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The ESG "backlash": How to balance competing demands

Climate change and social issues have, for (at least) the last decade, occupied legislative, regulatory and shareholder thinking, with implications for corporate decision making around the globe. Over the last year, the consequences of ongoing economic challenges and geopolitical events have ushered in what has been called a "rollback" in ESG – a renewed and altered focus on policies intended to combat climate change and the pursuit of equity, diversity and inclusion (EDI). The implications of this backlash are pertinent to corporates across western economies, with the potential to impact corporate strategies, investment paths and engagement with stakeholders from shareholders to consumers.

If rollbacks or reductions in corporate obligations relating to ESG are introduced in the UK and Europe, what are the risk and litigation implications? This article examines the status of the ESG backlash from a legal perspective, with particular regard for the increasingly complex decision-making challenge for boards of directors.

The start of the backlash

As far back as 2022, a number of states in the United States initiated efforts to prevent state bodies from engaging with financial institutions with ESG-led investing strategies.

In 2023, a group of state governors signed a joint statement proposing a number of measures to "*protect individuals from the ESG movement*". The motivations behind the statement were primarily fiduciary, such as the blocking of ESG as a factor in "*investment decisions at the state and local level*", meaning that only financial factors could be considered for investments such as pension funds.

A number of states had already withdrawn state funds from asset managers , where policies were alleged to have prioritised ESG initiatives over shareholder returns. The joint statement pre-empted a number of pieces of legislation and state-led litigation pursuing an anti-ESG agenda.

In Florida, House Bill 3 (An Act Relating to Government and Corporate Activism) imposed a collection of restrictive anti-ESG measures. In South Carolina, the ESG Pension Protection Act specified that the commission responsible for retirement investments may only consider pecuniary factors when making investment decisions. In Georgia, the Public Retirement Systems Investment Authority Law made similar provisions, prohibiting the consideration of any non-pecuniary interests such as the "*furtherance of any social, political or ideological interests*".

As legislative developments picked up pace, so did litigation relating to the introduction of ESG and climate-related measures. In Tennessee, the Attorney General pursued civil enforcement proceedings against BlackRock alleging breaches of the state's Consumer Protection Act resulting from a failure to disclosure ESG factors and allegedly overstating their financial benefits. On settlement in early 2025, the Attorney General proclaimed the outcome as speaking "*to the end of the ESG movement*".

In Texas, a federal judge held that American Airlines had violated federal law by allowing its asset manager and major shareholder to make investment decisions for its employee retirement plan based on ESG factors. The judge stated that the "*belief that ESG considerations confer a license to ignore pecuniary benefits is mistaken*".

The second administration of President Trump has wasted no time in pursuing a similar agenda. A range of Executive Orders have been issued, altering the position of the United States on a range of ESG issues.

The United States withdrew from the Paris Climate Accord, declaring an energy emergency and encouraging fossil fuel exploration and production by 'Unleashing American Energy'. In support of that Executive Order, the Environmental Protection Agency recently announced a formal reconsideration of its 2009 Endangerment Finding that greenhouse gases in the atmosphere endanger both the public health and the environment for current and future generations. Although there are barriers to the revocation of the Endangerment Finding, the potential reconsideration of this the decision was accompanied by the announcement of the 'biggest deregulatory action in US history'.

These deregulatory measures include the reconsideration of wastewater regulations for oil and gas developments, and regulations on power plants including Mercury and Air Toxics Standards that 'improperly targeted coal-fired power plants'.

In expectation of and in response to the new administration, organisations took a number of measures, reflecting the new environment. The six largest banks in the United States withdrew from the UN-sponsored Net Zero Banking Alliance in the days prior to the inauguration. Asset managers, which have been the target of litigation, withdrew from the Net Zero Asset Managers Initiative and, following further United States-based withdrawals, a general update confirmed a review to ensure the group "*remains fit for purpose in the new global context*".

A number of states have also continued to apply their own pressure on organisations, with the Attorneys General from 10 states issuing a warning to a group of financial services companies that their withdrawal from groups such as the Net Zero Banking Alliance were considered to be "*an optics-only effort*".

