Firms considering alliances would likely consult with attorneys on potential antitrust and other legal concerns. Their lawyers might write a memo laying out various issues and perhaps offering an opinion. These memos would be confidential and subject to attorney-client privilege. This class note covers some of the topics that might be discussed in a memo to an alliance member client, but it was prepared for educational purposes only, in the context of a case study of the Net Zero Insurance Alliance. It does not constitute legal advice.

A Note on Corporate Climate Alliances and Legal Risk

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December 8, 2023

I. Introduction

Business climate collaborations, including net zero target-setting alliances, standard-setting organizations, and carbon accounting frameworks, have proliferated in recent years.[1] Climate alliances take a range of approaches, with some industry alliances' members pledging to reduce greenhouse gas emissions. Though these pledges are not legally binding, legal, political, and reputational pressures are at play when companies decide whether to participate in alliances.[2]

Antitrust and competition law is an increasingly important factor for companies to consider when deciding whether to participate in a climate alliance. In most countries,[3] antitrust laws aim to promote competition, protect consumers, and ensure that resources are allocated efficiently. Governments enforce these laws to prevent anticompetitive collaboration; however, the design and implementation of these laws may affect how businesses collaborate on issues that serve a social good. Governments are still considering how antitrust laws should apply to climate collaborations. In the US, Republican members of Congress and states attorneys general have started investigating whether companies participating in climate alliances have violated antitrust laws. By contrast, the EU and the UK recently released guidance documents intended to ease antitrust burdens on climate alliances.

Companies may also consider whether joining a target-setting alliance raises "greenwashing" legal and reputation risks. The United Nations wrote that setting a net zero target without a plan to achieve it is greenwashing,[4] and companies that join target-setting alliances may therefore face greenwashing risks. Green advocacy groups have already accused climate alliance members of greenwashing—for example, RMI published a report criticizing members of the Glasgow Financial Alliance for Net Zero (GFANZ) for agreeing to

[1] Peter Tufano and colleagues have identified "more than 150 business climate collaborations ranging from common carbon accounting frameworks and principles for responsible investments to shared net zero objectives." Matteo Gasparini et al., *When Climate Collaboration is Treated as an Antitrust Violation*, Harvard Business Review (Oct. 17, 2022), https://hbr.org/2022/10/when-climate-collaboration-is-treated-as-an-antitrust-violation?ab=hero-subleft-2; *see also* David Young et al., *How to build a high impact sustainability alliance*, Boston Consulting Group (Feb. 2022), https://www.bcg.com/publications/2022/how-to-build-sustainability-alliance.
[2] Albert C. Lin, *Making Net Zero Matter*, 79 Wash. & Lee L. Rev. 679, 719–20 (2022).
[3] Some other countries' antitrust frameworks have additional goals. For example, the EU also aims to promote competition and free trade among member states. *See* European Union, *Trade: Towards open and fair worldwide trade*, https://european-union.europa.eu/priorities-and-actions/actions-topic/trade_en (last visited Nov. 12, 2023).
[4] United Nations, *Greenwashing – the deceptive tactics behind environmental claims*, https://www.un.org/en/climatechange/science/climate-issues/greenwashing (last visited Dec. 6, 2023).

the alliance's commitments while continuing to invest in fossil fuels.[5] Though these groups have not yet raised legal challenges, companies should consider how consumer protection, false advertising, and disclosure regimes apply to their commitments. In the United States (US),[6] false advertising and consumer protection laws aim to shield consumers from unfair and deceptive business practices, and consumers have used these laws to challenge green claims that they find deceptive. New state laws and federal guidance may soon provide additional clarity for companies making green claims and commitments.

This note first discusses potential legal risks for climate alliances stemming from antitrust law and policy, with a focus on the US, the European Union (EU), and the United Kingdom (UK). The note then discusses potential greenwashing legal risks related to joining a target-setting alliance, with a focus on US federal and state law. The legal developments in the US, the EU, and the UK may have a significant impact—research suggests antitrust frameworks can chill participation in climate alliances. For example, one study concluded that concerns about antitrust legal risk may discourage up to 60 percent of companies from participating in climate coalitions.[7] Similarly, companies increasingly cite "greenwashing" as a risk on their 10-K annual reports to the Securities and Exchange Commission (SEC),[8] and these risks could chill adoption of net zero commitments.[9]

II. US antitrust legal framework

A. US law

The US federal government regulates competition, and two laws in particular are relevant for climate alliances.[10]

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[5] Elizabeth Harnett & Asia Salazar, *Navigating the Financial Industry's Blurred Lines Between Climate Commitments and Greenwash*, RMI (Mar. 1, 2023) https://rmi.org/navigating-financial-industry-blurred-lines-between-climate-commitments-and-greenwash/.

