

Antitrust law and ESG initiatives: A rapidly evolving legal landscape

November 28, 2022 | Client Update | 9-minute read

In the U.S., some members of Congress and state AGs have advocated for greater antitrust scrutiny of industry-wide ESG initiatives, while other state AGs have argued that such initiatives are procompetitive. In the EU and the U.K., competition authorities have issued guidance to support industry-wide ESG initiatives. In this environment, firms contemplating joining ESG initiatives should seek advice to understand the global antitrust landscape.

Antitrust and ESG: New developments and key issues

Firms routinely incorporate environmental, social, and governance (ESG) goals as part of normal corporate operations. In the U.S., some federal and state elected officials and enforcement officials recently have raised concerns with whether ESG-related initiatives involving competitors can violate the antitrust laws. Federal antitrust agency leaders have noted correctly that there are no antitrust exemptions for “socially desirable” activity, including ESG initiatives, but they have provided little further guidance. At the state level, a number of Republican Attorneys General (AGs) have either begun or indicated interest in investigations into alleged violations of antitrust laws in connection with ESG initiatives, while some Democratic AGs have expressed support for the procompetitive benefits of ESG activities.

In certain EU jurisdictions and the U.K., regulatory authorities have taken a more proactive approach to facilitate promotion of collaborative ESG efforts within the boundaries of antitrust law. We discuss these developments, and their impact on business decisions, below.

Federal developments in U.S.

The Biden administration has prioritized support for ESG goals.¹ The administration has also emphasized, however, its commitment to increased enforcement of antitrust laws, without offering updated guidance as to how corporations can collaborate on ESG initiatives while remaining compliant with antitrust laws.² In her testimony at the September 20, 2022 hearing of the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, FTC Chair Lina Khan observed that ESG considerations can never “rescue an illegal deal,” and that the FTC is prohibited under antitrust law from conditioning merger approval on adoption of ESG commitments. FTC Chair Khan also stated that “there is no such thing” as an “ESG exemption” from antitrust laws, adding that, given that agreements regarding ESG initiatives have potential to impact competition, such agreements are “always” relevant to the FTC. At the same hearing, DOJ Antitrust Division Assistant Attorney General Jonathan Kanter agreed “with the sentiment that collusion is anticompetitive and ... that when firms have substantial power and they use that power to achieve anticompetitive ends, that should be actionable under the antitrust laws.”³

In Congress, elected officials have questioned the legality of ESG initiatives under various legal regimes, including antitrust law. For example, on November 8, 2022, a group of Republican senators sent a letter to fifty law firms advising those firms to “fully inform” clients of “the risks they incur by participating in climate cartels and other ill-advised ESG schemes.”⁴ The senators expressed “particular concern” regarding the “collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America’s adversaries abroad.”⁵

Of particular relevance is the senators' statement that Congress will "increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG" and refer those alleged violations to the FTC and DOJ. The senators advise firms and clients engaged in ESG initiatives to preserve relevant documents in anticipation of those investigations.⁶

While the Biden administration has expressed public support for ESG goals, clients who engage in ESG initiatives should be aware of the heightened federal interest in antitrust issues related to ESG matters and evaluate their ESG initiatives with this landscape in mind.

State developments in U.S.

At the state level, numerous Republican AGs have begun investigations into alleged antitrust concerns related to ESG-related behavior. In March 2022, Arizona AG Mark Brnovich published an editorial in the Wall Street Journal in which he announced an investigation into the "Climate Action 100+" initiative⁷ for potential violations of antitrust law. AG Brnovich alleged that participants in the initiative use "coordinated influence to compel companies to shut down coal and natural-gas plants." Moreover, AG Brnovich alleged the use of individual retirement funds in support of initiatives such as the Climate Action 100+ harms consumers in the form of increased energy prices and may constitute "coordinated conspiracy that allocates markets in violation of the law."⁸

Subsequently, on August 4, 2022, a coalition of 19 AGs led by AG Brnovich and Nebraska AG Doug Peterson sent a letter to BlackRock, Inc., CEO Laurence D. Fink, seeking clarification on BlackRock's commitment to maximize investor returns, stating that BlackRock's "actions appear to intentionally restrain and harm the competitiveness of the energy markets."⁹

