

“CLIMATE CARTEL” OR SUSTAINABILITY? NAVIGATING ANTITRUST LAWS, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INITIATIVES AND DIVERGENT ENFORCEMENT APPROACHES IN THE UNITED STATES¹

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Abstract

In the United States, there is a growing consensus that businesses ought to publish more information about their activities and outcomes, including significant environmental, social, and governance (ESG) data. This includes both the operations themselves and the results of those activities. The decision to make the provision of this information mandatory was motivated by the objective of enhancing the functioning of the capital markets. When participants are adequately educated about how firms are currently performing and how they are positioned to adapt to changes on the horizon, capital markets function effectively by giving correct market signals about corporate performance and efficiently allocating money. Capital markets also work effectively in terms of providing accurate market signals about corporate performance. Beyond the simple computation of immediate profit and loss, the range of information that is required by the capital markets has grown more extensive as a result of the changing conditions in the economy. Because climate change is causing alterations to the physical environment and causing an expanding range of governmental responses, participants in the capital market are required to take into consideration the possibility of sharp changes in the conditions under which businesses operate. Because of the increased attention paid to issues of social equity and economic inequality, demographic, occupational, and remuneration statistics on a company's employees have taken on a new level of significance for customer behaviour as well as the functioning of the business and its overall performance.

Keywords: *Environment, Sustainability, Governance, Cartel, United States, Laws*

1. Introduction

Companies all over the world are under increasing pressure to make headway on ESG problems like sustainability from stakeholders like shareholders, customers, employees, and regulators. There is frequently industry-wide demand. However, companies must make this progress while avoiding conflicts with competition laws, which vary across jurisdictions, and competition enforcers, who have adopted various and frequently politicized methods to sustainability. This first part, which concentrates on the United States, examines the challenging enforcement landscape for ESG efforts. The European Union, its member nations, and the United Kingdom will be the subject of the following chapter.

Republican members of the House Judiciary Committee wrote a letter² to an investor-led initiative that works to reduce greenhouse gas emissions at the businesses in which its members had investments on December 31, 2022. The initiative “seems to function like a cartel,” according to the House letter, which raised concerns. The document’s authors claimed the right to monitor “how coordinated efforts to advance environmental, social, and governance (ESG) policies could violate antitrust laws” and voiced doubt that “this collusive behaviour is not anti-competitive.” In order to “examine unlawful restraints of trade and commerce,” the letter reiterated previous requests to

²<https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/evo-media-document/2022-12-31-db-jdj-to-ceres.pdf>

produce documents and information. It also included a warning that, in the absence of voluntary production, “the Committee may... resort to compulsory process.” The final sentence of the letter promised that “the Committee will continue to pursue this oversight matter into the 118th Congress,” which convened on January 3, 2023.

The letter from the House of Representatives is an echo of a letter that five Republican senators sent to various US law firms in November 2022 regarding the ESG policies of the businesses, particularly in reference to sustainability.³ In the letter from the Senate, it was warned that “there is no ESG exemption to antitrust laws” and that businesses should inform their customers about “the risks they incur by participating in climate cartels and other ill-advised ESG schemes.” The representatives in the Senate made a statement to the effect that “Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the Federal Trade Commission and the Department of Justice.”

These letters highlight the tension that exists between sustainability goals, which can suggest collective actions within the same industry (for example, standard-setting or sector-wide goals), and antitrust laws, which generally prohibit cooperation among competitors when doing so would raise prices, restrict output, or decrease consumer choice. This conflict is brought to light by the fact that sustainability goals can suggest collective actions within the same industry (for example, standard-setting or sector-wide goals). Both letters, by using the language of “cartels,” suggest the prospect of criminal enforcement in the United States. In the United States, violations of antitrust cartel laws can result in hefty criminal fines for corporations as well as imprisonment for individuals.

Both letters raise the possibility that congressional investigators will look into the matter. The Republicans have taken control of the House of Representatives, and the powerful House Judiciary Committee is chaired by one of the authors of the letter from the House.

Finally, the letters bring into starker perspective the widening gap between enforcement methods regarding the handling of the junction of sustainability measures and antitrust enforcement inside the United States.

