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E S G A R T I C L E S

Competition regulation: a non-conventional tool for boosting ESG initiatives

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ESG initiatives arise from the increasing awareness of the largest and most complex economic, environmental, and social challenges that we are facing at a global scale. The United Nations 2030 Agenda and related Sustainable Development Goals (SDGs) include taking urgent action to combat climate change and its impacts; reaching the sustainable use and conservation of marine life, agriculture, and natural resources; ensuring access to affordable, reliable, sustainable, and modern energy, and, in general, ensuring sustainable production and consumption patterns.

Hence, businesses have turned their attention to the design of circular economy and sustainability strategies. However, such ambitious goals cannot always be reached alone, sometimes they require efforts from entire industries or, at least, of some of their main actors, a phenomenon that can be translated into a polemic concept for the legal Antitrust & Competition discipline: collaboration between competitors.

In this article, we highlight how overlooking competition implications on ESG initiatives can result in disruptive complications, and even deal breakers, not only for the involved industries or agents, but also for governments, and consequently for entire communities.

On one hand, we have businesses working on ESG strategies, who should be mindful of the importance of not only assessing the competition risks to an accurate extent, but also to run such risk assessment within the appropriate timeframe. On the other hand, we have the government's responsibility to provide a stable and secure legal environment that allows and promotes the effective implementation of businesses initiatives seeking sustainability goals, under a healthy competitive environment.

Today, the Mexican Competition Law does not provide an exemption for collaboration agreements between competitors for purposes of pursuing

large and complex challenges (climate change, for instance), or a binding special *ex ante* approval procedure for that purpose. Unfortunately, the only clarity we have today is that coordination between them with the purpose or effect of restricting competition is a highly punishable behavior that can even be prosecuted as a criminal offense. Fines for colluding add up to 10% of the agent's annual revenues, in addition to other legal and reputational consequences.

Compliance of competition laws is a crucial factor that corporations must include in any ESG project risk assessment -prudently, at an appropriate early stage-. At the same time, companies must constantly pursue efficiency and socially responsible behaviors in a world facing scarcity of resources. Competition regulations should not represent a decisive deterrent for the running of the project, especially when considering the benefits that an efficiently and effectively implemented ESG initiative can bring to all the parties involved (from costs reductions and expedited R&D to environmental impact and community development, among others).

Unfortunately, due to the lack of regulation on this specific type of collaboration for the greater good, the competition law risk hovers around these projects, forcing the participants to remain under a constant uncertainty or to simply abort the idea of collaboration. The risk intensifies when we introduce the whistleblower notion to the equation. The alternative offered by the leniency program can jeopardize the course of the interactions, especially on industries with hostile competitive environments.

In the Mexican scene we have witnessed how competition authorities started considering more receptive postures on collaboration agreements as reacting measures towards the economic crisis caused by the COVID-19 outbreak. The pandemic and its massive impact on the socioeconomic environment led governments to the realization that only reactions of the same magnitude would help reactivate and balance markets, setting-up the perfect

scenario for competition authorities to reconsider the exponential benefits and impact that synergies between competitors could represent. We should not trifle away the traction caused by this crisis, which can be used as an opportunity to continue promoting the debate towards a sustainability angle.

Despite COFECE's decision to not move forward with the publication of the Guidelines on Collaboration Agreements Between Competitors,¹ in April 2021 the regulator opted for including a short section on this topic in the Guidelines on Merger Notification,² sharing some parameters to ponder if a collaboration between competitors should be considered as a notifiable transaction. Nonetheless, we cannot ignore the fact that guidelines issued by the Mexican competition authorities are not legally binding, and therefore do not constitute a legal precept that can be used as hard law in the defense of future cases.

Synergies and collaboration are essential to accelerate innovation and scale for tackling the world's largest and most complex challenges. ESG policies need to be on the agenda of governments, regulators, businesses, academics, and competition practitioners around the globe. Governments and regulators should draw clear principles and well-defined regulation that allows (if not promotes) certain type of collaboration among competitors to face such massive challenges as an industry, while also ensuring a healthy competitive environment in the goods and services market. One example of much needed collaboration is the implementation of joint circular economy and sustainability strategies that can only work if the efforts are industry wide. While transitioning to a safer legal ground, practitioners will face the thrilling challenge of providing their clients with legal strategies that enhance viability of the

1 On November 2017, COFECE started a public consultation process on the draft of the Guidelines on Collaboration Agreements between Competitors.

2 The official Spanish version the most recent Guidelines on Merger Notification is available in the following Mexican Official Gazette link: https://www.dof.gob.mx/nota_detalle.php?codigo=5615397&fecha=08%2F04%2F2021

projects and propitiate their culmination by lowering risks such as the competition law risk.

The aforementioned supports the idea that we

need to evolve our competition law framework. To achieve this, it is important that companies have the appropriate legal counsel with a multidisciplinary ESG perspective.

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