The Securities and Exchange Commission also confirmed in March 2025 it would not be defending its own climate disclosure rules, which had been adopted in March 2024. The rules had been immediately subject to challenges from a number of states and business activist and lobbying groups. In the absence of federally mandated rules, state regulations are likely to shape any future discussions around sustainability disclosures in the United States. Based on developments already seen, the introduction of any measures at a state level are likely to be driven by the leanings of state legislatures and governorships.

EDI as a lightning rod for United States-European differences?

In the area of EDI, Executive Orders targeting "*Radical and Wasteful Government* [EDI] *Programs and Preferencing,*" and directed at "*Ending illegal discrimination and restoring merit-based opportunity*" vividly demonstrate the speed with which policy is moving.

The second Executive Order included a requirement to 'encourage' the private sector to 'end illegal EDI discrimination and preferences'. The heads of federal agencies were required to contribute to the production of a strategic enforcement plan identifying a number of measures including:

"*(i) Key sectors of concern within each agency's jurisdiction;*
(ii) The most egregious and discriminatory [EDI] *practitioners in each sector of concern;*
(iii) A plan of specific steps or measures to deter [EDI] *programs or principles…*"

Some organisations have renamed their EDI programmes as 'inclusion', 'talent' or 'opportunity'. One major asset manager removed references to EDI and ESG in its annual report and chairman's letter, having championed the terms years earlier. Forbes has a tracker highlighting the rollback of EDI programmes across a wide range of professional organisations in the United States, including Major League Baseball, PBS, Accenture and Disney.

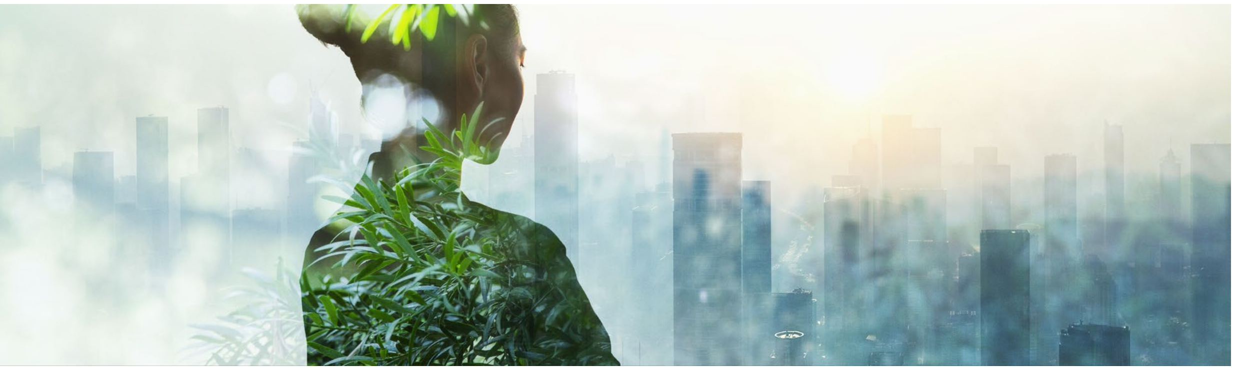
However, even organisations that have walked back some of their EDI programmes remain under review. The Federal Communications Commission issued a letter to Disney noting that "*significant concerns remain*". The letter noted that the "*Commission's Enforcement Bureau will be engaging with your company to obtain an accounting of Disney and ABC's* [EDI] *programs, policies, and practices*".

It is often stated that when America sneezes, the world catches cold, and as the backlash to ESG grows in the United States, the question is now being asked – will the UK and EU follow suit?

Early indications are that any impact from measures in the United States will be nuanced and very much dependent on the target.

Take EDI initiatives, for instance. As noted above, the Trump administration has made clear that this is a key policy area, and organisations have so far responded in kind. If the UK and Europe were unclear on the extent of the Trump administration's views on this issue, the State Department contacted a number of French and Belgian companies holding United States Government contracts to "*certify that they do not operate any programs promoting* [EDI] *that violate any applicable anti-discrimination laws*". Similar correspondence has been issued to suppliers for United States embassies and consulates. For those organisations with operations across both the United States and UK/Europe, the actions of the Trump administration will prompt a consideration of the laws underpinning EDI policies in those jurisdictions, raising challenges in providing a consistent approach.