[6] Other jurisdictions also have consumer protection frameworks, but they are outside the scope of this paper.

[7] Simon Holmes, *Climate change and competition law*, OECD Hearing on Sustainability and Competition (2020), https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf.

[8] As of March 2023, at least 14 S&P 500 companies have cited "greenwashing" as a risk in their 10-K annual reports to the Securities and Exchange Commission (SEC), most commonly as a business risk factor, compared to five companies in 2022 and zero in 2020. This data refers to greenwashing risks more broadly, and not to greenwashing risks from joining a climate alliance. Andrew Ramonas, BlackRock, *United Join Growing Club Citing Greenwashing Risk*, Bloomberg Law (April 3, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/esg/BNA%2000000187-3452-d8fb-abcf-b47b3c650001?isAlert=false. Companies responding to "greenwashing" risks have created a new phenomenon: "greenhushing," in which they underplay their sustainability actions to avoid scrutiny. Huw Jones, *'Greenhushing' and 'green bleaching' blur sanctions targets – watchdog*, Reuters (Dec. 4, 2023) https://www.reuters.com/sustainability/greenhushing-green-bleaching-blur-sanctions-targets-watchdog-2023-12-04/#:~:text=Greenhushing%20refers%20to%20companies%20under,these%20concepts%2C%22%20IOSCO%20said.

[9] The reverse of greenwashing, "greenhushing," in which a company downplays their climate commitments and goals, has increased in recent years. Ephrat Levi, *Go Green, Then 'Go Dark'?*, NYT (Apr. 21, 2023), https://www.nytimes.com/interactive/2023/04/21/business/what-is-greenhushing.html.

[10] In addition to these two laws, the Clayton Act also prohibits price discrimination and tying and prohibits mergers and acquisitions that "substantially… lessen competition." The Clayton Antitrust Act of 1914 (15 U.S.C. §§ 12-27) states that "No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital

- The Sherman Act prohibits some monopolies and trade restraints.[11]
  The Federal Trade Commission Act creates the Federal Trade Commission (FTC) and empowers the FTC to prohibit unfair methods of competition, deceptive acts, and deceptive practices.[12]

The Sherman Act prohibits trade restraints, which includes anticompetitive agreements.[13] Under Sherman Act cases, there are two types of trade restraints. Some trade restraints are per se illegal, meaning that they are illegal even if they are reasonable.[14] These prohibited restraints include horizontal price fixing, bid rigging, and the allocation of markets or consumers.[15] If a trade restraint does not fall into one of these categories, courts evaluate it under the "rule of reason." For these agreements, courts review the facts to determine whether the anticompetitive effects of the agreement outweigh its benefits.[16]

The Federal Trade Commission Act provides investigative tools for the FTC to enforce antitrust laws.[17] Antirust cases can be criminal or civil, though only the Department of

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and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly." The Act also prohibits price discrimination, tying agreements, and interlocking directorates.

[11] The Sherman Act applies to agreements to which a US company is a party, but also applies to agreements among foreign companies that involve "import commerce" or that have a "direct, substantial, and reasonably foreseeable effect" on US commerce. 15 U.S.C. § 6a. Thus, US federal antitrust law can also affect companies that operate outside of the US..The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-38. Under § 2 of the Sherman Act, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." The Sherman Act does not define "monopolize" and other key terms, leaving it to federal courts to interpret federal competition law.

[12] The Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58

[13] For the purposes of antitrust law, the Supreme Court has defined such agreements as "a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement." To establish that there is an agreement that is an unreasonable restraint of trade under antitrust law, a plaintiff must show that at least two distinct entities[13] are engaged in concerted action, defined as knowing commitment to a common scheme. *See* Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 764 (1984).

[14] *See, e.g., NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

[15] Department of Justice, Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look Out For (Jan. 5, 2016), https://www.justice.gov/d9/pages/attachments/2016/01/05/211578.pdf.

