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Lost In The Woods

By: Moshe Gelberman



In November of 2022, five U.S. Senators sent letters[1] to top law firms warning them that continued cooperation in environmental-social-governance (ESG) agreements, by the firms or by their clients, would be subject to heightened scrutiny under U.S. antitrust laws.[2] By failing to issue similar antitrust guidelines for ESG agreements, federal policy lags behind the international community, disserves the competitive market, and hurts ESG goals.

Under ESG considerations, companies look to “factors that assess how an organisation impacts on the environment and society,”[3] like the companies’ potential climate risks, effects on human rights, and degree of transparency.[4] ESG considerations have had a recent but rapid impact on corporate legal departments and law firms,[5] both in respect to the firms’ own initiatives and those of their clients.[6] Fifty percent of law firms in the United States and Europe surveyed by Wolters Kluwer have created ESG practices within the past three years, and 18% plan to create them within the next three years.[7] Legal departments have struggled to meet this rapid change, with only 20% of firms self-reporting as very prepared to meet the expected ESG guidance demands from their clients.[8]

A “business cannot become sustainable on its own.”[9] ESG goals, and environmental goals in particular, require collaborative efforts, as sole companies share only a margin of responsibility and redressability regarding sustainability issues.[10] Collaboration also leads to reduced risks for companies embracing ESG policies.[11] Broad, corporate-minded platforms can assist companies lacking their own expertise to adopt streamlined ESG goals, and processes by which to track those goals.[12] Naturally, investor groups and activists created organizations and climate pledges, which companies could join and sign to signal their commitment to, and assist in the standardization of, ESG goals.[13]

Lawmakers who see ESG initiatives as little more than products of a political agenda have pushed back against these investor and activist initiatives. Last year, Mark Brnovich, Attorney General of Arizona, pledged to investigate Climate Action 100+ for antitrust violations.[14] He referred to ESG efforts as an attempt to “choke off investment” in oil and gas, and argued that financial institutions that commit to ESG principles are abusing their power over shareholder assets solely in order to help facilitate “far-left” political campaigns.[15] After Blackrock, the world’s largest asset manager, signed onto NZAM, nineteen State Attorneys General, including Brnovich, sent a letter to Blackrock accusing the company of hurting its shareholders’ investment returns and circumventing the will of Congress and the American people.[16]

In a hearing before the Senate Judiciary Committee, Federal Trade Commission (FTC) Chairwoman Lina Khan affirmed the legal premise upon which ESG initiatives could be subject to scrutiny under antitrust laws.[17] Specifically, she rejected claims, reportedly brought to her by various firms, that ESG initiatives might be exempt from collusion prohibited under the Sherman Act[18] or other antitrust laws.[19] However, the Chairwoman was reluctant to commit to enforcement actions against ESG collaborations without further research.[20] The letter from the five Senators referenced the Chairwoman’s statements, and followed the State Attorneys General in referring to ESG initiatives as “collusive effort[s]” to restrict the oil and gas industries, to which climate activists and ESG-supporters attribute rising global energy costs.[21] The Senators recommended that the firms advise their clients about the risks of antitrust enforcement actions, which the Senators pledged will be taken by the FTC and the U.S. Department of Justice.[22]

The Biden administration has expressed its support for ESG initiatives, and some federal agencies have taken actions pursuant to the administration’s statements.[23] The U.S. Department of Labor has proposed a rule expressly allowing investment managers to consider ESG priorities,[24] and the Securities and Exchange Commission has proposed a rule that would enhance investment management disclosures of ESG practices.[25] However, the administration is also committed to increasing enforcement of antitrust laws,[26] as seen by Chairwoman Khan’s statements at the hearing before the Senate Judiciary Committee.[27]