It is important to note that the underlying laws in the United States and UK on this issue are fundamentally different. The background to the Executive Order considers the history of litigation in the United States relating to the issue of 'affirmative action' policies, which use legislation and programmes to remedy structural discrimination. The use of these policies has been viewed against the 14th Amendment which guarantees equal protection under the law.



Although the Executive Order only 'encourages' the end of EDI policies by the private sector, the direction to the Attorney General to identify the "*most egregious and discriminatory* [EDI] *practitioners*" is clearly intended to have a neutralising effect on EDI programmes in the United States.

The type of affirmative action targeted by the Executive Orders would not be permitted under UK law (such as the Equality Act 2010) save for very limited exceptions. Companies who would look to limit or reverse their UK-based EDI policies based on developments in the United States would be at risk of legal challenge in the UK from employees or prospective employees who are affected by any changes. Any changes to EDI programmes in response to the climate in the United States should be considered carefully and mindful of the existing legal framework in the UK (and Europe), particularly as to how those frameworks already respond to the aims of the Executive Orders.

Simplification of climate and sustainability disclosures

For clarity, the significant EU regulations relating to climate and sustainability disclosures are:

- The Corporate Sustainability Reporting Directive (CSRD), which requires large and listed companies to publish regular reports on the social and environmental risks they face and the impact of those activities;
- The Corporate Sustainability Due Diligence Directive (CSDDD), which aims to foster sustainable and responsible corporate behaviour in company operations and their value chains; and
- The Taxonomy Regulation, which forms the basis for the creation of a common definition of economic activities that can be considered environmentally sustainable, aligned with a net zero trajectory by 2050.

These measures have come under renewed scrutiny recently following the adoption of a package of measures by the European Commission (termed 'the simplification omnibus') which will:

- simplify CSRD reporting by removing 80% of companies from its scope, removing the need for those companies to disclose their environmental and social impacts;
- postpone reporting requirements for those companies in scope until July 2028 ("stopping the clock");
- give companies more time to comply with CSDDD requirements by postponing compliance for the largest companies until July 2028; and
- reduce the burden of taxonomy reporting obligations, limiting it to the largest companies (corresponding to the scope of the CSDDD).

The measures were framed as 'making life easier' for businesses while keeping decarbonisation and sustainability goals on target. CEPS, an independent think tank, viewed the measures differently, stating that they represented a "*profound retreat*", ignoring "*the long-term economic and reputational damage of weakening ESG frameworks*".

The Explanatory Memorandum accompanying the proposals notes that "*Trade tensions are rising as the geopolitical landscape continues to shift. The different approach undertaken by some other major jurisdictions regarding the regulation of corporate sustainability reporting and due diligence raises questions about the effects of these laws on the competitive positioning of EU companies*".

In effect, the EU is asking: is there value in being a world leader in sustainability measures if to do so increases (relative) energy pricing and impacts global competitiveness while other advanced and developing economies continue with higher emitting activities? In the context of historically high deficits and trade barriers, and a desire for growth after years of muted performance, this is a hugely challenging question.

What the simplification package proposals demonstrate is that there is no appetite currently in the EU for a bonfire of ESG and climate-related regulation. The measures adopted by the Commission this year are clearly intended to be measured, and not a complete withdrawal. Competition and economic pressures are apparent though, and reporting indicates that both the European Council and Parliament may accede to the proposals to stop the clock in short order, with the more detailed amendments to the scope of CSRD and CSDDD taking more time.

The UK is currently in the process of assessing whether the standards proposed by the International Financial Reporting Standards Foundation are suitable for endorsement in the UK as a part of the wider Sustainability Disclosure Reporting Framework. On 30 April 2025, the UK Prudential Regulation Authority, part of the Bank of England, announced a consultation on its proposed updated supervisory expectations for banks and insurers in relation to how they manage the effects of climate change on their businesses, reflecting international standards for banks and insurers.

However, the UK Financial Conduct Authority recently announced that, while there was broad support for extending its Sustainability Disclosure Requirements and investment labels regime to portfolio management, it is "not the right time" to do so.