On November 21, 2022, a group of Democratic AGs from 16 states including California, New Jersey, and New York, together with the District of Columbia, wrote to the chairs and ranking members of the Senate Banking and House Financial Services in response to the August 4 letter.¹⁰ The AGs argued that "the August 4 letter's claim that asset managers that consider ESG factors may be violating antitrust and competition laws is unsupported. An expression of general recommendations or a statement in favor of or against certain policies does not, without more, constitute a violation of the Sherman Act."¹¹

In addition to the BlackRock letter, Republican state AGs are pursuing other avenues of inquiry into ESG practices. On October 19, 2022, Missouri AG Eric Schmitt announced an investigation joined by 18 other AGs relating to the United Nations' (UN) Net-Zero Banking Alliance.¹² Describing the Net-Zero Banking Alliance as "a massive worldwide agreement by major banking institutions, overseen by the U.N., to starve companies engaged in fossil fuel-related activities of credit on national and international markets," AG Schmitt alleged that "Missouri farmers, oil leasing companies, and other businesses that are vital to Missouri's and America's economy will be unable to get a loan because of this alliance."¹³

Even beyond purely antitrust-focused inquiries and investigations, elected officials have opened regulatory investigations into and/or supported laws banning certain ESG initiatives under additional legal theories. For example, a coalition of state AGs sent a letter to a major "ESG and corporate governance research, ratings and analytics" firm expressing concern and requesting answers to questions regarding alleged anti-Israel bias in connection with the firm's ratings.¹⁴ Some states have enacted or are considering laws to bar their state pension funds from investing in companies that "boycott" energy companies or from including ESG considerations in investment decisions.

The politicization of ESG efforts seems likely to continue, heightening the potential for entities to face state-level antitrust inquiries in the near term, particularly in jurisdictions that have taken an overt public posture against ESG initiatives.

U.S. tension with global developments worldwide

In contrast to several states in the U.S., other major jurisdictions, particularly in Europe, are proactively publishing guidance designed to encourage legitimate ESG-related conduct.

For example, in the U.K., the Competition and Markets Authority (CMA) published guidance in January 2021 on the intersection of "sustainability agreements" and competition law.¹⁵ The CMA is explicit in its support of ESG initiatives that allow for transition to a low-carbon economy. The CMA's aim is to "ensure that competition policy does not create an unnecessary obstacle to sustainable development and that businesses are not deterred from taking part in lawful sustainability initiatives in the mistaken belief that they may breach competition law."¹⁶ The CMA goes as far as to observe that, in certain economic contexts, "sustainability agreements may deliver benefits that outweigh the potential consequence of restricting competition." The CMA includes more detailed guidance on mechanisms by which firms can avoid competition law pitfalls, such as use of a fair standard-setting process, avoidance of serious restrictions of

competition and anti-competitive behavior, and consideration of the availability of competition law allowances and either block or individual exemptions.¹⁷

The European Commission has also taken steps at the EU level to manage or reduce antitrust impediments to coordinating ESG efforts between rivals. In March 2022, the European Commission published two draft revised Horizontal Block Exemption Regulations on Research & Development (R&D) and Specialisation agreements (HBERs) and the draft revised Horizontal Guidelines, on which public consultation was invited.¹⁸ The HBERs provide guidance for competitors seeking to collaborate without breaching competition laws. These draft guidelines include a new and separate chapter devoted to sustainability agreements, including new guidance on data sharing, mobile infrastructure sharing agreements and bidding consortia.

And at the state level in Europe, additional EU member states have undertaken actions that reflect a more permissive or deferential interpretation of antitrust law in support of ESG goals than the current U.S. approach. Multinational firms considering international ESG initiatives should be mindful of these distinctions. What may be permissible under EU or individual Member State competition laws may be subject to greater scrutiny under U.S. antitrust law.