[16] *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

[17] Under the Clayton Act, the Department of Justice (DOJ) and the FTC review proposed mergers and acquisitions to determine whether they will significantly decrease competition. The DOJ and the FTC proposed new guidelines for mergers in July 2023, but the agencies have not yet finalized the new guidelines. Additionally, the Clayton Act forbids sellers from favoring one buyer over another when doing so would substantially lessen competition. The Federal Trade Commission Act provides investigative tools for the FTC to enforce antitrust and deception laws. *See* DOJ & FTC, Horizontal Merger Guidelines (Aug. 19, 2010) https://www.justice.gov/atr/horizontal-merger-guidelines-08192010; *see also* DOJ & FTC, Draft Merger Guidelines (July 19, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf; 15 U.S.C. §§ 13. FTC, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* (Rev. May 2021) https://www.ftc.gov/about-ftc/mission/enforcement-authority.

Justice (DOJ) can bring criminal cases.[18] Penalties for violations include fines,[19] injunctions (breaking up the agreements),[20] and imprisonment for individual offenders.[21] Although states attorneys general can enforce federal antitrust laws, states also have their own antitrust laws,[22] which are often more stringent than federal antitrust laws.[23]

B. Potential application of US law to climate alliances

If challenged, a court would likely evaluate a company's participation in a climate alliance under the "rule of reason" as it is unlikely the alliance would be structured to involve price fixing or bid rigging, for example. The key question under the rule of reason is whether the company's participation in an alliance "likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."[24] A court's inquiry into this question would involve three steps:

- First, a plaintiff challenging a company's participation a climate alliance would have to demonstrate that the alliance has "a substantial anticompetitive effect that harms consumers in the relevant market."[25] For this question, a court may consider the nature of the restraint, the industry, and the structure of the relevant market.[26]
- If a court finds that the company's participation in the alliance impairs competition, the company has an opportunity to offer a procompetitive justification for their participation. One federal court noted that "cooperation by competitors in standard-setting 'can provide procompetitive benefits the market would not otherwise provide, by allowing a number of different firms to produce and market competing products compatible with a single standard.'"[27]
- Even if the company demonstrates a procompetitive justification, the plaintiff could prevail if they can demonstrate that "the procompetitive efficiencies could be achieved through less anticompetitive means."[28]

To defend their actions under the "rule of reason," it will be important for members of alliances to ensure that prohibited topics—including anything nonpublic, current or forward

[18] Only the Department of Justice may bring criminal cases. 15 U.S.C. §§ 4, 15.
[19] Criminal fines for Sherman Act violations have been as high as $925 Million in the United States. Department of Justice, https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more (last visited Nov. 12, 2023).
[20] 15 U.S.C. § 26.
[21] 15 U.S.C. § 1.
[22] James Tierney, *Antitrust*, State AG, https://www.stateag.org/policy-areas/antitrust (last visited Nov. 12, 2023).
[23] There is little preemption of state antitrust laws, and courts allow states to regulate intrastate and interstate competition. Note, Antitrust Federalism, Preemption and Judge-Made Law, 133 HARV. L. REV. 2557 (2020)
[24] Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors 3–4 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.
[25] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).
[26] Antitrust Rule of Reason, Practical Law Practice Note 9-522-6396
[27] Princo Corp. v. International Trade Comm, 616 F.3d 1318, 1335 (Fed. Cir. 2010), *quoting* Herbert Hovenkamp et al., IP Antitrust § 35.2b (2010).
[28] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

looking, disaggregated, firm-specific, or "competitively sensitive"—are not discussed among competitors.[29] With these steps, which most alliances are careful to adhere to, it may be hard for plaintiffs bringing antitrust cases to show actual harm from climate alliances. Net zero commitments have had minimal impact on business for many companies at this stage (for example, oil majors that have made net zero commitments continue to make record profits). However, plaintiffs may argue that firms' investments in decarbonization will raise costs in the near term and lower costs in the long term. In response, companies could argue that any near-term higher private costs will be offset by the public benefits of lower emissions.[30]

