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Nathan Mendelsohn

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WHEN CAN AN AGREEMENT ON ENVIRONMENTAL POLICIES COMPLY WITH U.S. ANTITRUST LAWS?

Nathan Mendelsohn

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Over the past few years, there has been a rapid increase in consumer, investor, and business interests in instituting corporate standards that consider “environmental, social, and governance” (“ESG”) implications. Even as interests have grown, U.S. enforcers have maintained “there is no such thing” as an ESG exemption under American antitrust laws. But the lack of an explicit exemption does not mean any ESG policy is necessarily doomed to failure. Instead, even under a conventional antitrust analysis, some type of coordinated ESG policies may pass scrutiny.

This Article focuses specifically on policies implemented by multiple firms, as opposed to policies implemented by a single firm, that are designed to further various environmental goals and how they may be analyzed under U.S. antitrust laws.

laws. This Article discusses three ways that environmental policies may be analyzed that would allow them to pass scrutiny. First, only policies that actually constitute an agreement, as opposed to conscious parallelism, would be subject to scrutiny under Section 1 of the Sherman Act (15 U.S.C. § 1).3 Second, if the policies constitute legitimate efforts to lobby for government action, then they may be immune from antitrust liability under the Noerr-Pennington doctrine.4 Third, a policy may be found to not be unreasonable, either because it does not have anticompetitive effects or because it has procompetitive benefits that outweigh the anticompetitive effects.

I. IS THERE AN AGREEMENT?

To be actionable under the Sherman Act, there must be an agreement.5 “Even ‘conscious parallelism’ . . . is ‘not in itself unlawful.’”6 Specifically in the environmental context, multiple firms may implement similar, or even identical, policies without entering an agreement.7

One notable example, in 2019, Ford, BMW, Volkswagen, and Honda all announced they had entered agreements with the state of California to comply with California’s stricter emissions standards for cars sold across the country, rather than using the lower efficiency standards that would likely apply outside of California.8 The Department of Justice (“DOJ”) subsequently opened an investigation into whether the car manufacturers “agreed among themselves on the outlines of the deal with California regulators.”9 California regulators, on the

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9 Brent Kendall & Ben Foldy, Justice Department Issues Civil Subpoenas to Auto Makers in California Emissions Pact Probe, WALL ST. J.: AUTOS INDUS. (Nov. 7, 2019, 4:18 PM),
other hand, asserted that “the state worked individually with the automakers and that all parties were mindful of not violating antitrust laws.” In February 2020, the DOJ announced the closing of this investigation without stating its rationale.

Assuming, as California regulators asserted (and the DOJ may have concluded), that there was no agreement between the manufacturers, this provides an example of how parallel implementation of environmental policies may play out. Here, four large car manufacturers seemingly unilaterally agreed with California to comply with its emission standards nationwide. Arguably, the four manufacturers may have unilaterally determined that setting up parallel production facilities for California and the rest of the U.S. would have been inefficient. Further, in light of the significant regulatory issues facing California’s emissions standards, there was an obvious rationale for these decisions being made nearly contemporaneously, as these manufacturers may have wanted to announce their standards before the regulatory environment changed. As this may have amounted to simply parallel conduct, there would have been no agreement as required by Section 1. In creating new corporate policies, it is entirely possible that, like in the above example, various competitors may unilaterally decide that implementing more environmentally


10 Id.

11 Brent Kendall & Timothy Puko, Justice Department Drops Antitrust Probe of Auto Makers Involved in California Emissions Deal, WALL ST. J. (Feb. 7, 2020, 7:05 PM), https://www.wsj.com/articles/justice-department-drops-antitrust-probe-of-auto-makers-involved-in-california-emissions-deal-1158114207 (concluding that there was “no evidence of collusion among the companies” without any supporting statements or evidence from either the DOJ or the automakers).