2. US Anti-trust perspective on ESG

In the United States, companies are required to negotiate a federal system, which gives enforcement agencies at the federal level and state attorneys general (state AGs) the authority to enforce laws within their own jurisdictions. Although it is common practice for federal and state law enforcers to work together, there is no mandate requiring them to do so. Individual states retain the authority to take actions that may be in conflict with or run counter to decisions made at the federal level. A further possibility is that Congress may carry out its own investigations and then report any suspected infractions to antitrust authorities.

3. Federal enforcement positions on sustainability

The law of the United States makes it very apparent that even laudable policy goals such as sustainability have no bearing on the legitimacy of an alleged antitrust violation, and the Supreme Court has ruled that “social justifications proffered for respondents’ restraint of trade... do not make it any less unlawful.”⁴

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) in the United States are jointly responsible for the civil enforcement of federal antitrust laws. These agencies are in charge of competition enforcement in the country. In addition, the Department of Justice, in conjunction with other federal law enforcement agencies such as the FBI, conducts investigations into and brings criminal charges against antitrust cartels.

To this day, neither the Antitrust Division nor the FTC has signaled that it will do anything other than apply the law as it currently stands, regardless of the merits of an underlying sustainability purpose. This is the case regardless of whether or not the legislation should be changed.

³https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf

⁴*Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 424 (1990)

Four different automobile manufacturers received identical letters in August 2019 from the Assistant Attorney General (AAG) of the Antitrust Division. These letters demonstrated the enforcement risks that firms face while working towards sustainability goals at the industry level. The automakers had announced a month earlier their agreement with a California regulator to adopt fuel efficiency criteria that were stricter than the Trump administration's planned federal standards. This deal had been reached in advance of the federal standards being proposed by the Trump administration. The then-AAG wrote in the letters that the Division had learned through reporting of a possible agreement between the carmakers and that "we are concerned that [the recipient's] agreement with three automobile companies may violate federal antitrust laws."⁵ The Division had learned of the prospective agreement because it was reported to the Division.⁵

The automakers' agreement was thought to have been harmful since there was a possibility that it hampered competition by reducing the variety of vehicles that were made available to customers. The DOJ later defended the inquiry against suggestions that it was politically motivated, saying that "If the automakers had in fact entered into a horizontal agreement, it would have given rise to a potential antitrust violation." This statement was made in response to allegations that the investigation was politically motivated. This is the case regardless of whether or whether the subject matter of an agreement addressed a topical political problem like emissions; such considerations are immaterial to our prosecutorial judgment."⁶ In the end, the Antitrust Division came to the conclusion that there was no proof of cooperation and terminated the "narrow investigation" at the beginning of 2020.⁷)

The Antitrust Division and the Federal Trade Commission have been in the vanguard of a broad, "whole of government" mandate with regard to competition in the American economy under the administration of Vice President Joe Biden.⁸ The directors of the agencies have bemoaned decades of insufficient enforcement of the antitrust laws.⁹

Despite the increased enforcement activity, both agencies have maintained a neutral stance with regard to ESG initiatives. Although neither has taken or suggested enforcement actions targeting sustainability initiatives (such as the House and Senate letters or the Antitrust Division's letter from August 2019), the current heads of both agencies have acknowledged the possibility of enforcement actions being taken in the future. For example, in a hearing on supervision that took place in September 2022, the heads of both agencies testified that there is no ESG exemption to the antitrust rules, and that it is still usually illegal for businesses to collude with one another. In an opinion essay dated December 2022, the Chair of the Federal Trade Commission (FTC) emphasized this position and extended it to the agency's examination of mergers. In the post, the FTC Chair wrote, "Some in corporate America appear to think that the FTC won't oppose an otherwise illegal acquisition if we approve of its ESG impact. They are entirely incorrect."¹⁰

4. State-level Enforcement

ESG efforts also need to take into account the possibility of enforcement at the state level in the United States. While the environmental regulatory agencies of some states are making strides toward

⁵MakanDelrahim, Ltr. To House Judiciary Cmte., Jul. 1, 2020, *available* at <https://www.politico.com/f/?id=00000173-0d14-dd78-a9ff-7fb6e2a70000>

⁶<https://docs.house.gov/meetings/JU/JU00/20200624/110836/HHRG-116-JU00-20200624-SD008-U18.pdf>