C. Recent investigations in the US

Over the past year, opponents of climate alliances in the US have increased antitrust legal pressure on climate alliances. In October 2022, a group of Republican states attorneys general launched an antitrust investigation into the Net Zero Banking Alliance (NZBA), which is the banking group within the Glasgow Financial Alliance for Net Zero (GFANZ).[31] The states attorneys general directed six major banks participating in NZBA to produce documents related to their participation. The attorneys general allege that NZBA is a "worldwide agreement" that requires GHG emission reduction in portfolios, the result of which is to "starve companies engaged in fossil fuel-related activities of credit."[32] Similarly, in May 2023, Republican states attorneys general sent a letter to insurers in the Net Zero Insurance Alliance (NZIA), asking for records detailing their NZIA membership.[33] Most recently, in the summer of 2023, Republican members of the House Judiciary Committee sent letters to leaders of several asset management companies requesting records related to the companies' participation in the Net Zero Asset Management alliance (NZAM).[34]

The response by Net Zero Insurance Alliance (NZIA) provides an example of the possible chilling effect of these investigations. Although the NZIA rejected a proposal to include a

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[29] Competitor Collaborations in the US, Practical Law Practice Note 0-202-2806.
[30] A court reviewing an antitrust case could balance the short-term and long-term effects. For example, Thomas Leary, a former Commissioner of the FTC, noted that "there is nothing unusual or revolutionary about an antitrust analysis that balances short-term and long-term effects. It has been going on for a long time." Thomas Leary, Antitrust Law As A Balancing Act, The Tenth Annual Seattle Computer Law Conference (Dec. 17, 1999) https://www.ftc.gov/news-events/news/speeches/antitrust-law-balancing-act#_ednref11.
[31] Texas Attorney General, Press Release (Oct. 19, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-launches-investigation-six-major-banks-collusion-lending-practices-potentially-violate; Robert Azarow et al., State attorneys general take aim at banks with net-zero targets, Arnold and Porter Advisory (Oct. 19, 2022), https://www.arnoldporter.com/en/perspectives/advisories/2022/10/state-attys-general-take-aim-at-banks-w-netzero.
[32] Texas Attorney General, Press Release (Oct. 19, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-launches-investigation-six-major-banks-collusion-lending-practices-potentially-violate.
[33] Utah Attorney General, Letter to Net Zero Insurance Alliance Insurers (May 15, 2023) https://attorneygeneral.utah.gov/wp-content/uploads/2023/05/2023-05-15-NZIA-Letter.pdf.
[34] *See* House of Representatives Judiciary Committee, Press Release, Judiciary Committee Expands ESG Inquiry to BlackRock, Vanguard, State Street, Glasgow Financial Alliance for Net Zero, and Net Zero Asset Managers (July 6, 2023) https://judiciary.house.gov/media/press-releases/judiciary-committee-expands-esg-inquiry-blackrock-vanguard-state-street; Letters from Republican Members of Congress to Members of the Net Zero Asset Management Alliance (Aug. 1, 2023) https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/letters.pdf.

commitment to exit coal insurance as part of the terms of membership due to antitrust concerns,[35] Munich Re departed the NZIA citing the legal risks its participation in the alliance posed. In a statement, Munich Re's CEO explained that "[o]pportunities to pursue decarbonization goals in a collective approach without exposing ourselves to material antitrust risks are so limited that it is more effective to pursue our climate ambitions individually."[36] Several companies followed. More than a dozen insurance companies, including founding signatories, have now left the alliance.[37]

III. EU antitrust legal framework

A. EU law

The Treaty on the Functioning of the European Union (TFEU) establishes antitrust laws for the EU. Article 101 of the Treaty prohibits agreements that prevent, distort, or restrict competition.[38] No agreements are per se illegal in the EU, but some agreements, including those involving price fixing, are "restrictive by object." These agreements are presumed to violate antitrust law, but can still be exempted in some cases.[39]

Article 101(3) exempts agreements if the economic benefits outweigh potential negative effects.[40] To be exempted under 101(3), an agreement must meet four conditions:

- the agreement must… "contribute to… technical or economic progress"
- the "restrictions must be indispensable to…those objectives…"
- "consumers must receive a fair share of the… benefits"
- the agreement must not give parties "the possibility of eliminating competition…"[41]

[35] Alastair Marsh, *Net-Zero Insurers Uncover New Climate Adversary in Antitrust Law*, Bloomberg (Jan. 19, 2022) https://www.bloomberg.com/news/articles/2022-01-19/net-zero-insurance-coal-exit-plans-impeded-by-antitrust-laws?leadSource=uverify%20wall.