12 See Davenport & Tabuchi, supra note 8.


14 Davenport & Tabuchi, supra note 8 (“In coming weeks, the Trump administration is expected to all but eliminate an Obama-era regulation designed to reduce vehicle emissions that contribute to global warming. California and [thirteen] other states have vowed to keep enforcing the stricter rules, potentially splitting the United States auto market in two.”).
favorable policies would be in their unilateral interests.\textsuperscript{15} In these cases, there should be no liability under the antitrust laws.\textsuperscript{16}

II. IS THE AGREEMENT PROTECTED BY NOERR-PENNINGTON?

Under the \textit{Noerr-Pennington} doctrine, “no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.”\textsuperscript{17} This includes efforts to influence “all branches of the federal, state, and local U.S. governments.”\textsuperscript{18} This doctrine may serve to immunize legitimate petitioning on environmental grounds that would otherwise restrict competition.\textsuperscript{19}

The Fourth Circuit’s decision in \textit{A Fisherman’s Best, Inc. v. Recreational Fishing Alliance} presents a vivid example of how \textit{Noerr-Pennington} may apply in the environmental context.\textsuperscript{20} Here, the defendant, a recreational fishing organization, had worked to limit plaintiffs, a collection of fishing businesses, from fishing near Charleston, South Carolina by hosting rallies and releasing various statements to lobby for local restrictions on commercial fishing.\textsuperscript{21} In response, the city limited the commercial fishers’ ability to use a maritime center and let recreational fishers operate it instead.\textsuperscript{22} The mayor of Charleston stated that this decision was motivated by his newfound knowledge “of the effects of longlining on stocks of fish, of the interests of sports fishermen, and of the perception of citizens that governmental efforts at managing fisheries were not


\textsuperscript{16} Didden, \textit{supra} note 7 (“Collaborative conduct motivated by ESG considerations should not, and need not, generally run afoul of core antitrust prohibitions . . .”).


\textsuperscript{18} \textit{JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 50.01} (Matthew Bender & Co., Inc., 2nd ed. 2023).

\textsuperscript{19} See id. § 50.04. If the attempt to influence is a mere sham to harm competitors, then the \textit{Noerr-Pennington} doctrine does not apply. \textit{id}. § 50.04(4). This article assumes that the relevant petitioning activities were made in good faith and does not address how a claim of sham petitioning would play out in the environmental context.

\textsuperscript{20} See generally 310 F.3d 183 (4th Cir. 2002).

\textsuperscript{21} \textit{id}. at 187-88.

\textsuperscript{22} \textit{id}. at 188.
successful.” The Fourth Circuit affirmed the dismissal of the commercial fishers’ claims, finding that plaintiffs had validly acted “to solicit government action to keep longline vessels from using a facility built with taxpayer dollars and to avoid additional fishing efforts off the coast (by out-of-state vessels).”

Therefore, plaintiffs’ claims were barred by Noerr-Pennington.

A Fisherman’s Best illustrates that an agreement among competitors to petition for environmentally friendly policies may pass muster under antitrust laws. Courts have also found Noerr-Pennington applies in, e.g., challenges to a shopping center development based on the lack of an environmental impact statement and lobbying for a moratorium on constructing new landfills. Going forward, companies may wish to take a similar tack by focusing on petitioning governmental entities to achieve environmental goals, rather than entering agreements with other companies to achieve the same goals.

III. DOES THE AGREEMENT UNREASONABLY RESTRAIN TRADE?

Next, assuming an agreement is subject to scrutiny under Section 1, an agreement is still permitted if it does not unreasonably restrain trade. If an agreement “always or almost always tend[s] to restrict competition and decrease output,” it may be found to be unreasonable per se. This per se analysis is generally reserved for limited types of agreements that are “manifestly anticompetitive,” that is conduct “that would always or almost always tend to restrict competition and decrease output,” such as when competitors agree on prices or allocations of geographic markets.

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23 Id. at 189-90. “A longliner uses a floating main line that may be several miles long, suspended in the water by floats, to which short lines and baited hooks are attached at intervals. It is highly regulated and federally permitted and is the dominant form of commercial fishing used by United States fishermen in the Atlantic Ocean to harvest highly migratory species such as swordfish and shark.” Id. at 187 n.1.

24 Id. at 190-91, 196.

25 Liberty Lake Inv., Inc. v. Magnuson, 12 F.3d 155, 156 (9th Cir. 1993); see also Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18, 20-22 (2d Cir. 1980) (affirming dismissal where defendants petitioned environmental agencies to review a proposed shopping center development).


30 See Earl W. Kinter ET AL., FEDERAL ANTITRUST LAWS § 12.10 (Matthew Bender & Co., Inc., 2023) (“Explicit agreements among competitors to fix prices, to rig bids, or to restrict discounts remain illegal per se . . . .”); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 47, 49-50 (1990). This article assumes that any agreement would be made between participants that have market power.
enhanced competition are so unlikely to prove significant in any particular case that [courts] adhere to the rule of law that is justified in its general application.”  

