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Battle Over ESG Investment Standards Intensifies

Eleven attorneys general sue asset managers, alleging ESG investment standards raise coal prices and violate antitrust laws

John Roberti, Ronald F Wick, David F Lisner, Harvey B Silikovitz

The ideological battle over the role of Environmental, Social and Governance (ESG) investment standards intensified last week, as the Texas Attorney General and 10 other Attorneys General sued three asset management companies, alleging that ESG strategies pursued by those companies in relation to coal production violated federal and state antitrust laws.

ESG is a set of standards or ideals that socially conscious investors seek out when choosing where to place their money. Over the past four years, ESG investment standards have become increasingly controversial. Some liberal and progressive advocates have sought to pressure large investors to consider issues such as racial justice, labor policies, and environmental stewardship when making investments in companies. At the same time, some conservative critics have opposed ESG as an attempt to inject ideology into investment decisions at the expense of shareholder value.

Allegations and Defenses

The tension is on full display in the Texas complaint. The complaint alleges that the three asset management companies—BlackRock, Vanguard, and State Street—violated Section 7 of the Clayton Act by acquiring minority interests in multiple competing coal-producing companies and then using governance rights (such as proxy votes) to influence the coal companies to reduce output in the name of environmental stewardship. The complaint alleges that this output reduction, in turn, raised the price of coal directly and consumer electric bills indirectly. The states claim that the agreement was reached through organizations committed to reducing carbon output, such as Climate Action 100+ and the Net Zero Asset Managers Initiative.

The investment firms likely will raise several defenses. Among other things, they likely will argue that the states have not plausibly alleged an agreement among the investment companies. The complaint relies heavily on public statements and on the involvement of the investment companies in industry organizations, but the law imposes a high pleading burden on Section 1 plaintiffs, and the absence of a plausible economic motive may prove problematic for the plaintiffs. The companies will likely also challenge the plaintiffs' allegations of anticompetitive effect. The plaintiffs appear to allege that the agreement had the effect of increasing the price of coal, but given the nature of the alleged agreement, if proven, it likely would be assessed under the Rule of Reason. This means the alleged agreement's pro-competitive justifications (disregarding any potential environmental benefits) would be weighed against the anti-competitive effects, and these types of cases are often difficult for plaintiffs to prove.

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Similarly, the complaint's Section 7 challenge to the acquisition of a minority interest by different investors in different coal companies may be difficult to prove. The companies will likely point out that the investors are not alleged to have controlled any of the acquired companies, either individually or collectively, and if accepted, the claims would represent an expansion of the antitrust laws. Under either claim, any economic analysis of a but-for world would be complicated by competing industry trends and regulations.

Broader Implications for ESG and Antitrust

Certainly, it is possible to imagine ESG efforts that would raise significant antitrust concerns, given that ESG goals often require industry collaboration. Notwithstanding the best intentions, case law has held that an effort to achieve social good through collusion or unlawful agreements does not provide a defense, let alone immunity, to an antitrust challenge. *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679 (1978) (rejecting the argument that safety concerns justified an agreement among engineers not to quote prices before being hired); *In Re Processed Egg Prod. Antitrust Litig.*, 851 F. Supp. 2d 867, 877 (E.D. Pa. 2012) (industry agreement to improve the quality of life for animals may be alleged to increase prices or reduce output).

Government regulation may be an answer when an industry-wide agreement is needed to achieve a societal goal, but it is an imperfect one. The *Noerr-Pennington* doctrine holds that anticompetitive effects caused by petitioning the government are immune from antitrust liability. The state action doctrine holds that state actors, including state regulatory boards dominated by industry participants, are generally not subject to antitrust scrutiny. A regulator may choose standards that are not ideal for the industry, and unlike voluntary standards, companies cannot opt out of government-enforced regulations.

The heightened scrutiny of ESG means that any ESG effort must be approached with great care and sensitivity toward antitrust. Trade organizations can be alleged to be conduits for sharing sensitive information, and statements about intentions to adhere to policies or standards can be interpreted as signals or invitations to collude, even when made publicly. Accordingly, the compliance rules applicable to trade associations and public announcements of intentions should be observed diligently when the topic is ESG.

Conclusion: A Case to Watch

Finally, while ESG aspirations have not yet been tested as a defense to antitrust claims, there is no basis in antitrust law for targeting ESG goals as inherently suspect or deserving of greater antitrust scrutiny than other industry self-regulatory efforts. Given the controversial nature of ESG, this case will certainly be followed closely.

The Authors:

John Roberti
Partner

+1 202 851 2073
Email John

Ronald F Wick
Partner

+1 202 851 2072
Email Ronald

David F Lisner
Partner

+1 212 707 1329
Email David

Harvey B Silikovitz
Associate

+1 212 957 7068
Email Harvey

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New York | Paris | Washington DC | London

www.cohengresser.com
info@cohengresser.com
+1 212 957 7600

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