[36] Laura Malsch and Alastair Marsh, *Munich Re Exits Insurance Climate Group, Citing 'Material' Legal Risks*, Insurance Journal (April 3, 2023), https://www.insurancejournal.com/news/international/2023/04/03/714806.htm.

[37] Karin Rives & Raymond Barrett, *Net-Zero Alliances Jittery as GOP Attorneys General Play Antitrust Card* (June 8, 2023) https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/net-zero-alliances-jittery-as-gop-attorneys-general-play-antitrust-card-76075679; Tommy Wilkes et al., *Insurers Flee Climate Alliance After ESG Backlash in the US* (May 26, 2023) https://www.reuters.com/business/allianz-decides-leave-net-zero-insurance-alliance-2023-05-25/.

[38] The treaty prevents agreements that have the "object or effect the prevention, restriction or distortion of competition within the internal market." Treaty on the Functioning of the European Union, art. 101, Sep. 5 2008.

[39] This presumption means that it is very likely that the agreement falls into a 101(3) exemption. However, the EC can review restrictions by object for exemptions on an individual basis. Article 102 also deals with antitrust, but applies to businesses in a dominant position in a market.

[40] Treaty on the Functioning of the European Union, art. 101, Sep. 5 2008.

[41] "in respect of a substantial part of the products in question." *Id.*

The TFEU shares features with the US Sherman Act, requiring the European Commission to conduct a reason-based balancing test.[42] However, the European Commission does not impose criminal penalties for antitrust violations.[43]

B. Recent developments in the EU

In stark contrast to US Republicans who have increased legal pressure on climate alliances, the EU is taking actions to reduce legal risks for climate alliances. In June 2023, the European Commission adopted guidelines clarifying how the EU will assess climate alliances under the TFEU.[44]

First, the guidelines explain that certain alliances are unlikely to restrict competition, including those that:[45]

- adhere to an internal code of conduct (for example, an agreement not to exceed an ambient temperature in buildings),[46]
- follow the precise requirements of international treaties (even if the treaties have not been adopted by a member state),[47]
- set up databases to share information about unsustainable suppliers,[48] or
- conduct customer education campaigns.

Second, the guidelines explain how the European Commission will assess alliances that affect competition but have a legitimate sustainability objective.[49] The Commission will apply a "soft safe harbour," which allows alliances to impose binding minimum requirements on participating firms, if six criteria are met.[50]

- Businesses must use a transparent process to develop the standard. All interested businesses must be able to contribute in the process of creating the standard.
- The standard can only impose requirements on businesses that wish to participate.

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[42] European Parliamentary Rsch. Serv. Briefing, *EU and US competition policies Similar objectives, different approaches* (Mar. 27, 2014), https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf.

[43] However, national competition authorities may sometimes impose criminal penalties for antitrust violations. Tom Romanoff, *Comparison of Competition Law and Policy in the US, EU, UK, China, and Canada* (Dec. 16, 2021), https://bipartisanpolicy.org/blog/comparison-of-competition-law-and-policy-in-the-us-eu-uk-china-and-canada/.

[44] The guidelines apply to "sustainability agreements" which is a broader category than just climate alliances and includes standards for labor and human rights. European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (June 1, 2023) https://competition-policy.ec.europa.eu/system/files/2023-07/2023_revised_horizontal_guidelines_en.pdf.

[45] *Id.* at pp. 147-148.

[46] *Id.* at p. 150 "for example, on measures to eliminate single-use plastics from their business premises; not to exceed a certain ambient temperature in their buildings, or to limit the volume of internal documents that they print."

[47] *Id.* at p. 148.

[48] Provided that the agreements do not forbid or oblige parties to purchase specific products.

[49] If sustainability is used as a pretext, these methods do not apply.

[50] "The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned; (b) The combined market share of the participating undertakings must not exceed 20 % on any relevant market affected by the standard."

- Businesses can be required to meet minimum standards to comply, but they must be free to apply higher standards.
- Businesses cannot disclose competitively sensitive information unless it is necessary and proportionate for the standard.
- All businesses that meet the standard must be able to benefit from outcomes of the standard. This means that businesses that meet the standard can advertise their adherence to the standard.
- One of the following must be true: (a) the will standard not lead to a significant price increase or quality reduction OR (b) the combined market share of the participating businesses must not exceed 20 percent. [51]

Third, the guidelines explain how to assess whether alliances that restrict competition fall within Article 101(3)'s exemptions and provide examples of permissible alliance arrangements.