For now, corporates operating in the EU and due to fall within the scope of CSRD and CSDDD will be expected to continue their efforts to comply. However, unprompted visibility of compliance might be the victim of the changing environment. The term 'greenhushing' has found increasing use in the past year to describe companies' refusals to publicise their sustainability efforts. As summarised by KPMG, companies "*may fear pushback from stakeholders who would find its sustainability efforts lacking or from investors who believe ESG undermines returns*". It would not be surprising to see companies scaling back their announcements around sustainability and other ESG-related initiatives as a response.

Litigation risk

The prospect of government-led regulatory rollbacks, or unilateral action on the part of business to reduce their corporate and sustainability targets, may generate litigation on the part of investors and activists. Where do we foresee the litigation landscape moving in light of the ESG backlash being seen?

To date, key ESG-related litigation has focused on climate-related issues, seeking to challenge government and corporate responses to the climate crisis, and issues such as greenwashing. Our climate change litigation map highlights our pick of the top 20 active cases around the world.

For the reasons given above, we expect litigation trends to change emphasis, with ESG backlash actions coming much further to the fore.

United States

In the United States there have been a number of youth activist groups that have challenged state (*Held v Montana*, *Navahine v Hawai'i*) and federal (*Juliana v United States*) measures in response to climate change, with varying success. If rollbacks of climate-related measures continue, we expect that challenges will increase in number.

Furthermore, there are a number of outstanding 'polluter pays' actions brought by states (including California and Hawai'i) and municipalities against fossil fuel companies, seeking compensation for damage done to those locations whether generally or in relation to specific incidents. To date, the Supreme Court has declined to offer a ruling on whether states are the appropriate forum for these types of claims. These actions will continue but we expect further challenges from the fossil fuel companies themselves.

Rather than pursuing litigation, a number of states have introduced or are considering 'polluters pay' superfund legislation, requiring polluters to pay for climate-related harms. Vermont (the first state to introduce such an Act in 2024) has been the subject of an action from the United States Chamber of Commerce and the American Petroleum Institute on a similar basis to those challenges issued to the Supreme Court, namely that "*neither* [the United States] *federal constitutional structure nor the Clean Air Act authorizes a State to impose liability or penalties on out-of-state energy producers for harms arising from out-of-state and global greenhouse gas emissions*".

In April 2025, President Trump issued an Executive Order to 'protect energy from state overreach'. The details made clear that the targets of the Executive Order were state and local governments seeking "*to regulate energy beyond their constitutional or statutory authorities*".

The order specifically identified the superfund legislation enacted in Vermont and New York, and also the 'polluter pays' litigation pursued against energy companies "*under nuisance or other tort regimes*". The Attorney General was ordered to identify all state and local laws/regulations responding to climate change, and to take "*all necessary actions to prevent enforcement of these laws where their operation is determined to be illegal*".

In response to the Executive Order, the United States Department of Justice issued proceedings against four states (Hawai'i, Michigan, New York and Vermont) challenging their respective climate measures. At the time of writing, the outcome of those proceedings is not yet known.

What is clear is that challenges to pro-environment policies will continue. Reflecting the largely political nature of state policies, we expect that certain states will themselves, irrespective of any similar measures undertaken by the administration, continue to challenge companies seen to be pursuing climate or ESG-led initiatives. It points to added corporate decision-making complexity and nuance.

UK/Europe

By contrast in the UK and Europe, there is a more mature litigation environment for climate activists pursuing private companies, with varying success, and governments for alleged failure in respect of responding to climate change.

In the UK, the Supreme Court ruling in *Finch v Surrey County Council* has already limited the options for new UK-based fossil fuel projects, finding that consent must only be granted by authorities in full knowledge of the environmental cost, which includes 'downstream' and 'indirect' emissions. The impact of the UK decision in *Finch* has been felt almost immediately in 2025. The case of *Greenpeace and Uplift* returned the question of issuing licences for specific Scottish oil and gas fields back to the UK Government for consideration. It is expected that the developers will seek new consents in line with *Finch*, albeit now at the risk of further rejection.

The 2024 appeal decision in *Milieudefensie v Shell* overturned the watershed climate decision for those seeking to influence corporate behaviour, removing a quantifiable and time-limited reduction in Shell's CO^2 emissions. At the time of writing, Milieudefensie has confirmed that the decision will be challenged in the Netherlands Supreme Court.