⁷See <https://www.wsj.com/articles/justice-department-drops-antitrust-probe-of-auto-makers-involved-in-california-emissions-deal-11581114207>

⁸<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

⁹See Jonathan Kanter, "Solving the Global Problem of Platform Monopolization," Address at Fordham Competition Law Institute's 49th Annual Conference, Sept. 16, 2022, *available*

at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham>

¹⁰Lina Khan, "ESG Won't Stop the FTC," Wall Street Journal, Dec. 21, 2022, *available*

at <https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135>

a more sustainable future, the law enforcers in other states have been investigating whether or not these efforts constitute possible violations of antitrust laws. In rebuttal to these anti-ESG enforcers, further state enforcers have justified the activities as being within the bounds of the law.

In contrast to the generally impartial stance taken by federal agencies, a number of state attorneys general (AGs) have voiced concerns that are consistent with those of congressional Republicans. Specifically, these AGs believe that sustainability programs can amount to illegal collusion that is detrimental to specific companies.

It is significant that state attorneys general have responded favourably to the efforts of banks and other lenders to attain so-called “net zero” emissions goals. This includes the United Nations Net-Zero Banking Alliance (NZBA), which is a group of over one hundred banks that have “committed to aligning their lending and investment portfolios with net-zero emissions by 2050” by assisting their customers in making the transition away from greenhouse gases and investing in new forms of green energy innovation.¹¹

An editorial written by the Attorney General of Arizona in March 2022 asserted that “the biggest antitrust violation in history may be in plain sight.” The essay gave the impression that financial institutions and investors are working together to stifle investment in the generation of energy in the name of combating climate change.¹² He announced the launch of a probe into “potentially unlawful market manipulation,” citing climate activist groups that are working toward the “decarbonization of capital expenditures.”

This assertion was also made by AGs from other states. Nineteen Republican state attorneys general signed a letter in August 2022 expressing their alarm over “coordinated conduct” between “financial institutions to impose net-zero,” which raises antitrust concerns. The letter was sent to voice their worries.¹³ In the letter, it was pointed out that the ESG programs could result in antitrust violations such as “group boycotts, restraining trade, or concerted refusals to deal,” all of which would “clearly run afoul” of the laws governing antitrust in the United States.

After receiving that letter, a number of state attorneys general initiated a multistate investigation in October 2022. As part of that investigation, they submitted civil investigative demands to six US banks, asking those institutions for information regarding their involvement with the NZBA.

When the investigation was announced, one of the state attorneys general stated that the financial institutions had “collectively agreed that each of their lending practices will reflect the target of net-zero greenhouse gas emissions by 2050, with interim targets in 2030.”...and underlined the effect that the putative agreement would have on the ability of “companies engaged in fossil fuel-related activities” to acquire finance.¹⁴ Despite the fact that participation in the NZBA is entirely voluntary, the state attorneys general decided to launch their investigation anyway. This was done in spite of a statement made in October 2022 by the chair of the NZBA Steering Group, who said that members should “set [their] own individual targets and make independent decisions as to how to meet those targets.”¹⁵

In opposition to these state attorneys general who are against ESG efforts, another group consisting of 17 state attorneys general has defended ESG projects. This organization denounced as “unsupported” the idea of classifying investor-led sustainability programs as “climate cartels” that violate antitrust laws in a letter that it sent to Democratic members of Congress on November 21, 2022.¹⁶ The letter was sent on November 21, 2022. According to what is said in the letter, “an expression of general

¹¹<https://www.unepfi.org/net-zero-banking/>

¹²<https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807>

¹³<https://www.azag.gov/sites/default/files/2022-08/BlackRock%20Letter.pdf>

¹⁴<https://www.texasattorneygeneral.gov/news/releases/paxton-launches-investigation-six-major-banks-collusion-lending-practices-potentially-violate>

¹⁵<https://www.unepfi.org/industries/banking/letter-from-chair/>

¹⁶https://oag.dc.gov/sites/default/files/2022-11/ESG%20Letter_Final_11.18.22.pdf

recommendations or a statement in favour of or against certain policies does not, without more, constitute a violation of the Sherman Act.”