Key takeaways

In the U.S., the Biden administration has identified ESG goals as a priority and sought to promote ESG initiatives. ESG efforts have become politicized, however, and have been subject to criticism as potentially anticompetitive, creating uncertainty for businesses. Entities that do business across borders and may operate in jurisdictions that have differing positions on coordinating competitive activities with respect to ESG must be aware of these issues. Entities that are currently engaged in or contemplating participating in ESG initiatives should seek legal advice to ensure full compliance and mitigate antitrust risk.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

D. Jarrett Arp

+1 202 962 7150
jarrett.arp@davispolk.com

Arthur J. Burke

+1 212 450 4352
+1 650 752 2005
arthur.burke@davispolk.com

Ronan P. Harty

+1 212 450 4870
ronan.harty@davispolk.com

Nathan Kiratzis

+1 212 450 4157
nathan.kiratzis@davispolk.com

Christopher Lynch

+1 212 450 4034
christopher.lynch@davispolk.com

Suzanne Munck af Rosenschold

+1 202 962 7146
suzanne.munck@davispolk.com

Howard Shelanski

+1 202 962 7060
howard.shelanski@davispolk.com

Matthew Yeowart

+44 20 7418 1049
matthew.yeowart@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

- ¹ See, e.g., White House Fact Sheet, Biden Administration Roadmap to Build an Economy Resilient to Climate Change Impacts (October 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/15/fact-sheet-biden-administration-roadmap-to-build-an-economy-resilient-to-climate-change-impacts/>, describing Department of Labor proposed rule "making clear that investment managers can consider climate change and other ESG factors in making investment decisions." See also Securities and Exchange Commission, Press Release, "SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices," May 25, 2022, <https://www.sec.gov/news/press-release/2022-92>
- ² Exec. Order No. 14036, 86 FR 36987 (Jul 9, 2021) (Executive Order on Promoting Competition in the American Economy), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.
- ³ Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing, "Oversight of Federal Enforcement of the Antitrust Laws" (September 20, 2022), <https://www.judiciary.senate.gov/committee-activity/hearings/oversight-of-federal-enforcement-of-the-antitrust-laws>.
- ⁴ Letter from Senator Tom Cotton et al. to Fifty Law Firms (November 3, 2022), https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf
- ⁵ *Id.*
- ⁶ *Id.*

- ⁷ Climate Action 100+ describes itself as “an investor-led initiative to ensure the world’s largest corporate greenhouse gas emitters take necessary action on climate change.” The voluntary initiative “brings together – and builds on – a number of pre-existing, investor-led, engagement initiatives that had been operating in different regions of the world. In signing up to Climate Action 100+, investors commit to engaging with at least one of 166 focus companies that are strategically important to the net-zero emissions transition and to seek commitments on the initiative’s key asks: (i) Implement a strong governance framework on climate change; (ii) Take action to reduce greenhouse gas emissions across the value chain and; (iii) Provide enhanced corporate disclosure.” Climate Action 100+, <https://www.climateaction100.org/approach/how-we-work/>. Climate Action 100+ includes 700 global investors, classified as “investor participants” or “investor supporters,” who are collectively responsible for more than \$68 trillion in assets under management across 33 markets. Climate Action 100+, <https://www.climateaction100.org/whos-involved/investors/>.
- ⁸ Attorney General Mark Brnovich, *ESG May Be an Antitrust Violation*, Wall Street Journal, March 7, 2022, <https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807?page=1>.
- ⁹ Letter from Attorney General Mark Brnovich to Laurence D. Fink, August 4, 2022, <https://www.azag.gov/sites/default/files/2022-08/BlackRock%20Letter.pdf>.
- ¹⁰ Letter from Karl A. Racine *et al* to Senator Brown, Senator Toomey, Representative Waters, and Representative McHenry, Nov. 21, 2022, https://oag.dc.gov/sites/default/files/2022-11/ESG%20Letter_Final_11.18.22.pdf
- ¹¹ *Id.* at 5.
- ¹² Press Release, Office of Attorney General Eric Schmitt (October 19, 2022).
- ¹³ *Id.*
- ¹⁴ Letter from Daniel Cameron, Kentucky Attorney General, and Patrick Morrissey, West Virginia Attorney General, et al., to Jean Paul Bradshaw II, August 23, 2022.
- ¹⁵ Competition and Markets Authority, United Kingdom, Guidance, Environmental sustainability agreements and competition law (January 27, 2021), <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>
- ¹⁶ *Id.*
- ¹⁷ *Id.*
- ¹⁸ Press Release, European Commission, Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies (March 1, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371?ExcludePageBreak=true