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Weaponizing antitrust: An unsubstantiated attack against climate initiatives

By Jindrich Kloub, Matthew McDonald, Esq., Brent Snyder, Esq., and Jeff VanHooreweghe, Esq., Wilson Sonsini

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The antitrust attack on climate initiatives is heating up. In the last few months, 12 states have filed lawsuits attacking climate initiatives under the antitrust laws[1] and the House Judiciary Committee has issued demand letters that describe such initiatives as antitrust "cartels."[2]

These initiatives are not antitrust "cartels" (at least as alleged). Quite the opposite — these initiatives encourage competition with cleaner, more innovative, or more transparent products. That is pro-competitive under the antitrust laws.

We published an advisory (https://bit.ly/3PWjN2X) explaining how climate initiatives (pursued through shareholder activism) do not violate the antitrust laws when appropriate guardrails are followed.

Below we explain specifically why the conduct recently under attack by the 12 states and the House Judiciary Committee does not violate the antitrust laws (as alleged). At bottom, these are nothing more than political attacks, and the courts should quickly end the misuse of the antitrust laws for this political purpose.

In the last few months, 12 states have filed lawsuits attacking climate initiatives under the antitrust laws.

We take each in turn:

State of Texas et al. v. BlackRock, Inc. et al. (E.D. Tex.)

On November 27, 2024, eleven states filed antitrust claims against BlackRock, Vanguard Group, and State Street Corporation in connection with owning shares in coal companies.

Specifically, the states allege these asset managers violated the antitrust laws in two ways:

(1) the asset managers violated the Clayton Act by substantially lessening competition in certain coal markets by acquiring minority share interests in coal companies, and

(2) the asset managers violated the Sherman Act by conspiring to reduce the output of coal by owning such shares and participating in climate initiatives.

Neither claim is credible on the facts alleged.

To establish a violation of the Clayton Act, the states would need to allege (and ultimately prove) that the acquisitions of minority shares themselves (or even collectively) are likely to lessen competition substantially in the coal markets at issue. The states face an uphill battle for several reasons.

These are nothing more than political attacks, and the courts should quickly end the misuse of the antitrust laws for this political purpose.

The following are only a few:

- First, the states would need to overcome that the asset managers acquired *minority* interests, not controlling interests. Acquisitions of minority interests by a common investor generally raise an issue under the antitrust laws only when the minority shareholders have the ability to influence competitive conduct (e.g., via specific operational rights or board appointments) or gain access to competitively sensitive information that may be improperly shared with competitors; speculation that a minority shareholder might try to convince management to take certain actions is insufficient.
- Second, even if the states establish these minority shareholders could decide how the coal companies approach the market or could improperly share sensitive business information with competitors, the states face the significant challenge of establishing the asset managers have acted to lessen competition in the coal markets at issue (or are likely to do so in the future), not acted to promote cleaner (improved) products.
- Third, the states would need to prove the lessening of competition is likely to occur in the product markets identified — thermal coal and South Power River Basin Coal.

This requires establishing that these are indeed relevant antitrust markets, and that the minority acquisitions are likely to lessen competition in those markets (e.g., by influencing the coal companies to compete less intensely, or facilitating price coordination among the coal companies). As with any Clayton Act claim, the states need to show there are no alternatives to this coal that will mitigate the potential reduction in competition (if any).

To establish a violation of the Sherman Act, the states would need to allege (and ultimately prove) that the asset managers actually agreed *with each other* to reduce coal production.

Further, to establish a *per se* violation, the states would need to prove the purpose of their agreement was to eliminate competition in order to increase prices (to the *benefit* of coal suppliers and the *detriment* of purchasers). The states again face significant challenges.