In the past, the FTC, along with the U.S. Department of Justice, has published antitrust guidelines for collaboration among competing business associations.[28] Despite the potential conflict between the current administration’s ESG and antitrust enforcement goals, and despite the ongoing political questioning of ESG agreements from State Attorneys General and U.S. Senators, the FTC has failed to issue guidelines for firms and companies as to how to pursue ESG goals.[29] With antitrust enforcement policy uncertain, firms will be ill-equipped to advise their clients on how to pursue their ESG goals. Some firms have published their own insights, recommending unilateral and voluntary commitments and discouraging boycotts, information sharing, and price-rigging.[30]

ESG agreements have received more guidance internationally. The Competition and Markets Authority of the U.K. published guidance on the intersection of sustainability and competition law in January 2021.[31] The European Commission loosened requirements under which companies could seek guidance from the Commission regarding ESG agreements,[32]

and has requested comments on proposed rules which would allow higher levels of cooperation for ESG practices.[33] Austria and the Netherlands have also explicitly granted antitrust exemptions to ESG-oriented actions.[34]

European competition law differs from U.S. antitrust law in that the latter is concerned primarily with consumer welfare, while the former encompasses a wider range of “political/social/economic objectives.”[35] However, Chairwoman Khan has built her career on shifting U.S. antitrust law from one solely concerned with consumer prices to one which makes judgments about how power is distributed.[36] Under her leadership, the FTC should issue guidelines for ESG collaboration, focused not on the rising energy costs about which the Senators are concerned, but on broader environmental, social, and governance goals.

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[1] Letter from Tom Cotton, Charles E. Grassley, Marco Rubio, Michael S. Lee, & Marsha Blackburn, U.S. Senators., to Fifty-One Law Firms (Nov. 3, 2022) (available at https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf [<https://perma.cc/9W89-UG4T>]) [hereinafter Letter to Law Firms].

[2] Clara Hudson & Dan Papsun, *Republicans Seize on ‘Climate Collusion’ to Muzzle ESG Plans*, Bloomberg law (Nov. 8, 2022, 1:13 PM) <https://news.bloomberglaw.com/antitrust/republicans-seize-on-climate-collusion-to-muzzle-esg-plans> [<https://perma.cc/7AXU-4VCX>].

[3] Simon Boyle, *What is ESG and what does it mean for law firms?*, Bristol L. Soc’y (Feb. 16, 2021) <https://www.bristollawsociety.com/news/what-is-esg-and-what-does-it-mean-for-law-firms/> [<https://perma.cc/254M-8SDX>].

[4] *Id.*

[5] Wolters Kluwer, 2022 Survey Report: The Wolters Kluwer Future Ready Lawyer 29 (2022).

[6] Brent Turner, *Custom & Advisory: Implications of ESG for law firms bring up compliance issues & new business opportunities*, Reuters (Nov. 23, 2022, 11:49 AM) <https://www.reuters.com/legal/legalindustry/custom-advisory-implications-esg-law-firms-bring-up-compliance-issues-new-2022-11-23/> [<https://perma.cc/8ZVN-2CR7>].

[7] Wolters Kluwer, *supra* note 5, at 30. Twenty five percent of firms have ESG practices more than three years old. *Id.*

[8] *Id.*

[9] Marek Nakonieczny, Coro Strandberg, & Allyson Hewitt, *Business Led ESG Collaboration: How-to Guide for Business 3* (MaRS, 2022) <https://corostrandberg.com/wp-content/uploads/2022/05/business-led-esg-collaboration-guide.pdf> [<https://perma.cc/435B-RUP9>].

[10] *The Power of a Collaborative Approach to ESG*, Acad. for Sustainable Innovation (Sept. 2, 2022) <https://sustainableinnovation.academy/power-collaborative-approach/>; *see generally* Francisco Gomez Martinez, Sander Onderstal, & Maarten Pieter Schinkel, *Can Collaboration Promote Corporate Social Responsibility? Evidence from the Lab*, 19-034/VII Tinenberg Institute Discussion Papers (2019).

[11] Acad. for Sustainable Innovation, *supra* note 10.

[12] Boyle, *supra* note 3.