Nonetheless, the appeal court's decision returned the baton to the hands of national legislators to deal with challenging corporate behaviours, albeit with an acknowledgment that large corporates, such as fossil fuel companies, do have a special obligation to cut emissions. Although Milieudefensie is now appealing the *Shell* decision, and also pursuing a similar action against the Dutch bank ING, decisions such as *Shell* are creating a feedback loop for activist groups in the UK and Europe, with a lack of clear legislation preventing corporate behaviour from being challenged, resulting in activists considering further action to challenge government (in)action.

This emphasises the potential avenues of challenging states via the European Court of Human Rights. The *Verein KlimaSeniorinnen Schweiz* decision held that the Convention encompasses a right for individuals to effective protection by state authorities from serious adverse effects of climate change on their life, health, well-being and quality of life. Although the full and effective implementation of the outcome of this decision in Switzerland remains an ongoing process, decisions such as this are influential on the litigation environment in the UK and Europe, when compared to the United States. Any efforts to limit or reduce climate response targets are likely to generate litigation, whether based on human rights arguments or otherwise.

Companies Act and FSMA litigation?

In terms of the UK, is there the prospect of further litigation resulting from organisations rolling back their ESG and climate plans?
Climate trends still point to increasing temperatures and related weather events, whether droughts, floods, storm surges or hurricanes. The physical and transition risks associated with these trends are still key business and scenario planning challenges for governments and corporates alike. Administrative and corporate decision making needs to embed resilience in the short, medium and longer term.

In the context of corporates, the threat of ESG backlash litigation only leads to an additional layer of complexity to achieving adequate levels of profitability and longer term viability in a manner reconciled with regulation, law and customer, employee and shareholder interests.

One of the most noteworthy actions against a company in the UK to date involved a climate activist group taking a small shareholding in the fossil fuel company Shell and pursuing a shareholder derivative action against the board of directors. That action was unsuccessful but highlighted the routes by which climate and ESG-related activists could pursue companies under the Companies Act 2006.

In this instance, ClientEarth submitted that the directors of Shell had breached two of the general statutory duties under the Companies Act, as well as other specific incidental duties. Section 172 of the Companies Act imposes a duty to act to promote the success of the company (a subjective test), and section 174 requires the exercise of care, skill and diligence at both an objective and a subjective level. Although the prospect of claims challenging the rollback of ESG-related and climate initiatives remains, what of the inverse?

In the event that a company continues to implement ESG and climate-related measures as part of the future direction of the company, could shareholders who have adopted the same perspective as seen in some American states take action? The answer must be yes, with shareholders arguing that corporate measures or investments related to sustainability are in conflict with the need to promote the success of a company on a fiduciary level.

And in respect of those companies that row back from recent ESG commitments, how does management preserve its credibility in the eyes of shareholders or defend itself from activist action based on ESG criteria and objectives which those companies had only recently presented as being at the heart of their strategies and planning? Boards of directors may suddenly find enhanced scrutiny from both directions. The need for effective governance and clear audit trails will come to the fore.

Beyond shareholder derivative actions, sections 90 and 90A of the Financial Services and Markets Act 2000 provide investors with a route for redress against listed companies for publication of untrue statements in prospectuses or the provision of misleading statements to the market.

There has been discussion previously as to whether regulation of the disclosure, and general prevalence, of ESG issues in published documents increases the risk of section 90 and 90A actions as shareholders pressure issuers to make the relevant disclosures, which could affect share prices. To date, no such increase has been seen. It is possible that the high threshold for a statement to be considered untrue or misleading (including by omission) has proven to be a barrier for many potential claims, particularly in respect of issuers' stated ESG goals.

However, in June 2024, a firm specialising in the pursuit of securities litigation confirmed it had filed a group securities litigation claim against Boohoo for their losses sustained as a result of ESG-related issues in Boohoo's supply chain. We await the outcome of this issue with interest.

Looking ahead

The current ESG backlash raises profound questions that go to the heart of corporate values, and credibility, a topic to which we will return in upcoming thought leadership. For now, there is an unenviable pressure on boards of directors requiring the judgment of Solomon to balance competing demands.

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