To name a few:

- First, the states would need to cite some evidence of an agreement among the asset managers to not compete in the supply of coal. While an "agreement" under the antitrust laws is broadly defined, it will take more than alleging that each asset manager owns minority interests in competing coal producers and each participates in organizations seeking to protect the environment. Further, the asset managers are not those "competing" to supply coal. Thus, the states have the greater challenge of showing that asset managers facilitated the alleged conspiracy through the coal suppliers.
- Second, to prove a *per se* violation, the states would need to establish the purpose of the agreement was to reduce the supply of coal, not an agreement to meet certain climate goals. To be clear, evidence of participating independently in a climate organization (or even an independent commitment to an organization's climate goal, *e.g.*, "net zero") is not evidence of an agreement. But, even if the managers agreed *with each other* to meet a climate organization's goal, that is not an agreement to reduce output.
- Third, to be a *per se* violation, the agreement must lack redeeming value (in antitrust parlance the agreement must be a "naked" restraint to competition). If the states prove the asset managers agreed to anything, it appears it would be an agreement to reduce carbon in the *production* of coal (not reduce the output of coal). It is difficult to argue that reducing carbon lacks redeeming value. Indeed, such an agreement (if it even existed) would *improve* coal production, which is pro-competitive. This is what the antitrust laws promote, not prohibit.

State of Nebraska et al. v. Daimler Truck North America et al. (Neb.)

On November 19, 2024, the state of Nebraska filed suit against four domestic truck original equipment manufacturers ("OEMs") and their trade association, claiming violations of Nebraska state antitrust and consumer protection laws. Both laws follow federal antitrust law, the Sherman Act.

Nebraska alleges that defendants conspired with the California Air Resources Board to phase out Class 8 internal combustion engine ("ICE") vehicles in favor of electric vehicles. Class 8 vehicles comprise the heaviest weight class of trucks and include vehicles such as heavy semi-trucks.

According to the complaint, this "nakedly anti-competitive" conspiracy was memorialized in the 2023 Clean Truck Partnership agreement ("CTP"), through which the OEMs agreed to comply with California regulations and reduce their output of Class 8 ICE vehicles. Per the allegations, the OEMs agreed to comply even if the California regulations were found to be unlawful in litigation and even in states outside of California that have adopted or may adopt California's regulations.

Plaintiffs claim the CTP amounts to an illegal agreement to reduce the output of ICE vehicles, driving up prices for such vehicles in Nebraska and elsewhere.

For there to be a true antitrust "cartel" or "collusion," there would need to be an agreement among competitors not to compete in a particular market.

Plaintiffs face significant challenges, most notably because the conduct alleged is unlikely to be found the "naked" horizontal agreement plaintiffs claim it is:

- First, while plaintiffs claim that "[t]he CTP agreement is an explicit horizontal agreement between competitors," they offer no facts as to how the defendants actually agreed amongst *each other*. They claim that because the defendants signed "on the same day," there must have been "a high level of interfirm communications and prior agreement" among them. Yet this is speculation and insufficient to support a claim.
- Second, the remaining allegations at most describe how each OEM agreed *with the State of California* to comply with California's regulations. However, any such agreements lack the required horizontal element that is needed to constitute an actionable conspiracy.[3]
- Third, the complaint fails to seriously grapple with the obvious pro-competitive benefits of the CTP agreement. Plaintiffs only state perfunctorily that the "agreement has no procompetitive benefits." They have not and likely cannot demonstrate that any alleged anticompetitive harm outweighs the clear redeeming value of the agreement *on its face*, i.e., promoting the output of alternative, innovative trucks.

House Judiciary Committee 'demand letters' and interim report

On December 20, 2024, the U.S. House Judiciary Committee demanded information from more than 60 U.S.-based asset managers regarding their involvement with the Net Zero Asset Managers (NZAM) initiative, which the Judiciary Committee labels "a woke ESG cartel."[4]

These demand letters follow the Judiciary Committee's release of an interim report titled "Climate Control: Exposing the Decarbonization Collusion in Environmental, Social and Governance (ESG) Investing" in June 2024. In that report, the Judiciary Committee argued that a coalition of left-wing environmental activists and major financial institutions have "colluded" to force American companies to decarbonize and reach net-zero emissions.[5]

The labels "cartel" and "collusion" are hyperbolic absent proof, and the Judiciary Committee's letters and report are devoid of proof that any of the companies or organizations under attack violated the antitrust laws.