While this guidance provides clarity for businesses joining climate coalitions that their participation creates minimal legal risk in the EU, much of its impact will depend on European member states' national competition authorities (NCAs) and their implementation of the guidance. The European Commission reviews some antitrust cases, but NCAs enforce ninety percent of antitrust cases, meaning that much of European antitrust law is set at the member-state level.[52] Prior to the release of the new guidelines, NCAs had diverged in their approaches to sustainability agreements, and NCAs were part of the call for the EU to release guidance to harmonize their approaches.[53] The NCAs will now have to adapt their approaches as they figure out how to apply the new guidance.[54]

IV. UK antitrust legal framework

A. UK law

In the United Kingdom, the Competition and Markets Authority (CMA) regulates antitrust and enforces the UK's antitrust laws.[55] The Competition Act 1998 (Act) lays out much of the relevant antitrust law for the UK,[56] and Chapter 1 of the Act prohibits agreements that

[51] *Id.* at pp. 152-53.
[52] Jurgita Malinauskaite, Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities, Journal of Common Markey Studies (Jan. 16, 2023) https://onlinelibrary.wiley.com/doi/full/10.1111/jcms.13458. Member countries also have their own antitrust laws. For example, France also enforces the French Commercial Code (Code de commerce); Italy also enforces the Cost and, Germany also enforces the Restraints of Competition.
[53] *Id.*
[54] *Id.*
[55] UK Competition and Markets Authority, About Us, https://www.gov.uk/government/organisations/competition-and-markets-authority (last visited Nov. 12, 2023).
[56] Competition Act (1998) (Eng.) , https://www.legislation.gov.uk/ukpga/1998/41/part/I/chapter/I.

restrict trade. The Competition Act 1998 is very similar to the TFEU, prohibiting businesses from entering into agreements that prevent, restrict, or distort competition.[57]

B. Recent developments in the UK

To respond to climate alliance concerns about the application of the Act, in August 2023, the UK CMA published a "Green Agreements Guidance."[58] This guidance explains how competition rules apply to climate alliances in the UK.[59] Similar to the EU's guidance, the CMA explains that several categories of alliances are unlikely to create competition concerns. The list is similar to the EU's categories, but in the UK, this list also includes alliances that "do something jointly which none of the parties could do individually."[60] The guidance provides practical criteria for many types of alliances, including alliances that set industry standards.

Also similar to the EU's guidance, the UK's guidance explains how the CMA will decide whether to exempt climate alliances that affect competition. When deciding whether to exempt a climate alliance that would otherwise be subject to the Competition Act, the CMA will consider:

- Whether the alliance contributes to objective benefits[61]
- Whether the alliance is reasonably necessary to achieve those benefits[62]
- Whether consumers will receive a fair share of the benefits[63]
- Whether there is meaningful remaining competition left in the market[64]

The CMA also creates an open-door policy by which businesses considering entering a climate alliance can ask the agency for informal guidance. Additionally, for companies that seek and follow such guidance, the CMA makes clear that it will not impose antitrust enforcement fines.

[57] This includes agreements to fix prices; "limit or control production, markets, technical development or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which… have no connection with the subject of such contracts."
[58] Competition Markets Authority, Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (Oct. 2023) https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf.
[59] *Id.* at pp. 11-12. The CMA document uses the term "sustainability agreements," but the alliances to which this agreement applies is narrower than the EU's guidance. The UK's guidance document only applies to environmental agreements, which include climate change agreements, but not agreements dealing with human rights issues.
[60] *Id.* at p. 16.
[61] *Id.* at p. 29.
[62] *Id.* at p. 31.
[63] *Id.* at p. 33.
[64] *Id.* at p. 37. Note that this list is very similar to the TFEU Article 101(3)'s exemption criteria.

V. Greenwashing legal frameworks

Companies may also consider whether joining a target-setting climate alliance raises greenwashing legal or reputational risks.[65] In the US, federal and state consumer protection laws aim to shield consumers from unfair and deceptive business practices, and consumers have used these laws to challenge some instances of alleged greenwashing. New state and federal laws and guidance may provide clarity on the evidence needed to support green claims, and companies can consider these documents and other risks when joining standard-setting alliances and making net zero commitments.