[13] *See, e.g., Commitment*, The Net Zero Asset Managers Initiative, <https://www.netzeroassetmanagers.org/commitment/> [<https://perma.cc/B5NB-DSSK>](last visited Jan. 20, 2022) (hereinafter NZAM); Climate Action 100+, <https://www.climateaction100.org/> [<https://perma.cc/P3MA-SBSB>] (last visited Jan. 20, 2022).

[14] Mark Brnovich, *ESG May Be an Antitrust Violation*, Wall St. J.: Opinion (Mar. 6, 2022 4:40 PM) <https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment->

political-agenda-coordinated-influence-11646594807 [https://perma.cc/B8VJ-GLDV].

[15] *Id.*

[16] Letter from Mark Brnovich et al., State Att’y’s Gen., to Laurence D. Fink, CEO of Blackrock Inc. (Aug. 4, 2022) (available at <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf> [https://perma.cc/RMH9-H23D]).

[17] *Oversight of Federal Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, United States Senate Committee on the Judiciary, Hearing on Antitrust laws, 107th Cong. (statement of Lina Khan, Chairwoman, Federal Trade Comm.) at 2:04:10-2:04:25 (Sept. 20, 2022) <https://www.judiciary.senate.gov/meetings/oversight-of-federal-enforcement-of-the-antitrust-laws> (hereinafter Khan).

[18] 15 U.S.C. § 1.

[19] Khan, *supra* note 17, at 2:03:51-2:03:59.

[20] *Id.* at 2:04:10-2:04:25.

[21] Letter to Law Firms, *supra* note 1.

[22] *Id.*

[23] Sheila R. Adams, Jarrett Arp, Arthur J. Burke, Suzanne Munck af Rosenschold, & Emily W. Parento, *Antitrust law and ESG initiatives: A rapidly evolving legal landscape*, Davis Polk & Wardwell LLP (Nov. 28, 2022) <https://www.davispolk.com/insights/client-update/antitrust-law-and-esg-initiatives-rapidly-evolving-legal-landscape> [https://perma.cc/XGB3-LKPD] [hereinafter Davis Polk].

[24] *See Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 57272 (Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550).

[25] Press Release, Secs. & Exch. Comm’n, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices (May 25, 2022) (available at <https://www.sec.gov/news/press-release/2022-92> [https://perma.cc/W799-BTVG]).

[26] Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 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/> [https://perma.cc/UM4R-SXE2]).

[27] *See* Khan, *supra* note 18.

[28] Fed. Trade Comm. & U.S. Dep’t Just., *Antitrust Guidelines for Collaborations Among Competitors* (2000) (available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [https://perma.cc/282H-SM4W]).

[29] Davis Polk, *supra* note 22.

[30] *See, e.g.*, Bruce D. Sokler, Jacob H. Hupart, Tinny T. Song, & Payton T. Thornton, *Is Antitrust ESG's Achilles Heel? House Republicans Think So.*, Mintz (Dec. 13, 2022) https://www.mintz.com/insights-center/viewpoints/2022-12-13-antitrust-esgs-achilles-heel-house-republicans-think-so#_ftnref3 [https://perma.cc/F7T3-WADY]; Hill Wellford, Ryan Will, & Laura Muse,

The Intersection Between ESG Efforts and Antitrust Law, Vinson & Elkins (July 14, 2022)

<https://www.velaw.com/insights/the-intersection-between-esg-efforts-and-antitrust-law/> [https://perma.cc/MM95-3RF7]

(summary of a paper presented at the American Bar Association’s 2022 Antitrust Spring Meeting).

[31] Davis Polk, *supra*, note 22.

[32] *Id.*

[33] Hudson & Papsun, *supra* note 2.

[34] *Id.*

[35] Dirk Auer, Geoffrey A. Manne, & Sam Bowman, *Should ASEAN Antitrust Laws Emulate European Competition Policy?*, 67 No. 3 Singapore Economic Review 1637, 1644 (2022).

[36] Sheela Kolhatkar, *Lina Khan's Battle to Reign in Big Tech*, New Yorker (Nov. 29, 2021)

<https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech> [<https://perma.cc/R382-PB9F>].