If an agreement is not “manifestly anticompetitive,” then it should be analyzed under the rule of reason. Under the rule of reason, the challenger to the agreement generally must first show (1) that the agreeing parties have market power and (2) that the agreement has anticompetitive effects. Next, the agreeing parties must show that the agreement had procompetitive justifications. Third, the burden shifts back to the challenger who must show that the procompetitive benefits were available through a “substantially less restrictive” alternative.” Finally, the court weighs the total anticompetitive effects and procompetitive benefits to see if “the agreement ‘on balance’ remains unreasonable.”

This Article next addresses when agreements to further environmental goals may be subject to per se liability and then discusses how a rule of reason analysis may play out in antitrust challenges to environmental agreements.

A. Would the Agreement be Adjudicated Under the Per Se Standard?

Courts are hesitant to apply the per se standard unless “a court has ‘considerable experience’ with the type of restraint at issue and can predict that the restraint would be found to be unreasonable under the rule of reason in almost all instances.” The Third Circuit’s and the district court’s decisions in

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34 See KINTER ET AL., supra note 31, § 12.14; California Dental Ass’n v. FTC, 526 U.S. 756, 775 n.12 (1999) (“[B]efore a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects . . . there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive.”).
36 Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 990 (9th Cir. 2023) (emphasis in original) (quoting O’Bannon v. Nat’l Collegiate Athletics Ass’n, 802 F.3d 1049, 1070 (9th Cir. 2015)); see also Ohio v. Am. Express Co., 585 U.S. 529, 554 (2018) (Breyer, J., dissenting) (“[T]he antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways . . . .”); Impax Lab’ys, Inc. v. FTC, 994 F.3d 484, 492 (5th Cir. 2021) (“If [the defendant] successfully proves procompetitive benefits, then the FTC can demonstrate that any procompetitive effects could be achieved through less anticompetitive means.”).
37 Am. Express Co., 585 U.S. at 554 (Breyer, J., dissenting) (citation omitted).
38 In re Processed Egg Prods. Antitrust Litig., 962 F.3d 719, 730 (3d Cir. 2020) (quoting Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007)). Note, the Processed Egg litigation is one of the only cases where courts have been called to assess an agreement based in part on environmental goals, here animal welfare.
In re Processed Egg Products Antitrust Litigation are instructive. There, the plaintiffs, a class of egg purchasers, alleged that egg producers inflated egg prices and restricted demand by, *inter alia*, creating a certification program “that was promoted as a set of measures for animal welfare [but] was actually intended to reduce the supply of eggs. The [certification] [p]rogram required egg producers to put fewer chickens in each cage to give the chickens more space.”

The district court concluded that plaintiffs failed to show the certification program “constituted an express agreement among competitors to restrict egg supply.” Instead, there was countervailing evidence that “greater cage space increased hen welfare and thereby improved hen productivity, and by extension egg output.” Therefore, given the lack of clear anticompetitive effects and the potential procompetitive benefits via increased output, the certification program was not a proper candidate for per se treatment. The Third Circuit affirmed this decision after a jury finding for the defendants, which agreed with the district court that the certification program plausibly increased total output and should have been adjudicated under the rule of reason.

Processed Egg Products makes clear that agreements that further environmental goals, such as increased animal welfare, may not be subject to per se scrutiny, even if, as plaintiffs claimed, the agreements may seem likely to reduce output and increase prices. Instead, if the agreement is not an express agreement on pricing or output and plausibly can result in increased output without raising prices, then the court will likely analyze the agreement under the rule of reason framework. However, if an agreement does not plausibly have these procompetitive benefits, it is more likely to be adjudged as per se illegal. Furthermore, based on the Third Circuit’s and the district court’s emphasis on traditional antitrust concerns, rather than treating increased animal welfare as a procompetitive benefit in itself, it appears likely that benefits to the environment by themselves would not be sufficient to warrant a rule of reason analysis.

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39 Id. at 722-23.
41 Id. at 1046.
42 Id. at 1047.
43 Processed Egg, 962 F.3d at 728.
44 See id. at 728-29.
45 See id.
46 See id. (noting that where an agreement had procompetitive benefits and was not manifestly anticompetitive, then the rule of reason applied).
B. How Would the Agreement Be Analyzed Under the Rule of Reason?