A. US and state false advertising and consumer protection law

At the federal level,[66] consumers can file complaints with the FTC challenging deceptive "greenwashing" practices.[67] Under the FTC Act, companies may not engage in "unfair or deceptive acts or practices in or affecting commerce," including misrepresentations or deceptive omissions of material fact. Advertising must be truthful and non-deceptive, not unfair, and advertisers must have evidence that backs up their claims.[68] The law also requires clear and conspicuous disclosures when necessary to prevent an advertisement from being misleading.

The FTC publishes nonbinding Green Guides,[69] which are marketing guides designed to help advertisers avoid misleading or deceptive environmental claims.[70] The FTC prosecutes greenwashing claims under the FTC Act and uses the Green Guides to support their

[65] Though beyond the scope of this memo, other jurisdictions are also considering increasing their regulation of green claims. For example, in early 2023 the EU proposed the Green Claims Directive, a proposal that would require companies to substantiate green claims. EU, *'Green claims' directive Protecting consumers from greenwashing*, https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753958/EPRS_BRI(2023)753958_EN.pdf (Oct. 2023).
[66] In addition to these two laws, commercial entities can bring cases under the Lanham Act. The Lanham Act has strict standing requirements and is an unlikely vehicle for challenging net-zero commitments, but a court reviewing a challenge would consider whether (1) defendant made a literally or implicitly false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) misrepresentation is material (i.e. likely to influence the purchasing decision); (3) misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) defendant placed false or misleading statement in interstate commerce; (5) plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products. *See* 15 U.S.C. § 1125(a); Azurity Pharms., Inc. v. Edge Pharma, LLC, 45 F.4th 479, 486 (1st Cir. 2022); Compulife Software Inc. v. Newman, 959 F.3d 1288, 1316 (11th Cir. 2020); Skydive Ariz., Inc. v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012).
[67] 15 U.S.C. §§ 41-58.
[68] The FTC may consider an advertisement deceptive when it is likely to mislead reasonable consumers. Federal Trade Commission, FTC Policy Statement Regarding Advertising Substantiation (Nov. 1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation; Federal Trade Commission, FTC Policy Statement on Deception (Oct. 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf
[69] Federal Trade Commission, Green Guides, https://www.ftc.gov/news-events/topics/truth-advertising/green-guides.
[70] Because the guides are non-binding, interpretative rules, each claim still needs to be justified under §5 of the FTC Act. The Carbon Offsets and Certifications and Seals of Approval sections may be especially useful to companies making net-zero claims. Linda Goldstein et al., The Difficult Art of Advertising Carbon Reductions, BakerHostetler (August 2021), https://www.bakerlaw.com/The-Difficult-Art-of-Advertising-Carbon-Reductions.

claims. Cases include claims related to "100 percent bamboo" fiber cloth,[71] "biodegradable" paper products,[72] "recycled" plastic lumber,[73] and bogus certification claims.[74] However, FTC enforcement largely focuses on claims regarding goods and products rather than services, and most enforcement actions result in injunctions rather than monetary penalties. FTC claims typically focus on demonstrable features of a product, and the longer timeline and impact of net-zero claims may be harder to prosecute.

In addition to this federal framework, states also have consumer protection laws designed to protect consumers from deceptive and unfair practices, unfair competition, unfair or unlawful practices in business, and false advertising. State consumer protection laws and their necessary elements vary by state. State consumer protection claims related to sustainability have often focused on product labels, and there are a growing number of cases focused on ESG statements.[75] In reviewing these cases, courts tend to distinguish actionable "specific and verifiable facts" from "aspirational" and prospective statements.[76]

B. Application of US federal and state law to greenwashing and net zero claims

Environmental groups, states, and consumers have brought consumer protection cases challenging greenwashing in the US. In March 2021, environmental groups filed a complaint with the FTC against Chevron pursuant to violations of FTC's Green Guides, the first FTC complaint related to a fossil fuel company's climate impact.[77] The NGOs argue the company is "consistently misrepresenting its image to appear climate-friendly and racial justice-oriented, while its business operations overwhelmingly rely on climate-polluting fossil fuels, which disproportionately harm communities of color."[78]

In recent years, states have also brought lawsuits against ExxonMobil and other fossil fuel companies under their state consumer protection statutes for misleading consumers and fraudulently misrepresenting the risks of their products, intentionally shifting consumer perception of their products via greenwashing, and other claims.[79] Those laws could be used

