safety issues.

Collaboration on such matters can take many forms, ranging from ad-hoc cooperation amongst small groups of companies to sector wide initiatives or initiatives coordinated by industrial or trade associations.

TOPICS WHICH MAY BE LEGITIMATE TO DISCUSS

The following topics are examples of what can generally be discussed at meetings involving ESG initiatives, provided that the discussion does not concern individual company behavior or impact on the competitive behavior of participants:

- The need to comply with certain labour laws, modern slavery laws, health and safety rules etc., and at a high level what those laws mean (however, individual responses to particular legal changes should not be discussed);
- Legal proposals or regulatory reforms that impact the industry and coordination of a collective response to such proposals;
- Health and safety standards across an industry and how these can be improved;
- The adverse environmental impact caused by an industry or group of companies, and how this could be reduced (except where involving the discussion of new technology or other factors which would give a company a competitive edge);
- Caution should be exercised but in certain circumstances it may be permissible to disclose, at a very high level, a suspicion that a supplier may be engaged in modern slavery (for example, because of unusually low supply prices offered). Competition law advice should be sought prior to making such a disclosure and in any event should not involve the discussion of competitors' supply costs or whether or not the parties will continue to use that supplier.

If in doubt seek legal guidance before attending the meeting or before taking any material steps
ESG matters are, in certain circumstances, able to be discussed because the information does not relate to competitive markets, practices or processes. Where a discussion on ESG issues veers into matters in which the parties are competitive, exercise caution and seek legal advice before taking any material steps.

There are previous examples of cases where organisations set up to discuss ostensibly legitimate matters have been found to be in breach of competition rules. For example, in Italy, a body established by law with responsibility for, amongst other things, ensuring road safety was found to have reached a price fixing agreement by fixing the minimum operating costs of road transport as between private operators.

'RED FLAGS' - TOPICS TO AVOID

In order to reduce the risk of breaching competition law, certain rules need to be followed in relation to meetings with competitors.

The following types of information are examples of matters which should never be discussed with competitors, irrespective of whether the conversation is within the context of an ESG initiative:

- Prices, fees, discounts, margins, promotion periods;
- Commercial terms, rebate strategies, volumes;
- Cost information including supplier pricing/costs, labour costs and other key cost inputs;
- New technologies and product launches;
- Alignment of terms which lead to the exclusion of a competitor or reduction of competition on a market;
- Supply capacity, expansion plans, or customer specific information; and
- Remuneration, incentives and employment terms offered to employees.

Information relating to future conduct is particularly sensitive and poses the highest level of competition law risk. While it may seem unlikely that any specific meeting between competitors relating to an ESG project would veer into such topics, it is important to be vigilant because a company may be implicated in a competition law violation simply by being present when competitively sensitive information is discussed.

GUIDELINES FOR MANAGING COMPETITION LAW RISK

Given the risks around any meetings involving competitors, including those relating to ESG initiatives and projects, caution should be exercised when attending such meetings. In particular, the following steps should be taken when engaging with competitors:

- Before participating in any meeting or discussion with competing companies check that the purpose of the meeting/discussion is legitimate and there is no equally effective way of securing the same purpose/outcome without communicating with these companies;
- Ensure that meeting agendas are circulated in advance and obtain a copy ahead of each meeting. Raise any concerns with the legal team ahead of the meeting;
- Ensure that accurate minutes are circulated after the meeting and that you keep your own personal notes of the meeting;
- Keep watch for the discussion of any competitively sensitive information during the meeting. It is also important to consider whether the particular topic being discussed is relevant to competition and something which therefore should not be discussed openly with competitors. For example, new technology to produce greener energy which limits any adverse environmental impact should not be discussed by competing energy companies. Another example would be discussing detailed supplier pricing or fixing such prices between competitors under the guise of modern slavery or other ESG concerns.
- If you have any competition law concerns during the meeting inform the organiser (and ensure this is minuted). If the discussions persist, leave the discussion (ensuring that this is noted in the minutes) and inform your legal team immediately.
- Make unilateral and independent decisions about whether or not to use a supplier. Do not reach (or attempt to reach) an agreement or understanding with a competitor that you both will avoid using a particular supplier due to modern slavery concerns.
- To the extent that any platform, association, membership organisation or competitor asks for data from your company in the context of an ESG initiative, consider the reason for the request and exercise caution in particular to avoid inadvertent disclosure of competitively sensitive information.

These guidelines should be followed at all meetings involving competitors, whether they occur on a formal or informal basis and whether involving only two competitors or larger numbers, as in sector based industry associations. Because the competition law risks relating to competitor meetings are relatively high and the consequences for engaging in the exchange of competitively sensitive information potentially severe, it pays to be vigilant while advancing the ESG agenda.

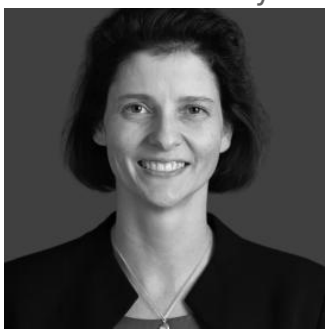
FURTHER INFORMATION

Herbert Smith Freehills' market leading competition practice is at the forefront of advising on competition law issues and works closely across all offices to help deliver robust high quality advice to clients, including working with the firm's cross-disciplinary Business and Human Rights team.

For further information on any of the issues covered in this article please contact Liza Carver and Matthew Bull.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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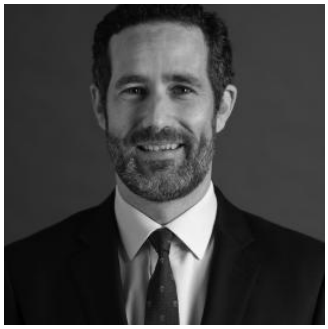

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