5. Congressional investigations

The US Congress has extensive investigative authority, in addition to that of federal and state law enforcement agencies. In addition to the ability to make informal requests for information or documents, like the ones that were made in the House letter, the investigative authority that Congress possesses also includes the power to formally subpoena both documents and witness testimony. If a congressional subpoena is not complied with, the Department of Justice (DOJ) may be asked to open a criminal investigation into the individual’s possible contempt of Congress.¹⁷

Despite the fact that Congress has the ability to investigate whether or not ESG initiatives comply with federal antitrust laws during its new session (based on letters from the House and Senate), it only has limited powers to actually enforce these laws. In the event that Congress is under the impression that it has uncovered criminal cartel behaviour in connection with a sustainability effort, for example, it does not have the authority to prosecute the behaviour. Instead, it is required to report the subject to the Department of Justice (DOJ) for investigation, and the DOJ (probably through the Antitrust Division) would exercise its autonomous discretion over whether to pursue further inquiry or criminal charges without any duty to act on the suggestion of a congressional committee.

Despite this, it is not safe to assume that people who are the subject of congressional investigations in this field will not face any consequences as a result of those investigations. In this sense, two potential dangers stand out:

To begin, the ability of Congress to get records and witness statements in and of itself is fraught with danger. It is possible for these investigations to unearth problematic papers from a company, and if they do, they may do so in a way that poses a major risk to the company’s reputation, or that leads to private civil litigation. Even a single document or remark that is removed from its context and viewed in isolation has the potential to damage relationships with customers and investors. Furthermore, if a congressional investigation were to uncover truly “hot” documents, it would serve as a force multiplier for federal agency enforcement by the Department of Justice (DOJ), which would likely follow up with its own investigation if the situation warranted it.

Second, the state attorney general of a state that has the authority to investigate and prosecute potential violations could be referred to by Congress. Even though a referral to a state attorney general is historically uncommon, and even though it is highly unlikely that such a referral would result in criminal prosecution (states generally lack the authority to pursue criminal antitrust enforcement), this possibility should not be ignored in light of the public signals from anti-ESG state attorneys general and members of Congress. It is possible for state attorneys general to serve in the capacity of proxy enforcers for congressional investigations.

The environment for the enforcement of sustainability programs in the United States is, therefore, complicated, inconsistent, and frequently politicized. This includes strong suggestions for congressional investigations, the existing reality of investigations by state attorneys general, and the ever-present possibility of investigations by the federal government.

When considering environmental, social, and governance (ESG) challenges from a multinational perspective, the calculus becomes much more complicated. In the upcoming issue of this newsletter, we are going to investigate the equally complex regulatory environment that exists in Europe.

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¹⁷2 U.S.C. §§ 192 and 194.

²<https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/evo-media-document/2022-12-31-db-jdj-to-ceres.pdf>

³https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf

⁴*Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 424 (1990)

⁵Makan Delrahim, Ltr. To House Judiciary Cmte., Jul. 1, 2020, *available at* <https://www.politico.com/f/?id=00000173-0d14-dd78-a9ff-7fb6e2a70000>

⁶<https://docs.house.gov/meetings/JU/JU00/20200624/110836/HHRG-116-JU00-20200624-SD008-U18.pdf>

⁷See <https://www.wsj.com/articles/justice-department-drops-antitrust-probe-of-auto-makers-involved-in-california-emissions-deal-11581114207>

⁸<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

⁹See Jonathan Kanter, “Solving the Global Problem of Platform Monopolization,” Address at Fordham Competition Law Institute’s 49th Annual Conference, Sept. 16, 2022, *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham>

¹⁰Lina Khan, “ESG Won’t Stop the FTC,” Wall Street Journal, Dec. 21, 2022, *available at* <https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135>

¹¹<https://www.unepfi.org/net-zero-banking/>

¹²<https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807>

¹³<https://www.azag.gov/sites/default/files/2022-08/BlackRock%20Letter.pdf>

¹⁴<https://www.texasattorneygeneral.gov/news/releases/paxton-launches-investigation-six-major-banks-collusion-lending-practices-potentially-violate>

¹⁵<https://www.unepfi.org/industries/banking/letter-from-chair/>

¹⁶https://oag.dc.gov/sites/default/files/2022-11/ESG%20Letter_Final_11.18.22.pdf

¹⁷2 U.S.C. §§ 192 and 194.