1. Does the Agreement Have Anticompetitive Effects?

Assuming a court finds that the per se standard does not apply, as discussed above, the first step is for the challenger to identify some anticompetitive effects.\(^{48}\) In designing an agreement to further environmental goals, simply avoiding anticompetitive effects may be the best course of action. The simplest way to minimize antitrust risk may often be for companies to agree on non-binding standards and labels. For example, the agreement in Processed Egg Products was, at its core, an agreement about what was required for eggs to be certified under the Animal Care Certified Program.\(^{49}\) In other words, egg producers were still free to choose to not be certified, although the jury still found that the certification program amounted to an agreement to reduce supply.\(^{50}\)

As Processed Egg found, such standardization agreements are often subject to antitrust claims, even if the agreements, on their face, just set out a standard.\(^{51}\) That is because these agreements may result in companies reducing output or agreeing on which inputs to purchase to meet the voluntary environmental standards.\(^{52}\) Nonetheless, where a set standard merely “serve[s] the beneficial purpose of communicating information about product composition or quality in a way that can significantly reduce the costs of acquiring certain inputs,”\(^{53}\) it is unlikely to have anticompetitive effects. For example, if a consumer is looking for foods labeled “natural,” it would be beneficial to have a uniform definition of what that term actually means. Given that there is no formal definition set by the FDA,\(^{54}\) an agreement by various food manufacturers on a definition without more is unlikely to have anticompetitive effects.\(^{55}\)

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\(^{49}\) Processed Egg I, 206 F. Supp. 3d at 1036.

\(^{50}\) Processed Egg, 962 F.3d at 725.

\(^{51}\) See id. at 719.

\(^{52}\) C.f. Nat’l Macaroni Mfrs. Ass’n v. FTC, 345 F.2d 421, 424-26 (7th Cir. 1965) (finding that macaroni manufacturers had entered an illegal agreement by standardizing the contents of macaroni at fifty percent durum semolina and fifty percent farina wheat due to a crop shortage).

\(^{53}\) AREEDA & HOVENKAMP, supra note 4, ¶ 2014b.


\(^{55}\) AREEDA & HOVENKAMP, supra note 4, ¶ 2014b (“This classification system enables the [] buyer to purchase the product and be confident about its quality even though he has little information about the particular manufacturer. This in turn enables the supplier to purchase from competing manufacturers without concern about a particular manufacturer’s idiosyncratic classification system, and generally focuses the competition toward price”).
2. Does the Agreement Have Procompetitive Benefits?

As discussed above, Processed Egg appears to have only treated traditional antitrust concerns like increased output and reduced prices as cognizable benefits.56 But Processed Egg also makes clear that an agreement on environmental policies (e.g., animal welfare standards) may have procompetitive benefits that may allow these agreements to avoid per se scrutiny.57 There, the court concluded defendants proffered legitimate ways that the certification program increased output.58 The plaintiffs argued the certification program contained three aspects that reduced output, but the defendants argued each of these aspects had procompetitive benefits.59

First, plaintiffs argued that establishing a minimum cage space for each hen would reduce the total number of hens per facility, while defendants argued that increased cage space “has a positive impact on the health of the chickens, and that ‘healthy, stress-free birds produce more eggs.’”60 Further, producers were free to expand their facilities to contain the same or a great number of hens.61

Second, plaintiffs argued that eliminating “backfilling,” i.e., banning the replacement of hens that die during a production cycle with new hens, reduced total output.62 Defendants argued that backfilling increases the spread of diseases, so banning this practice could help prevent future supply shortfalls.63

Finally, plaintiffs argued that the one hundred percent rule, which required that all of a producer’s facilities had to comply with the certification requirements to be certified, meaning a producer could not produce certified and non-certified eggs, reduced output.64 Defendants argued that this rule was needed to satisfy “consumer demand for humanely produced eggs, and that the increased value of this product was ultimately based upon the defendant’s ability to certify not only their compliance with the standards as articulated by the UEP, but also their total renunciation of the harmful practices these standards sought to remedy.”65

57 Processed Egg I, 206 F. Supp. 3d at 1045-47.
58 Id. at 1047.
59 Id. at 1036, 1045-47.
60 Id. at 1045-46 (citation omitted).
61 Id. at 1046.
62 Id. at 1036, 1038.
63 Id. at 1038.
64 Id. at 1036, 1046.
65 Id. at 1046.
Defendants’ procompetitive justifications were all of the type generally cognizable under antitrust laws, such as guaranteeing consistent output, increasing output, and meeting consumer demand. In deciding a motion in limine to exclude references to animal welfare, the district court ruled that these benefits to animal welfare were relevant to “[i]ncreasing output, widening consumer choice, and meeting customer demand.” The court also noted, “[t]he demand for, motivation behind, and actual effects of the [certification program] are therefore entirely probative as to whether the Program was a pretext for an agreement to reduce supply.” Given that the courts did not identify or discuss the increased animal welfare as procompetitive benefits in themselves, it appears unlikely that environmental benefits by themselves would be credited.