[71] Federal Trade Commission, Press Release (Jan. 3, 2013), www.ftc.gov/news-events/press-releases/2013/01/four-national-retailers-agree-pay-penalties-totaling-126-million.
[72] Kmart Corp., FTC Docket No. C-4263, File No. 082 3186 (July 15, 2009); Tender Corp., FTC Docket No. C-4261, File No. 082 3188 (July 15, 2009); Dyna-E Int'l, Inc., FTC Docket No. 9336, File No. 082 3187 (May 20, 2009).
[73] Engineered Plastics Sys., LLC, FTC Docket No. C-4485, File No. 132 3204 (Aug. 20, 2014); Am. Plastic Mfg., Inc., FTC Docket No. C-4453, File No. 122 3291 (Apr. 24, 2014); N.E.W. Plastics Corp., FTC Docket No. C-4449, File No. 132 3126 (Apr. 3, 2014).
[74] Nonprofit Mgmt. LLC, FTC Docket No. C-4315, File No. 102 3064 (Feb. 23, 2011).
[75] *See* David Hackett et al., Growing ESG Risks: The Rise of Litigation, 50 Environmental Law Reporter 10849, 10853 (2020); Albert C. Lin, Making Net Zero Matter, 79 Wash. & Lee L. Rev. 679, 722–24 (2022).
[76] *Id.*
[77] Earthworks, Press Release (March 16, 2021), https://earthworks.org/releases/accountability-groups-file-first-of-its-kind-ftc-complaint-against-chevron-for-misleading-consumers-on-climate-action/.
[78] Earthworks, Press Release (March 16, 2021), https://earthworks.org/releases/accountability-groups-file-first-of-its-kind-ftc-complaint-against-chevron-for-misleading-consumers-on-climate-action/.
[79] *M*assachusetts v. Exxon Mobil Corp., No. 19-03333, 2019 (Mass. Super. Ct. Nov. 29, 2019); Connecticut v. Exxon Mobil Corp., No. 3:20-cv-1555, 2021 (D. Conn. June 2, 2021); District of Columbia v. Exxon Mobil Corp. et al., No. 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020); Vermont v. Exxon Mobil Corp. et al. (Vt. Super. Ct. Sept. 14, 2021).

to challenge the validity of net zero commitments if they can demonstrate consumer reliance on those commitments and show that the commitments are sufficiently concrete, not speculative and future-oriented.

In May 2023, a consumer filed a class action lawsuit against Delta in California claiming that the airline misrepresented itself as carbon neutral despite its reliance on offsets.[80] The plaintiff argues that she and others paid more for Delta flights on the belief that their flights were carbon neutral, but that these claims were false and misleading. The complaint contends that Delta violated California's Consumers Legal Remedies Act, the state's False Advertising, Business and Professions Code and the Business and Professions Code. Litigation is ongoing, but this case could be a bellwether for greenwashing litigation in the US.

C. Expected developments in the US

Along with the development of these cases, several upcoming policies may provide additional guidance for companies joining standard setting alliances. FTC last updated its Green Guides in 2012, but in Dec. 2022, the FTC asked for public input to help them update their Green Guides.[81] These updates could provide further guidance for how the federal consumer protection regime applies to net zero claims. Additionally, as of Jan. 2024, California will require companies that "operat[e]" or "make [net zero or other emissions] claims" in the state to disclose on their website information explaining how their net zero emissions claims will be accomplished or measured.[82] Though California's law is only a transparency measure, it may provide fuel for future consumer protection claims.

VI. Conclusion

Climate alliances can foster collaborations that help corporations innovate to achieve climate targets. However, these alliances only work to the extent companies can join and meaningfully participate in them. Though the EU and the UK have decreased antitrust pressure for climate alliances, Republican-led antitrust investigations and greenwashing litigation in the US may nonetheless pose an increased legal risk. In the coming years, as countries and businesses consider how to achieve the emission reductions consistent with applicable targets, it will be important to consider the role of alliances and how to enable participation to capture the benefits of such alliances and avoid antitrust concerns.

[80] Berrin v. Delta Airlines, No. 2:23-cv-04150 (C.D. Cal. May 2023).
[81] Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766 (Dec. 20, 2022).
[82] A.B. 1305, 2023-2024 Leg. (Cal. 2023).