Again, for there to be a true antitrust "cartel" or "collusion," there would need to be an agreement among competitors not to compete in a particular market,[6] the purpose or effect of which was to restrain competition in that market,[7] and the absence of redeeming pro-competitive value to the agreement.[8]

And while "social justifications" do not save otherwise anti-competitive conduct,[9] promoting competition with more innovative products (*e.g.*, cleaner or more transparent) serves the core purpose of antitrust law.[10]

Conclusion

These complaints fall well short of what is required to allege a violation of the antitrust laws. Conclusory allegations of an agreement should be found insufficient to support what are otherwise implausible claims. Even should the plaintiffs' claims be allowed to proceed, it is easy to foresee a variety of pro-competitive and innovation-enhancing justifications that will outweigh any countervailing (potential, if not entirely speculative) anticompetitive effects.

What appears to be a blatantly political motivation will ultimately have to give way to scrutiny of the merits, and it appears highly likely that the claims will end up being found to be utterly lacking.

Notes

[1] Complaint, *Texas v. BlackRock, Inc.*, No. 6:24-cv-00437 (E.D. Tex. Nov. 27, 2024) (No. 1), https://bit.ly/40Lqt98; Complaint, *State of Nebraska et al. v. Daimler Truck North America et al.* (Neb. 2024), https://bit.ly/3EAp6Cp.

[2] Press Release, H.R. Comm. On the Judiciary, Judiciary Committee Probes 60+ Companies over ESG Ties (Dec. 20, 2024), https://bit.ly/4fWFZ7u. These demand letters follow the Judiciary Committee's report from June 2024. Staff of H.R. Comm. on the Judiciary, 118th Cong., Interim Staff Rep., "Climate Control: Exposing the Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing" (June 11, 2024), https://bit.ly/4hhT50C.

[3] *See e.g., Dickson v. Microsoft Corp.*, 309 F.3d 193, 204 (4th Cir. 2002) (without evidence of the rim connecting the spokes of a hub-and-spoke conspiracy, a "rimless wheel conspiracy" must be rejected).

[4] Press Release, U.S. House of Representatives Judiciary Comm., "Judiciary Committee Probes 60+ Companies over ESG Ties" (Dec. 20, 2024), https://bit.ly/4fWFZ7u.

[5] U.S. House of Representatives Judiciary Comm., "Climate Control: Exposing the Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing"(Jun. 11, 2024) ("Interim Report"), available here: https://bit.ly/4hhT50C.

[6] *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.") To be clear, the Judiciary Committee alleges the illegal agreement is: "members of the climate cartel expressly have agreed to *decarbonize* the American economy." Interim Report at *1 (emphasis added). This alleged "agreement" on its face focuses on decarbonization; it is not an agreement to reduce output or raise the price of any product being sold or purchased (if any agreement existed at all).

[7] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.")

[8] *White Motor Co. v. United States*, 372 U.S. 253, 262 (1963) (*Per se* antitrust violations are "'made up of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 2 (1958)).

[9] *FTC v. Superior Court Trial Lawyers*, 493 U.S. 411 (1990).

[10] *Cf. Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979) (recognizing that even jointly setting a price can be justified when promoting new, improved products).

About the authors




(L-R) **Jindrich Kloub** is a partner in **Wilson Sonsini**'s Brussels office, where he leads the European antitrust team, specializing in investigations, cartel defense and digital market regulations. He previously served as executive director of the Hong Kong Competition Commission and as a lead case handler at the European Commission's Directorate-General for Competition. He also is part of the firm's ESG cross-practice initiative, advising on sustainability and EU regulations, and can be reached at jkloub@wsgr.com. **Matt McDonald** is an antitrust partner in Washington, D.C., focusing on government antitrust investigations, including mergers, acquisitions and civil antitrust matters. He represents clients before agencies including the Federal Trade Commission and the Department of Justice, with experience navigating global regulatory bodies such as China's State Administration for Market Regulation and serving in the FTC's mergers IV division. He can be reached at mmcdonald@wsgr.com. **Brent Snyder** is a partner in the antitrust group and head of the regulatory practice in San Francisco. He previously led the DOJ's criminal antitrust enforcement program and served as CEO of the Hong Kong Competition Commission. He guides clients through high-stakes investigations and litigation. He can be reached at bsnyder@wsgr.com. **Jeff VanHooreweghe** is a partner and vice chair of the antitrust group in San Francisco. With a background in the DOJ's antitrust division, he leverages his experience to guide clients through complex antitrust matters, including investigations and litigation across industries. He can be reached at jvanhooreweghe@wsgr.com.

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