3. How to Weigh Anticompetitive Effects and Procompetitive Benefits?

In weighing anticompetitive and procompetitive effects of an environmental policy, courts appear to solely be concerned with traditional antitrust concerns. As the jury in Processed Egg determined (and the district and appellate court affirmed), an agreement can address environmental concerns and have anticompetitive effects, but still pass scrutiny by having sufficient procompetitive benefits.

Some of the claimed procompetitive benefits in the Processed Egg litigation would also not go into effect immediately after the implementation of the program while there also may have been some short-term decrease in output. For example, if a producer could simply expand its facilities while keeping the same number of hens, which would produce more eggs due to a healthier environment, there would certainly be some time before the new facility was completed. In the meantime, the number of hens that producers would maintain would likely go down in the short term. However, this likely short-term reduction in output was not treated as problematic by the court, indicating that some short-term, anticompetitive effects are not by themselves sufficient to

66 See KALINOWSKI ET AL., supra note 18, § 12.02 (“A wide range of competitive benefits have been found to justify restraints. These include: . . . increasing output; generating operating efficiencies; making a new product available; increasing consumer choice; enhancing quality.”).
68 Id.
70 See Processed Egg, 962 F.3d at 725, 728-29; Processed Egg I, 206 F. Supp. 3d 1036-37, 1045-36.
72 Id.
defeat the claimed procompetitive benefits. On the other hand, the procompetitive benefits need not necessarily materialize immediately to be cognizable.

While many agreements on environmental policies may be acceptable by providing long-term benefits in the form of consistent output at the cost of some short-term losses, *Processed Egg I* indicates that these costs should be transitory. For example, while there may be some time before any new facilities could be built, the court noted the certification “[p]rogram specifically provided a phase-in period, during which producers could adjust to any supply effects that the cage space requirement could have had.” This indicates that short-term reductions in output would be transitory while long-term output could remain constant or increase.

*Processed Egg I* begs the question of how future courts will weigh traditional antitrust considerations, short-term reductions in output, and long-term procompetitive benefits made for the benefit of the environment. As one hypothetical, an agreement by fishers to fix the total catch-per-year limit below the statutory or regulatory maximum to avoid depleting the fishing stock might result in a short-term reduction in output, but the limit may also plausibly increase output in the long term. Under the *Processed Egg* framework, such an agreement would likely impose non-transitory price increases that may outweigh the long-term benefits. That said, it does not appear that a party has tried to justify an environmental agreement by arguing that any non-transitory price increases are outweighed by long-term benefits. So, it is possible that a court or jury may weigh the long-term benefits as outweighing the short-term costs.

IV. CONCLUSION

In short, even while environmental agreements are not subject to an antitrust exemption, that does not mean any policy is doomed to fail. First, businesses can advance environmental interests without reaching an agreement — as

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73 See *Processed Egg*, 962 F.3d at 728 (noting that while the increased cage space requirement would “lead to fewer hens in existing structures,” businesses “could increase the number of hen houses and add more hens”).

74 Id. at 724, 728.

75 See *Processed Egg I*, 206 F. Supp. 3d at 1046.

76 Id.

77 See id.

78 As discussed in Section 2, the fishers could likely avoid antitrust liability by instead petitioning for quotas rather than simply deciding on output themselves.

79 Id. at 1052.
possibly illustrated by Ford, BMW, Volkswagen, and Honda in 2019. Second, businesses can achieve their environmental goals through political influence, which was illustrated by the fishermen in *A Fisherman’s Best*. Such action may be protected by the *Noerr-Pennington* doctrine. Third, even if an agreement is subject to scrutiny under the rule of reason, it is entirely possible to reach an agreement that both benefits the environment and does not harm competition or has procompetitive benefits outweighing the harm, as the jury found was the case for animal welfare standards in the *Processed Egg* litigation.